

INTERNATIONAL LAW AS A POLITICAL INSTRUMENT IN THE CASE OF KOSOVO (1999-2010)

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“The greatest grieves are those we cause ourselves”¹

Introduction

On 22 July 2010, the International Court of Justice (ICJ) opined that Kosovo’s declaration of independence of 18 February 2008 was no violation of international law. This opinion brought some clarity to the legal uncertainty about Kosovo’s status, which had persisted for over a decade. Since the end of the Kosovo war and the establishment of the UN administration by Security Council Resolution 1244 (1999), the international legal dimension had been an important part of the conflict. The present article chooses an international relations perspective on Kosovo’s recent legal history. The first section sets out the instrumentalist vision on international law, stating that international law is nothing but a political instrument that states can apply in the foreign relations. The second section comments on instrumentalism arguing that legal norms often are indeterminate or imprecise. The question is thus whether law is effective as a policy instrument. In the third section, it is analysed how effective law was in the case of Kosovo from 1999 to 2010. The last section distinguishes some reasons why international law might be ineffective as a policy instrument: law is often addressed to conflicts of a political nature and when a norm is created, it can also be used by other states to realise contrasting policy goals.

I Theories about International Law as a Political Instrument

This section defines the theoretical framework underlying the instrumentalist position on the function of international law. As such, it takes an international relations perspective on international law. Law is not just a given factor, but originates from the interaction of actors in international relations. When exploring the multidisciplinary field in between international law and international relations, one of the first questions that comes to mind is what the relationship between law and politics is, and how the process of the formation of international law elapses. It is generally agreed that treaties and customary law emerge from the interaction of states. Nevertheless, different schools of thought in international relations have formulated

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¹ Sophocles, *Oedipus Rex*.

varying answers on the nature of the relationship between law and politics.² The present section limits itself to the realist and rationalist approach, which both share instrumentalist notions. The basic idea of the instrumental strand is that international legal norms and principles serve a purpose in the foreign policy of a state. According to instrumentalism, “rules and norms will matter only if they affect the calculations of interests by agents”.³ Legal means are seen as one of the available instruments to achieve the interests of states, next to for instance the use of force, diplomacy, or economic power. Although specific ideas about the use and relevance of law vary throughout realism and rationalism, both theories feature the notion that international law can be employed as an instrument in the foreign policy toolbox of a state.

I.1 Realism

In the view of realists, international relations are explained by the power relations amongst states acting in an anarchic system. In their struggle to survive, states seek to maximise their power, security, or wealth. Within this balance of power, states balance against each other or actively compete over influence on other states.⁴ Accordingly, realists describe international law as instrumental in the power ambitions of states. Morgenthau sees the main function of international law as regulating problems that might arise in a system where sovereign states have contacts with each other.⁵ For instance, states need to know what rights diplomatic representatives or vessels in foreign waters have. In this way, law contributes to stability and therefore to the security of states. Most basic norms have generally been observed, but the efficacy and validity of more ambitious rules of law is doubtful. Examples hereof include the prohibition on the use of force entailed in the Briand-Kellogg Pact, the Covenant of the League of Nations and the Charter of the United Nations. In many cases, these rules are violated or not enforced in case of violation.⁶ To quote Morgenthau, “to recognize that international law exists is, however, not tantamount to asserting that it is as effective a legal system as the national legal systems are and that, more particularly, it is effective in regulating and restraining the struggle for power on the international scene.”⁷

² Two excellent volumes on this discussion are M. Byers (ed.) *The Role of Law in International Politics. Essays in international relations and international law*, Oxford: Oxford University Press 2000; and C. Reus-Smit (ed.) *The Politics of International Law*, Cambridge: Cambridge University Press 2004. See also the discussion of realism, institutionalism, liberalism and constructivism in J. Goldstein, M. Kahler, R. Keohane & A.-M. Slaughter, ‘Introduction: Legalization and World Politics’, *International Organization* (54: 3), 2000, pp. 385-399, at 391-393.

³ R. O. Keohane, ‘International Relations and International Law: Two Optics’, *Harvard International Law Journal* (38: 2) 1997, pp. 487-502, at 487.

⁴ H. Morgenthau, *Politics Among Nations. The Struggle for Power and Peace (5th edition)*, New York 1973, pp. 172-176.

⁵ *Idem*, p. 272.

⁶ *Idem*, pp. 272-273.

⁷ *Idem*, p. 273.

In Morgenthau's view, international law owes its existence to identical interests of individual states and the distribution of power: "where there is neither community of interest nor balance of power, there is no international law".⁸ By implication, law is of a fundamental political nature: "legal rules emanate from dominant powers and represent their interests. Legal rules that "work" bind the weaker members of the system".⁹ Legal norms lose their relevance when they are against the interests of states who have enough power to bear potential negative consequences of the ignorance of international law. It can only be seen as binding and enforceable when it matches the interests of those states.¹⁰ Law is not just a tool used by one state to dominate another, but has the additional advantage that it carries legitimacy. Realism suggests that states are often able to frame their action in accordance with the law. In this way, international law can offer a justification for a certain conduct.¹¹ This has been famously summarised by Zimmern's notion that international law at times resembles "an attorney's mantle artfully displayed on the shoulders of arbitrary power".¹²

I.2 Rationalism

The rationalist approach is based on rational choice theory. Similar to realists, rationalists see states as utility-maximising actors. However, the crucial difference with realists is that rationalists believe multilateral cooperation – whether in the form of 'regimes', 'institutions', or international law – to be a good instrument to achieve state interests.¹³ Thus, rationalists sustain that "international law emerges from states acting rationally to maximize their interests, given their perceptions of other states and the distribution of state power".¹⁴ Accordingly, states make a rational analysis of the costs and benefits of compliance or violation of international law. When states assume they profit from violating law, they might do so by bending or stretching the law to a certain interpretation that suits them, or by attempting to renegotiate a particular agreement.¹⁵ Realists and rationalists thus agree that the constraints of international legal norms on state action are weak. Rather than requiring an irrational conduct (a constraining force), law

⁸ *Idem*, p. 274.

⁹ Goldstein et al. 2000, *supra* note 2, p. 391.

¹⁰ C. Reus-Smit 2004, 'The Politics of International Law', In: C. Reus-Smit (ed.), *The Politics of International Law*, Cambridge: Cambridge University Press 2004, pp. 14-44, at 16.

¹¹ N. J. Wheeler, 'The Kosovo Bombing Campaign', In: C. Reus-Smit (ed.), *The Politics of International Law*, Cambridge: Cambridge University Press 2004, pp. 189-216, at 190.

¹² A. Zimmern, *The League of Nations and the Rule of Law: 1918-1935* (London: Macmillan, 1936), p. 94; quoted in Reus-Smit 2004, *supra* note 10, p. 16.

¹³ Reus-Smit 2004, *supra* note 10, p. 18. This is also the point of convergence with institutionalism.

¹⁴ J. L. Goldsmith & E. A. Posner, *The Limits of International Law*, Oxford: Oxford University Press 2005, p. 3.

¹⁵ E. A. Posner, *The Perils of Global Legalism*, Chicago: The University of Chicago Press 2009, p. ix.

formalises the agreement among states to refrain from behaviour in their bilateral relations that harms mutual interests (a guaranteeing force).

Goldsmith and Posner see a one-way causal relation between state interest and international law:

“The usual view is that international law is a check on state interests, causing a state to behave in a way contrary to its interests. In our view, the causal relationship between international law and state interests runs in the opposite direction. International law emerges from states’ pursuit of self-interested policies on the international stage. International law is, in this sense, endogenous to state interest. It is not a check on state self-interest: it is a product of state interest.”¹⁶

This does not mean that international law is irrelevant, as most realists would argue. The main utility of international law is to achieve mutually beneficial outcomes through coordination and cooperation. However, in the opinion of Goldsmith and Posner, the compliance pull of international law has been overrated by international law scholarship. Being a product of state interest, international law does not pull states towards compliance contrary to their interests.¹⁷

II The Indeterminacy of International Law

The previous section introduced the instrumentalist vision of international law. It shortly discussed the realist and rationalist explanations for the emergence of international law. The current section brings forward the issue of the indeterminate or imprecise nature of many international legal norms and raises the question what this indeterminacy implies for the effectiveness of law as a political instrument.

In substance, international law is a set of rules formulated to govern parts of the behaviour of actors in the international arena. As such, it consists of a large body of rules that have been codified to a various extent. In this sense, international law can simply be defined by its sources. Treaties are the only sources containing fixed texts, although not necessarily unequivocal. The meaning or scope of customary law is even more open for debate. The ‘norms’ of international law are thus much more loosely defined than, say, domestic criminal law. To summarise, international law is of ‘indeterminate character’.¹⁸

This indeterminacy creates two major problems. Firstly, it is not clear what the law is. This is especially problematic with customary law, which is based on the difficultly definable notions of ‘state practice’ and ‘*opinio iuris*’. There are no precise legal prescriptions how a norm emerges or loses its quality of

¹⁶ Goldsmith & Posner, *supra* note 14, p. 13.

¹⁷ *Ibid.*

¹⁸ Wheeler 2004, *supra* note 11, p. 191.

law.¹⁹ And if non-compliance is enough to cease a norm to be in force, what sense there is to have the norm in the first place? It is also unclear whether a customary rule binds states that have not consented to it.²⁰ The second problem is that even when various actors share a common vision on the content of the law, they might have divergent interpretations about the merits of the case. For instance, NATO and the NGOs Human Rights Watch and Amnesty International agreed what body of law was applicable to the NATO bombing campaign in Serbia, but had various opinions on the issue whether or not the loss of civilian lives were ‘excessive’ in comparison with the military advantage.²¹ The indeterminacy of the term ‘excessive’ here leaves space for (political) interpretation and controversy.

Martti Koskenniemi takes the argument about international law’s indeterminacy to a higher level. He argues that even where there is no linguistic ambivalence, “international law remains indeterminate because it is based on contradictory premises and seeks to regulate a future in regard to which even single actors’ preferences remain unsettled.”²² Since international law emerges from a political process where states have contradictory interests and no strategy to shape legal norms for an uncertain future, they agree “to supplement rules with exceptions, have recourse to broadly defined standards and apply rules in the context of other rules and larger principles.”²³ As a result, “it is possible to defend any course of action – including deviation from a clear rule – by professionally impeccable legal arguments (...), [to] make choices between several rules as well as rules and exceptions, and interpret rules in the context of evaluative standards.”²⁴ According to Koskenniemi, this is not due to carelessness or bad faith, but from the actor’s “deliberate and justified wish to ensure that legal rules will fulfil the purposes for which they were adopted.”²⁵

This notwithstanding, not all international law can be rightly characterised as indeterminate. It matters whether an international legal text is a bilateral treaty among states with a common interest or a multilateral compromise addressing a complicated or controversial issue. Technocratic lawyers make different law than negotiating diplomats. If two states seek to give a coordinated answer to a concrete question, such as the location of a border or the constitution of an embassy, they can easily do so. However, such

¹⁹ R. Higgins, *Problems and Process. International Law and How we Use it*, Oxford: Oxford University Press 1994, p. 2.

²⁰ Reus-Smit 2004, *supra* note 10, p. 20.

²¹ Wheeler 2004, *supra* note 11, pp. 197-213. The Geneva Conventions and its Additional Protocols form the principal source of international humanitarian law. Attacks resulting in ‘excessive’ civilian casualties are prohibited by Additional Protocol I (1977) to the Geneva Conventions, Art. 51(5)(b).

²² M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument. Reissue with new epilogue*, Cambridge: Cambridge University Press 2005, p. 590.

²³ *Ibid.*

²⁴ *Idem*, p. 591.

²⁵ *Ibid.*

treaties are less suitable to solve global collective action problems than trade relations and environmental guidelines where one state is able to block the whole process.²⁶ The indeterminate part of international law is most often of political nature. Just like law on the domestic level, international law addresses political issues. Yet in effective states, the making of law is coupled with authority. In this way, governments are able to impose the respect of the law. This enforcement capability is lacking in the international arena. This is the rationale behind Posner's description of international law as 'law without government'.²⁷

II.1 Implications

Notwithstanding the indeterminate nature of many international legal instruments, it should be acknowledged that historically there is a tendency towards higher degrees of precision. The more precise or determinate an international legal norm is, the narrower the scope for 'reasonable interpretation'. Precise sets or rules are elaborate and prescribe desired behaviour in a detailed manner.²⁸ As Abbott *et al.* interestingly point out, "it [precision] is essential to a rationalist view of law as a coordinating device."²⁹

The above exploration on the indeterminate or imprecise nature of international law raises the question how international law can serve as a political instrument. Precision is an important condition for an instrument to be effective, yet rationalism does not consider this. Goldsmith and Posner observe that international law emerges from rational interaction of states. Where states engage in political action, there always are cases where compromises are sought (but only when the political costs of breaking cooperation exceed the costs of the compromise). By default, this results in international legal agreements of an indeterminate nature. It is questionable how effective such agreements are in achieving the interest of the states behind them. Varying judicial interpretations of imprecise norms might not match the interests of states that advance certain legal norms. These aspects are not considered by instrumentalist theories, which typically analyse the consequences of legal means from the point of view of compliance only.³⁰

III Historical Overview and Analysis (1999-2010)

The present section analyses the use of international law as a political instrument in the case of Kosovo. Since there is little space to discuss

²⁶ Posner 2009, *supra* note 15, p. 30.

²⁷ *Idem*, p. 8.

²⁸ K. W. Abbott, R. O. Keohane, A. Moravcsik, A.-M. Slaughter & D. Snidal, 'The Concept of Legalization', *International Organization* (54: 3) 2000, pp. 401-419 at 412-415.

²⁹ *Idem*, p. 413.

³⁰ For discussions on the topic of compliance with international law, see among others Goldsmith and Posner, pp. 26-32; pp. 101-104; or M. Scharf, 'International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate', *Cardozo Law Review* (31) 2009, pp. 45-98.

Kosovo's history here³¹, the discussion mainly focuses on three important documents: United Nations Security Council Resolution 1244 (10 June 1999) establishing an interim administration in Kosovo, Kosovo's Declaration of Independence (18 February 2008), and the International Court of Justice's advisory opinion on the legality of the latter declaration (issued 22 July 2010).

NATO started bombing Serbia in March 1999, as Serbia's President Milošević had rejected the imposed Rambouillet peace agreement that was to be signed by Serbia, the Kosovar insurgents and the international community. The bombardments stopped when Serbia signed a capitulation agreement at Kumanovo on 9 June 1999. The following day, the Security Council passed a resolution inspired by NATO. This text in substance confirmed the earlier agreements of the Kumanovo Treaty and the G8 summit of 6 May. NATO sought to address three core problems with this famous Resolution 1244 (1999). Firstly, the agreement had to stop the violence against civilians. Secondly, the Resolution mandated the UN to establish an interim administration under the name UNMIK (United Nations Mission in Kosovo). Thirdly, the Resolution effectively froze the conflict about the status of Kosovo. The Resolution is remarkably ambiguous on the future status of the Serbian province. According to the Resolution, UNMIK's responsibilities include "[p]romoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo"³² and "[f]acilitating a political process designed to determine Kosovo's future status".³³ At the same time, the preamble reaffirmed "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States in the region."³⁴ Clearly, these notions are contrasting, unspecific and open for multiple interpretations.

It is remarkable that the Security Council did not only fail to prevent or sanction the interference with article 2 (4) of the UN Charter by NATO, but also played a very active role in the restriction of Yugoslavia's sovereignty. By Resolution 1244, the Council did nothing more than affirming the status quo and formalising agreements that had been made in another forums. Swabach thus argues that the Council's most important function was to 'make it [the status quo] legal', the resolution being a compromise between NATO on the one side and Russia and China on the other side.³⁵ Especially the affirmation of the sovereignty and territorial integrity of Yugoslavia seems to originate from this bargaining. From an instrumentalist perspective, it is difficult to explain why the Security Council took the effort to formalise the outcome of the agreements from the G8 and Kumanovo through a binding resolution.

³¹ An excellent book on Kosovo's history is M. Weller, *Contested Statehood. Kosovo's Struggle for Independence*, Oxford: Oxford University Press 2009.

³² S/RES/1244 (1999), para. 11 (a).

³³ S/RES/1244 (1999), para. 11 (e).

³⁴ S/RES/1244 (1999), preamble, tenth consideration clause.

³⁵ A. Swabach, 'Yugoslavia V. Nato, Security Council Resolution 1244, and the Law of Humanitarian Intervention', *Syracuse Journal of International Law and Commerce* (27) 2000, pp. 77-101, at 80-82.

The added value of a legal instrument is unclear. Due to the military strength of the alliance, NATO could perfectly have established an interim administration independently. Analysis of the further development of the case suggests that taking the conflict to a legal forum has opened an entire new (legal) dimension to it.

Negotiations about the status of Kosovo were unable to lead to an agreement and in a timing orchestrated with Washington and European capitals, the members of Kosovo's Assembly passed a Declaration of Independence on 18 February 2008.³⁶ In this declaration, Kosovo pledged to "act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999)".³⁷ The Special Representative of the UN Secretary General did not use his competence to declare acts of the Assembly null and void, nor did the Security Council take a position.³⁸ Whilst Kosovo was quickly recognised by the U.S. and many European states, Serbia succeeded to convince the UN General Assembly to seek an advisory opinion of the ICJ on the following question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" Written and oral proceedings followed, in which a record number of 36 state parties explained their views. These proceedings gave a clear display of the indeterminacy of legal provisions on independence, self-determination and sovereignty and were used by those in favour and against Kosovo's independence to argue in sustain diametrically opposed positions. States thus employed an instrumental use of international law coinciding with their foreign policy objectives, leading to many contrary claims. The indeterminacy of the applicable law allowed states to advocate self-serving interpretations.

³⁶ One of the issues of debate at the ICJ was whether the declaration of independence was passed by the Assembly of Kosovo set up under UNMIK (as Serbia argued), or by 'the democratically elected representatives of the people (Kosovo's argument). The Court found the authors of the declaration acted "*in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.*" (International Court of Justice 22 July 2010, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, para. 109)

³⁷ Kosovo Assembly 18 February 2008, *Kosovo Declaration of Independence*, available online: <http://www.assembly-kosova.org/?cid=2,128,1635>; retrieved 20 September 2010.

³⁸ This fact supplies Kosovo with the argument that he supports it, whilst other states see it as compatible with the status neutral approach of the United Nations and a result of the political deadlock. See for instance "Oral Statement of the authors of the Unilateral Declaration of Independence" (International Court of Justice 1 December 2009, *Public sitting held on Tuesday 1 December 2009, at 3 p.m., at the Peace Palace, President Owada, presiding, on the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for advisory opinion submitted by the General Assembly of the United Nations)*), p. 60; "Oral Statement of the Republic of Serbia" (International Court of Justice 1 December 2009, *Public sitting held on Tuesday 1 December 2009, at 10 a.m., at the Peace Palace, President Owada, presiding, on the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for advisory opinion submitted by the General Assembly of the United Nations)*), p. 39.

On 22 July 2010 the Court issued its advisory opinion, assessing general international law, Resolution 1244, and the Constitutional Framework³⁹, for Kosovo issued by UNMIK. In a ruling that was remarkably limited in scope, the Court ruled that “the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently the adoption of that declaration did not violate any applicable rule of international law.”⁴⁰ The main consideration leading to this conclusion is the lack of existence of laws guiding the issuance of declarations of independence. For instance, the Court established there was “a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation”. Nevertheless, the emergence of states in other contexts shows there is no prohibition on declarations of independence in other cases.⁴¹

Due the indeterminacy of the applicable law, the Court concluded that the declaration did not constitute a violation of international law. Subsequently, many observers and media made statements that the Court regarded the declaration as ‘not illegal’ or even supported Kosovo’s independence. Although technically correct and imaginable from a political standpoint, this seems not to be the correct approach to the matter. In practice, one could better say that the declaration should be regarded as an ‘a-legal’ phenomenon: rather than assessing the question in legal terms, the Court has concluded that there are no precise laws governing (that is, authorising or prohibiting) the behaviour of Kosovo, and therefore it cannot be a violation of international law.

Taking another meta-perspective, the Court could similarly have argued that the declaration is not authorised by international law, and therefore is not in accordance with international law. The most neutral, correct and a-political approach would be to describe the event as an a-legal and political question. In fact, some parties stated that the issue can not really be assessed in legal terms. No declaration of independence has legal value for itself. It is only the political value that other states attach to those declarations with legal pretensions that matter.⁴²

Analysing the course of developments over the years, it is remarkable how the use of international legal instruments seems to have backfired upon states. In 1999, members of NATO inspired the Security Council to pass

³⁹ See paras. 85-93 of the advisory opinion for a discussion on the Constitutional Framework (International Court of Justice 2010, *supra* note 36).

⁴⁰ International Court of Justice 2010, *supra* note 36, para. 122.

⁴¹ *Idem*, para. 79.

⁴² “Oral statement of the Republic of Finland” (International Court of Justice 8 December 2009, *Public sitting held on Tuesday 8 December 2009, at 10 a.m., at the Peace Palace, President Owada presiding, on the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for advisory opinion submitted by the General Assembly of the United Nations)*), p. 51.

Resolution 1244. Over the years, with the slowly progressing negotiations, it proved to be an important tool in the hands of Serbia. The provision on Serbia's sovereignty supplied it with a powerful argument to oppose any solution it had not consented to. Interestingly, international law was also fruitlessly used by Serbia when it requested the advisory opinion. Clearly expecting law to be at its side, Serbia did not expect this outcome of the advisory opinion. Moreover, the continuous framing of the situation in terms of the resolution showed that it had not become irrelevant. Thus, it can be concluded that realism's claim that law is only respected in support of the interest of more powerful states does not correctly describe the developments in the case of Kosovo.

IV Analysis and Implications

The previous chapter concluded that the instrumentalist theory is unable to explain the developments in the Kosovo case. Instead of effectively addressing the status issue, the interference of international law complicated the situation. Subsequently, this final section points at several flaws in the instrumentalist argument. The theory that law is (only) proposed by states in their interest seems to be inaccurate. Based on the analysis of the case, two submissions are made.

- Apart from a regulating function, international law also has a discursive function. Law is not exclusively created because of its utility, but also for reasons as legitimacy or as a consequence of the work of institutions.
- The consequences of the use of law as an instrument have to be considered. Legal rules might be ineffective when they are indeterminate or addressing problems of a political nature. As there is no monopoly on the use of a certain legal reasoning, it can be used by other states to realise their own policy preferences.

IV.1 Discursive Function

Constructivists have criticised the instrumentalist approach to international law in various ways. One of the most relevant criticisms is that instrumentalists ignore the discursive aspect of international law. Apart from a cooperation mechanism, it also encompasses models of legitimate agency and action. This factor is difficult to include in models that only care about interests and actions. The formation of interests and the ways in which norms affect the identities and preferences of actors are ignored by rationalism.⁴³ Another common criticism of the rationalist approach is that it is unfit to explain why states resort to binding legal norms instead of non-binding forms of cooperation.⁴⁴ Constructivists believe that behaviour is not purely based on a need for power, ratio or utility, but that it is also shaped by inter-subjective notions. Therefore, they seek to discover what factors

⁴³ Reus-Smit 2004, *supra* note 10, pp. 19-21.

⁴⁴ Goldstein et al. 2000, *supra* note 2, p. 392.

underlie state behaviour. Identity and values can affect the ideas that a state formulates about its interests, and subsequently influence its behaviour.⁴⁵ This is a radical break with realists and rationalists, who see interests as given.⁴⁶ Obviously, this means that many more aspects have to be weighted in a constructivist explanation of the emergence of international law. For instance, it might be affected by domestic principles as democracy and the rule of law, or ethical considerations about the treatment of human beings (for instance, the prohibition on torture). It might also affect the way states look at international law. Apart from an instrument, international law can become a goal in itself or an autonomous legitimate institution.

Part of the function of legal norms is the creation of a language according to which the world is understood. In a constructivist understanding, things themselves do not convey meaning, but people construct the meaning of things.⁴⁷ Thus, as long as an aggregate of individual human beings does not have the label 'people' to describe itself, it does not perceive itself as a people. This works similarly with legal norms: when they are created, they open a certain discourse and raise expectations with people. The principle of self-determination can serve as a wonderful example. In the words of Robert Lansing, advisor to American President Wilson who launched the concept: "The more I think about (..) the right to self-determination, the more convinced I am of [its] danger (...) The phrase is simply loaded with dynamite. It will raise hopes which can never be realized. It will, I fear, cost, thousands of lives."⁴⁸ Although its practical meaning currently has been limited to a context of decolonisation, it is still an important legal concept. Law performs a function in the strengthening of political arguments that actors make. Law-making cannot be strictly separated from the application of law, and the role of existing law on the further law-making process. In antithesis to Goldsmith and Posner's one-way relation between states and law, Reus-Smit advocates "a view of international politics as both a rule-governed and rule-constitutive form of reason and action, and international law as a central component of the normative structures that are produced by, and constitutive of, such politics".⁴⁹

IV.2 Consequences of International Law

Realists and rationalists, here grouped together under instrumentalism, have theorised that states use international law as a political instrument. Nevertheless, there has been little evaluation of the effects or consequences

⁴⁵ Reus-Smit 2004, *supra* note 10, pp. 21-22.

⁴⁶ Reus-Smit analyses this in a model with four steps of political deliberation: idiographic, purposive, ethical, and, finally, instrumental. See Reus-Smit 2004, *supra* note 10, pp. 24-26.

⁴⁷ J. Milliken, 'The Study of Discourse in International Relations: A Critique of Research and Methods', *European Journal of International Relations* (5) 1999, pp. 225-254, at 229.

⁴⁸ R. Lansing, *The Peace Negotiations: A Personal Narrative*, 1921, pp. 97-98. Quoted in R. M. Hanna, 'Right to Self-Determination in *In Re Secession of Quebec*', *Maryland Journal of International Law & Trade* (213) 1999, pp. 213-246, at 226.

⁴⁹ Reus-Smit 2004, *supra* note 10, p. 23.

of such use of law and the discussion remains stuck at the level of theories of compliance. Next to the issue of compliance, legal rules also affect the discourse: law has a life of its own. The 'behaviour of law' or the consequences of the use of law as a political instrument are difficult to predict. As the analysis of the case of Kosovo has demonstrated, they might even be risky. When unintended additional consequences are considered, the outcome might not always be according to the policy preference of the state creating or invoking a certain norm. As has been extensively discussed, the indeterminacy of legal norms is a major reason why they can be ineffective.

Secondly, a legal norm can be ineffective when it is attempting to address a problem of a fundamental *political* nature. Morgenthau's discussion of *Streitigkeiten* and *Spannungen* can shed some light on the role of 'the political' and 'the legal' within international affairs.⁵⁰ As the political is based on subjective concepts as vital interests or national honour, it can always overtake any legal substance⁵¹. On this basis, Morgenthau separated international conflicts in disputes (*Streitigkeiten*) and tensions (*Spannungen*). The former can be dealt with by legal means. However, in the case of tensions, the political intensity of the disagreement largely prevails over the legal dimension. The tension thus is not about the content of the rights and duties contained in the law, but whether and how they should be changed. Therefore, tensions cannot be resolved by legal settlement, unless the political aspects lose their importance and the conflict can be expressed exclusively in legal terms.⁵² Similarly, the ICJ's opinion could not bridge the gap between the two irreconcilable opposed positions of Serbia and Kosovo. As Serbia does not see its political conviction recognised by the advisory opinion, it does not accept the reasoning of the Court.

Thirdly, there is *no monopoly* on the use of a certain legal reasoning. When states create a legal norm or new interpretation, other states can also invoke this legal instrument (norm, bending of a norm, derogation or violation). Instrumentalism does not consider that the political utility of legal norms changes with political reality. Over time, a norm might become a tool in the hands of other parties. This potential risk should also be counted by states in their analysis of the costs and benefits of the creation of a certain norm. Resolution 1244 is the most speaking example with regard to the assertion that international law does not create monopolies. Though initially effective in realising NATO's objectives, the resolution was later at the benefit of Serbia. Serbia often invoked the affirmation of its sovereignty and territorial

⁵⁰ This explanation is based on M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870 – 1960*, Cambridge: Cambridge University Press 2002, pp. 440-445 and M. Koskenniemi, 'The Image of Law and International Relations', in: M. Byers (ed.) *The Role of Law in International Politics. Essays in international relations and international law*, Oxford: Oxford University Press 2000, pp. 17-34, at 25. The original argument was presented in H. Morgenthau, *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen*, Leipzig: Noske 1929.

⁵¹ Koskenniemi 2002, pp. 441-442.

⁵² *Ibid.*, pp. 442-443.

integrity when opposing the independence of Kosovo. The risk of the resolution becoming a tool in the hands of other parties was neglected when NATO decided to seek Security Council confirmation for its peace agreement with Serbia in 1999.

Conclusion

For instrumentalist international relations scholars, international law is nothing but an instrument in the foreign policy of states. However, in international relations, there is little evaluation of the actual working of international law. The present article has sought to perform such a small evaluation for the case of Kosovo between 1999 and 2010. The conflict in Kosovo entered an international legal dimension by Security Council Resolution 1244 of 10 June 1999. This resolution was ambiguous about Kosovo's final status, but reaffirmed Serbia's sovereignty over the territory. When a formal analysis is made, only looking at compliance, one could argue that the resolution has been irrelevant, as the settlement process has resulted in an outcome that seems not to be strictly in accordance with the provision on Serbia's sovereignty and territorial integrity. But when the informal function of law is studied, and the options for behaviour that it creates, there are several unintended consequences created by the resolution. Through its formal attitude towards compliance, instrumentalist theory is unable to include the actual consequences.

The most striking example is the advisory opinion asked by the General Assembly. Several NATO states here had to defend their recognition of Kosovo, which at first glance seemed not entirely in accordance with the letter of Resolution 1244. NATO hoped that after an interim period there would be a mutually agreeable solution for the status of Kosovo. As NATO's hopes for an agreement between Kosovo and Serbia or within the Security Council were idle, they took action without Serbia's consent. The resolution supplied Serbia with powerful legal argumentation to challenge Kosovo's independence. Here, NATO's grieves resulted from a resolution they had wanted to pass to legalise the status quo after the bombing campaign. Interestingly, also for the advisory opinion sought by Serbia, the final outcomes were much different than hoped. Instead of condemning the unilateral declaration of independence of Kosovo, the Court is of the opinion that the declaration does not constitute a violation of any applicable international law. Obviously, this is a major disappointment for Serbia. Had it not sought the advisory opinion, Serbia had not faced this grief.

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