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IMPALED ON MORTON'S FORK:[†] KOSOVO, CRIMEA, AND THE *SUI GENERIS* CIRCUMSTANCE

Christopher R. Rossi*

ABSTRACT

This Article investigates the problematic invocation of unique circumstances as a justification for circumventing international law relating to the use of force and state secession. Borrowing from the teachings of critical sociology, this Article addresses the lessons learned from NATO's 1999 intervention in Kosovo and Kosovo's 2008 Declaration of Independence from Serbia; it adapts those teachings to Russia's 2014 annexation of Crimea. Doctrinal, state-sponsored, and international juridical attempts to conform the Kosovo events to the international rule of law mask internal and unreconciled tensions within the United Nations Charter system. These tensions, which threaten to further weaken the system and expose it to dangerous manipulations, have upset international law's delicate balance between respect for territorial integrity and the right of self-determination. These weaknesses also help explain why two of the most significant doctrinal developments to emerge from the mist of Kosovo—the Responsibility to Protect and remedial secession—have retreated from earlier enthusiastic assessments of their prospects in international law. Embedded in the recourse to the sui generis claim is the cautionary belief that its invocation may likely mask extra-legal intentions as support for international law's progressive development.

[†] Morton's Fork is the logical dilemma of choosing between equally undesirable options. *Morton's Fork*, OXFORD DICTIONARIES ONLINE (2015).

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INTRODUCTION

In 1999, NATO launched a successful seventy-eight day bombing campaign against Serbia in its southern province of Kosovo.¹ The purpose of the campaign was to halt human rights violations given imminent concerns of ethnic cleansing against Kosovar Albanians.² NATO initiated the war without seeking United Nations (U.N.) Security Council authorization,³ which violated the U.N. Charter. Chapter VII of the Charter grants the Security Council a monopoly on the use of force save for individual or collective self-defense.⁴ But Security Council action seemed futile because Russia likely would have vetoed any forceful initiative against its close ally, Yugoslavia.⁵ The Security Council addressed the situation in Kosovo through resolutions that attempted to end hostilities prior to the intervention, but none of them authorized the use of force.⁶ At the conclusion of hostilities, the Security Council established the U.N. Interim Administration in Kosovo (UNMIK).⁷ This resolution, Security Council Resolution 1244 (1999), was cited as paving the way for Kosovo to become an independent state,⁸ but it in fact advocated a “political solution,” “reaffirm[ed] the commitment of all Member States to the sovereignty and

¹ The NATO air campaign took place from March 24–June 10, 1999. See THE INDEPENDENT INT’L COMM’N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 92 (2000) [hereinafter KOSOVO REPORT].

² See Press Release, Secretary-General of NATO, Press Statement by Dr. Javier Solana (Mar. 23, 1999), <http://www.nato.int/docu/pr/1999/p99-040e.htm> [hereinafter Press Statement by Dr. Javier Solana]; see also Press Release, Secretary-General, Secretary-General [Annan] Calls for Renewed Commitment in New Century to Protect Rights of Man, Woman, Child—Regardless of Ethnic, National Belonging, U.N. Press Release SG/SM 6949 HR/CN/898 (Apr. 7, 1999) [hereinafter Press Release by Secretary-General Annan], <http://www.un.org/press/en/1999/19990407.sgsm6949.html> (noting the “dark cloud of the crime of genocide” may be “happening once more, in Kosovo”).

³ See CIARÁN BURKE, AN EQUITABLE FRAMEWORK FOR HUMANITARIAN INTERVENTION 1 (2013).

⁴ See U.N. Charter arts. 39–51.

⁵ See BURKE, *supra* note 3.

⁶ See S.C. Res. 1160 (Mar. 10, 1998); S.C. Res. 1199 (Sept. 23, 1998); S.C. Res. 1203 (Oct. 24, 1998); S.C. Res. 1239 (May 14, 1999); see also Ilan Fuchs & Harry Borowski, *The New World Order: Humanitarian Interventions from Kosovo to Libya and Perhaps Syria?*, 65 SYRACUSE L. REV. 304, 305–06 (2015) (“[N]o specific Security Council Resolution explicitly authorized the use of force.”).

⁷ S.C. Res. 1244 (June 10, 1999).

⁸ See Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Verbatim Record, I.C.J., CR 2009/30, at 28, ¶16 (Dec. 8, 2009), <http://www.icj-cij.org/docket/files/141/15726.pdf> (“The simple fact is that resolution 1244 works. Without preordaining, it permitted Kosovo’s independence.”); see also James Ker-Lindsay, *Preventing the Emergence of Self-Determination as a Norm of Secession: An Assessment of the Kosovo ‘Unique Case’ Argument*, 65 EUR.-ASIA STUD. 837, 844 (2013) [hereinafter Ker-Lindsay, *Preventing the Emergence of Self-Determination*].

territorial integrity of the Federal Republic of Yugoslavia,”⁹ and “did not contain any provision dealing with the final status of Kosovo or with the conditions for its achievement.”¹⁰

NATO’s decision to bypass the Charter’s *jus ad bellum* regime, the law governing the initiation of force, complicated the legitimacy of the mission and challenged the efficacy of international law.¹¹ International law’s respect for territorial integrity prohibits military action by one state against another, except in self-defense.¹² The Federal Republic of Yugoslavia had not attacked a fellow U.N. member state or a NATO member state; and indeed, Kosovo had belonged to Serbia.¹³ In addition to violating the Charter, the air strikes violated a general principle of law dating back to Roman law—the same principle NATO purported to uphold in its actions against Yugoslavia¹⁴—legal rights cannot arise from unlawful acts (*ex injuria jus non oritur*).¹⁵

To justify its acts, NATO floated trial balloons. Official statements linked NATO actions to the intentions behind the Security Council Resolutions and

⁹ S.C. Res. 1244, *supra* note 7, pmb1. The International Court of Justice recalled Resolution 1244’s tenth preambular paragraph on the Federal Republic of Yugoslavia’s sovereignty and territorial integrity in its 2010 advisory opinion on Kosovo. *See* Accordance with the International Law of Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403, ¶ 96 (July 22) [hereinafter *Advisory Opinion on Kosovo*]. The *Advisory Opinion on Kosovo* opined that:

The Court thus concludes that the object and purpose of resolution 1244 (1999) was to establish a temporary, exceptional legal régime which, save to the extent that it expressly preserved it, superseded that Serbian legal order and which aimed at the stabilization of Kosovo, and that it was designed to do so on an interim basis.

Id. ¶ 100.

¹⁰ *Advisory Opinion on Kosovo*, *supra* note 9, ¶ 114.

¹¹ *See* DANILO ZOLO, *INVOKING HUMANITY: WAR, LAW AND GLOBAL ORDER* 72 (2002).

¹² *See* U.N. Charter arts. 2(4), 51.

¹³ According to NATO’s constitutive document, the North Atlantic Treaty [Washington Treaty], Articles 5 and 6(1) require that an armed attack against one or more of the parties be considered an attack against them all. The North Atlantic Treaty arts. 5, 6(1), Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243; *see also* Fuchs & Burovski, *supra* note 6, at 305–06.

¹⁴ *See* Press Statement by Dr. Javier Solana, *supra* note 2 (noting the need to stop the Yugoslav Government’s repression of its people); *see also* President Clinton, Statement on Kosovo, Address at the University of Virginia Miller Center (Mar. 24, 1999), <http://millercenter.org/president/speeches/speech-3932> (noting attacks against civilians and Serbia’s military build-up of 40,000 troops in and around Kosovo during the Rambouillet negotiations were “in clear violation of the commitments they had made”).

¹⁵ *See generally* Christopher R. Rossi, *Ex Injuria Jus Non Oritur, Ex Factis Jus Oritur, and the Elusive Search for Equilibrium After Ukraine*, 24 TUL. J. INT’L & COMP. L. 143–73 (2015) [hereinafter *Rossi, Ex Injuria*].

the transcendent authority of the international community;¹⁶ NATO pledged cooperation with international criminal proceedings, underscored the need for regional security arrangements, and highlighted violations of international law by Yugoslav President Milošević's regime.¹⁷ According to the United States (U.S.) Department of State's acting Legal Adviser, NATO's justifications were "based on the unique combination of a number of factors."¹⁸

Ian Brownlie and C.J. Apperly wrote that these legal justifications contained "eccentricities from the outset," including an avoidance of legal specifics and a notable steering-clear of the familiar but controversial¹⁹ doctrine of humanitarian intervention, favoring instead the emotive appeal to avoid a "humanitarian catastrophe."²⁰ Rosalyn Higgins wondered whether NATO's "legal inventiveness" "stretch[ed] too far legal flexibility in the cause of good . . . In our unipolar world, does now the *very adoption* of a resolution under Chapter VII of the Charter trigger a legal authorisation to act by NATO when *it* determines it necessary?"²¹ NATO Secretary-General Javier Solana sought to avoid such criticisms with his assurance that NATO was "not waging war against Yugoslavia,"²² a point begrudgingly contradicted by NATO's Supreme Commander²³ and the tally of ensuing carnage.²⁴

¹⁶ See Press Statement by Dr. Javier Solana, *supra* note 2 (noting the need to stop the Yugoslav Government's repression of its people).

¹⁷ See Patrick Thornberry, 'Come, friendly bombs. . .': *International Law in Kosovo*, in *KOSOVO: THE POLITICS OF DELUSION* 43, 45 (Michael Waller et al. eds., 2001).

¹⁸ "These particular factors included: the failure of the FRY to comply with Security Council demands under Chapter VII; the danger of a humanitarian disaster in Kosovo; the inability of the Council to make a clear decision adequate to deal with that disaster; and the serious threat to peace and security in the region posed by Serb actions." Michael J. Matheson, *Justification for the NATO Air Campaign in Kosovo*, 94 AM. SOC'Y INT'L L. PROC. 301, 301 (2000).

¹⁹ See Ian Brownlie & C.J. Apperly, *Kosovo Crisis Inquiry: Memorandum on the International Law Aspects*, 49 INT'L & COMP. L.Q. 878, 886 (2000) ("There is no sufficient evidence of the existence of a legal right of States, whether acting individually or jointly, to use force for humanitarian purposes.").

²⁰ *Id.* at 880; Press Statement by Dr. Javier Solana, *supra* note 2.

²¹ Rosalyn Higgins, *International Law in a Changing International System*, 58 CAMBRIDGE L.J. 78, 94 (1999).

²² Press Statement by Dr. Javier Solana, *supra* note 2; see also Adam Roberts, *NATO's 'Humanitarian War' over Kosovo*, 41 SURVIVAL 102, 102 (1999).

²³ See Peter J. Boyer, *General Clark's Battles*, NEW YORKER (Nov. 17, 2003), <http://www.newyorker.com/magazine/2003/11/17/general-clarks-battles> (quoting retired General Wesley Clark's Sept. 19, 2003 remark at the University of Iowa College of Law's Richard S. Levitt Lecture Series that the Kosovo war was "technically illegal"); see also DAVID L. PHILLIPS, *LIBERATING KOSOVO: COERCIVE DIPLOMACY AND US INTERVENTION* xv (2012) ("We are going to systematically attack, disrupt, degrade, devastate, and, unless President Milošević complies with the demands of the international community, we are going to destroy his forces with their facilities." (quoting NATO's Supreme Allied Commander, General Wesley Clark)).

²⁴ The NATO air campaign included 38,400 sorties, 10,484 strikes and 26,614 bombs dropped; over ninety percent of the Kosovar Albanian population was displaced; 863,000 civilians fled Kosovo and another

Official attempts to quiet concerns of unlawful action were “contemporaneously accompanied by a period of stark silence from international lawyers concerning the *strict* legality of the operation.”²⁵ Part of this silence reflected uncertainty about formulating a lawful international community response beyond the Security Council to aid populations suffering from internal atrocities.²⁶ This silence would end with the 2001 introduction of a Canadian-sponsored report advocating the international community’s “Responsibility to Protect,” an important and evolving norm of disputed significance in international law.²⁷ Another part of the silence stemmed from a more primordial concern: impaled on Morton’s Fork, international lawyers had to choose between ignoring the Charter’s prohibition against using force to prevent possible “ethnic cleansing,” or upholding the letter of the law while witnessing the wholesale slaughter or displacement of innocents.²⁸ The dilemma of choosing between these (equally?) bad alternatives posed a major theoretical contradiction for international lawyers. Either choice undercut the moral underpinnings of the *ex injuria jus non oritur* principle and problematized the legality of the Kosovo bombardment, spreading doctrinal uncertainty. As Patrick Thornberry wrote: “Kosovo is a stop on the voyage to somewhere, direction and destination [] still shrouded in mist.”²⁹ Higgins forewarned that the “passing *outside* of the UN altogether” and the extending

590,000 persons were displaced internally. See KOSOVO REPORT, *supra* note 1, at 90, 92. Estimates vary, but the American Association of the Advancement of Sciences statisticians estimate 10,500 Kosovar Albanians were killed during the bombing campaign. *Id.* at 306. Widespread atrocities were documented, including rape, summary executions on both sides, use of human shields, torture, cruel and inhumane treatment, wanton pillaging, and the burning of over 500 villages. See *id.* Annex 1, 306–11. One report citing Serbian Defense Ministry statistics claims 659 Serbian soldiers were killed or missing. See Marija Ristic, *Death Toll from NATO Yugoslavia Bombing Still Unknown*, BALKANINSIGHT (Mar. 25, 2013), <http://www.balkaninsight.com/en/article/number-of-victims-of-nato-bombing-still-unknown>.

²⁵ BURKE, *supra* note 3, at 6 (citations omitted).

²⁶ See Gareth Evans, President, Int’l Crisis Grp., Address at the 98th Annual Meeting of the American Society of International Law: The Responsibility to Protect: Rethinking Humanitarian Intervention (Apr. 4, 2004), <http://www.gevans.org/speeches/speech103.html> (describing the international community and academic response to Kosovo and other humanitarian disasters as not confidently handled or helpful).

²⁷ See generally INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>. The U.N. Security Council validated the concept in 2006. See S.C. Res. 1674 (Apr. 28, 2006). For a discussion on the disputed significance of the doctrine, see Christopher R. Rossi, *The Responsibility to Protect and the Plenitudinal Mindset of International Humanitarian Law*, 5 J. INT’L HUMANITARIAN L. STUD. 352, 372–77 (2014) [hereinafter Rossi, *Responsibility to Protect*].

²⁸ See Rossi, *Responsibility to Protect*, *supra* note 27, at 365.

²⁹ See Thornberry, *supra* note 17, at 44.

of powers reserved under the Charter to the Security Council presented considerable long-term implications.³⁰

This Article investigates the doctrinal attempts to reconcile the contradictions presented by Kosovo. Western international lawyers attempted to square competing concerns about NATO's intervention by asserting that Kosovo was unique, or *sui generis* ("of its own kind/genus").³¹ The same claim would be made again to support Kosovo's unilateral Declaration of Independence from Serbia, confounding standard usage by making Kosovo *doubly* unique.³² But the invocation of the *sui generis* circumstance satisfied concerns. It forestalled direct confrontation with the U.N. Charter proscription against using force while making an allowance for a circumscribed exception. It sustained the liberal international view of the Charter system by normalizing international legal disclosure in support of the Charter's power structure. It avoided nettlesome legal questions about the primacy of territorial integrity, the primacy of the Charter's *jus ad bellum* system, and the relation of both to the basic if not burgeoning right of self-determination.³³ It seemingly supported, at least by inference, a right of remedial secession³⁴ in a historically dangerous corner of Europe, notwithstanding Europe's own determination that no such right applied to the autonomous province of Kosovo.³⁵ And,

³⁰ Higgins, *supra* note 21, at 94.

³¹ See, e.g., Nicholas J. Wheeler, *The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purposes in International Society*, in HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS 41 (Jennifer M. Welsh ed., 2004) (noting the bombing represented the first time in the Charter's history that a group of states justified bombing another state in the name of protecting minority populations within that state); Roberts, *supra* note 22 (listing a "unique combination of a number of factors").

³² See Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Verbatim Record, 2009 I.C.J. Rep. 30, ¶ 39 (Dec. 8) ("If the Court should find it necessary to examine Kosovo's Declaration through the lens of self-determination, it should consider the unique legal and factual circumstances of this case.").

³³ See Rossi, *The Responsibility to Protect*, *supra* note 27, at 358–61.

³⁴ Remedial secession modifies the prevailing opinion among international legal scholars that there is no international legal right to secede except under (1) classical conditions of decolonization, where an overseas colony seeks liberation from Metropolitan rule or (2) to reclaim state territory acquired through unjust military occupation. Remedial secession would establish a third exception, where, as a last resort, a group subject to serious and persistent internal injustices would be acknowledged by the international community to have the right to secede and form its own political unit. See ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION 333, 335 (2004).

³⁵ The Arbitration Commission of the Conference on Yugoslavia (the "Badinter Arbitration Commission") was established by the Council of Ministers of the European Community in 1991 under Robert Badinter, President of the French Constitutional Court; its five-member Commission handed down fifteen opinions on legal questions raised by the impending break-up of the Socialist Federal Republic of Yugoslavia. See generally Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-*

importantly, it provided time to nurture the doctrinal responses on the Responsibility to Protect and remedial secession.³⁶ These doctrines emerged “hand in hand” out of Kosovo.³⁷ But at what cost and of what consequence? This Article argues the *sui generis* circumstance conciliated Kosovo’s doctrinal antagonisms by avoiding the “terrible either-or’s” of legitimacy or legality.³⁸ This conciliation did not eradicate the contradictions—it repressed them. International legal scholars, and most certainly Western foreign policy-makers, coalesced around the *sui generis* designation because it seemingly avoided the establishment of a precedent; but that act may have boomeranged. It may have created its own precedent in terms of circumventing the Charter system while rhetorically attempting to uphold it.³⁹ Taking a card from the West’s playbook, Russia now has exploited the legal rhetoric of Kosovo, “cleverly embraced” the language of international law, and dangerously shifted the delicate balance between territorial integrity and self-determination toward the latter through its 2014 annexation of Crimea.⁴⁰ How many more cards will Russia play? Revanchist concerns, some cloaked in the guise of self-determination, have spread across Europe: from the Transnistria statelet in Moldova on the underbelly of the former Soviet Union,⁴¹ in the technically-Azerbaijani but

Determination of Peoples, 3 EUR. J. INT’L L. 178 (1992) (discussing the formation of the committee and its opinions relating to the future of self-determination). The Committee established the right of Yugoslavia’s six republics (as recognized under the 1974 Yugoslavian Constitution) to gain independence (Bosnia & Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia) but claimed this right did not extend to national minorities or to the two autonomous Serbian provinces of Vojvodina and Kosovo. *See id.* at 182–84 (Opinions No. 1 and No. 2). For discussions on the Badinter Arbitration Commission’s preclusion of secession options for autonomous regions, see SUZANNE N. LALONDE, DETERMINING BOUNDARIES IN A CONFLICTED WORLD: THE ROLE OF UTI POSSIDETIS 237 (2002); James Ker-Lindsay, *Preventing the Emergence of Self-Determination*, *supra* note 8, at 842–43.

³⁶ See EIKI BERG & MARTIN MOLDER, JANUS-FACED HUMAN SECURITY DISCOURSE: EU AND RUSSIA TALKING PAST EACH OTHER IN KOSOVO AND THE CAUCUS? 12 (2012).

³⁷ JAMES KER-LINDSAY, THE FOREIGN POLICY OF COUNTER SECESSION: PREVENTING THE RECOGNITION OF CONTESTED STATES 37 (2012) (noting that the Responsibility to Protect emerged “hand in hand” with the notion of remedial secession) [hereinafter KER-LINDSAY, COUNTER SECESSION].

³⁸ Leszek Kolakowski, *In Praise of Inconsistency*, DISSENT MAG., Apr. 1964, at 201, 204.

³⁹ See Theodore Christakis, *The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say About Secession*, 24 LEIDEN J. INT’L L. 73, 80 nn.35, 81 (2011) (noting the constancy of claims classifying Kosovo as *sui generis*); *Transcript. Prepared Remarks by Secretary of State Madeleine K. Albright*, COUNCIL ON FOREIGN REL. (June 28, 1999), <http://www.cfr.org/nato/prepared-remarks-secretary-state-madeleine-k-albright/p3189> (cautioning against concluding that Kosovo serves as a precedent).

⁴⁰ William W. Burke-White, *Crimea and the International Legal Order*, 56 SURVIVAL 65, 68 (2014).

⁴¹ Will Englund, *Transnistria, the Breakaway Region of Moldova, Could be Russia’s Next Target*, WASH. POST (Mar. 24, 2014), http://www.washingtonpost.com/world/europe/transnistria-the-breakaway-region-of-moldova-could-be-russias-next-target/2014/03/24/c68c50a4-be46-4042-a192-6813e93380bc_story.html; David Kashi, *Could Moldova Be the Next Crimea? Ethnic Russians in Transnistria Call on Moscow for*

ethnically-Armenian region of Nagorno-Karabakh situated between the Caspian and Black Seas,⁴² in the Lugansk and Donetsk regions of Ukraine, where Russia and Ukraine stand at the brink of open war,⁴³ in the heart of central Europe,⁴⁴ among the Baltic countries,⁴⁵ in Finland,⁴⁶ and throughout Scandinavia⁴⁷—across the fourteen borderland states of the former USSR now populated by twenty-five million Russians relocated to territories newly created following the Soviet collapse of 1991⁴⁸—irredentist sentiment stoked by the Russian diaspora present antagonistic opportunities for aggression.⁴⁹ How many coming European conflicts will be draped in the name of the *sui generis* circumstance?

This Article assesses the lessons of Kosovo through the prism of this exceptional derogation from the Charter system and the challenges presented by the desire to avoid a precedent. Mindful of the widening of international

Accession, INT'L BUS. TIMES (Mar. 18, 2015), <http://www.ibtimes.com/could-moldova-be-next-crimea-ethnic-russians-transnistria-call-moscow-accession-1562140>.

⁴² See MICHAL LEBDUŠKA & VÁCLAV LÍDL, ASS'N FOR INT'L AFFAIRS, EASTERN PARTNERSHIP: THE NEXT FIVE YEARS BETWEEN BRUSSELS AND MOSCOW 7 (2014) (discussing the urgency of a solution to Nagorno-Karabakh given Russia's annexation of Crimea); Amit K. Chhabra, *Superpower Responsibility for State Recognition: Charting a Course for Nagorno-Karabakh*, 31 B.U. INT'L L.J. 125, 130–31 (2013). See generally HEIKO KRÜGER, THE NAGORNO-KARABAKH CONFLICT: A LEGAL ANALYSIS 1–24 (2010) (discussing the historical conflict regarding Nagorno-Karabakh's territorial status).

⁴³ Lizzie Dearden, *Ukraine Crisis: Separatist Leaders Elected in Donetsk and Luhansk in 'sham' Vote*, INDEPENDENT (Nov. 4, 2014), <http://www.independent.co.uk/news/world/europe/ukraine-crisis-separatist-leaders-elected-in-donetsk-and-luhansk-in-sham-vote-9837474.html>; *Ukraine Conflict: Battles Rage in Donetsk and Luhansk*, BBC NEWS (Jan. 19, 2015), <http://www.bbc.com/news/world-europe-30878406>.

⁴⁴ Rick Lyman, *Poles Steel for Battle, Fearing Russia Will March on Them Next*, N.Y. TIMES (Mar. 14, 2015), http://www.nytimes.com/2015/03/15/world/europe/poland-steels-for-battle-seeing-echoes-of-cold-war-in-ukraine-crisis.html?_r=0.

⁴⁵ Ambrose Evans-Pritchard, *Putin Could Attack Baltic States Warns Former NATO Chief*, TELEGRAPH (Feb. 5, 2015), <http://www.telegraph.co.uk/news/worldnews/europe/russia/11393707/Putin-could-attack-Baltic-states-warns-former-Nato-chief.html> (quoting former NATO Secretary-General Anders Fogh Rasmussen as saying there is a “high probability” that Russian President Vladimir Putin will intervene in Estonia or Latvia where large Russian minority populations reside to test NATO resolve).

⁴⁶ Adam Withnall, *Vladimir Putin 'wants to regain Finland' for Russia, Adviser Says*, INDEPENDENT (Mar. 30, 2014), <http://www.independent.co.uk/news/world/europe/vladimir-putin-wants-to-regain-finland-for-russia-adviser-says-9224273.html> (quoting President Putin's former personal representative to the G8, Andrej Illarionov); Griff Witte, *Finland Feeling Vulnerable Amid Russian Provocations*, WASH. POST (Nov. 23, 2014), http://www.washingtonpost.com/world/europe/finland-feeling-vulnerable-amid-russian-provocations/2014/11/23/defc5a90-69b2-11e4-bafd-6598192a448d_story.html (noting that there is growing alarm surrounding Russian invasion by former Finnish defense and parliamentary leaders).

⁴⁷ Andrew A. Michta, *Putin Targets the Scandinavians*, AM. INT. (Nov. 17, 2014), <http://www.the-american-interest.com/2014/11/17/putin-targets-the-scandinavians/>.

⁴⁸ Timothy Heleniak, *Migration Dilemmas Haunt Post-Soviet Russia*, MIGRATION POL'Y INST. (Oct. 1, 2002), <http://www.migrationpolicy.org/article/migration-dilemmas-haunt-post-soviet-russia>.

⁴⁹ Witte, *supra* note 46.

law in directions suggested by the already voluminous literature on the Responsibility to Protect⁵⁰ and the less well received idea of remedial secession,⁵¹ this Article construes the *sui generis* assertion as an invitation to *anomie*—the breakdown of structural integrity through normless “lack of regulation”⁵²—more as a theoretical patch to mask tensions within the Charter system rather than as a proper platform to develop international law progressively through these doctrinal additives.

To address this issue, this Article will proceed as follows: Part I will situate the concept of the *sui generis* claim within the context of international law. Part II, borrowing from the teachings of critical sociology, will address the theoretical deficiency (gap) in the U.N. Charter system that stimulates doctrinal appeals to the *sui generis* claim. Part III will highlight the external and internal tensions caused by NATO's 1999 bombardment of Kosovo and Kosovo's 2008 Declaration of Independence from Serbia. Part IV will address the “double bind” created by juridical and doctrinal attempts to conform the aforementioned problems of Kosovo to international law. Part V will discuss the troubling consequence of international law's overworking of the *sui generis* concept: Russia's annexation of Crimea. The Article will conclude with a discussion of the doctrinal backsliding of the two doctrines that developed hand-in-hand with Kosovo: the Responsibility to Protect and remedial secession.

⁵⁰ See generally Rossi, *The Responsibility to Protect*, *supra* note 27 (discussing the voluminous literature on the doctrine of the Responsibility to Protect).

⁵¹ BUCHANAN, *supra* note 34; Jure Vidmar, *Remedial Secession in International Law: Theory and (Lack of) Practice*, 6 ST. ANTONY'S INT'L REV. 37, 56 (2010). Written and oral proceedings before the International Court of Justice in its Advisory Opinion on Kosovo record a sharp division among states registering an *opinio juris*—states identified mostly as European. Of the thirty-five submissions, Albania, Estonia, Finland, Germany, Ireland, The Netherlands, Norway, Poland, Slovenia, Switzerland, and ICJ Judges Cañado Trindade and Yusuf, supported remedial secession. Those opposed included: Argentina, Azerbaijan, Brazil, China, Cyprus, Egypt, Iran, Japan, Libya, Romania, Serbia, Spain, Slovakia, and ICJ Judge Koroma. See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403 (July 22); James Summers, *Kosovo: From Yugoslav Province to Disputed Independence*, in KOSOVO: A PRECEDENT? THE DECLARATION OF INDEPENDENCE, THE ADVISORY OPINION AND IMPLICATIONS FOR STATEHOOD, SELF DETERMINATION AND MINORITY RIGHTS 44 (James Summers ed., 2011) (“A greater participation from Asia and Africa would most likely increase opposition.”).

⁵² See ÉMILE DURKHEIM, SUICIDE: A STUDY IN SOCIOLOGY 258 (George Simpson ed., John A. Spaulding & George Simpson trans., 1951) (defining anomic suicide); ÉMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 291–328 (W.D. Halls trans., 1984) (discussing anomic, forced, and abnormal forms of the division of labor).

I. THE *SUI GENERIS* CLAIM IN INTERNATIONAL LAW

The *sui generis* claim is not prevalent in international law, but it arises often enough to make it a familiar legal concept, certainly not *sui generis*. Often, the term figures in calls for a new multi-lateral treaty.⁵³ Here, it is presented as a means of extending or supplementing extant regimes that have not accounted for peculiarities or developments. The ice-bound features of the Arctic Ocean, for instance, make it a body of water distinct from the mostly blue-water regimes of the United Nations Law of the Sea Convention (UNCLOS);⁵⁴ because UNLCOS addresses pelagic space of the cryosphere in but one article, Article 234,⁵⁵ proposals periodically broach the subject of a special Arctic treaty to account for the region's unique, ice-bound features.⁵⁶ Hybrid regime structures, such as the quasi-state status of the European Union (EU),⁵⁷ the European Convention on Human Rights (which mixes international and domestic legal systems),⁵⁸ and international criminal tribunals (involving common law accusatorial and civil law inquisitorial traditions—sometimes neither)⁵⁹ have spawned debates about their *sui generis* status and the need for special conventional expression. Intellectual property law,⁶⁰ the rights of

⁵³ See James Henderson, *Interpreting Sui Generis Treaties*, 36 ALTA. L. REV. 47 (1997).

⁵⁴ See United Nations Convention on the Law of the Sea art. 234, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

⁵⁵ Article 234 grants coastal states the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution in ice-covered areas within the limits of the exclusive economic zone where particularly severe climate conditions create exceptional hazards to navigation and where pollution could cause major harm to the ecological balance. *Id.*

⁵⁶ See, e.g., LEONID TIMTCHENKO, *QUO VADIS ARCTICUM?: THE INTERNATIONAL LAW REGIME OF THE ARCTIC AND TRENDS IN ITS DEVELOPMENT* (1996); Oran R. Young, *If an Arctic Ocean Treaty is Not the Solution, What is the Alternative?*, 47 POLAR REC. 327 (2011).

⁵⁷ Jakob C. Øhrgaard, *International Relations or European Integration: Is the CFSP Sui Generis?*, in *RETHINKING EUROPEAN UNION FOREIGN POLICY* 26 (2004).

⁵⁸ See, e.g., Andrew Drzemczewski, *The Sui Generis Nature of the European Convention on Human Rights*, 29 INT'L & COMP. L.Q. 54–63 (1980). But see Daniel Rietiker, *The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law—No Need for the Concept of Treaty Sui Generis*, 79 NORDIC J. INT'L L. 245–77 (2010).

⁵⁹ See generally Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 EUR. J. INT'L L. 569–89 (2000).

⁶⁰ See generally Jane C. Ginsburg, *Four Reasons and a Paradox: The Manifest Superiority of Copyright over Sui Generis Protection of Computer Software*, 94 COLUM. L. REV. 2559–72 (1994); John M. Griem Jr., *Against a Sui Generis System of Intellectual Property for Computer Software*, 22 HOFSTRA L. REV. 145 (1993); Bonwoo Koo, Carol Nottenburg & Philip G. Pardey, *Plants and Intellectual Property: An International Appraisal*, SCIENCE 1295–97 (2004).

indigenous peoples,⁶¹ and the international law of trade⁶² comprise other areas that generate proposals for *sui generis* treatment. These proposals seem united in promoting a gap-filling application of the *sui generis* claim based on the insufficiency of existing law. Here, the *sui generis* claim approximates a *praeter legem* function, akin to Roman law's development of the principle of equity (*aequitas*), by serving as a supplement to the law. In one interesting application, historical circumstances dating to Spanish colonial rule in the New World rendered the Pacific waters of the Gulf of Fonseca *sui generis*.⁶³ Two international courts affirmed a condominium or shared sovereignty arrangement among El Salvador, Honduras, and Nicaragua, the coparceners adjacent to Fonseca's indented coastline.⁶⁴ This *lex specialis* was applied not to supplement the law, but to retrospectively conform legal title to pre-existing factual circumstances.⁶⁵ Here, the *sui generis* claim could be construed as unique but *infra legem*—within the law.⁶⁶

Kosovo's *sui generis* circumstances presented different and problematic constructions. Both the bombing and the secession seemed strikingly against the law—*contra legem*.⁶⁷ The challenge for advocates of its application has been to re-characterize it as somehow legally acceptable or tolerably outside the law (*ultra vires*).⁶⁸

⁶¹ See, e.g., John Borrows & Leonard I. Rotman, *The Sui Generis Nature of Aboriginal Rights: Does It Make a Difference*, 36 ALTA. L. REV. 9 (1997); James Henderson, *Interpreting Sui Generis Treaties*, 36 ALTA. L. REV. 46 (1997).

⁶² See, e.g., Pascal Lamy, *The Place of the WTO and its Law in the International Legal Order*, 17 EUR. J. INT'L L. 969 (2006).

⁶³ See Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nicar. intervening), Judgment, 1992 I.C.J. Rep. 351, ¶ 412 (Sept. 11) (labeling the Gulf of Fonseca's waters *sui generis*).

⁶⁴ See El Salvador v. Nicaragua, CACJ Judgment of Mar. 9, 1917, in 11 AM. J. INT'L L. 674 (1917); El Sal./Hond.: Nicar. intervening, 1992 I.C.J. Rep. ¶ 432.

⁶⁵ See generally Land, Island, and Maritime Frontier Dispute (El Sal./Hond.; Nicar. intervening), Summary of the Judgment (Sept. 11, 1992), <http://www.icj-cij.org/docket/files/75/6673.pdf>.

⁶⁶ This conclusion prompted a vigorous dissent by Judge Oda. For a sympathetic treatment of Judge Oda's dissent, see generally Christopher R. Rossi, *Jura Novit Curia? Condominium in the Gulf of Fonseca and the 'Local Illusion' of a Pluri-State Bay*, 37 HOUS. J. INT'L L. 793 (2015) [hereinafter Rossi, *Jura Novit Curia*].

⁶⁷ See Christopher J. Borgen, *Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition*, 12 AM. SOC'Y INT'L L. INSIGHTS (2008), <http://www.asil.org/insights/volume/12/issue/2/kosovos-declaration-independence-self-determination-secession-and> [hereinafter Borgen, *Kosovo's Declaration of Independence*]; Patrick Wintour, *MPs Say Kosovo Bombing Was Illegal But Necessary*, GUARDIAN (June 6, 2000), <http://www.theguardian.com/politics/2000/jun/07/balkans.politicalnews>.

⁶⁸ Borgen, *Kosovo's Declaration of Independence*, *supra* note 67.

II. THE PROBLEM OF *ANOMIE*: BORROWINGS FROM CRITICAL SOCIOLOGY

To assess the *sui generis* claim, it is instructive to reflect on the fundamental tension of the Charter system—the inability of the Security Council to uphold reliably its *jus ad bellum* responsibilities under Chapter VII due to often-encountered deadlocks caused by the veto-wielding five permanent members.⁶⁹ Balancing requirements of justice and order remains a central challenge and the pursuit of either goal often brings this collective security system into conflict.⁷⁰ For insight into the management of this conflict, it is instructive to look to the field of critical sociology and, principally, the writings of Alvin Gouldner.⁷¹ His understanding of anomalies and gaps—how *lacunae* appear and are made to disappear—help explain the attraction of the *sui generis* exception in international law;⁷² his ideas provide context for the West’s difficulty in dealing legally and politically with Russia’s annexation of Crimea,⁷³ an annexation that has allowed Russian President Vladimir Putin, through his discursive encounters with the media,⁷⁴ to hoist the West by its own moralizing petard.⁷⁵

A. *Lacunae and the Desire to Normalize*

Gouldner was interested in gaps or holes in the construction and maintenance of theory and structure.⁷⁶ He investigated the role of

⁶⁹ See Rossi, *Responsibility to Protect*, *supra* note 27, at 355. For an empirical study of the veto over a fifty-five year period, see Steve Chan, *Power, Satisfaction and Popularity: A Poisson Analysis of UN Security Council Vetoes*, 38 COOPERATION & CONFLICT 339–59 (2003).

⁷⁰ See generally ROBERT E. OSGOOD & ROBERT W. TUCKER, *FORCE, ORDER AND JUSTICE* (1967).

⁷¹ See generally ALVIN W. GOULDNER, *THE TWO MARXISMS: CONTRADICTIONS AND ANOMALIES IN THE DEVELOPMENT OF THEORY* (1980) [hereinafter GOULDNER, *THE TWO MARXISMS*].

⁷² See *id.*; Borgen, *Kosovo’s Declaration of Independence*, *supra* note 67. Gouldner commented that an anomaly or gap was defined by whether the observation conformed or departed from theoretical expectations. The secession of Kosovo was interpreted as *sui generis*, or a unique anomaly, for falling away from theoretical expectations for secession in international law.

⁷³ See Burke-White, *supra* note 40, at 66 (arguing that Washington has been unable to fully counteract Moscow’s legal argument that its support for Crimea’s annexation is grounded in international law).

⁷⁴ Steven Lee Myers, *Putin, Flashing Disdain, Defends Action in Crimea*, N.Y. TIMES (Mar. 4, 2014), www.nytimes.com/2014/03/05/world/europe/putin-flashing-disdain-defends-action-in-crimea.html?_r=0; *Transcript: Putin Defends Russian Intervention in Ukraine*, WASH. POST (Mar. 4, 2014), www.washingtonpost.com/world/transcript-putin-defends-russian-intervention-in-ukraine/2014/03/04/9caded1a-a3a9-11e3-a5fa-55f0c77bf39c_story.html; Vladimir Putin, President of the Russian Federation, Address to State Duma Deputies, Federation Council Members, Heads of Russian Regions and Civil Society Representatives in the Kremlin (Mar. 18, 2014), eng.kremlin.ru/news/6889#sel=53:1,53:6.

⁷⁵ See Rossi, *Ex Injuria*, *supra* note 15, at 166.

⁷⁶ This recurring theme first appeared in Gouldner’s treatment of the origins of Western social theory, ENTER PLATO (1965), which carried over into his critical examination of Marxism in *THE COMING CRISIS OF*

contradictions in the specific development of critical social theory.⁷⁷ His interest centered on the challenges contradictions presented to a “common-language-speaking community.”⁷⁸ He focused on the intramural discord that beset the *sociolect* of post-World War II Marxism, with the praxis-oriented voluntarism of Young Hegelian (Critical) Marxists squaring off against the deterministic historical materialism of Engles’ (Scientific) legacy.⁷⁹ That focus is of no interest here,⁸⁰ but Gouldner’s insights on contradictions inform the community of scholars who speak the evolving *legalect* of international humanitarian law and state creation/secession.⁸¹

Gouldner sensed the strong desire among scholars to “normalize theory”—to render observations consistent with expectations,⁸² or to “interpret[] ambiguous outcomes in conformity with their wishes and needs”⁸³—as a means of reducing dissonance, contradictions, and anomalies.⁸⁴ He criticized classically construed notions of “objectivity,” which bore the imprint of Max Weber’s powerful emphasis on “value free” epistemology⁸⁵—the basis of Weber’s admiration of the “logical formal rationality” of Western law.⁸⁶

WESTERN SOCIOLOGY (1970), and matured through his three volume investigation of the “dark side of the dialectic”: THE DIALECTIC OF IDEOLOGY AND TECHNOLOGY: THE ORIGINS, GRAMMAR AND FUTURE OF IDEOLOGY (1976); THE FUTURE OF INTELLECTUALS AND THE RISE OF THE NEW CLASS (1979); and THE TWO MARXISMS: CONTRADICTIONS AND ANOMALIES IN THE DEVELOPMENT OF THEORY (1982).

⁷⁷ See GOULDNER, THE TWO MARXISMS, *supra* note 71, at 11–12, 14, 16.

⁷⁸ *Id.* at 165.

⁷⁹ *Id.* at 15–16.

⁸⁰ However, the influence of Critical Marxism had a profound effect on the *praxis*-oriented Frankfurt School; its informal birth in the late 1970s spawned a major attack against the formalistic structures of liberalism and law that directly gave birth to the Critical Legal Studies movement. See CHRISTOPHER R. ROSSI, EQUITY AND INTERNATIONAL LAW: A LEGAL REALIST APPROACH TO INTERNATIONAL DECISIONMAKING 14 (1993) [hereinafter ROSSI, EQUITY AND INTERNATIONAL LAW].

⁸¹ See GOULDNER, THE TWO MARXISMS, *supra* note 71, at 11–12, 26, 28–29.

⁸² See *id.* at 16–18. Michel Foucault’s interest in normalization is more fashionable in critical social and international relations circles; his focus on normalization in relation to power and knowledge addresses how structures (for instance, the Panopticon) establish a system of discipline that conforms behavior to an ideal. See generally MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1977). Gouldner’s understanding of normalization focuses on tensions caused by theoretical weaknesses, making his contributions important in relation to considerations of the *sui generis* exception.

⁸³ Alvin W. Gouldner, *The Dark Side of the Dialectic: Toward a New Objectivity*, 46 SOC. INQUIRY 3, 3 (1975) [hereinafter Gouldner, *The Dark Side of the Dialectic*].

⁸⁴ See *id.* at 4.

⁸⁵ See *id.* at 3 (arguing that rational frameworks about the social world suppose them to have been produced in accordance with justified criteria and methods).

⁸⁶ Weber’s interest in the rule-oriented rationality of Western jurisprudence, i.e., his formulation of the sociology of Western legal thought, derives from his massive three-volume study (especially Volume 2, pages 641–901) entitled, LAW IN ECONOMY AND SOCIETY (Max Rhenstin ed., Edward Shils trans., 1984). For a discussion of logical formal rationality, see ROSSI, EQUITY AND INTERNATIONAL LAW, *supra* note 80, at 53.

Dilemmas, paradoxes, and antinomies expressed problems posed by systemic contradiction—internal theoretical contradictions “in which a system, at any concrete level, is blocked/inhibited from conforming with one system *rule* . . . because it *is* performing in accordance with another system *rule*.”⁸⁷ The Kosovo bombardment and later its secession challenged the theoretical integrity of international law at concrete levels.⁸⁸ The systemic rules in support of legitimacy inhibited adherence to the rules of legality and vice-versa, first in regard to the bombing campaign, second in regard to secession/self-determination.⁸⁹ Reconciling (“normalizing”) these tensions fomented doctrinal confusion and a sense that something was internally wrong with the Charter paradigm.⁹⁰ The Independent International Commission on Kosovo consciously acknowledged the need to close this gap⁹¹ as legal scholars struggled to “normalize” the dissonance through the articulation of a theoretical fix, which took the patchwork form of the unique exception.⁹²

B. *External and Internal Contradictions and the Pathological Problem of Anomie*

To Gouldner, contradictions constrain the development of theory in important ways. They force a dichotomy by “provid[ing] satisfaction of one alternative only”; they reduce the desirability of any outcome; and they inhibit compromise because they mandate a choice between outcomes.⁹³ Gouldner noted that contradictions could be external or internal to theory.⁹⁴ External contradictions generate polemics, which contribute to theoretical boundary formation and “are identity-defining for a theory.”⁹⁵ For instance, developing

See generally Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031, 1031–76 (2003).

⁸⁷ GOULDNER, THE TWO MARXISMS, *supra* note 71, at 169–70.

⁸⁸ *See* David Wippman, *Kosovo and the Limits of International Law*, 25 FORDHAM INT'L L.J. 129, 130–31 (2001); Borgen, *Kosovo's Declaration of Independence*, *supra* note 67.

⁸⁹ *See* Wippman, *supra* note 88, at 131–32; *see also* Dan Bilefsky, *World Court Rules Kosovo Declaration Was Legal*, N.Y. TIMES (July 22, 2010), <http://www.nytimes.com/2010/07/23/world/europe/23kosovo.html>.

⁹⁰ *See* Borgen, *Kosovo's Declaration of Independence*, *supra* note 67; *see also* Claudia Parsons, *UN Security Council Fails to Bridge Gaps on Kosovo*, REUTERS (Dec. 19, 2007), http://www.reuters.com/article/idUSN19619120_CH_2400.

⁹¹ *See* KOSOVO REPORT, *supra* note 1, at 10.

⁹² *See infra* notes 117–19; *infra* notes 122–41 and accompanying text.

⁹³ GOULDNER, THE TWO MARXISMS, *supra* note 71, at 169.

⁹⁴ *See id.*

⁹⁵ *Id.* at 16.

world approaches to international law generally emphasize a circumscribed right of self-determination in the post-colonial period to make amends for late nineteenth century and early twentieth century imperial rule; the traditional Westphalian approach preferences the regard for state-centricity and territorial integrity.⁹⁶ These bounded approaches demonstrate external orientations to international law's history, construed polemically as counter-imperial history or as the Westphalian system's "well-documented intimacy with the powerful."⁹⁷

Internal contradictions, however, "constitute improprieties that generate powerful impulses to conceal them and to resist efforts to uncover or even discuss them."⁹⁸ Internal contradictions need to be explained away to prevent corroding normative and theoretical structure.⁹⁹ But they are sometimes simply repressed or ignored, particularly when they inhibit change or demonstrate acute gaps in theoretical completeness.¹⁰⁰ Was the *sui generis* claim constructed as a means of avoiding Charter contradictions? Left unattended, internal contradictions "proliferate pathologies of action,"¹⁰¹ leading to a paralysis of choice,¹⁰² ambivalence,¹⁰³ or an awareness of theoretical crisis—*anomie*.¹⁰⁴ Moreover, a "double bind" may arise where internal contradictions can result from avoidance of the problem or the effort to conform to them through normalizing efforts.¹⁰⁵ Deviance from one set of rules produces *anomie* by deteriorating normative structure precisely as a result of faithful

⁹⁶ See A. Claire Cutler, *Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy*, 27 REV. INT'L STUD. 133, 140; Marc Weller, *The Sounds of Silence: Making Sense of the Supposed Gaps in the Kosovo Opinion*, in THE LAW AND POLITICS OF THE KOSOVO ADVISORY OPINION 187, 196–99 (2015).

⁹⁷ SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* 1 (2012).

⁹⁸ GOULDNER, *THE TWO MARXISMS*, *supra* note 71, at 16.

⁹⁹ *Id.* at 170.

¹⁰⁰ Gouldner charges that the "textual skimpiness" of the Asiatic Mode of Production was left so underdeveloped in the body of Marx's work because it so sharply contradicted Marx's primary paradigm that all of history was a history of class struggle. Unable to address the contradiction, Marx repressed it. *See id.* at 325–28.

¹⁰¹ *Id.* at 169. Pathologies of action is a concept found throughout the work of Durkheim; it occupies a significant place in modern sociological inquiry. *See* Jennifer M. Lehmann, *The Question of Caste in Modern Society: Durkheim's Contradictory Theories of Race, Class, and Sex*, 60 AM. SOC. REV. 566 (1995); Frank W. Elwell, *The Sociology of Emile Durkheim*, EMILE DURKHEIM'S SOC., <http://www.faculty.rsu.edu/users/f/felwell/www/Theorists/Durkheim/index2.htm> (last visited Dec. 12, 2015).

¹⁰² GOULDNER, *THE TWO MARXISMS*, *supra* note 71, at 69.

¹⁰³ *See id.*

¹⁰⁴ *Id.* at 170.

¹⁰⁵ *Id.*

conformity to another set of rules.¹⁰⁶ In each case, contradictions do not result from *anomie*, they produce *anomie*.¹⁰⁷ The double bind of using the *sui generis* defense to avoid Charter contradictions did indeed produce a “pathological” problem of *conforming* the exceptional circumstance through normalizing efforts: the *sui generis* claim “was used as a legal argument in order to convince the international community that [Kosovo] is *so unique* [sic] that it is situated out of the realm of international law and cannot be considered in any way as a ‘precedent’ for future secessionist attempts.”¹⁰⁸ As if situated in a “twilight zone,” normalizing the exceptional circumstance of Kosovo necessitated the conclusion “in the interest of [i]nternational stability, [that] international law does not apply any more.”¹⁰⁹ Eric Posner noted this “exquisitely tortured” overworking of the *sui generis* justification: NATO’s bombing of Kosovo was tantamount to the admission “that we broke the law; we won’t do it again; and you better not, either.”¹¹⁰ And in the case of Kosovo’s unilateral break from Serbia, the International Court of Justice (ICJ) became ensnared in a “double bind” in its Advisory Opinion on Kosovo:¹¹¹ the ICJ not only avoided the question put to it,¹¹² accentuating a juridical sense of crisis through creation of a disguised *non liquet*, its attempt to conform/normalize Kosovo’s actions to Security Council Resolution 1244 also may have been so “parsimonious” and “sophistic” as to deprive its opinion of legal relevance.¹¹³ The Advisory Opinion may now serve as an unfortunate example of the Court’s own pathological paralysis of (in)decision.¹¹⁴

The *sui generis* exception attempted to avoid the problem of Charter contradictions exposed by Kosovo.¹¹⁵ As a means of side-stepping the internal contradictions of the Charter system, the exceptional derogation avoided the paralysis of choosing between equally unappealing options and may have

¹⁰⁶ See *id.*

¹⁰⁷ *Id.*

¹⁰⁸ Christakis, *supra* note 39, at 80–81 (emphasis added).

¹⁰⁹ *Id.* at 81 (internal quotations omitted).

¹¹⁰ Eric Posner, *The Kosovo Precedent*, ERIC POSNER (Mar. 21, 2014), <http://www.ericposner.com/the-kosovo-precedent> (referencing comments defending NATO made by U.S. Acting Legal Adviser Michael Matheson).

¹¹¹ See generally Accordance with the International Law of Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403 (July 22).

¹¹² Anne Peters, *Does Kosovo Lie in the Lotus-Land of Freedom?*, 24 LEIDEN J. INT’L L. 95, 95–96 (2011).

¹¹³ *Id.* at 108.

¹¹⁴ Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1, 3 (1999).

¹¹⁵ See Christakis, *supra* note 39, at 80–81; Siegfried Schieder, *Pragmatism as a Path Towards a Discursive and Open Theory of International Law*, 11 EUR. J. INT’L L. 663, 664 (2000).

helped develop the Responsibility to Protect and remedial secession doctrines.¹¹⁶ These doctrines not only grew beyond their *sui generis* conditions precedent, giving rise to enthusiastic assessments about new directions in international law,¹¹⁷ they also eclipsed discussion of the underpinning and dissonant theoretical weakness (*anomie*) remaining within the Charter system, a weakness that now has been exploited by Russia in support of its actions in Crimea.¹¹⁸ This deteriorating normative structure, overtaken by the enthusiasm for doctrinal change, is not an optimal basis on which to construct new directions for the Charter system as suggested by the Responsibility to Protect and remedial secession doctrines.¹¹⁹ Gaps at the foundation of the Charter system, out of which these doctrines arose, may now account for the doctrinal backsliding affecting both concepts.¹²⁰

III. THE DOCTRINAL MAKING OF THE *SUI GENERIS* EXCEPTION AND THE ATTEMPT TO NORMALIZE

Discussions about the legality and legitimacy of the NATO bombardment evidenced an awareness of theoretical *anomie*, prompting attempts to reconcile tensions between the two.¹²¹ The Kosovo Commission, chaired by Richard Goldstone and Carl Tham, concluded the NATO campaign was “illegal, yet legitimate,” a conclusion that muted the significance of wrongfulness central to the *ex injuria* principle.¹²² Martti Koskenniemi argued: “NATO was either entitled to bomb Serbia or it was not. *Tertium non datur*.”¹²³ Society contained no dark corner exempt from international law’s reach.¹²⁴ Koskenniemi,

¹¹⁶ See Christakis, *supra* note 39, at 78 n.21; Martti Koskenniemi, ‘*The Lady Doth Protest Too Much*’: Kosovo, and the Turn to Ethics in International Law, 65 MOD. L. REV. 159, 161–62 (2002). See generally, Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, 81 FOREIGN AFF. 99, 99–110 (2002).

¹¹⁷ See Antonio Cassese, *Ex Iniuria Jus Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT’L L. 23, 26, 29–30 (1999); JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT 336–37 (2010) (noting that the Responsibility to Protect could entail a fundamental conceptual shift in the role and powers of states).

¹¹⁸ Posner, *supra* note 110.

¹¹⁹ See Evans & Sahnoun, *supra* note 116, at 101; Peters, *supra* note 112, at 104–05.

¹²⁰ See Evans & Sahnoun, *supra* note 116, at 100–01; Peters, *supra* note 112, at 107–08.

¹²¹ See Anthea Roberts, *Legality vs. Legitimacy: Can Uses of Force Be Illegal But Justified?*, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 179, 180 (Philip Alston & Euan MacDonald eds., 2008).

¹²² KOSOVO REPORT, *supra* note 1, at 186; see also Roberts, *supra* note 121, at 179–214.

¹²³ Koskenniemi, *supra* note 116, at 161–62. *Tertium non datur* is the principle of mathematics and logic that holds a proposition is true or false with no middle option (also known as the principle of the excluded middle). See Abraham A. Fraenkel & Yehoshua Bar-Hillel, *Foundations of Set Theory*, in STUDIES IN LOGIC AND THE FOUNDATIONS OF MATHEMATICS 215–38 (L.E.J. Brouwer et al. eds., 1958).

¹²⁴ See Koskenniemi, *supra* note 116, at 162.

however, adopted the painfully ambivalent position that it “was both formally illegal and morally necessary.”¹²⁵ He noted that for international lawyers “Kosovo has come to be a debate about . . . what we hold as normal and what exceptional.”¹²⁶ Michael Reisman noted NATO’s action “did not accord with the designs of the Charter”—unless it could be construed as “the *exceptio* for that very small group of events that warrant or even require unilateral action”¹²⁷ He predicted some international lawyers “will strain to weave strands [from various U.N. statements and resolutions] into a retrospective tapestry of authority.”¹²⁸ Indeed, those strands would find future support in the Responsibility to Protect doctrine, which retrospectively derived in part from Kosovo,¹²⁹ and in Security Council Resolution 1244, which directly came about from Kosovo.¹³⁰

Bruno Simma acknowledged the illegal nature of the act *and* the “thin red line” separating NATO’s response from international legality.¹³¹ He suggested the gap could be minimized by characterizing the lessons of Kosovo as *sui generis*.¹³² Siegfried Schieder grouped him into the “rational ‘moralist[.]’” camp, which (*minimally*),¹³³ attempted to “wipe[.] clean” the “venial [not mortal] sin” of Kosovo because of its “special marginal situation.”¹³⁴ “It would become a mortal sin only if a precedent for the future were to be drawn from it.”¹³⁵ Antonio Cassese, another “rational moralist,”¹³⁶ also acknowledged the illegal act and its “exceptional character,” but he construed the gap between lawfulness and legitimacy as an existential gulf, not as a mere “thin red

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ W. Michael Reisman, *Kosovo’s Antinomies*, 93 AM. J. INT’L L. 860, 860 (1999).

¹²⁸ *Id.*

¹²⁹ See generally Evans & Sahnoun, *supra* note 116, at 99–110.

¹³⁰ See Peters, *supra* note 112, at 100; Roberts, *supra* note 121, at 182.

¹³¹ Simma, *supra* note 114, at 22.

¹³² *Id.* at 14 (arguing that we should “regard the Kosovo crisis as a singular case”); see also *Kosovo Declaration of Independence*, REPUBLIC KOSOVO ASSEMBLY (Feb. 17, 2008), <http://www.assembly-kosova.org/?cid=2,128,1635>.

¹³³ Schieder conceives of rational moralists as supporting minimalist and maximalist interpretations of international law. Minimalists interpret the Kosovo case as excusable as long as the U.N. system of collective security is not undermined. Maximalists take that approach one step further, criticizing the Charter’s ban on force in the sense that positivists regard it as the sole content of binding law to the exclusion of other norms (*jus cogens*, human rights) that are of importance to the community of states as a whole. Schieder, *supra* note 115, at 692–93.

¹³⁴ *Id.* at 692.

¹³⁵ *Id.*

¹³⁶ *Id.* at 692–93.

line.”¹³⁷ Out of this flagrant breach of *lex lata*, the law as it is, he more broadly (*maximally*) suggested something new.¹³⁸ Avoiding Posner’s “exquisitely tortured” critique, Cassese suggested *ex injuria jus non oritur* might be evolving into new customary law legitimizing the use of force absent Security Council authorization in stringently circumscribed instances:¹³⁹ “[I]t would amount to an exception similar to that laid down in Article 51 of the Charter (self-defence).”¹⁴⁰ Similarly, Thornberry noted an emerging trend: international law was “witnessing the rapid development of [a new] international law of humanitarian emergency, where the U.N. has primary, but not necessarily exclusive responsibilities”; where “no bright white line” of sovereignty could separate internal from international spheres and serve as an excuse for repression; where human rights could obtain the logical *nostrum* of community jurisdiction, making egregious violations a matter of international concern.¹⁴¹

A. *The Antinomies of NATO’s Bombardment of Kosovo*

“Faced with such antinomies” in reconciling Kosovo’s legality and legitimacy, Reisman wrote that no international lawyer could “look back at the incident without disquiet.”¹⁴² For too many analysts and commentators, “the Kosovo crisis offer[ed] a dubious precedent for future international interventions in Europe”¹⁴³ NATO’s action stimulated as much concern about future self-deputized vigilantism as it did complaints about the veto-added Charter system and its critical inability to fulfill its collective security function.¹⁴⁴ How best to close this gap and “ensure that NATO’s actions in Kosovo do not set a precedent for future interventions other than to assert it as an ‘exceptional response to violence’?”¹⁴⁵

From Kosovo’s mist a dynamic began to take shape. The Charter system could be saved from the *contradictions* presented by NATO’s bombardment by characterizing Kosovo as *sui generis*, or as the first step in international law’s

¹³⁷ Cassese, *supra* note 117, at 23–24.

¹³⁸ *Id.* at 30.

¹³⁹ *See id.* at 29 (“[F]or the exclusive purpose of putting an end to large-scale atrocities.”).

¹⁴⁰ *Id.*

¹⁴¹ Thornberry, *supra* note 17, at 56.

¹⁴² Reisman, *supra* note 127, at 860.

¹⁴³ PAUL LATAWSKI & MARTIN A. SMITH, *THE KOSOVO CRISIS AND THE EVOLUTION OF POST-COLD WAR EUROPEAN SECURITY* 32 (2003).

¹⁴⁴ Reisman, *supra* note 127, at 861–62.

¹⁴⁵ LATAWSKI & SMITH, *supra* note 143, at 32–33.

creative ontology toward an emboldened international community response to internal violence. International legal scholars became important agents in developing this hybrid characterization. They upheld the Charter system's emphasis on order and territorial imperative while crafting doctrinal space for limited exceptions. The *sui generis* appellation allowed conflicted international lawyers a means of managing *lacunae* in the Charter's *jus ad bellum* structure without dealing with the tendentious problems of establishing a precedent. The doctrinal interplay nuanced an emerging idea to create remedial protection for populations suffering from internal abuse even before scholars, as agents, may have been fully aware of that goal.¹⁴⁶ U.N. Secretary-General Ban Ki-moon, in the footsteps of Gareth Evans and Mohamed Sahnoun, co-chairs of the commission that forwarded the Responsibility to Protect doctrine,¹⁴⁷ later would become the principal norm entrepreneur for this position.¹⁴⁸ Support for the norm to create remedial protection for egregiously abused civilians opened the door to remedial secession as an adaptable right of subjugated peoples.

B. Antinomies Redux: Kosovo's Independence Declaration and Remedial Secession

Kosovo's mist would thicken before doctrinal characterizations could coalesce around establishing the Kosovo bombardment as a *sui generis* exception. In 2008, Kosovo unilaterally declared independence from Serbia, citing "years of strife and violence in Kosovo that disturbed the conscience of all civilized people."¹⁴⁹ The declaration reworked the right of self-determination, an irreproachable right of an *erga omnes* character,¹⁵⁰ which historically serves as a narrow exception to international law's support of the territorial integrity of states for the rights of peoples transitioning from colonial rule.¹⁵¹ The Kosovo declaration did not fit squarely in the colonial context but

¹⁴⁶ For a discussion on constructivism, agency, and the formation of interactive social rules, see generally Vendulka Kubálková, *Reconstructing the Discipline: Scholars as Agents*, in INTERNATIONAL RELATIONS IN A CONSTRUCTED WORLD 193–201 (Vendulka Kubálková et al. eds., 1998), and Nicholas Onuf, *Constructivism: A User's Manual in Societal Rules*, in INTERNATIONAL RELATIONS IN A CONSTRUCTED WORLD 58–78 (Vendulka Kubálková et al. eds., 1998).

¹⁴⁷ See Evans & Sahnoun, *supra* note 116, at 99, 101.

¹⁴⁸ See Rossi, *Responsibility to Protect*, *supra* note 27, at 369–70 nn.90–92 (noting Secretary-General Ban Ki-moon's creation of a special advisor position for the Responsibility to Protect and issuance of six reports on the Responsibility to Protect since 2009).

¹⁴⁹ *Kosovo Declaration of Independence*, *supra* note 133.

¹⁵⁰ East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. Rep. 90, ¶ 29 (June 30).

¹⁵¹ See LEE C. BUCHHEIT, SECESSION, THE LEGITIMACY OF SELF-DETERMINATION 7 (1978); John Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo*, in 357 RECUEIL DES COURS 9 (2011); see also G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples

drew support from an inverted or *a contrario* reading of the 1970 Declaration on Friendly Relations.¹⁵² The Safeguard Clause of the Declaration precluded the dismemberment of states “conducting themselves in compliance with the principle of equal rights and self-determination of peoples.”¹⁵³ The negative implication of this clause supports a right of remedial secession: “If the State does violate the rights of some of its peoples, then those people would have a claim to impair territorial integrity by secession.”¹⁵⁴

If this reading of the Safeguard Clause constituted an example of Reisman’s strained retrospective search for legal authority,¹⁵⁵ Security Council Resolution 1244 (1999) and its annexes may have provided another.¹⁵⁶ The European Union interpreted this Resolution as supporting a spirit of independence for Kosovo, or at least as not constraining or pre-determining the final status outcome for Kosovo.¹⁵⁷ The General Assembly specifically requested advice from the ICJ on the question: “Is [Kosovo’s] unilateral

(Dec. 14, 1960) (proclaiming the right of self-determination in the context of decolonization); G.A. Res. 2625 (XXV), Declaration on Principles of international Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970) (attaching self-determination to ending colonialism); G.A. Res. 3314 (XXIX), Definition of Aggression (Dec. 14, 1974) (exempting wars of self-determination against colonial and racist regimes from the definition of aggression); Reference re Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 154 (concluding that the people of Quebec do not qualify as colonial peoples).

¹⁵² Vidmar, *supra* note 51.

¹⁵³ G.A. Res. 2625 (XXV), *supra* note 151.

¹⁵⁴ Thomas W. Simon, *Remedial Secession: What the Law Should Have Done, from Katanga to Kosovo*, 40 GA. J. INT’L & COMP. L. 105, 123 (2011) (noting, however, that the “saving clause [Safeguard Clause] seems to limit any possible entitlement to secede to racial and religious groups”). Support for the principle directly derives from the U.N. Charter art. 1(2). See Oliver Corten, *Territorial Integrity Narrowly Interpreted: Reasserting the Classical Inter-State Paradigm of International Law*, 24 LEIDEN J. INT’L L. 87, 91–92 (2011) (noting the *a contrario* implication of the Saving Clause).

¹⁵⁵ Numerous states contested the *a contrario* significance of G.A. Res. 2625 (XXV), arguing that the remedial secession thesis cannot be deduced from the resolution or from international practice. See Corten, *supra* note 154, at 92 n.30.

¹⁵⁶ S.C. Res. 1244, *supra* note 7. Annexes 1 and 2(5) authorize the establishment of an interim “transitional” administration for Kosovo charged with “establishing and overseeing the development of provisional democratic self-governing institutions” under which “the people of Kosovo can enjoy substantial autonomy within” Yugoslavia. *Id.*

¹⁵⁷ See Chris Borgen, *International Law and Kosovo’s Independence: Assessing Resolution 1244*, OPINIO JURIS (Feb. 19, 2008, 7:17 PM) [hereinafter Borgen, *International Law and Kosovo’s Independence*], <http://opiniojuris.org/2008/02/19/international-law-and-kosovo%E2%80%99s-independence-assessing-resolution-1244/> (agreeing that the EU position “holds water”); see also Marcelo G. Kohen & Katherine Del Mar, *The Advisory Opinion on Kosovo and U.N.S.C.R. 1244 (1999): A Declaration of ‘Independence from International Law’?*, 24 LEIDEN J. INT’L L. 109, 109–26 (2011). The EU’s interpretation was significant because the European Union took on an expanded role in the administration of Kosovo in 2008, with the devolution of most UNMIK operations and the establishment of the EU’s Rule of Law Mission in Kosovo (EULEX). See Summers, *supra* note 51, at 41–42.

declaration . . . in accordance with international law.”¹⁵⁸ The ICJ provided its own inverted or *a contrario* response when it interpreted the General Assembly’s request as asking only for an assessment of whether the Declaration of Independence violated international law.¹⁵⁹ It reasoned:

The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it.¹⁶⁰

One wonders what new meaning the Court imparted to advisory opinions. In contentious cases, the presumption of *jura novit curia* reigns: “[t]he court knows the law,” which it may apply *proprio motu* (on its own motion) and *ex officio* (regardless of the legal arguments of the parties in dispute).¹⁶¹ The same maxim applies in advisory opinions, although they have no legal effect.¹⁶² But not to opine on the question presented negates even the reason for asking advice. It renders the process dilatory, or worse. Judge Bennouna claimed the Court trivialized the request, providing with its non-answer “a good reason why the Court should have refrained from acceding to the General Assembly’s request for an opinion in the first place.”¹⁶³ Judge Simma declared the ICJ skirted the bounds of *non liquet*, an odious denial of justice caused when “a judicial institution [is] unable to pronounce itself on a point of law”¹⁶⁴ Judge Simma did not go so far as to claim the Court breached this prohibition, but other interpretations of the problem of *non liquet* note its disguised and informal contexts.¹⁶⁵ Scholars roundly derided the opinion for its circumvention of the real issue: remedial secession.¹⁶⁶

¹⁵⁸ Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403, ¶ 1 (July 22).

¹⁵⁹ *Id.* ¶ 56; see also *id.* ¶ 1 (declaration by Simma, J.).

¹⁶⁰ *Id.* ¶ 56.

¹⁶¹ See Rossi, *Jura Novit Curia*, *supra* note 66.

¹⁶² See *Jurisdiction*, INT’L CT. JUST., <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2> (last visited Dec. 12, 2015) (summarizing that “advisory opinions have no binding effect”).

¹⁶³ Advisory Opinion on Kosovo, *supra* note 158, ¶¶ 67, 69 (dissenting opinion by Bennouna, J.).

¹⁶⁴ *Id.* ¶ 9 (declaration by Simma, J.).

¹⁶⁵ See generally LUCIEN SIORAT, LE PROBLEME DES LACUNES EN DROIT INTERNATIONAL: CONTRIBUTION A L’ÉTUDES DES SOURCES DU DROIT ET DE LA FONCTION JUDICIAIRE (1958) (discussing types of *non liquet* due to the obscurity, logical or social insufficiency, silence, or absence of law). The doctrine finds principal explication in field of judicial settlement of disputes, where its application is prohibited as a general principle of international law. See HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 51–84 (1933) (noting the peculiarities of *non liquet* and “genuine” and “spurious” applications by judges and states). For classical treatments exploring the concept outside the judicial realm, see Hersch Lauterpacht, *Some Observations on the Prohibition of Non Liquet and the Completeness of the Legal Order*, in SYMBOLAE

The ICJ then examined Security Council Resolution 1244 in light of Kosovo's Declaration of Independence.¹⁶⁷ It avoided discussion of whether Security Council Resolution 1244 created a *sui generis* circumstance, but it did label it "an exceptional measure"¹⁶⁸ and observed that because Security Council Resolution 1244 referenced the territorial integrity of Yugoslavia and because it also established an international administration for Kosovo, it created a specialized law, or *lex specialis*.¹⁶⁹ Having arrived at this conclusion, the only question it needed to determine—a question it was not asked—was "whether the declaration of independence violated either general international law or the *lex specialis* created by Security Council Resolution 1244?"¹⁷⁰

The Court advised that Kosovo's declaration did not violate general international law—opining that no such prohibition existed.¹⁷¹ But the *lex specialis* created by Security Council Resolution 1244, which led to UNMIK's interim administration of Kosovo, presented a more involved consideration: did the *lex specialis* enjoin unilateral actions by both Serbia and Kosovo?¹⁷² Did it introduce "a specific prohibition on issuing a declaration of independence?"¹⁷³ This question again touched on the thorny problem of remedial secession, where the Court might have been required "to opine on

VERZIJL 196–221 (J.H.W. Verzijl & F.M. van Asbeck eds., 1958) (discussing treatments of *non liquet* in arbitration, by the International Law Commission, and in doctrine); W.M. Reisman, *International Non-Liquet: Recrudescence and Transformation*, 3 INT'L LAW. 770 (1969) (noting *non liquet*'s express or implied appearance in municipal legal systems); Julius Stone, *Non Liquet and the Function of Law in the International Community*, 35 BRIT. Y.B. INT'L L. 124, 126 (1959) (noting *non liquet*'s apparent minuteness, suggesting not its triviality but its relation to the fundamental "sub-atomic" structure of law).

¹⁶⁶ See, e.g., Timothy William Waters, *Misplaced Boldness: The Avoidance of Substance in the International Court of Justice's Kosovo Opinion*, 23 DUKE J. COMP. & INT'L L. 267 (2013).

¹⁶⁷ Advisory Opinion on Kosovo, *supra* note 158, ¶ 83.

¹⁶⁸ *Id.* ¶ 97 (noting it was "aimed at addressing the crisis existing in that territory").

¹⁶⁹ See *id.* (noting that Security Council Resolution 1244, together with UNMIK regulation 1999/1 (establishing civil and security presence) "had the effect of superseding the legal order in force at that time"). *Lex specialis* is one of three general techniques of rule interpretation (together with *lex superior*, the preference of rules deriving from one superior source, and *lex posterior*, the preference of rules promulgated later in time); it is employed to resolve conflicts of law and lays down the presumption that general rules yield to the application of more specific rules. See Michael Akehurst, *The Hierarchy of the Sources of International Law*, 47 BRIT. Y.B. INT'L L. 273, 273 (1976).

¹⁷⁰ Advisory Opinion on Kosovo, *supra* note 158, ¶ 83.

¹⁷¹ The court advised "that general international law contains no applicable prohibition of declarations of independence," was not violated, and that the legal relevance of Security Council Resolution 1244 established a "Constitutional Framework" deriving from international law, functioning "as part of a specific legal order . . . which is applicable only in Kosovo . . ." *Id.* ¶¶ 84, 88–89. The ICJ noted the Constitutional Framework was "still in force and applicable at the time of Kosovo's declaration." *Id.* ¶ 91.

¹⁷² See Corten, *supra* note 154, at 94.

¹⁷³ Advisory Opinion on Kosovo, *supra* note 158, ¶¶ 101, 111 (noting this question was a matter of controversy in the proceedings); see Summers, *supra* note 51, at 46–47.

whether a Security Council decision under Chapter VII is invalid if it infringes upon a right of self-determination, often viewed as a norm that has acquired the status of *jus cogens*.”¹⁷⁴

The Advisory Opinion on Kosovo recognized that Resolution 1244 “was mostly concerned with setting up an interim framework of self-government”;¹⁷⁵ and that its three distinct features were to (1) establish an international civil and security presence with full responsibility for governance; (2) implement an interim scheme for humanitarian administration; and (3) facilitate a negotiated solution for Kosovo’s future status.¹⁷⁶ The Court stressed that Security Council Resolution 1244 was mindful but not dispositive of Kosovo’s final status process.¹⁷⁷ And yet the language of the unilateral declaration (obviously akin to numerous other revolutionary decrees) was not intended to take effect within the legal order created for the interim self-administration phase; its significance and effect would lie outside that order.¹⁷⁸ But the Court recognized that all matters relating to the external relations of Kosovo fell within the exclusive prerogative of the Secretary-General’s Special Representative for Kosovo,¹⁷⁹ whose duties included supervising the *lex specialis* created by the Security Council for Kosovo’s administrative rule.¹⁸⁰ had the Special Representative considered Kosovo’s Declaration of Independence an act *ultra vires*, he would have been duty-bound to “take action.”¹⁸¹ But, in an act of “some significance,” he remained silent, “suggest[ing] he did not consider the declaration” as coming from within the established interim order, but from “outside the framework of the interim administration.”¹⁸² This reading of the Special Representative’s silence suggests the U.N.’s chief administrator in Kosovo lacked power to take action over an internal secession movement in a territory over which he had

¹⁷⁴ See generally Sean Murphy, *Reflections on the I.C.J. Advisory Opinion on Kosovo: Interpreting Security Council Resolution 1244 (1999)*, in *THE LAW AND POLICY OF THE KOSOVO ADVISORY OPINION* (Michael Wood & Marko Milanovic eds., Oxford Univ. Press 2015).

¹⁷⁵ Advisory Opinion on Kosovo, *supra* note 158, ¶ 104.

¹⁷⁶ *Id.* ¶¶ 96–99 (discussing the three distinct features of Security Council Resolution 1244).

¹⁷⁷ *Id.* ¶ 104.

¹⁷⁸ See *id.* ¶ 105.

¹⁷⁹ German diplomat Joachim Rucker served as the Special Representative of the Secretary-General for Kosovo between September 2006 and June 2008. See *Curriculum Vitae Ambassador Dr. Joachim Ruecker*, GERMAN PERMANENT MISSIONS GENEVA, <http://www.genf.diplo.de/Vertretung/genf/en/01/botschafter-stv-lebenslauf-en.html> (last visited Dec. 12, 2015).

¹⁸⁰ See Advisory Opinion on Kosovo, *supra* note 158, ¶ 106.

¹⁸¹ *Id.* ¶ 108.

¹⁸² See *id.* ¶¶ 108–09 (concluding that the authors of the declaration acted outside the framework of the interim administration).

prerogative power.¹⁸³ This explanation exposed an internal contradiction created by the Security Council's *lex specialis*, which the Advisory Opinion on Kosovo avoided, perhaps out of an interest in safeguarding its institutional integrity on the legality of remedial secession in relation to the right of self-determination.¹⁸⁴ Already the die may have been cast regarding Kosovo's final status: a 2005 report submitted by the former Secretary-General's Special Envoy in Kosovo, Kai Eide, convinced former Secretary-General Kofi Annan that "the time has come to move to the next phase of the political process,"¹⁸⁵—the determination of the "highly sensitive political issue" of the future status of Kosovo.¹⁸⁶ Eide's successor, Martti Ahtisaari, reinforced the U.N.'s commitment of independence for Kosovo, sparking criticism that negotiations to reintegrate Kosovo into Serbia (albeit with a high degree of autonomy) were not brokered honestly,¹⁸⁷ and by 2007, were not part of the U.N.'s plan.¹⁸⁸

Attempts to normalize the ICJ's ambiguous conclusion on Kosovo's independence made Security Council Resolution 1244 a source of authority for all sides¹⁸⁹—a point facilitated by the ICJ's conclusion that it "is at best ambiguous" on the question of a *lex specialis* prohibiting a unilateral

¹⁸³ Russia vociferously attacked Rucker's impartiality in his role as U.N. envoy. See Ioannis Michaletos, *Debate in U.N. Council Between Russia-U.N. Envoy on Kosovo Status*, SERBIANNA (Mar. 26, 2007), <http://serbianna.com/blogs/michaletos/archives/98> (criticizing Rucker for preaching for Kosovo's independence); see also Edith Lederer, *Churkin Lashes out at UN Kosovo Envoy*, MOSCOW TIMES (Mar. 21, 2007), <http://www.themoscowtimes.com/sitemap/free/2007/3/article/churkin-lashes-out-at-un-kosovo-envoy/198279.html> (citing critical comments by Russia's U.N. ambassador).

¹⁸⁴ Ieva Vezbergaitė, *Remedial Secession as an Exercise of the Right to Self-Determination of Peoples*, (2011) (LL.M thesis, Central European University), www.etd.ceu.hu/2012/vezbergaitė_jeva.pdf.

¹⁸⁵ U.N. Secretary General, Letter Dated October 2005 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/2005/635 (Oct. 7, 2005), <http://www.unosek.org/docref/KaiEidereport.pdf>.

¹⁸⁶ *Id.* at 18.

¹⁸⁷ See Ker-Lindsay, *Preventing the Emergence of Self-Determination*, *supra* note 8, at 845, 846 nn.28–29 (criticizing Ahtisaari's method of negotiations to load his argument with no alternative but statehood).

¹⁸⁸ See *id.* at 846 (noting the Ahtisaari Plan discussions were aimed at achieving the "modalities" of statehood for Kosovo, not autonomy within Serbia).

¹⁸⁹ Borgen, *Kosovo's Declaration of Independence*, *supra* note 67, at 2 ("On balance, it appears the Resolution 1244 neither promotes nor prevents Kosovo's secession."); Steven E. Meyer, *Security Council Resolution 1244—Everyone's Favorite Crutch*, TRANSCONFLICT (Mar. 11, 2013), <http://www.transconflict.com/2013/03/security-council-resolution-1244-everyones-favorite-crutch-113/> (cautioning that the resolution has become a bumper sticker used by all sides to justify their positions on Kosovo's outcome); Murphy, *supra* note 174, at 2 (referring to Resolution 1244's relation to Kosovo's long-term fate "vague and underdeveloped").

declaration of independence.¹⁹⁰ This ambiguity concealed the ICJ's double bind: if it deviated from the normative structure of the Security Council's *lex specialis*, its opinion could be construed as conforming remedial secession to an evolving set of rules pertaining to self-determination; but conforming secession to the rules on self-determination would undermine the authority of the Security Council and its exercise of Chapter VII responsibilities under Security Council Resolution 1244.¹⁹¹ Gouldner noted that internal contradictions present powerful impulses to conceal or ignore inconsistencies when presented with contradictory values.¹⁹² If these tensions were not ignored or repressed, they were not adroitly addressed.¹⁹³ More sublime was the residual sense of *anomie* pertaining to the judicial treatment of remedial secession.¹⁹⁴

IV. THE DOUBLE BIND: CONFORMING KOSOVO TO INTERNATIONAL LAW WHILE AVOIDING A PRECEDENT

Kosovo's unilateral declaration eventually received strong support from the West,¹⁹⁵ with the notable exceptions of Spain and Cyprus, which faced separatist concerns in Catalonia and the Basque Country; it also faced opposition in Turkish-occupied Northern Cyprus.¹⁹⁶ By November 2012, over ninety countries recognized Kosovo's declaration, but there were notable

¹⁹⁰ See Accordance with International Law of the Unilateral Declaration of Independence in Respect to Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403, ¶ 118 (July 22).

¹⁹¹ Press Release, Security Council, Security Council Meets in Emergency Session Following Kosovo's Declaration of Independence, with Members Sharply Divided on Issue, U.N. Press Release SC/9252 (Feb. 18, 2008), <http://www.un.org/press/en/2008/sc9252.doc.htm>.

¹⁹² GOULDNER, THE TWO MARXISMS, *supra* note 71, at 16.

¹⁹³ See *id.* at 13.

¹⁹⁴ ALVIN GOULDNER, THE COMING CRISIS OF WESTERN SOCIOLOGY 528 (1970) [hereinafter GOULDNER, WESTERN SOCIOLOGY].

¹⁹⁵ Seventy U.N. member states recognized Kosovo's Declaration of Independence of February 17, 2008, including twenty-two EU states. See Grace Bolton & Gezim Visoka, *Recognizing Kosovo's Independence: Remedial Secession or Earned Sovereignty?*, at 2 (S.E. Eur. Studies at Oxford, Occasional Paper No. 11/10, 2010), doras.dcu.ie/17126/1/RecognizingKosovosindependence.pdf.

¹⁹⁶ See Christopher Borgen, 350. *Is Kosovo a Precedent? Secession, Self-Determination and Conflict Resolution*, GLOBAL EUR. PROGRAM, WILSON CTR. (July 7, 2011), www.wilsoncenter.org/publication/350-kosovo-precedent-secession-self-determination-and-conflict-resolution [hereinafter Borgen, *Is Kosovo a Precedent*]; Spain Will Not Officially Recognize Kosovo, EURORESIDENTES (Feb. 18, 2008), news-spain.euroresidentes.com/2008/02/spain-will-not-officially-recognise.html. Greece, Slovakia and Romania also steadfastly have refused to recognize Kosovo. See James Ker-Lindsay, *Between "Pragmatism" and "Constitutionalism": EU-Russian Dynamics and Differences During the Kosovo Status Process*, 7 J. CONTEMP. EUR. RES. 175, 188 (2011) [hereinafter Ker-Lindsay, *Between Pragmatism and Constitutionalism*].

objectors, including Russia, China, India, Brazil¹⁹⁷ and four NATO members.¹⁹⁸ Interestingly, support among the United States and leading EU members arose only after alternatives failed; evidence indicates policy-makers wanted to avoid at all cost an association between Kosovo's secession and modifications to the right of self-determination.¹⁹⁹ Once again, concerns arose about Kosovo's precedential value, this time in terms of establishing secession as a remedy for chronic and egregious human rights violations.²⁰⁰ The Badinter Arbitration Commission, created in 1991 to advise on the breakup of Yugoslavia, had attached the right of independence to the six republics during Yugoslavia's collapse, but not to autonomous regions such as the two Serbian provinces of Vojvodina and Kosovo.²⁰¹ Appeals for Kosovo's self-determination had been parried during the Dayton peace process, which ended the Bosnian War in 1995.²⁰² The principals again avoided discussing Kosovo's right of constitutional self-determination during the 1997 Rambouillet Peace Conference²⁰³ and during the initial post-bombardment period of UNMIK's administration of Kosovo as an autonomous region.²⁰⁴ Indeed, there did not

¹⁹⁷ Ker-Lindsay, *Preventing the Emergence of Self-Determination*, *supra* note 8, at 838.

¹⁹⁸ The four NATO members were Spain, Turkey, Romania, and Slovakia.

¹⁹⁹ See Ker-Lindsay, *Preventing the Emergence of Self-Determination*, *supra* note 8, at 838.

²⁰⁰ Christopher J. Borgen, *Introductory Note to Kosovo's Declaration of Independence*, 47 I.L.M. 461 (2008) [hereinafter Borgen, *Introductory Note*] (noting the United States and the United Kingdom have argued Kosovo's secessionist claim is *sui generis* and of no precedential value); Borgen, *Is Kosovo a Precedent*, *supra* note 196, at 9. See generally Dugard, *supra* note 151.

²⁰¹ See Pellet, *supra* note 35, at 182 (holding that the Socialist Federal Republic of Yugoslavia was in the process of dissolution and "it is incumbent upon the Republics to settle such problems of state succession as may arise from this process"). In the concluding part of Opinion No. 8, the Badinter Arbitration Commission referenced Opinion No. 1 and found its dissolution "complete." Jure Vidmar, *Montenegro's Path to Independence: A Study of Self-Determination, Statehood and Recognition*, 3 HANSE L. REV. 73, 73 (2007). Opinions Nos. 4–7 held that Bosnia-Herzegovina, Croatia, Macedonia, and Slovenia had met the requirements for recognition. *Id.* at 88. Serbia and Montenegro did not apply for recognition; instead, in 2003 they became the State Union of Serbia and Montenegro, disuniting in 2006. See *id.* at 73, 89. "Politics that did not have republic status in the SFRY [Socialist Federal Republic of Yugoslavia] were not recognized as having the right of self-determination." *Id.* at 101. The 1974 Yugoslav Constitution defined Kosovo and Vojvodina as autonomous provinces. See Ker-Lindsay, *Preventing the Emergence of Self-Determination*, *supra* note 8, at 843.

²⁰² See Ker-Lindsay, *Preventing the Emergence of Self-Determination*, *supra* note 8, at 843.

²⁰³ See Marc Weller, *The Rambouillet Conference on Kosovo*, 75 INT'L AFF. 211, 215 (2002) (noting the governments and international organizations at Rambouillet did not accept a right of statehood for Kosovo). The Rambouillet Agreement was a NATO-sponsored aborted peace agreement between the SFRY and representatives of Kosovar Albanians; it bore the name of Château Rambouillet, where talks commenced. *Id.* The Yugoslav government refused to sign the agreement, claiming it granted Kosovo too much autonomy. See Permanent Rep. of France to the United Nations, Letter Dated June 4, 1999 from the Permanent Rep. of France to the United Nations Addressed to the Secretary-General, U.N. Doc S/1999/648 (June 4, 1999) (introducing the "Rambouillet Accords: Interim agreement for Peace and Self-Government in Kosovo").

²⁰⁴ See Ker-Lindsay, *Preventing the Emergence of Self-Determination*, *supra* note 8, at 844.

appear initially to be any “appetite for an independent Kosovo even after the NATO intervention.”²⁰⁵ A leading legal authority on state secession, James Crawford, noted no international practice supporting “a unilateral right to secede based on a majority vote of the population of a sub-division or territory.”²⁰⁶ Accordingly, “self-determination within a state is to be achieved by participation in the political system of the state, on the basis of respect for its territorial integrity.”²⁰⁷ Critical as the West has been about Russia’s motivations and actions in Crimea, it was Russia’s legal position (motivations aside) in the U.N.-sponsored status process leading up to Kosovo’s unilateral Declaration of Independence that more accorded with traditional thinking on the right of secession under international law.²⁰⁸ But the subsequent collapse of the 2007 Ahtisaari Plan to establish supervised independence,²⁰⁹ followed by the similarly unsuccessful 2007 Troika negotiations between the United States, European Union, and Russia,²¹⁰ tilted U.S. declaratory policy toward supporting Kosovo’s independence.²¹¹ As James Ker-Lindsay noted, the challenge became how to accomplish Kosovo’s statehood without upsetting established principles of international law or sowing tendentious seeds of secession among Chechens, Kurds in Iraq, Turkish Cypriots, Tamils in Sri Lanka, Serbs in the tenuously connected Republika Srpska, or in what is left of Serbian ancestral homes in Croatia’s Krajina region.²¹² From Katanga to Kosovo, past and present remedial secession grievances threatened to

²⁰⁵ *Id.* at 847.

²⁰⁶ James Crawford, *State Practice and International Law in Relation to Unilateral Secession: Report to Government of Canada Concerning Unilateral Secession by Quebec*, TAMILNATION.ORG (Feb. 19, 1997), <http://tamilnation.co/selfdetermination/97crawford.htm>.

²⁰⁷ *Id.*

²⁰⁸ See Ker-Lindsay, *Between Pragmatism and Constitutionalism*, *supra* note 196, at 176.

²⁰⁹ The Comprehensive Proposal for the Kosovo Status Settlement (the Ahtisaari Plan) was a failed 2007 settlement proposal between Serbia and Kosovar Albanians. See U.N. Secretary-General, Letter Dated Mar. 26, 2007 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc S/2007/168/Add.1 (Mar. 26, 2007). It was designed to supersede Security Council Resolution 1244, which created the interim administration for Kosovo following NATO’s bombing campaign. *Id.* It was developed and submitted to the U.N. Security Council by U.N. Special Envoy, Martti Ahtisaari. See GERARD M. GALLUCCI, TRANSCONFLICT, THE AHTISAARI PLAN AND NORTH KOSOVO 4–5 (Nov. 2011), http://www.transconflict.com/10/wp-content/uploads/2011/11/PolicyPaper_AhtisaariPlanNorthKosovo.pdf; Bureau of European & Eurasian Affairs, *Summary of the Comprehensive Proposal for the Kosovo Status Settlement*, U.S. DEP’T STATE (Jan. 20, 2009), <http://www.state.gov/p/eur/rls/fs/101244.htm>.

²¹⁰ U.N. Secretary-General, Letter Dated Dec. 10, 2007 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/2007/723 (Dec. 10, 2007) (introducing with enclosure the Report of the European Union/United States/Russian Federation Troika on Kosovo).

²¹¹ Ian Traynor, *Bush Insists Kosovo Must Be Independent and Receives Hero’s Welcome in Albania*, GUARDIAN (June 10, 2007, 10:16 PM), <http://www.theguardian.com/world/2007/jun/11/balkans.usa>.

²¹² See Ker-Lindsay, *Between Pragmatism and Constitutionalism*, *supra* note 8, at 838–48.

appear.²¹³ Shortly thereafter, the United States would support the break-up of Sudan and the creation of South Sudan in 2011²¹⁴—a secession that almost immediately devolved into chaos.²¹⁵ That case was controlled by a referendum negotiated within the political order, as part of a six-year interim Comprehensive Peace Agreement,²¹⁶ making this case truly more of an exception than a precedent.²¹⁷ Previously, the independence of Eritrea from Ethiopia (1993) and East Timor (Timor-Leste) from Indonesia (2002) “did little to challenge the accepted norms of state formation” because both were granted independence by the parent states, which themselves had gained formal control through suspect means.²¹⁸ Rampant inter-communal violence in Iraq prompted proposals in 2006 to divide up the land into Kurdish, Sunni, and Shiite autonomous regions.²¹⁹ Those proposals never gained acceptance or *de jure* recognition, although, ironically, as of early 2016, tri-partition may come closest to describing the *de facto* situation in the “cradle of civilization.”²²⁰

²¹³ See generally Simon, *supra* note 154.

²¹⁴ See TED DAGNE, CONG. RESEARCH SERV., R41900, THE REPUBLIC OF SOUTH SUDAN: OPPORTUNITIES AND CHALLENGES FOR AFRICA'S NEWEST COUNTRY 1 (2011) (noting U.S. support since the late 1980s and the Obama Administration's FY2012 \$518 million request for assistance).

²¹⁵ See generally Alex de Waal, *When Kleptocracy Becomes Insolvent: Brute Causes of the Civil War in South Sudan*, 113 AFR. AFF. 347, 347–69 (2014) (discussing South Sudan's ensuing civil war and the 2012 shutdown of its oil industry).

²¹⁶ See generally Agreement Between the Government of the Sudan (GOS) and the People's Liberation Movement/Sudan People's Liberation Army (SPLM/SPLA) on Implementation Modalities of the Protocols and Agreements, Dec. 31, 2004, U.S. INST. PEACE, http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/implementation_coversheet.pdf.

²¹⁷ See Terence McNamee, *The First Crack in Africa's Map? Secession and Self-Determination After South Sudan*, at 7 (The Brenthurst Found., Discussion Paper, 2012), <http://issat.dcaf.ch/index.php/fre/content/download/6238/54041/file/Brenthurst%20paper%202012-01.pdf>.

²¹⁸ Ker-Lindsay, *Preventing the Emergence of Self-Determination*, *supra* note 8, at 842 (noting that neither case could be regarded as a true case of unilateral or even contested secession because Eritrea and East Timor had been separate colonies prior to absorption by Ethiopia and Indonesia).

²¹⁹ See, e.g., Joseph R. Biden Jr. & Leslie H. Gelb, *Unity Through Autonomy in Iraq*, N.Y. TIMES (May 1, 2006), http://www.nytimes.com/2006/05/01/opinion/01biden.html?pagewanted=all&_r=0. (proposing a five-point plan for maintaining a united Iraq through ethno-religious autonomous regions based on the federated solution for Bosnia established by the Dayton Accords); Michael O'Hanlon & Edward P. Joseph, *If Iraq Must Be Divided, Here's the Right Way to Do It*, REUTERS (July 4, 2014), <http://blogs.reuters.com/great-debate/2014/07/03/if-iraq-must-be-divided-heres-the-right-way-to-do-it/>.

²²⁰ With northeast Iraq now controlled by Kurdish Peshmerga militias, the south controlled by Iranian-backed Shiite militias, and the northwest controlled by the Sunni Islamic State caliphate (ISIS/Daesh), an argument could be made that the country (and more if east-central Syria is considered) has effectively been partitioned.

Kosovo was different. With Russia in the throes of post-Soviet stagnation, magnified by the 2008 global financial crisis,²²¹ NATO confidently pursuing its “open door” policy with eastern Europe,²²² and every political option expended for resolution of Kosovo’s relation to Serbia, all European roads to secession led to Kosovo. But again, what better way of avoiding Pandora’s box of expanded self-determination claims than to describe Kosovo’s unilateral declaration as unique? Anticipating a problem (doubtless with the encouragement of Western authorities), the framers of Kosovo’s Declaration of Independence sought to avoid remedial secession’s metastasis by inserting in their constitutive document a clause declaring “that Kosovo is a special case arising from Yugoslavia’s non-consensual breakup and is not a precedent for any other situation.”²²³

To some observers, Kosovo represented an unartful dodge from the pathology of Charter tensions on territorial integrity and state creation. Construed ultimately as an opportunistic means for the West to eat its state secession cake and have it too—and to remove itself from Kosovo before becoming an occupying rather than liberating force²²⁴—it “has come to be seen as an unacceptable redefinition of international principles designed to extricate [the United States and leading EU members] from a ‘mess’ of their own making, while denying other peoples the right to apply the same principles elsewhere.”²²⁵

²²¹ See JEFFREY MANKOFF, COUNCIL ON FOREIGN RELATIONS, THE RUSSIAN ECONOMIC CRISIS 8, 16 (2010) (discussing Russia’s deep economic crisis beginning in 2008 and western assertiveness); Clifford G. Gaddy & Barry W. Ickes, *Russia After the Global Financial Crisis*, 51 J. EURASIAN GEOGRAPHY & ECON. 281, 281 (2010).

²²² At its Bucharest Summit in April 2008, Albania and Croatia were invited to join NATO. Its leadership agreed to invite the former Yugoslav Republic of Macedonia to become a member once a mutually acceptable solution to its name could be reached with Greece. Ukraine and Georgia also were promised membership, followed by membership invitations to Montenegro in 2009 and Bosnia and Herzegovina in 2010. See *Enlargement*, NATO (Sept. 1, 2015, 3:56 PM), http://www.nato.int/cps/en/natolive/topics_49212.htm# (discussing NATO’s enlargement process).

²²³ DECLARATION OF INDEPENDENCE (Kosovo 2008).

²²⁴ See Ker-Lindsay, *Preventing the Emergence of Self-Determination*, *supra* note 8 at 854 (noting that NATO and the U.N. administration ran the risk of being seen as an occupying power in Kosovo).

²²⁵ *Id.* at 838.

V. ENTER CRIMEA

Dogged concerns of an overworked reliance on the *sui generis* exception produced claims of hypocrisy.²²⁶ Special circumstances had been invoked before to justify Western actions in Grenada (1983), Panama (1989), Iraq (2003), and Libya (2011).²²⁷ Critics long have viewed these justifications as window-dressing for regime change²²⁸ or as “philanthropic imperialism.”²²⁹ Russia’s response to Georgia’s 2008 attempt to reclaim the autonomous regions of South Ossetia and Abkhazia engendered similar criticisms of pretext,²³⁰ but that conclusion was muddled by an EU fact-finding report that Georgia actually started the war.²³¹

A sense of existential crisis, however, took hold in February-March 2014 following the turbulent Maidan movement in Ukraine that ousted the pro-Russian regime.²³² In response, the eastern region of Crimea broke away from Ukraine, declared independence, and through a widely-viewed sham referendum,²³³ reconstituted itself as an independent state only long enough to accede to a treaty allowing absorption by Russia.²³⁴ President Putin made repeated reference to the “well-known Kosovo precedent—a precedent our

²²⁶ See generally Ariel Zellman, *Georgia: Territorial Integrity of Political Hypocrisy*, ARIEL ZELLMAN RES. PUBS. INFO. BLOG (Aug. 26, 2008, 5:24 PM), <https://arielzellman.wordpress.com/2008/08/26/georgiateritorial-integrity-or-political-hypocrisy/>.

²²⁷ Posner, *supra* note 110.

²²⁸ See Xymena Kurowska, *Multipolarity as Resistance to Liberal Norms: Russia’s Position on Responsibility to Protect*, 14 CONFLICT, SECURITY & DEV. 489, 497 (2014); Richard Falk, *Libya After Qaddafi*, NATION (Oct. 26, 2011), <http://www.thenation.com/article/164221/libya-after-qaddafi#>.

²²⁹ Alex de Waal, *No Such Thing as Humanitarian Intervention*, HARV. INT’L REV.: BLOG (Mar. 21, 2007), <http://hir.harvard.edu/no-such-thing-as-humanitarian-intervention/>.

²³⁰ See Gareth Evans, *Russia, Georgia and the Responsibility to Protect*, 1 AMSTERDAM L.F. 25, 25–26 (2009) (discussing inappropriate invocation by Russia of the Responsibility to Protect).

²³¹ A fact-finding report commissioned by the European Union (the Tagliavini Commission Report), the first of its kind in EU history, found that Georgia started the five-day war following a long period of provocations. The conflict was limited to the Caucasus region and described as “a combined inter-state and intrastate-conflict, opposing Georgian and Russian forces at one level of confrontation as well as South Ossetians together with Abkhaz fighters and the Georgians at another.” INDEP. INT’L FACT-FINDING MISSION ON THE CONFLICT IN GEOR., REPORT: VOLUME 1, at 5 (Sept. 2009), http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/30_09_09_iiffmgc_report.pdf; see also Charles King, *The Five-Day War: Managing Moscow After the Georgia Crisis*, FOREIGN AFF., Nov.-Dec. 2008, at 2, 11 (“[W]hat the West has failed to grasp is that many of the region’s inhabitants view the war of August 2008 as a justified intervention rather than a brazen attempt to resurrect a malevolent empire.”).

²³² See Martin Winiecki, *Ukraine: Torn Between Russia and the West*, TERRA NOVA VOICE (Mar. 16, 2014), <http://terranovavoice.tamera.org/2014/03/is-there-a-third-way-for-ukraine/1608>.

²³³ See G.A. Res. 68/262 (Mar. 27, 2014).

²³⁴ See Denver Nicks, *Crimea Signs Treaty to Join Russia*, TIME (Mar. 18, 2014), <http://time.com/28443/putin-paves-way-for-crimea-annexation/>.

western colleagues created with their own hands in a very similar situation.”²³⁵ Likening Crimea’s unilateral separation from Ukraine with Kosovo’s split from Serbia, President Putin dismissed the claim that Kosovo was a special case, saying “[w]hat makes it so special in the eyes of our colleagues?”²³⁶

Some scholars also found the cases of Kosovo and Crimea too close for legal comfort,²³⁷ with Kosovo establishing a legal precedent for Russia’s annexation of Crimea.²³⁸ How could the *sui generis* circumstance of Kosovo be presented as an act *infra legem* (within the law) or *praeter legem* (as a supplement to the law) when, by definition, its unique classification held it outside the application of international law, making it either *contra legem* (in opposition to the law), or, possibly more charitably, *ultra vires* (beyond legal authority)?²³⁹ Several scholars agree that even if Kosovo did not create a precedent, *stricto sensu*, it serves as a dangerous complication.²⁴⁰ John Dugard thought it naïve that Kosovo would be accepted as a *sui generis* circumstance;²⁴¹ the only surprise was how quickly it was invoked as precedent by Russia in respect of Abkhazia and South Ossetia.²⁴² Vaughn Lowe forewarned that if NATO labeled the Kosovo campaign as an action *sui generis*, “it will surely come to be regarded . . . as a precedent.”²⁴³ Many years before, in view of NATO’s bombing campaign, Michael Mandelbaum predicted the boomerang effect of the *sui generis* claim, arguing that it would one day return to give Russia “the right to intervene in Ukraine” on behalf of

²³⁵ Vladimir Putin, President of the Russian Fed’n, Address on State Duma Deputies, Federation Council Members, Heads of Russian Regions and Civil Society Representatives in the Kremlin (Mar. 18, 2014), <http://eng.kremlin.ru/news/20603>.

²³⁶ *Id.*

²³⁷ See Dugard, *supra* note 151, at 211 (arguing that Kosovo, as well as Abkhazia and South Ossetia, will be invoked as justification for recognition by secessionist movements in non-colonial situations); Marko Milanovic, *Crimea, Kosovo, Hobgoblins and Hypocrisy*, EJIL: TALK! BLOG (Mar. 20, 2014), www.ejiltalk.org/crimea-kosovo-hobgoblins-and-hypocrisy; see also Simon Tisdall, *Opinion, Obama Can’t Have it Both Ways on Crimea*, CNN (Mar. 18, 2014), www.cnn.com/2014/03/17/opinion/crimea-vote-putin-obama/.

²³⁸ See generally Posner, *supra* note 110.

²³⁹ Ian Hurd, *Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World*, 25 ETHICS & INT’L AFF. 293, 301 (2011).

²⁴⁰ See RENAUD FRANCOIS, EUROPEAN STRATEGIC INTELLIGENCE & SEC. CTR. [ESISC], INDEPENDENCE OF KOSOVO: DOES IT SET A DANGEROUS PRECEDENT? 6 (Feb. 28, 2008); see also Sebastian Schäffer, Comment, *The Kosovo Precedent—Directly Applicable to Abkhazia and South Ossetia*, 3 CAUCASIAN REV. INT’L AFF. 108, 110 (2009).

²⁴¹ Dugard, *supra* note 151, at 212–13.

²⁴² *Id.* at 213.

²⁴³ Vaughn Lowe, *International Legal Issues Arising in the Kosovo Crisis*, 49 INT’L & COMP. L.Q. 934, 939 (2000).

mistreated ethnic Russians.²⁴⁴ Pleading before the ICJ in its Advisory Opinion on Kosovo, Finland's legal representative hinted at the slippery slope of the *sui generis* claim. She said every unilateral secession movement derives “from a domestic illegality,” or an act *ultra vires*;²⁴⁵ secession movements are absurdly *sui generis*, and that “[f]or every State, its statehood is *sui generis*, and dependent on its own history and power, not on the discretion of others.”²⁴⁶ Those who attack the *sui generis* claim appear to deny that “[a] State is a State because it is special, not because it has come about by some procedural routine or some mechanical criterion.”²⁴⁷ “Statehood is not a gift that is mercifully given by others”;²⁴⁸ it does not come about by procedural routine, as if “distributing parking tickets.”²⁴⁹ As if to suggest there is no peer review system for membership into the club of statehood, she argued, “[statehood] is simply a political fact.”²⁵⁰

Russia's actions in defense of Ukraine's dismemberment “exploited the tension” between territorial acquisition by force and self-determination—decidedly and dangerously in favor of the latter.²⁵¹ Its justifications broadly incorporated the right of remedial secession, the protection of nationals, collective self-defense, historic title, humanitarian intervention, and the Responsibility to Protect.²⁵² President Putin's omnibus co-optation of this language of international law exposed doctrinal falsehoods of the *sui generis* claim.²⁵³ He failed, however, to address one decisive consideration: Russia's

²⁴⁴ Michael Mandelbaum, *A Perfect Failure: NATO's War Against Yugoslavia*, 78 FOREIGN AFF. 2, 6 (1999). If predictions are of value, Moldova may soon present Europe's next secession crisis. Since 1992, the sliver of land east of the Dniester River and west of Ukraine—called Transnistria—has claimed autonomy from Moldova; its population of 500,000 consists largely of ethnic Russians and its economy is substantially supported by Russia. The enclave voted overwhelmingly for accession by Russia in 2006 but Moscow rejected the offer. For causes, context, and consequences of the Transnistria conflict, see generally MATTHEW ROJANSKY, CARNEGIE ENDOWMENT FOR INT'L PEACE, PROSPECTS FOR UNFREEZING MOLDOVA'S FROZEN CONFLICT IN TRANSNISTRIA (June 14, 2011), http://carnegieendowment.org/files/Rojansky_Transnistria_Briefing.pdf.

²⁴⁵ Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Request for Advisory Opinion, ¶ 9 (Dec. 8, 2009), <http://www.icj-cij.org/docket/files/141/15726.pdf>.

²⁴⁶ *Id.* ¶ 7.

²⁴⁷ *See id.* ¶ 8 (statement of Päivi Kaukorante, Republic of Finland Director General, Legal Service, Ministry of Foreign Affairs).

²⁴⁸ *Id.* ¶ 7.

²⁴⁹ *Id.* ¶ 8.

²⁵⁰ *Id.* ¶ 9.

²⁵¹ *See* Burke-White, *supra* note 40, at 65.

²⁵² *See* Rossi, *Ex Injuria*, *supra* note 15, at 146–47 (citing President Putin's multiple justifications).

²⁵³ *See* Burke-White, *supra* note 40, at 66 (discussing President Putin's ability to “exploit the legal ambiguities” in international law).

threat and use of force prompted Crimea's sham referendum, which tainted Crimea's profession of self-rule and turned its accession to Russia into an example of flat-out annexation.²⁵⁴

CONCLUSIONS: ONE STEP FORWARD, TWO STEPS BACK

Political forensics experts already regard Crimea as a *fait accompli*—a failed example of rhetorical gamesmanship on the part of NATO expansion enthusiasts who proved unwilling in the clutch to support Ukraine as a strategic Western interest.²⁵⁵ But international legal doctrine is left to deal with two important consequences for the Charter's *jus ad bellum* system: the Responsibility to Protect and remedial secession as a legitimate form of self-determination.²⁵⁶ Both of these legacies of Kosovo's *sui generis* status present challenges to the theoretical integrity of the Charter system.²⁵⁷ As some scholars suggest, they may represent next steps in the development of international law.²⁵⁸ A constructivist orientation underscores this possibility. Constructivists articulate the nuances, social processes, and informal richness of international law creation; they embrace formal and informal interactive pathways from norm emergence to acceptance.²⁵⁹ These pathways are central to shaping law and human conduct. Rules or laws are not simply given or mandated; they are formed through social interaction, through language, and through shared understandings. Outcomes are not predetermined, ordained, or even necessarily rationally pursued; they arise from social interaction which, in itself, may affect how actors view themselves.²⁶⁰ Lending (perhaps unintended) voice to constructivist theory, Antonio Cassese noted “it is not an exceptional occurrence that new standards emerge as a result of a breach of *lex lata*.”²⁶¹

²⁵⁴ See *id.* at 72 (discussing how the referendum ultimately was deemed to have no validity and “challenged the bedrock principle of nonintervention and the illegality of territorial acquisition through the use of force”).

²⁵⁵ See Jeffrey Mankoff, *Russia's Latest Land Grab: How Putin Won Crimea and Lost Ukraine*, 93 FOREIGN AFF., May-June 2014, at 68 (2014) (conceding Russia may have won Crimea); John Mearsheimer, *Why the Ukraine Crisis is the West's Fault: The Liberal Decisions That Provoked Putin*, 93 FOREIGN AFF., Sept.-Oct. 2014, at 79 (2014) (noting flaws in NATO's Eastern expansion policy).

²⁵⁶ See Vidmar, *supra* note 51, at 38.

²⁵⁷ See Jutta Brunnée & Stephen Toope, *Norms, Institutions and UN Reform: The Responsibility to Protect*, 2 J. INT'L L. & INT'L REL. 121, 127–28 (2006).

²⁵⁸ See Cassese, *supra* note 117, at 29–30.

²⁵⁹ See Rossi, *Responsibility to Protect*, *supra* note 27, at 383 n.162.

²⁶⁰ See BRUNNÉE & TOOPE, *supra* note 118, at 13.

²⁶¹ Cassese, *supra* note 117, at 30.

A constructivist dynamic may have been behind the rapid ascension of the doctrine of the Responsibility to Protect and the international traction it gained since its informal birth in 2001.²⁶² The shared understanding of Kosovo's final and independent status, which the United States, European Union, and U.N. Secretary-Generalship embraced, also may have supported the currency of remedial secession as an emerging variation of the right of self-determination.²⁶³ But the rise of these ideas coincides with serious indications of doctrinal backsliding. The Responsibility to Protect remains very much a "work in progress" and remedial secession may be a more unstable and explosive doctrine than its Western advocates can abide.²⁶⁴

The "astonishing" formal endorsement of the Responsibility to Protect in the 2005 World Outcome Document,²⁶⁵ and its widespread mention in the

²⁶² See generally Rossi, *Responsibility to Protect*, *supra* note 27, at 383. The doctrine first found expression in the Report of the International Commission on Intervention and State Sovereignty (ICISS). See generally INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY (ICISS), THE RESPONSIBILITY TO PROTECT (Dec. 2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>. This report was published under the auspices of the Canadian International Development Research Center and was initiated by Canadian Foreign Affairs Minister Lloyd Axworthy. *Id.* at ix.

²⁶³ See Borgen, *Kosovo's Declaration of Independence*, *supra* note 67.

²⁶⁴ Edward C. Luck, *From Promise to Practice: Implementing the Responsibility to Protect*, in THE RESPONSIBILITY TO PROTECT: THE PROMISE OF STOPPING MASS ATROCITIES IN OUR TIME 185 (Jared Genser & Irwin Colter eds., 2012).

²⁶⁵ G.A. Res. 60/1, 2005 World Summit Outcome, UN Doc. A/RES/60/1, ¶¶ 138–39 (Sept. 16, 2005). The paragraphs read:

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the UN in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war-crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

language of global consensus, lead respected authorities to conclude it may “present[] a fundamental challenge to structural imperatives” and has the “potential for transformative change in the deep structures of sovereignty.”²⁶⁶ Its inclusion in two paragraphs of the World Outcome Document projected expressions of “a tectonic shift . . . that will create a new legal and diplomatic discourse about member states’ obligations to their own people and to one another.”²⁶⁷ But “veto-wielding permanent members of the Security Council . . . oppose the spread of enforcement authority beyond Chapter VII confines, notwithstanding the deadlock this force-centralization permits.”²⁶⁸ Many developing countries interpreted the doctrine as an invitation for meddling by more powerful states, but they “dropped their reservations . . . once the substantive norm was decoupled from specific operational criteria” and denuded of this most consequential component.²⁶⁹ This act indicates the Responsibility to Protect’s hidden doctrinal complexity based on non-normalized fissures deep in the Charter system.²⁷⁰ The state-sponsored acceptance of the idea (as indicated by its inclusion in the World Summit Outcome Document) may represent a doctrinal variant of a distorted or misrepresented legal desire—a preference falsification—constructed to give rise to the illusion of its normative and popular appeal rather than the international community’s genuine desire to embrace it.²⁷¹ Rather than developing from a *sui generis* circumstance into a center-stage additive to international legal doctrine, the doctrine is sliding back into a more aleatory world, “roundly discussed and studied, habitually and diplomatically invoked, institutionally referenced and applied, and yet treated by many with insouciance or as strange happenstance, like a loud meteor strike on a barren field.”²⁷² Scholars have criticized it for its “shallow and dangerous moralisation” at the hands of powerful and privileged states;²⁷³ Secretary-

Id.

²⁶⁶ Brunnée & Toope, *supra* note 257, at 127–28 (noting, however, that it was not at all clear the concept will fulfill its promise and “may prove to be mere rhetorical flourish”).

²⁶⁷ Anne-Marie Slaughter, *Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform*, 99 AM. J. INT’L L. 619, 627 (2005).

²⁶⁸ Rossi, *Responsibility to Protect*, *supra* note 27, at 372.

²⁶⁹ Nicholas J. Wheeler, *A Victory for Common Humanity? The Responsibility to Protect After the 2005 World Summit*, 2 J. INT’L L. & INT’L REL. 95, 96 (2005).

²⁷⁰ See generally *id.* at 102–05 (discussing the limits of the Responsibility to Protect doctrine).

²⁷¹ See generally TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION 326–48 (1995) (detailing social norm construction and preference falsification).

²⁷² Rossi, *Responsibility to Protect*, *supra* note 27, at 367.

²⁷³ Koskenniemi, *supra* note 116, at 162; Noam Chomsky, Statement to the United Nations General Assembly Thematic Dialogue on the Responsibility to Protect (July 23, 2009), <http://www.un.org/ga/president/63/interactive/protect/noam.pdf>.

General Ban Ki-moon overhauled the concept in 2008,²⁷⁴ presented it as a three-pillar approach to policy formation,²⁷⁵ and affirmed its coercive application only in accordance with Chapter VII provisions.²⁷⁶ This reworking seems to have downscaled the beyond-the-Charter-paradigm implications of the doctrine, turning it into a less inventive restatement of powers the Security Council always possessed.²⁷⁷ Facilitated by the *sui generis* circumstance of Kosovo, the Responsibility to Protect has been invoked in a variety of settings, but it

failed its “first test case” in Darfur [2004], was unilaterally expanded [by NATO] beyond its Security Council mandate in Libya [2011] . . . fails to protect populations in South Sudan and Syria, and yet serves as a pretext for [Russia’s] . . . annexation of Crimea and aggressive sabre rattling toward eastern Ukraine²⁷⁸

Remedial secession presents a firebomb for NATO, particularly if adapted to an evolving Kurdistan, which would involve portions of eastern Turkey, a key NATO ally.²⁷⁹ It presents woeful strategic implications for the West if it leads to a re-awakening of Achaemenidian interests in establishing a Greater Iran, or among Shiite militias in southern Iraq, which openly proclaim allegiance to Tehran.²⁸⁰ These prospects may seem inchoate, and comprise but two of many similar scenarios awaiting remediation in the form of state creation, but their consideration is borne out of dangerous tensions currently enveloping Europe.²⁸¹ Shed imperfectly of its previous command economy and central planning system, Russia still embraces an amalgam of authoritarian interests, which seek out avenues of expression in co-opted international legal

²⁷⁴ See Ban Ki-moon, U.N. Secretary-General, Address at Event on “Responsible Sovereignty: International Cooperation for a Changed World,” (July 15, 2008), http://www.un.org/sg/selected-speeches/statement_full.asp?statID=1631; see also U.N. Secretary-General, *Implementing the Responsibility to Protect*, ¶¶ 8, 11–66, U.N. Doc. A/63/677 (Jan. 12, 2009) (detailing the three pillars).

²⁷⁵ See Rossi, *Responsibility to Protect*, *supra* note 27, at 376 (“Pillar one stressed the . . . State’s responsibility to protect its own population; pillar two . . . emphasized the international community’s responsibility to provide proactive (not simply reactive) assistance; and pillar three affirmed . . . coercive action, but again, only in accordance with Chapter VII provisions, thus rejecting unauthorized measures.”).

²⁷⁶ See *id.*

²⁷⁷ See *id.* (summarizing Chesterman).

²⁷⁸ *Id.* at 374–75.

²⁷⁹ Michael Rubin, *The Complexities of Kurdish Secession*, COMMENTARY MAG. (July 3, 2014), <https://www.commentarymagazine.com/foreign-policy/middle-east/the-complexities-of-kurdish-secession/>.

²⁸⁰ See generally Ali Khedery, *Iran’s Shiite Militias Are Running Amok in Iraq*, FOREIGN POL’Y (Feb. 19, 2015), <http://foreignpolicy.com/2015/02/19/irans-shiite-militias-are-running-amok-in-iraq/>.

²⁸¹ See *Set the Kurds Free*, ECONOMIST (Feb. 21, 2015), <http://www.economist.com/news/leaders/21644151-case-new-state-northern-iraq-set-kurds-free>.

form.²⁸² The *sui generis* circumstance, cloaked in the evolving *legalect* of the Responsibility to Protect or remedial secession, provides an easier avenue for expression of international law's *anomie*, given its systemic failure to deal with or normalize pathologies of actions caused by internal contradictions of the Charter system.²⁸³ International law should take more seriously the prospect that the *sui generis* circumstance is actually more common than unique; that over-worked attempts to defy its meaning and conform its application to short-term interests may mark it as a troublesome signpost, not only as a dangerous precedent for "unique" circumstances to come, but of the internal contradictions of the Charter system that cannot be wished away by an exceptional appellation.²⁸⁴

²⁸² See Burke-White, *supra* note 40, at 65.

²⁸³ See Christakis, *supra* note 39, at 73, 81 (discussing issues the ICJ circumvented when considering Kosovo's secession).

²⁸⁴ See ROSSI, EQUITY AND INTERNATIONAL LAW, *supra* note 80, at 384; Posner, *supra* note 110 (detailing other instances that are similar to Kosovo and its precedent).