

## Kosovo and intersecting legal regimes

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# Kosovo and Intersecting Legal Regimes: An Inter-disciplinary Analysis

## Abstract

The unilateral declaration of independence by Kosovar authorities in Pristina in 2008 has been the source of various controversies in international affairs. From a legal perspective, Kosovo's secessionist drive is contrary to the well-established position of international law regarding the territorial integrity of States. From a political perspective, Kosovo's case exemplifies the political drive to alter the law – a drive that applies to other entities in Kosovo's position. Both these phenomena are accompanied by the divergent interests held by Kosovars as the “local agency” and by the interests of Serbia and third States (including great powers) that support or oppose Kosovo's independence. The inter-disciplinary nature of this matter is enhanced by the intersection of applicable legal frameworks with competing political interests. The motivating factors – and implications of – great power conduct in this context should be examined through the prism of political realism, which provides an enhanced perspective on the relationship between legal and political factors in all their complexity.

## Keywords

Kosovo, political realism, reciprocity, revisionism, unilateralism,

## I. Introduction

The 2008 Unilateral Declaration of Independence (UDI) by the Kosovar authorities in Pristina, combined with Kosovo's subsequent recognition by dozens of foreign governments as an independent State, have generated major controversies in international affairs. Both

legal and political opinions about Kosovo are sharply divided. This contribution will discuss the Kosovo UDI situation from an inter-disciplinary perspective, using and contrasting the methods and conclusions reached within legal science as well as within the discipline of international relations. Special emphasis will be placed on notions and categories of political realism as one of the principal theories of International Relations. Positions regarding the status of the territory of Kosovo are sharply, and at present practically irreconcilably, divided between the secessionist entity and the territorial State. The focus of political realism may help to explain the considerations that motivate great powers in dealing with such irreconcilable divisions, as well as the patterns of policy and conduct they adopt in relation to such divisions. This analysis reveals that the merit and success of secessionist claims may not be entirely dependent on the choices and capacities of the secessionist entities as ‘local agencies’<sup>1</sup> but could, to some extent, be attributed to certain interest-based calculations and behaviours by great powers. More generally, this contribution proposes to illustrate, using the case of Kosovo, the dynamics of ‘the power dimensions of independence given entanglement in a set of external relationships, which have arisen in very different contexts’.<sup>2</sup> By focusing on the external political support for revisionist claims to secession, this contribution also draws on the concept of ‘global entanglement’ singled out in the Special Issue’s Introduction.<sup>3</sup> Such ‘global entanglement’ is evident in those instances when secession increases the similar expectations of other secessionist entities; it is also evident at the level of great power relations, where one great power’s support for a particular secessionist entity motivates another great power to support another entity in the same way. Another theme identified in the Introduction is the contestation of established legal rules and principles through the independence aspirations of the ‘local agency’, through great powers’ support of such aspirations, and through the consequent drive to revise the established legal positions to

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<sup>1</sup> On ‘local agency’ see section 1 below.

<sup>2</sup> K Fierke, Introduction to this Special Issue, (pp1–2)

<sup>3</sup> K Fierke, Introduction, (pp2–3)

fit underlying political interests. This connects to another theme at the intersection between law and politics,<sup>4</sup> and indeed it tests the relationship between the two.

The structure of this contribution is as follows. Section II will explain what is at stake in the Kosovo situation and what issues constitute the principal bones of contention that induce the relevant political entities to rely upon, or to make particular interpretations of, relevant intersecting legal regimes. This section will illustrate the clash between political interests and legal regimes. It will further introduce the problem of revisionism and describe how revisionist claims have been advanced in relation to Kosovo's status. Section III will focus on how States tend to respond to such contentious situations, in which the parameters of legitimacy are contested by various entities with diverse interests in the relevant matter. This will be examined through the prism of political realism. Section IV will examine the extent to which the political interests of States may find expression in the applicable legal rules and frameworks and whether law could be the mirror-image of politics and political interest. Last but not least, section V will address the implications of the self-regarding policy choices of States in such contexts, focusing on the phenomenon of reciprocity and the risks to the stability of international affairs that the consequent aggravation of the great powers' mutual relations entails. Section VI will offer general conclusions.

## II. The Kosovo Situation, 1999-2015: War, UDI and Supervision by Institutions

### *The Overall Legal Background*

Historically, Kosovo has been an autonomous province of Serbia within the Socialist Federal Republic of Yugoslavia (SFRY). After the dissolution of SFRY in 1991-1992, Kosovo

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<sup>4</sup> K Fierke, Introduction, (p16)

continued as part of Serbia within the Federal Republic of Yugoslavia (FRY). The treatment of Albanians in Kosovo by FRY security forces was a source of great human suffering with international implications, culminating in the 1999 attack and air campaign by NATO against FRY. The air campaign ended with the withdrawal of Yugoslavian forces from Kosovo and the establishment, on the basis of Security Council resolution 1244 (1999), of the UN Mission in Kosovo (UNMIK) to administer the territory and the Kosovo Force (KFOR) to provide for order and security. By the end of the NATO intervention, the number and extent of human casualties and suffering among the Kosovo Albanians was much higher than before the NATO intervention. On 17 February 2008, the authorities in Kosovo declared the province's independence from Serbia.

International law generally disapproves of the unilateral secession of a territory from the State it belongs to. The principle of the territorial sovereignty of the State prevails over the secessionist, or self-determination, claims by populations inhabiting any part of that State's territory. The Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by General Assembly resolution 1514 (XV) on 14 December 1960, specifies that 'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'. Similarly, General Assembly resolution 2625 (1970) (Friendly Relations Declaration) specifies that the principle of self-determination shall not:

'be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.'

Although these declarations are not binding as such, General Assembly resolution 2625 certainly embodies customary international law.<sup>5</sup>

Two-and-half years after the UDI, the International Court of Justice delivered its Advisory Opinion on *UDI in Kosovo* (2010).<sup>6</sup> The Court's principal point in the Advisory Opinion was that the arrangements introduced in relation to Kosovo through UN Security Council resolution 1244 (1999) retain their applicability despite the UDI proclaimed in Pristina in 2008. In effect, Kosovo has not become an independent State in the eyes of international law.

The International Court did not discuss the notion of 'remedial secession', nor did it address, let alone accord any significance to, the fact that many States have recognised Kosovo as an independent State. Nor was the claim that Kosovo is a *sui generis* entity, whose independence could be justified on a special basis not relevant to the status of other secessionist entities, accorded any particular importance. Instead, the Court relied on resolution 1244, which, despite placing Kosovo under international administration, did not exempt it from the law generally applicable to secessionist entities. Moreover, the Court expressly preserved the territorial integrity of FRY/Serbia.

As the above overview of the legal material has shown, international law has clear ways of prioritising territorial integrity over self-determination in order to avoid the dismemberment of States, given all the entailed risks to the stability of international affairs that the non-consensual re-drawing of borders may entail. However, the inter-disciplinary focus pursued in this contribution requires a broader scope. Allusion is, at times, made to the serious conflicts that result from the tension between two fundamental principles of international law: the right to self-determination of peoples and the territorial integrity of

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<sup>5</sup> As confirmed in *Nicaragua v US* (Merits), ICJ, Judgment of 26 August 1986, *ICJ Reports*, 1986, 14, 100–101

<sup>6</sup> *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion of 22 July 2010, *ICJ Reports* 2010, 403

States.<sup>7</sup> Such concerns are not without foundation because, on the surface, the values and interests protected by those two principles are indeed different. One principle is focused on protecting States from dismemberment, and the other principle is focused on empowering a non-State entity against the State.

Moreover, one should not overlook the fact that, ideologically speaking, to the secessionist entity (or ‘local agency’), self-determination is an idea and policy aspiration before it is a rule of positive international law. Such an attitude, pursued by the ‘local agency,’ may also act as one of the triggers that motivates the phenomenon examined in this paper – the great powers’ propensity to seize on the secessionist aspirations of the ‘local agency’ when that is conducive to their political interests.

### *Divergent Policies, Intersecting Regimes*

Against the background of the legal position outlined above, there is a sharp divergence of political opinion regarding both the political future and the legal status of Kosovo. Pursuant to resolution 1244, the only possible explanation of Kosovo’s position as a matter of international law is its status as part of the 1244 interim administration regime. Any projection of the independent standing of the Kosovar authorities, as a discrete ‘local agency’, is premised on unilateralism, which is incompatible with the 1244 framework.

Consequently, and soon after the UDI in Kosovo, the UN Secretary-General reiterated ‘the status-neutral approach of the United Nations’ in that territory.<sup>8</sup> However, the local attitudes towards UNMIK, and towards the continuing operation of resolution 1244 in general, have been obstructive. The Secretary-General has reported the following:

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<sup>7</sup> See N Cornago, Beyond self-determination: constituent diplomacies and the politics of coexistence, suggesting that ‘The line of argumentation is ascendant when it sets out from specific interests or the will of the specific actors, such as when the discourse is articulated around the central government concerns, or conversely, elaborated from inside the secessionist movement political strategy.’

<sup>8</sup> UN Doc. S/2008/692, para 26.

‘my Special Representative is facing increasing difficulties in exercising his mandate owing to the conflict between resolution 1244(1999) and the Kosovo Constitution, which does not take UNMIK into account. The Kosovo authorities frequently question the authority of UNMIK in a Kosovo now being governed under the new Constitution. While my Special Representative is still formally vested with executive authority under resolution 1244(1999), he is unable to enforce this authority.’<sup>9</sup>

The Secretary-General thus acknowledged that the UDI in Pristina had gone against resolution 1244. This is, inevitably, also a step directly against the position of the Advisory Opinion – illustrating that parties on the ground are sharply divided. As the UN Secretary-General described it,

‘The Government of Serbia and a majority of Kosovo Serbs continue to recognize UNMIK as their sole and legitimate civilian international interlocutor under resolution 1244(1999). This has had significant implications, including in the police, customs and judicial sectors, where UNMIK continues to play a prominent role. A majority of Kosovo Serbs strongly reject any authority or symbol of Kosovo institutions.’<sup>10</sup>

On the other hand, the Kosovar authorities in Pristina have taken the position premised on their full independence, and thus they are opposed to the continued presence of UNMIK in Kosovo. As Prime-Minister Hashim Thaçi told the UN Security Council,

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<sup>9</sup> UN Doc. S/2008/692, pp. 6–7.

<sup>10</sup> *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, UN Doc. S/2008/692, 24 November 2008, para 4.



‘it is our firm conviction that it is time for the Council to consider closing the United Nations Interim Administration Mission in Kosovo (UNMIK) in the near future, which will contribute to the process under way in Kosovo, create space for local ownership, preserve the credibility of the United Nations and its role in the past in Kosovo, and ultimately reduce unnecessary financial costs.’<sup>11</sup>

All this shows that, on the ground in Kosovo, there is no reconciled position as to the status of the UN in Kosovo. Nevertheless, the multilateral calculus of rights and obligations, as an issue of positive international law, depends on the initial balance of rights and obligations determined when UNMIK was established by resolution 1244. The presence of UNMIK and the UN role in general, as determined by resolution 1244, do not fit with any notion of ‘local agency’ or ‘local ownership’. In this context, the concept of ‘local ownership’ is an acknowledgment that there can be no genuine independence for Kosovo so long as the presence of UNMIK, and of the 1244 framework that established it, continues. As the Advisory Opinion has specified, this legal framework will continue until the Security Council abolishes it.

The multiplicity of entities and actors involved in and around the Kosovo situation – the Kosovar Albanian authorities, FRY/Serbia, international actors such as the UN and EU, third State governments supporting or opposing Kosovo’s independence – has implications, not only for perceptions of the applicable law in relation to Kosovo but also for the interdisciplinary analysis of the Kosovo situation. From the point of view of international legal reasoning, we must focus on the nature of each relevant entity’s legal claims and opinions and their correspondence with applicable international legal frameworks (as outlined above). From the perspective of political realism, we must focus on the nature and dynamics of

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<sup>11</sup> UN Doc. S/PV.6979, p. 10.

mutual relations – collaborative as well as confrontational – among the entities involved in the Kosovo situation. The implications of the divergence of legal and political opinions regarding Kosovo's status can be understood through the use of the methods and concepts of political realism.

### *Unilateralism, Multilateralism, and Revisionism in the Example of Kosovo*

The claim that Kosovo is an independent State could be described as a revisionist claim in so far as it attempts to modify the well-established legal position applicable to claims of secession. The whole revisionist drive is motivated by the dissatisfaction of the relevant State(s) with the generally applicable legal position under international law. It could reasonably be said that revisionism of this kind was generated by the conflict between political interests and applicable legal frameworks in the inter-war period (1920s-1930s). The initial analytical background for such a revisionist agenda was articulated in the writings of Carl Schmitt, who highlighted the relevant systemic dilemmas.

Schmitt developed the revisionist approach in his reflection on the League of Nations framework. He emphasised the rise of German power in the 1930s and the desires to liberate the German Reich from the shackles of the 1919 Versailles Peace Treaty and to restore its political and strategic power position. Specifically in relation to the legal regimes established by the Versailles Treaty, which represented the *status quo* in the 1930s when aspiring German revisionism sought to challenge it, Schmitt refers to subsequent technological progress (including the power of *Luftwaffe*) to call into question the existing legal regimes as well as their power positions.<sup>12</sup>

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<sup>12</sup> C Schmitt, The *Grossraum* Order of International Law with a Ban on Intervention for Spatially Foreign Powers: A Contribution to the Concept of *Reich* in International Law, in C Schmitt, *Writings on War* (T Nunan ed., Cambridge, Polity 2011), 75, 111–112

The ideological underpinnings of revisionist policies at particular stages in the history of international relations do not constitute a crucial factor for our analysis.<sup>13</sup> Instead, our analysis shows the commonality between various revisionist claims and agendas in the context where a rising power finds itself uncomfortable with the pre-existing legal framework and, for that reason, attempts either to revise it or to establish exceptions to it. In this sense, revisionism is the most far-reaching manifestation of the contestation over the validity or relevance of the established legal and constitutional principles – a contestation that grows out of the political interests of the day.

The analytical starting-point, relevant to the inter-disciplinary analysis pursued here, is that the UN Charter was adopted in the aftermath of World War Two, at which time a particular distribution of power among the great powers found expression in the allocation of permanent seats and veto power to each of the five permanent members of the UN Security Council. Important far-reaching decisions that would modify existing legal rights and obligations of States could only be adopted through the concurrence of all five permanent members of the Security Council. According to the UN Charter (Article 53), no enforcement action should be undertaken against the sovereign State and its government, unless the Security Council grants the authorisation to do so.<sup>14</sup>

Since the end of the Cold War and the demise of the Socialist bloc beginning in the 1990s, the power balance has shifted. One implication, indeed one of the culminations, of this process was the 1999 NATO-led war against the FRY over Kosovo. When, in 1999, the member-States of the North Atlantic Alliance realised that the UN Security Council would not authorise forcible action against the FRY, they decided to undertake such action without the Security Council's authorisation. Similarly, in 2007-2008, when a number of permanent

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<sup>13</sup> Indeed, about Schmitt's affiliation with the Nazi regime in Germany, see the Translator's Introduction in Nunan (ed.), (n 12) 2–3

<sup>14</sup> The International Court has specified that 'enforcement action' under the Charter means a coercive action against the State, i.e., against its government. *Certain Expenses of the United Nations* (Advisory Opinion of 20 July 1962), *ICJ Reports* 1962, 151, 177

and non-permanent members of the Security Council realised that the Security Council, as a collective organ, would not support the independence of Kosovo from Serbia, they proceeded to unilaterally recognise Kosovo's independence. The interests and position of the pro-Kosovo great powers – for instance the US, UK, France, Germany, and Italy – are embedded and represented in the United Nations and the regional (NATO, EU) frameworks alike. However, given that the coercive authority over which the UN Security Council has a monopoly could be activated only with the consent of China and Russia, the political agenda of the pro-Kosovo great powers has ended up prioritising the action through the regional organisations over whose decisions they have control, or even in a unilateral manner. This is how revisionism meets unilateralism.

“Humanitarian intervention”, advanced as the principal justification for NATO's attack on FRY, is not recognised under international law and forms no part of it. Stoessinger argued, in clearly revisionist terms, that by intervening in Kosovo in 1999, ‘NATO had established a new principle of international law: not only would the persecution by a dictator of his own people not be tolerated, it will be reversed. In this brave effort, the United States led and the rest of NATO followed.’<sup>15</sup> However, this ‘new principle’ has not found recognition in State practice, given that the statement of the Non-Aligned Movement, backed by 132 States, ‘reject[ed] the so-called ‘right’ of humanitarian intervention, which has no legal basis in the UN Charter or in the general principles of international law.’<sup>16</sup> As a corollary to these developments, the notion of the Responsibility to Protect’, subsequently developed by the UN, eschews reference to the unilateral use of force against the State and instead focuses on the action taken within the multilateral framework of the UN Security Council. The notion of the ‘Responsibility to Protect’ relates to protecting vulnerable populations from governments that expose them to war crimes, genocide or crimes against

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<sup>15</sup> JG Stoessinger, *Why Nations Go to War* (Bedford/St Martins, Boston/NY 2001), 248

<sup>16</sup> Statement by the Non-Aligned States (132 States), 24 September 1999, in I Brownlie, *Principles of Public International Law* (OUP, Oxford, 2008), 744; and the statement made in Havana, 10-14 April 2000, para. 54

humanity, or from governments that fail to protect them from such atrocities. This concept has not been developed to purport to validate forcible interventions outside the context of Chapter VII of the UN Charter.<sup>17</sup> Therefore, the types of the use of force endorsed by the 'Responsibility to Protect' doctrine would be qualitatively different from the intervention performed in the case of Kosovo in 1999.

In policy-operational terms, the attack on FRY led to the intensification of the crisis in Kosovo and thus to an increase in casualties and victims. However, it did not lead to actually saving those it was supposedly meant to protect. Furthermore, as Robert Jackson observed, the Kosovo crisis did not present a serious threat to international peace and security, either in the Balkans or beyond. As he states, 'it became a major international crisis only when NATO decided to intervene on its own initiative and without a full international mandate.'<sup>18</sup>

### III. Explaining the Kosovo Situation through the Prism of Political Realism

#### *The Relevance of Political Realism*

As we have seen, the positions of various governments and other entities regarding Kosovo were mutually irreconcilable, not just in terms of the content of the applicable law but also in terms of political attitudes. Needless to say, the present analysis is meant to highlight the Kosovo situation through the prism of the relevant theories of international relations rather than pronouncing on those theoretical debates in any overall sense. Political realism is the political theory most useful for exploring the contexts of irreconcilable political conflict.

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<sup>17</sup> *The Outcome Document of the 2005 United Nations World Summit*, A/RES/60/1, para 138, refers to 'collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII.'

<sup>18</sup> R Jackson, *The Global Covenant* (Oxford, OUP 2000), 293

Political realism differs from other theories such as constructivism, which places a greater emphasis on shared rules and values rather than on conflicts of interest between States.<sup>19</sup>

The choice of realism as the principal analytical framework here has visible advantages. To illustrate, constructivists emphasise the process of communication between States and the consequent constraint in their mutual conduct, resulting in the shared rules and perceptions to which States adhere.<sup>20</sup> They emphasise the socially constituted identity of States<sup>21</sup> rather than seeing States as self-regarding political units who make their own autonomous interest-based choices as to whether to comply with international legal rules or to seek changes in the applicable law. However, the intersubjective meanings and norms that shape State identities, so central to constructivist thought,<sup>22</sup> are precisely what broke down in relation to Kosovo, as seen in the sharp divergence of State opinions as to the entitlements of this secessionist entity.

In a rather interesting analysis, JS Barkin has attempted to narrow down the difference between realism and constructivism by suggesting that 'constructivism is a set of assumptions about how to study politics' rather than a set of assumptions about how politics works, and therefore it is fully compatible with the realist patterns of thinking.<sup>23</sup> Furthermore, 'The essence of scientific realism as applied in the social sciences is the idea that real social structures exist out there, independent of our observation of them.'<sup>24</sup> This may be a somewhat different version of constructivism, one that attempts to broaden the category of societal and inter-subjective patterns so that it also includes self-regarding political actions and decisions. However, this difference is only a nuanced and not a cardinal one, at least for our present case-specific analysis. Whether we consider societal and inter-subjective patterns as giving

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<sup>19</sup> On constructivism in general see F Kratochwil, *Rules, Norms and Decisions* (Cambridge, CUP 1989)

<sup>20</sup> A Linklater, Constructivism in S Burchill *et al.*, *Theories of International Relations* (Palgrave, Basingstoke 2001), 218

<sup>21</sup> C Reus-Smit, *The Moral Purpose of State* (Princeton, Princeton UP, 1999), 26

<sup>22</sup> See Linklater (n 20), 223

<sup>23</sup> JS Barkin, 'Realist Constructivism' (2003) 5 *ISR*, 325, 338

<sup>24</sup> See Barkin (n 23), 330

expression to – or serving as social limitations on – self-regarding power politics, under any analytical pattern of constructivist observation, the outcome would still be a lack of societal consensus on how the Kosovo situation ought to be resolved. In fact, the ‘reality’ of ‘social structures’ in the international system may, at times, be precisely the factor that prevents the existence of socially constituted consensus regarding controversies of this kind.

Constructivism was, to some extent, reinforced by the end of the Cold War, which was thought to have reshaped international politics.<sup>25</sup> The emphasis on non-material factors in politics – on reimagining the social, or ignoring the particularities of State interests<sup>26</sup> – has also been central to constructivism. However, the Kosovo situation highlights the resurgence of precisely those particularities. This is, among other reasons, why the analysis below alludes to cases from the 18<sup>th</sup> and 19<sup>th</sup> centuries – periods that richly illustrate the mutual mistrust of States when their political and legal positions diverge, at times resulting in their unwillingness or inability to find collaborative solutions to international crises produced by revisionist policies.

It may be that constructivism can explain part of the process involving claims of legal change or legal exceptionalism. From a purely analytical perspective, it may stand to reason that the *initiation* of a unilateralism- and exceptionalism-driven solution in relation to Kosovo, initiated by Western great powers and backed by their significant hard or soft political power, could have been intended as a kind of social pressure – or even ‘soft power’ – to tame the position of dissentient States, aimed at the creation of an inter-subjective consensus regarding the exceptional solution to the case at hand in a way that constructivists would easily acknowledge. Yet, the subsequent reaction from the dissentient States, their autonomous calculation of policies, interests and actions, shows that the Kosovo situation more closely resembles the process, described by Reus-Smit, by which the claims of

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<sup>25</sup> See Linklater (n 20), 216

<sup>26</sup> See Linklater (n 20), 225–226

normative change replace social communicative action and result in an outright conflict of interests, possibly even threatening the system itself.<sup>27</sup> However, the whole point of this case-focused analysis is not to deny the relevance of constructivism but merely to state its limits.

On the other hand, critical constructivism challenges the conventional constructivist assumption that compliance with norms is dictated by the sense of social or institutional belonging.<sup>28</sup> Furthermore, ‘critical and consistent constructivists consider norms as constituted through practice.’ Norms are understood as ‘carriers of meaning-in-use, which is re-/enacted through social practice’, and critically engaged through the contestation process.<sup>29</sup> As emphasised in a key work on this theme, the contestation process involves various stages, including the contestation of established norms and the validation of the revised outcome.<sup>30</sup> Then, various forms of contestation could lead either to a shared recognition of the new situation, to a legitimacy gap, or to a conflict.<sup>31</sup> However, the choice of political realism as the principal framework of observation is required here by the focus on the essentially State-centric process of great powers’ self-regarding and interest-driven entanglement with local independence aspirations. Kosovo Albanians as a ‘local agency’ are hardly in a position to launch such contestation bids alone and without the external support of great powers.

Attempts could also be made to see the Kosovo situation through the prism of liberal theory. In the 1990s, Anne-Marie Slaughter expressly advanced the idea that the number of rights States possess depends on their correspondence with the model of democratic and liberal governance.<sup>32</sup> From that point of view, FRY under Milosevic would not be seen as a democratic State proper, and thus some of its rights could be curtailed; in this case its boundaries were re-drawn without its consent. However, this approach is difficult to

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<sup>27</sup> On which see section V below.

<sup>28</sup> A Wiener, *A Theory of Contestation* (Heidelberg, Springer 2014), 41

<sup>29</sup> See Wiener (n 28), 21

<sup>30</sup> See Wiener (n 28), 6–7

<sup>31</sup> See Wiener (n 28), 55–60

<sup>32</sup> A-M Slaughter, A Tulumello and S Wood, ‘International Law and International Relations Theory: A New Generation of Inter-Disciplinary Scholarship’ (1998) 92 *AJIL*, 367, 373



accommodate with positive international law, and it has not been advanced by governments supporting Kosovo's independence.

Given that Kosovo's independence is supported by governments who are the major stakeholders within the NATO and EU, it may be tempting to rationalise the recognition of Kosovo's independence through the prism of Hedley Bull's "international order", which embodies the great power management of crisis situations with the aim to secure the survival of the international system at the cost of the rights – or even survival – of individual States. Just as the partition of Poland two centuries ago is a central case that Bull relies on,<sup>33</sup> re-drawing Serbia's boundaries without its consent could also fit Bull's bill. However, the main analytical as well as practical challenge would be the attempt to re-imagine the 'international order' without it representing all relevant major powers, operating outside the authority of the UN and without being supported by the binding force of UN Security Council resolutions.<sup>34</sup>

As we can see, hardly any of the above theories, as applied to the Kosovo situation, warrants viewing law as a mirror-image of politics. The fact that realism, at least, does not pretend to be doing so represents one of its analytical advantages. Its other analytical advantage is that it facilitates a comparative analysis of the attitude and conduct of statesmen at various stages of history, as opposed to assuming that international politics in our age is substantially or radically different from what it was decades or even centuries ago.

#### *Great power self-interest and its entanglement with the agenda of the 'local agency'*

A principal premise of realism is that states compete in an unregulated state of anarchy, driven by their consequent mutual fear and distrust of each others' intentions. These factors are thought to generate their drive for aggrandizement. The classical position was articulated

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<sup>33</sup> H Bull, *Anarchical Society* (2<sup>nd</sup> ed., Macmillan, Basingstoke, 1977), 17, 86–89

<sup>34</sup> See below section IV on this.

in the political testament of Frederick the Great, who described aggrandizement as one of the principal concerns of a prince. He emphasised that, ‘If the desire of self-aggrandizement does not procure acquisitions for the prince-statesman, at least it sustains his power, because the same means which he prepares for offensive action are always there to defend the State if defence proves necessary, and if he is forced so to use them.’<sup>35</sup>

In the approach illustrated in Frederick the Great’s political testament, space-related aggrandizement implies the expansion of the relevant State’s territorial realm. This obviously implies an attack on the established territorial *status quo* that consists in the other States’ territorial sovereignty, political independence or territorial rights. The national interest-driven aggrandizement could also be premised on less indirect and informal means than territorial conquest. As an example of the latter, the British Empire had, alongside the direct colonial acquisitions of territory, pursued the pattern of an ‘informal empire’ consisting in the informal political and economic domination of territorial spaces without directly acquiring sovereignty over those spaces.<sup>36</sup> Overall, aggrandizement could be aimed at economic benefits, the enhancement of the State’s strategic position, or consolidating its hegemonic status. And, as aggrandizement is driven by the State’s own national interest, it could result in unilateral actions that disregard the requirements under, or potential of, the relevant multilateral arrangements.

All of the above runs into the specifically post-Cold War dimension of aggrandizement and upsets the pattern perceived for years after the end of the Cold War, with the effect that the hegemonic policies of the United States of America involve no design on other States’ territories. However, just as the British Empire of the 18<sup>th</sup> and 19<sup>th</sup> centuries has oscillated between informal aggrandizement, motivated primarily by economic interests, and

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<sup>35</sup> For the text of Frederick the Great’s Political Testament see [http://germanhistorydocs.ghi-dc.org/sub\\_document.cfm?document\\_id=3548](http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=3548)

<sup>36</sup> See in general J Gallagher and R Robinson, *The Imperialism of Free trade*, (1953) 6 *Economic History Review*, 1

territorial conquest, for instance in India or Southern Africa, Kosovo's case could make States feel threatened regarding the cores of their territorial realms. Although with Kosovo, the US and its allies are not acquiring territory for themselves, their policies are nevertheless aimed at re-drawing national boundaries without the consent of the relevant State. Therefore, the central element prioritised by realists – the enhancement of States' mutual fear and mistrust – has returned.

Some historical comparisons with previous instances of territorial changes dictated by a great power's interests may not be out of place. Overall, parallels with the 19<sup>th</sup> century may be most apposite because this was a period when international affairs were both ruled, and seen to be ruled, more by the national interests and autonomous choices of States and less by ideological factors or perceptions of universality. It is precisely the dominance of national interests in the conduct of foreign policy that generates the phenomenon of the entanglement of 'local' independence aspirations and great power behaviour in support of – or in opposition to – such aspirations. In one such context, the British Foreign Secretary George Canning's recognition of the independence of Latin American republics in the 1820s occurred contrary to the principle of monarchical legitimacy and contrary to the will of most European States. The driving force behind such policy was the British national economic interest in trade and investment in Latin America. Engaging with the newly emerged independent republics would benefit this national economic interest more. Canning rejected the idea of discussing the status of South American republics with European powers at an international conference and instead proceeded to unilaterally recognise their independence.<sup>37</sup> His overall preference towards unilateralism was due to his perception that 'Conferences are useless or dangerous – useless if we are in agreement, dangerous if we are not.'<sup>38</sup> France, Russia, Austria and Prussia lodged protests 'against this outrage of monarchical principles'.

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<sup>37</sup> H Temperley, *The Foreign Policy of Canning 1822-1827* (G Bell & Sons, London, 1925)

<sup>38</sup> H Seton-Watson, *Britain in Europe* (CUP, Cambridge 1938), 85

In England itself, King George IV intervened in the matter of Canning's handling of the South American recognitions, asking whether 'the great principles of policy established in 1814, 1815 and 1818' were to be abandoned and effectively substituted by the 'French revolutionary creed'. However, the Duke of 'Wellington frightened [the King] with the possibility of an exposure in Parliament and a *coup d'état* if he resisted further.'<sup>39</sup>

Canning's position regarding the independence or autonomy of Greece was motivated by the same attitude. He 'felt that the emergence of a vassal but autonomous Greek State would be favourable to British trade and would probably leave Britain 'in fact the masters of navigation' in the Mediterranean.' At an earlier stage of the crisis, Canning's 'recognition of the Greeks as belligerents rested on the contention that the sole alternative was to treat them as pirates and this was incompatible with vital British commercial interests.' Notably, if not somewhat self-servingly, he also took the position that 'belligerency was not so much a principle as a fact.'<sup>40</sup> Overall, in relation to the outcome of the crisis, Canning's observation was that the Ottoman 'Sultan was incapable of reimporting his authority upon Greece, without some external help.' And 'The Greeks will be satisfied with nothing but independence. The Turks will be satisfied with nothing but submission.'<sup>41</sup> However, in relation to both Greece and South America, British economic interest was among the chief considerations driving British policy. Independence claims could carry the day with the external help of a great power who was motivated by their own interest in the first place. Nor would the British position be determined by the mere factual success of Greeks or South Americans. For, when the relevant entity's independence was not in its interest, the British Government would be both emphatic and consistent in opposing it, as manifested by Lord Palmerston's position in relation to Egyptian attempts to become independent from the

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<sup>39</sup> See Seton-Watson (n 38), 86–88

<sup>40</sup> See Seton-Watson (n 38), 99–100, 118

<sup>41</sup> See Seton-Watson (n 38), 101–103

Ottoman Empire in the 1830s.<sup>42</sup> In this way, the drive for independence of the ‘local agency’ is no longer treated as a localised issue and instead becomes affiliated with the interdependence and global entanglement of great power interests in relation to the relevant local matter. In turn, those great powers become ready to contest the pre-established legal standards that do not accommodate those interests. Entanglement thus forms a cause for contestation.

Another form of the global entanglement of great powers is manifested by the prioritisation of mutual relations among great powers, with the goal of legitimising revisionist territorial changes. To illustrate, soon after Mussolini’s Italy invaded and annexed Abyssinia, the British Foreign Secretary Lord Halifax expressly told the League of Nations Council on 12 May 1938 that the League’s coercive measures against Italy did not preclude the British Government from recognising the Italian annexation of Ethiopia. Each member-State of the League could decide on this matter for itself, even if the League did not have to collectively decide on this point. Recognising the realities of the annexation was, as Lord Halifax suggested, an alternative to living in a ‘world of fantasy’.<sup>43</sup> Thus, there was consensus, or entanglement, among great powers, as well as among other members of the League, to condone and tolerate the outcome that was the product of the contestation of the League Covenant requirements.

The above instances lead to the recognition of the outcome of political aggrandizement through territorial changes, at the cost of contradicting the overarching legal regime that does not legally allow for such territorial change while also gratifying the expansion or aggrandizement needs of the relevant great powers. The above historical overview demonstrates that, with the evolution of international legal standards relating to secession and territorial change, revisionist claims are more likely to involve challenges to

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<sup>42</sup> See Seton-Watson (n 38), 199

<sup>43</sup> Referred to in Schmitt (n 12), 171

the territorial *status quo*, manifested through the acute contrast between the political interest upholding the factual change and the pre-existing legal position, which does not allow for such factual change. All of these situations have thus involved a degree of revisionism, which reveals the contestation of the pre-established constitutional requirements regarding the legitimacy of the creation, extinction, recognition and independence of States. In Canning's times, the conflicting legal views favoured, on the one hand, the imprescriptible right of legitimate sovereign monarchs to their colonies and provinces, and, on the other hand, the independence of *de facto* independent States.<sup>44</sup> The recognition of the Italian conquest of Abyssinia disregarded the League of Nations Covenant and its relevant resolutions, while Kosovo's recognition disregards the strict requirements that exist under both general international law and Security Council resolution 1244. However, in all of the above cases, the contestation of core constitutional requirements was manifested through state resistance to the authority of international institutions and to multilateral decisions. States demonstrated their resistance by unilaterally asserting national power and a self-interested agenda when governments or statesmen judged that to be in the national interest. It is precisely the dependence of the success of a secessionist agenda on the successful contestation of pre-established legal standards that increases the entanglement between a great power and the 'local agency,' which appear to enter into a reciprocal, if circumstantial, deal. The 'local agency' may be counting on enjoying great power support, and great powers may be purporting to enhance the legitimacy of their selective policies by referencing the local agency's will. Ostensible and exceptional political legitimacy is imagined (through the interdependence and entanglement among the relevant entities) as a tool to contest the established legal position that does not, on its own, allow for or legitimate the selective privileging of local independence bids.

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<sup>44</sup> See Temperley (n 37), 456

In other cases, it may be within the purview of the relevant great powers to uphold particular revisionist outcomes in relation to the ‘local’ situations they are entangled with, but such a situation does not make their power and authority sufficient to secure the finality or conclusive effect of those revisionist outcomes. One example is provided by the separate peace concluded between Russia and the Ottoman Empire in the aftermath of the 1828-1829 Russo-Turkish war. The treaty gave the Russians more territorial benefits, at the expense of the Ottomans, than would be acceptable to other European powers. As Russian Foreign Minister Nesselrode observed in 1829, the European powers were unhappy with the Russian action in relation to the Ottoman Empire and the bilateral Ottoman-Russian treaty. At the time, hostilities between the two powers had ended, and he did not anticipate any immediate resistance from the European great powers. Nonetheless, he observed that, ‘however resigned and powerless they may be at the present moment, we should see combinations arising against us whose consequences would inevitably kindle a general war in Europe.’<sup>45</sup>

Another illustration is provided by the multilateralisation of the Ottoman straits regime after the Treaty of Unkiar Skelessi was concluded between Russia and the Ottomans, with the outcome of the multilateral 1841 Straits Convention entailing a somewhat different regulation of the Straits regime.<sup>46</sup> At the start, ‘Austria and Prussia accepted the treaty [of Unkiar Skelessi]. When Britain and France protested, Nesselrode replied that Russia and the Ottoman Empire were within their rights as sovereign states to make a defensive alliance, which Britain eventually acknowledged’,<sup>47</sup> perhaps because the immediate forcible resistance had little chance of success. As one historian has emphasised,

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<sup>45</sup> M Rendall, ‘Defensive Realism and the Concert of Europe’ (2006) 32 *RIS*, 523, 532

<sup>46</sup> See in general M Rendall, ‘Restraint or Self-Restraint of Russia: Nicholas I, the Treaty of Unkiar Skelessi, and the Vienna System’ 1832-1841, (2002) 24 *International History Review*, 37, 52ff

<sup>47</sup> See Rendall (n 45), 43

‘Britain and France's failure to offer a credible deterrent allowed Russia to intervene in the affairs of the Ottoman Empire. The strong language used by Britain and France only encouraged Russia to make the treaty of Unkiar Skelessi. Nonetheless, Russia acknowledged that if it appeared to be seeking conquests at the Ottomans' expense, it was likely to provoke a balancing coalition.’<sup>48</sup>

In this particular case, the particularistic solution prevailed and the relevant actors acquiesced to it for the time being. It was, however, subsequently replaced by a more multilateral regime.

The political tradition of the 19<sup>th</sup> century was to submit major controversies to common European congresses and conferences rather than resolve them directly and bilaterally between the affected States. In instances where, for instance, Britain refused to recognise the Adrianople Treaty between the Russian and Ottoman Empires, or where Germany refused to recognise the 1884 Anglo-Portuguese Treaty on trading influences in Africa,<sup>49</sup> the matters were ultimately referred to and resolved through multilateral conferences that included a greater number of great powers. For Russia in the aftermath of the Russo-Turkish war of 1877-1878, ‘the only way to avoid war was to submit the Treaty of San Stefano to a European Conference’. The separate Treaty of San Stefano was almost certain to lead to Russia’s war with Britain and Austria.<sup>50</sup> When, however, a great power feels confident that it will get its way without submitting the matter to such a multilateral conference or a similar arrangement, they may be tempted to reject calls for a multilateral arrangement and proceed with their designs unilaterally.

In relation to Kosovo, a truly multilateral arrangement that would either complete the process of revisionist contestation, or conclusively do away with it, is currently unlikely. Hence, several arrangements from 1999 onwards have focused on more immediate problems,

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<sup>48</sup> See Rendall (n 45), 48

<sup>49</sup> R Robinson and J Gallagher, *Africa and the Victorians* (Macmillan Press, London & Basingstoke 1961), 173

<sup>50</sup> RB Mowat, *The Concert of Europe* (Macmillan & Co., London, 1930), 56



thus deferring the resolution of the issue of Kosovo's status because there is insufficient agreement to resolve it (in the sense of resorting to consensual, multilateral, compromise-driven arrangements at a point in time when no one is prepared for drastic unilateral action).

To illustrate, in the immediate aftermath of the 1999 war against FRY, which resulted in the significant expansion of NATO's power position in the Balkans, the difficulties of maintaining this divisive position in the longer run has induced NATO States to agree to a more multilateral regime under Security Council resolution 1244. The multilateral regime included the UN supervision of Kosovo via UNMIK and, overall, was a far more mitigated version of what had been envisaged through the draft Rambouillet agreements earlier in 1999. Ironically enough, the inability of NATO to unilaterally impose a solution to the Kosovo problem back in 1999 has led to the creation of the UN-adopted legal framework that currently makes it very difficult, indeed impossible, for Kosovo to be viewed as an independent State in terms compatible with international law.

This pattern is also evident in the above-mentioned UN position regarding the status-neutral character of the UN presence in Kosovo. Although this UN presence prevents Serbia from administering the Kosovo region, it does nothing to prejudice its sovereignty over it. The 2013 Brussels Agreement between Serbian and Kosovar authorities addresses issues regarding the police and judiciary arrangements in Kosovo and, most importantly, introduces a new entity – the Association of Serb Municipalities – with enhanced standing in administration and policing.<sup>51</sup> The Agreement does not directly or substantially draw on Kosovo status issues as covered by the Security Council resolution 1244, nor does it try to modify any of the positions established by those instruments.

On 30 April 2015, the European Commission adopted the Stabilisation and Association Agreement proposal for Kosovo. For its entry into force in 2016, it requires

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<sup>51</sup> First Agreement of Principles Governing the Normalization of Relations, Brussels, 19 April 2013.

agreement from the EU Council and the European Parliament.<sup>52</sup> The text of the agreement indicates that ‘this Agreement is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.’ The association agreement does not seem to require ratification from member-States of the EU, as usually is the case with EU association agreements. Instead, Article 144 specifies that EU and Kosovo (referred to as ‘Parties’) will adopt this agreement in accordance with their internal procedures.

Earlier, in the 2012 feasibility study document related to the conclusion of the association agreement, the EU Commission suggested that the recognition of Kosovo as a State was neither a precondition nor a requirement for this agreement to be concluded.<sup>53</sup> Thus, the EU has fallen short of endorsing Kosovo’s independent status.

For the analytical purposes of political realism specifically, it is clear that in relation to the same issue or crisis, governments or statesmen, whether prince-statesmen centuries ago or modern policy-makers, are likely to seek aggrandizement, prioritise their own foreign policy interest over pre-existing normative standards and multilateral fora, and draw on the desires of the ‘local agency’ to that end. However, they cannot always guarantee the desired outcomes, nor can they always avoid counter-productive ones. In this sense, realism cannot be an infallible practical guide for a wise ‘prince-statesman’ because the rationality of the observed species is not always infallible. Hence, realism is relevant to explain policy-makers’ decisions as well as the consequences of their miscalculations.

#### IV. Political Realism and the International Legal Reasoning

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<sup>52</sup> See <[https://ec.europa.eu/commission/2014-2019/hahn/announcements/adoption-stabilisation-and-association-agreement-proposal-kosovo\\_en](https://ec.europa.eu/commission/2014-2019/hahn/announcements/adoption-stabilisation-and-association-agreement-proposal-kosovo_en)>

<sup>53</sup> EU Commission, *Feasibility Study for a Stabilisation and Association Agreement between the European Union and Kosovo*, {SWD(2012) 339 final}

We should now examine the relationship between political realist reasoning and international legal reasoning. As an illustration of the classical realist approach, Hans Morgenthau opposed the legalistic-moralistic approach to international affairs,<sup>54</sup> suggesting that States disregard international law when their national interest so requires and that 'considerations of power rather than of law determine compliance and enforcement'.<sup>55</sup> A further nuance in Morgenthau's approach was that he saw international law as too ambiguous, imprecise and indeterminate to tackle the political ambitions of States.<sup>56</sup> Goldsmith and Posner adopt a similar approach, also suggesting that having strict legal rules is unwise, as compliance for States would be too costly.<sup>57</sup> However, from this perspective, Kosovo's independence may be an accomplished fact, but international law does not give, or does not have to give, clear support to that independence.

This, however, is not a position that would satisfy the governments of pro-Kosovo States. They not only want Kosovo to be independent from Serbia as a matter of accomplished fact, they want its position be widely seen as compatible with international law. Their overall strategy is to achieve legal change together with political change rather than to explain Kosovo as a policy-driven case of unlawful secession; their approach is broadly compatible with the version of the law-politics relationship upheld in the teachings of Morgenthau.

Paradoxical or curious as it may sound, the formation or modification of the underlying pre-existing legal position, in terms of the allocation of rights and obligations to particular entities under international law, albeit at first regarded by political realists as

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<sup>54</sup> H Morgenthau, *Politics Among Nations* (McGraw Hill, Boston, 1993), 14–15

<sup>55</sup> See Morgenthau (n 54), 268

<sup>56</sup> See Morgenthau (n 54), 259ff

<sup>57</sup> This they describe as the 'prudential view', JL Goldsmith and EA Posner, *The Limits of International Law* (OUP, Oxford 2006), 203

something secondary to power politics and as subordinated to power action and political interest, in essence becomes the primary and ultimate aim of the agenda pursued as part of that very same power politics, indeed an indispensable final step to secure the success of this political agenda. The success of such a political agenda would enhance the power position of pro-Kosovo great powers even more, putting them in the privileged position that could eventually secure not only their power primacy but also their ability to change, or provide exceptions to, the existing international law. The ability to secure legal change, along with getting one's way factually and politically, thus becomes an inevitable component of any meaningful domination or hegemonic status that is to be sustained and maintained.<sup>58</sup>

In Frederick the Great's time, carrying out such an agenda was much easier, given that military conquest provided a legal title for territorial acquisitions. However, the revisionist agenda becomes, in modern times, more difficult to complete and successfully implement against conflicting, and at times overarching, legal rules and regimes. The following sub-sections illustrate this using the examples of two strategies pursued to adapt legal positions to the political agenda.

#### *Unilateral re-interpretation of Security Council resolutions*

One strategy witnessed in the Kosovo situation is the unilateral re-interpretation of Security Council resolutions by States, which is done at the cost of distorting their textual meaning but to the benefit of the States' own foreign policy agendas. The political drive to exit the 1244 framework has been reflected in the US and UK submissions to the International Court of Justice during the *Kosovo UDI* Advisory Opinion hearings, which addressed the continuing binding force of resolution 1244(1999). To illustrate, the UK position before the Court was,

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<sup>58</sup> According to Adam Watson, hegemony means 'that some power or authority in a system is able to 'lay down the law' about the operation of the system.' A Watson, 'Systems of States' (1990) 16 *RIS*, 99, 104

in reference to the UN Secretary-General's view, that 'the situation established under resolution 1244 was, however, unsustainable in the long term.'<sup>59</sup> According to the UK,

'The purpose of setting up local provisional institutions was to transfer authority from the international civil presence over time, until all authority was vested in local institutions, whose character at that point would – unless otherwise agreed – no longer be provisional.'<sup>60</sup>

This inevitably presupposes that there would be some unilateral determination as to when and whether provisional institutions should cease to be provisional. These submissions say little more than that individual States could unilaterally determine when and on what conditions the collectively adopted Security Council resolutions could produce their effect.

Ordinarily, it is a principle of paramount importance under the law of international organisations that a decision made by an organ such as the UN Security Council could be abolished or amended only through the collective will and decision of this very same organ. Apart from this institutional aspect, the issue has broader normative importance, directly related to the binding force of the Security Council's decisions under Article 25 of the UN Charter and, through that provision, to the binding force and observance of the terms of the Charter itself. And as we have already seen, the International Court has rejected this unilateral exit option in relation to Kosovo.

### *The portrayal of Kosovo as a sui generis entity*

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<sup>59</sup> UK Written Submission, 111 (para. 6.28); the US Written Submission, at 68, similarly maintained that resolution 1244 allowed for the future status of Kosovo without Belgrade's consent, mainly because this resolution contained references to the abortive Rambouillet Accords which, had they been signed by FRY, would indeed have provided for such possibility.

<sup>60</sup> UK Written Submission, 112 (para. 6.29), also referring to the periodic review requirements (para. 6.30), which, however, do nothing to reverse the requirement that the actual continuation of 1244 arrangements depends on the collective decision of the Security Council. Even if UNMIK faced difficulties in administering the entire territory of Kosovo (see para. 6.47), it still does not follow that its mandate or any other aspect of the 1244 arrangements could be modified unilaterally; that is, without the Security Council's collective decision.

Another strategy aimed at securing Kosovo's exemption from the legal position ordinarily applied to the position of secessionist entities has been to portray it as a *sui generis* entity, entitled to independence on some special basis. The initial endorsement and approval of this idea has come from the US State Department.<sup>61</sup> However, none of the factors cited have envisaged the independence of Kosovo, and resolution 1244 has expressly preserved the opposite position. A political drawback of the *sui generis* approach is its selectivity, in that it attempts to exceptionally legalise and permit that which is generally unlawful and not permitted.

Modern legal regulation of secession claims under international law, by according primacy to territorial integrity over the aspirations of secessionist groups, is a formula that applies to all States and, therefore, provides for a framework of general satisfaction of States within the international system. Addressing the concept of 'peace by satisfaction', Raymond Aron has observed that 'satisfaction will be lasting and assured only on the condition that it is general. If one of the actors nourishes ambitions or is suspected of nourishing them, how could the others keep from returning to the infernal cycle of competition?'

## V. Reciprocity: A Nemesis to Unilateralism

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<sup>61</sup> The State Department's relevant points were the following: '(1) The state of Yugoslavia collapsed in a non-consensual, exceptionally violent way, creating threats to international peace and security that have obliged the UNSC to act repeatedly. ...

(5) In 1999, NATO's 19 allies reached the consensus decision to take collective action to remove Milosevic's police and military forces from Kosovo.

(6) Kosovo is administered by the United Nations under U.N. Security Council Resolution (UNSCR) 1244, unanimously adopted (with China abstaining) on June 10, 1999, to address Milosevic's actions. Elements of UNSCR 1244 include denying Serbia a role in governing Kosovo; setting up an interim UN administration; providing for local self-government; and envisioning a UN-led political process to determine Kosovo's future status.' *Why Kosovo Is Different*, US Department of State, [www.state.gov](http://www.state.gov)

<sup>62</sup> R Aron, *Peace and War* (Weidenfeld & Nicolson, London 1966), 161

In international politics, as in all other areas of social life, action is bound to generate reaction. As Robert Keohane, the leading international relations scholar on the relevance of reciprocity in international affairs, has emphasised, ‘actors behaving in a reciprocal fashion respond to cooperation with cooperation and to defection with defection.’<sup>63</sup> Another related factor is that the policy- and interest-driven aggrandizement and use of force weakens or undermines trust between States. Having annexed Silesia to his own kingdom, Frederick the Great was well aware that

‘A lightning stroke, like the conquest of Silesia, is like a book the original of which is a success, while imitations of it fall flat. We have brought on our heads the envy of all Europe through the acquisition of this fine Duchy, which has put all our neighbours on the alert. There is not one who does not distrust us. My life is too short to restore them to a sense of security advantageous to our interests.’<sup>64</sup>

Other statesmen have been less sensitive to the impact of reciprocity. In the wake of recognition of the independence of the South American republics, Canning became scornful at the suggestion of continental Europeans that ‘his recognition of the revolted Colonies of Spain would cause the rebellion in Jamaica, or the loss of India.’<sup>65</sup> Generally, the political power position of the day could be responsible for the degree of confidence that statesmen might enjoy at a particular moment regarding the feasibility of the exceptional nature of their actions.

In the era of post-Cold War realities, aggrandizement sows the seeds of mutual distrust between nations as much as it did in the classical age of *Realpolitik* during Frederick the Great’s reign. The very relevance of the reciprocity principle as a guiding principle in

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<sup>63</sup> R Keohane, ‘Reciprocity in International Relations’ (1986) 40 *International Organization*, 1, 6

<sup>64</sup> Frederick the Great’s Political Testament (n 35)

<sup>65</sup> See Temperley (n 37), 460

international affairs is reinforced, and could be rationalised, by mainline analytical patterns of political realism, emphasising the anarchy of the international system and the autonomous determination by States of their priorities, policies, and interests. If the generally applicable law does not restrain some great powers from pursuing their national interest in defiance of it, other great powers are even less likely to be constrained by the exceptional legal positions upheld and propagated by their adversaries. If, on some policy grounds, one great power decides to recognise the independence of a secessionist entity on such an exceptional basis, other great powers could likewise be expected to make a similar autonomous judgment and take similar autonomous action in relation to other entities. In this sense, Russian action in relation to Crimea may yet prove to be the first in a series of sequels.

The combination of aggrandizement and selectivity in secession situations calls for elaborating on an analytical framework that could help to rationalise, or even institutionalise, the dynamics of revisionist power relations when the political claims of States diverge from legal requirements and could generate reciprocal adverse reactions from other States. One framework that could offer a useful analytical perspective is that of the ‘decentred globalism’ developed by Buzan and Lawson.<sup>66</sup>

As we have seen above, the developments in Kosovo from 1999 onwards were, to some extent, the results of growing unilateralism in international affairs. However, today’s conditions may require some focus on regionalisation, manifested by the formation and consolidation of formal or informal regional blocs and power centres, and thus on the increased role of regional power frameworks in the increasingly multipolar context in which international affairs are conducted. In this sense, ‘decentred globalism’ could envisage the ordering function of regional frameworks and thus be viewed in the systemic, or semi-constitutional sense, as it is, to some extent, treated in the analysis of Buzan and Lawson.

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<sup>66</sup> See generally B Buzan and G Lawson, *The Global Transformation: History, Modernity and the Making of International Relations* (Cambridge CUP 2015)



Furthermore, ‘decentred globalism’ could be an alternative to the aspirations of any great power to universal hegemony.

On the other hand, the ‘decentred globalism’ thesis could also be viewed in terms of the adversarial relations between power centres in the decentred world, which is, to some extent, reflected in the way that Buzan and Lawson have formulated it. According to Buzan and Lawson, regional formations could be bastions for retaining local distinctions, fall-backs if global cooperation weakens, and platforms from which to practice pluralist international relations more effectively.<sup>67</sup> Pluralism would, in this context, be driven not by nation-States and their distinctive identities and interests<sup>68</sup> but by regions led by core regional powers that could develop visions and agendas of their own and, to a large extent, subdue the autonomous foreign policy capacities and interests of individual States within the relevant region. That could evoke similarities either with Schmitt’s *Grossraum* thesis or with Samuel Huntington’s ‘core States’ thesis (whatever the original intentions might have been behind the shape of those two earlier analytical constructs).<sup>69</sup>

In practice, this could suggest the privileged position, or even dominance, of the regional great powers over the outcome of secessionist crises in their ‘core’ regions. A regional power could be an ‘arbiter’ of secessionist claims, not least driven by its own interests, and it could effectively (to recall the words of Adam Watson) ‘lay down the law’ in such contexts. The selectivity endorsed by unilateralism and underlying the Kosovo developments from 1999 onwards would, in other similar cases, expose State autonomy and territorial integrity through its region-specific policies and arrangements.

Owing to the inter-disciplinary focus of our analysis, the legal implications of all of the above should also be addressed. From a legal perspective, there would only be a relative

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<sup>67</sup> See Buzan and Lawson (n 66), 291ff., 302-303

<sup>68</sup> As was developed in an earlier work by B Buzan, *From International to World Society: English School Theory and the Social Structure of Globalisation* (CUP 2004), 139ff

<sup>69</sup> Buzan and Lawson also envisage the possibility that, under the ‘decentred globalism’, ‘regional powers will, for better or worse, have a stronger hand in their locales.’ See Buzan and Lawson (n 66), 303

difference between an *ad hoc* exit from the UN Security Council-established regimes of territorial governance, such as that embodied in resolution 1244, and more regularised practices and patterns that could develop in the modern or post-modern regional *Grossraum* spaces in the interest of regional hegemons. Both options would raise the issue of their correspondence with positive international law.

The enhanced version of the decentralisation of global security governance, premised on the endorsement of the dominant role of regional powers within their own regions, was rejected back in 1945 at the San Francisco conference, when the United Nations Charter was adopted. The universal peace and security model was instead prioritised, accommodating the role of regional arrangements under Chapter VIII of the Charter only as far as their activities would be compatible with the Charter. The flipside is that the trend towards regionalisation via ‘decentred globalism’, albeit quite real in our time, brings to our attention precisely those dimensions at risk of undermining the relevance of the global security framework.

What would be at stake with reciprocal reactions would, then, be not only the serial persistence of mutual setbacks to great powers and their interests but also the proper functioning, and in the longer run perhaps even the survival, of the multilateral security system. The phenomenon of reciprocity could be displayed at the State-to-State or at the regional level, but both of these options would raise the same issues under international law, which would have to be dealt with either in the context of countermeasures in response to a previous internationally wrongful act as a matter of the law of State responsibility,<sup>70</sup> or in the context of reciprocal termination of a treaty by a State in response to its material breach by another State – an option envisaged under Article 60 of the 1969 Vienna Convention on the Law of Treaties.

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<sup>70</sup> See Articles 49ff, ILC Articles on State Responsibility, Report of the International Law Commission on the work of its Fifty-third session (2001), *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10)*

Reciprocal non-compliance, by way of counter-measures, could conceivably be practised at the ‘micro’ level, manifested through the breach by one State of the UN Security Council resolution in response to the breach of the same or another resolution by another State. There is nothing in international law to exempt the UN Charter from the regime applicable to countermeasures. The escalation of such process could elevate the reciprocal non-compliance to the reciprocal violation of the provisions of the UN Charter itself, and the Crimea situation can also be seen through this prism. As for the Article 60 scenario in relation to the Charter itself, its likelihood at this juncture is rather minor, given that the relevant great powers hold great stakes in the privileged position that permanent membership in the Security Council gives them. This factor operates as a political reinforcement for the viability of the United Nations system and, through it, as a constraint on the extent to which patterns of ‘decentred globalism’ could produce purely regional solutions.

What the above also illustrates is that the contestation process may not always be kept under control and that selective contestation is not feasible. Contesting core constitutional concepts could entail the destabilisation of systemic foundations. In that respect, the possibilities envisaged under Article 60 of the Vienna Convention deal with both the selective contestation process and reactions to such contestation, and they provide for the outcomes that may not always be envisaged or intended at the initial stage of revisionist actions.

## VI. Conclusion

The above analysis has demonstrated the inter-connectedness between the categories that operate within both international legal reasoning and political realism. The inter-disciplinary focus on these issues could help to clarify how the dynamics of conflicts and crises driven by

secessionist claims are not merely due to the independence aspirations of oppressed people or even to the mere acceptance of a *fait accompli* ; they are also due to choices and calculations that the relevant great powers make on the basis of their own interests and, at times, in a selective manner. This pattern of interdependence reveals the lack of feasibility of the selective privileging of ‘local agencies’ and of their independence aspirations, unless the agenda of the ‘local agency’ were also to be entangled with the self-regarding national interests of the relevant great powers that would be ready to uphold those aspirations and thereby enhance their own privileged position, endowing it with the features of both legal and political hegemony that their preponderance of power entails.

But, what distinguishes Kosovo from most of the earlier instances in which territorial changes were engineered is that the law applicable to the Kosovo crisis constrains the legality of choices that the great powers make. Legal standards cannot, as such, prevent great powers from pursuing their political power agendas (as is inherent to Morgenthau’s position on this matter), but they still remain in place both as formulations of the community standard as to the acceptable behaviour of States, and as standards that, despite having been violated, continue to have binding force in relation to States. Violation of law does not mean that the law has been changed.

Furthermore, the violation of legal standards applicable to secession claims generates reactions from other States. Selectivity in relation to those claims generates a sense of discontent, unfairness and incoherence, and sets the stage for reciprocal reactions. In the anarchic world of international affairs, there is no regulatory force or authority to set limits on those reactions and keep them under control. It is within more than one actor’s power to disregard the relevant legal frameworks, including those introduced through Security Council resolutions, in their own autonomously defined interest and to their own advantage. By focusing on divergences of policies, actions and reactions on a global plane, and on the inter-

connectedness of the great powers' reactions in relation to different crisis situations, political realism shows the inter-dependence and global entanglement between those crisis situations and between the great powers using them in their own interest, even if their interests and policies are divergent and mutually conflicting. The truly global entanglement of great powers, extending beyond the various politically constructed regional or semi-regional zones of peace, security or democracy, is likely to materialise when the action of some of them contravenes international law and thus deepens political as well as legal divisions among great powers.

Therefore, the outcomes of violations of international law are politically unstable, and in some cases, they are politically self-defeating, producing (for the power-wielding great powers) the implications they would be keen to avoid. When handling the 1999 response to the Kosovo crisis or the independence issue from 2007 onwards, the pro-Kosovo governments do not seem to have considered the factors that Frederick the Great or Nesselrode had in mind when handling their contemporary problems. The ultimate political upshot in the Kosovo context, therefore, is that caution and moderation would be well-advised before taking initial steps towards endorsing any revisionist territorial claim. For, in the anarchic world of autonomous States, hegemonic law-making may be a no-less-difficult aim to attain than the international Rule of Law. When miscalculations are made, the observation 'what comes around goes around' may appear to be uncharitable, but it is not necessarily inaccurate.