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Impaled on Morton's Fork: Kosovo, Crimea, and the Sui Generis Circumstance

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Impaled on Morton’s Fork: Kosovo, Crimea, and the *Sui Generis* Circumstance

Abstract: This Article investigates the problematic invocation of unique circumstances as a justification for circumventing the international law relating to use of force and state secession. Borrowing from the teachings of critical sociology, this Article addresses the lessons of 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 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 to 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 and 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 as likely mask extra-legal intentions as support international law’s progressive development.

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In 1999, NATO launched a successful seventy-eight day bombing campaign against Serbia in its southern province of Kosovo. The purpose of the campaign was to halt human rights violations given imminent concerns of ethnic cleansing against Albania Kosovars. NATO initiated the war without seeking Security Council authorization, which violated the UN Charter: Chapter VII of the Charter grants the Security Council a monopoly on the use of force save for individual or collective self-defense. But Security Council action seemed futile because Russia likely would have vetoed any forceful initiative against its close ally, Yugoslavia. 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. At the conclusion of hostilities, the Security Council established the UN Interim Administration in Kosovo (UNMIK). This resolution (Security Council Resolution 1244 (1999)) was cited as paving the

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5 See Ciarán Burke, AN EQUITABLE FRAMEWORK FOR HUMANITARIAN INTERVENTION 1 (2013).


way for Kosovo to become an independent state, but it in fact advocated a “political solution,” “reaffirm[ed] the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia,” and “did not contain any provision dealing with the final status of Kosovo or with the conditions for its achievement.”

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. International law’s respect for territorial integrity prohibits military action by one state against another, except in self-defense. The Federal Republic of Yugoslavia had not attacked a fellow UN member state; it had not attacked a NATO member state; and indeed, Kosovo had

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9 S.C. Res. 1244, Preamble, supra note 7. See also Advisory Opinion on Kosovo, ¶ 96, 443 (recalling 1244’s tenth preambular paragraph on the Federal Republic of Yugoslavia’s sovereignty and territorial integrity). 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, 444.

10 *Advisory Opinion on Kosovo*, ¶ 114, 449.


12 See U.N. Charter arts. 2(4) and 51.

13 According to NATO’s constitutive document, the North Atlantic Treaty [Washington Treaty], arts. 5 and 6(1) require that an armed attack against one or more of the parties shall be considered an attack against them all. The North Atlantic Treaty, Washington D.C., Apr. 4, 1949, http://www.nato.int/cps/en/natolive/official_texts_17120.htm.
belonged to Serbia.\(^{14}\) In addition to violating the Charter, the air strikes violated a general principle of law dating to Roman law -- the same principle NATO purported to uphold in its actions against Yugoslavia:\(^ {15}\) Legal rights cannot arise from unlawful acts (*ex injuria jus non oritur*).\(^ {16}\)

To justify its acts, NATO floated trial balloons. Official statements linked NATO actions to the intentions behind the Security Council resolutions and the transcendent authority of the international community; 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 US Department of State Acting Legal Adviser, NATO’s justifications were “based on the unique combination of a number of factors.”\(^ {18}\)

\(^{14}\) See Fuchs & Borowski, *supra* 6, at 305.

\(^{15}\) See *Press Statement* by Dr. Javier Solana, *supra* note 3 (noting the need to stop the Yugoslav Government’s repression of its people); see also *Statement on Kosovo* (Mar. 24, 1999), Bill Clinton, Miller Center, University of Virginia, [http://millercenter.org/president/speeches/speech-3932](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 “in clear violation of the commitments they had made.”).


\(^{17}\) See Patrick Thornberry, ‘*Come, friendly bombs .. . .*: International Law in Kosovo, in, KOSOVO: THE POLITICS OF DELUSION 45 (Michael Waller, Kyril Drezov & Bülent Gökay eds., 2001).

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 controversial\textsuperscript{19} doctrine of humanitarian intervention, favoring instead the emotive appeal to avoid a “humanitarian catastrophe.”\textsuperscript{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 \textit{very adoption} of a resolution under Chapter VII of the Charter trigger a legal authorization to act by NATO when it determines it necessary?\textsuperscript{21} NATO General Secretary Javier Solana sought to avoid such criticisms with his assurance that NATO was “not waging war against Yugoslavia,”\textsuperscript{22} a point begrudgingly contradicted by NATO’s Supreme Commander,\textsuperscript{23} and the tally of ensuing carnage.\textsuperscript{24}

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\textsuperscript{20} \textit{Press Statement} by Dr. Javier Solana, \textit{supra} note 3; Brownlie & Apperly, \textit{supra} at 884.
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\textsuperscript{22} \textit{Press Statement} by Dr. Javier Solana, \textit{supra} note 3; see also Adam Roberts, NATO’s \textquoteleft Humanitarian War’ over Kosovo, 41(3) Survival (Autumn 1999), 102-23 at 102.
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\textsuperscript{23} See Peter J. Boyer, General Clark’s Battles, The New Yorker, Nov. 17, 2003, http://www.newyorker.com/magazine/2003/11/17/general-clarks-battles (quoting General (ret.) 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”). \textit{See also} David L. Phillips, \textit{Liberating Kosovo: Coercive Diplomacy and US Intervention} xiv (2012) (quoting NATO’s Supreme Allied Commander, General Wesley Clark: “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.”).
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\textsuperscript{24} The NATO air campaign included 38,400 sorties, 10,484 strikes and 26,614 bombs dropped; over 90 percent of the Kosovar Albanian population was displaced; 863,000 civilians fled Kosovo and another 590,000 persons were displaced internally. \textit{See The Kosovo Report}, \textit{supra} note 2, at 90-2. Estimates vary but American Association of the Advancement of Sciences statisticians estimate 10,500 Albanian Kosovars were killed during the bombing campaign, \textit{id.}, Annex 1 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. \textit{See id.} Annex 1, 306-311. One report citing Serbian Defense
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.” Part of this silence reflected uncertainty about formulating a lawful international community response beyond the Security Council to aid populations suffering from internal atrocities. 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. 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. 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:

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25 Burke, *supra* note 5, at 6 (footnote omitted).


28 *See id.* at 365.
‘Kosovo presented a stop on a voyage to somewhere, with direction and destination shrouded in mist’. 29 Higgins forewarned that the “passing outside of the UN altogether” of powers reserved under the Charter to the Security Council presented considerable long term implications. 30

This Article investigates the doctrinal attempt 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 in support for Kosovo’s unilateral declaration of independence from Serbia, 32 confounding standard usage by making Kosovo doubly unique. But the invocation of the sui generis circumstance satisfied concerns: It forestalled direct confrontation with the UN Charter proscription against using force while making allowance for a circumscribed exception; 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; it seemingly supported, at least by inference, a right

29 See Thornberry, supra note 17, at 44.
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 (J.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); A. Roberts, NATO’s ‘Humanitarian War’ over Kosovo, 41 SURVIVAL 102, at 102 (Autumn 1999) (listing a “unique combination of a number of factors”).
32 See statement of Mr. Hongju Koh, Legal Adviser, US Department of State, Public Sitting held on Tuesday 8 December 2009, at 10 a.m., at the Peace Palace, on the 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, 22, ¶ 39, at 38, http://www.icj-cij.org/docket/files/141/15726.pdf (“...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”).
of remedial secession\footnote{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, \textit{Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law} 333 and 335 (2004).} in an historically dangerous corner of Europe, notwithstanding the Europeans’ own determination that no such right applied to the autonomous province of Kosovo;\footnote{The Arbitration Commission of the Conference on Yugoslavia [hereinafter the Badinter Arbitration Commission] was established by the Council of Ministers of the European Community in 1991 under the presidency of 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, \textit{The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-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 & Hercegovina, 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 Opinions No. 1 and No. 2, \textit{id.} at 182-84. For discussions on the Badinter Arbitration Commission’s preclusion of secession options for autonomous regions, see Ker-Lindsay, \textit{supra} note 8, at 842 and 843; and Suzanne N. Lalonde, \textit{Determining Boundaries in a Conflicted World: The Role of Ut picta flips 237} (2002).} and, importantly, it provided time to nurture the doctrinal responses on the Responsibility to Protect and remedial secession. These doctrines emerged “hand in hand” out of Kosovo.\footnote{James Ker-Lindsay, \textit{The Foreign Policy of Counter Secession: Preventing the Recognition of Contested States} 37 (2012) (noting the Responsibility to Protect emerged “hand in hand” with the notion of remedial secession).} But at what cost and of what consequence? This Article argues the \textit{sui generis} circumstance ‘conciliated doctrinal antagonisms’ presented by Kosovo by avoiding the terrible ‘either-or’s’ of legitimacy or legality.\footnote{See Leszek Kolakowski, \textit{In Praise of Inconsistency}, 11(2) DISSERT 201, 204 (Apr. 1964).} 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. 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.

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, in the technically-Azerbaijani but ethnically-Armenian region of Nagorno-Karabakh situated between the Caspian and Black Seas, in the Lugansk and Donetsk regions of Ukraine, where Russia and


38 William W. Burke-White, 56(4) SURVIVAL 65-80 (2014), at 65-6 (play book) and 68 (shifting the balance).


Ukraine stand at the brink of open war, in the heart of central Europe, among the Baltic countries, in Finland, and throughout Scandinavia -- across the 14 borderland states of the former USSR now populated by 25 million Russians relocated to territories newly created following the Soviet collapse of 1991 -- irredentist sentiment stoked by the Russian diaspora present antagonistic opportunities for aggression. 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.

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43 Ambrose Evans-Pritchard, *Putin could attack Baltic states warns former Nato chief*, THE TELEGRAPH (London) (Feb. 5, 2015), [http://www.telegraph.co.uk/news/worldnews/europe/russia/11393707/Putin-could-attack-Baltic-states-warns-former-Nato-chief.html](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 Putin] will intervene in Estonia or Latvia where large Russian minority populations reside to test NATO resolve.).


46 Rossi, *supra* note 16, at __.
Mindful of the widening of international law in directions suggested by the already voluminous literature on the Responsibility to Protect and the less well received idea of remedial secession,48 this Article construes the *sui generis* assertion as an invitation to *anomie* – the breakdown of structural integrity through normless “lack of regulation”49 -- it views the assertion 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: Section II will situate the concept of the *sui generis* claim within the context of international law. Section III, borrowing from the teachings of critical sociology, will address the theoretical deficiency (gap) in the United Nations Charter system that stimulates doctrinal appeals to the *sui generis* claim. Section IV will

47 See generally Rossi, *supra* note 27 (discussing the voluminous literature on the doctrine of the Responsibility to Protect).
highlight the external and internal tensions caused by NATO’s 1999 bombardment of Kosovo and Kosovo’s 2008 Declaration of Independence from Serbia. Section V will address the ‘double bind’ created by juridical and doctrinal attempts to conform the aforementioned problems of Kosovo to international law. Section VI will discuss the troubling consequence of international law’s overworking of the *sui generis* concept: Russia’s annexation of Crimea. And section VII 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.

II. 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. Often, the term figures in calls for a new multi-lateral treaty. 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 UN Law of the Sea Convention (UNCLOS); because UNLCOS addresses pelagic space of the cryosphere in but one article, Article 234, proposals periodically broach the subject of a special Arctic treaty to account for the region’s unique, ice-bound features.

Hybrid regime structures, such as the

51 Art. 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.
52 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(4) POLAR RECORD 327 (2011).
quasi-state status of the European Union, the European Convention on Human Rights (which mixes international and domestic legal systems), and international criminal tribunals (involving Common law accusatorial and Civil law inquisitorial traditions -- sometimes neither) have spawned debates about their sui generis status and need for special conventional expression. Intellectual property law, the rights of indigenous peoples, and the international law of trade, 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*. This *lex specialis* was applied not to supplement the law, but to retrospectively conform legal title to pre-existing factual circumstances. Here, the *sui generis* claim could be construed as unique but *infra legem* -- within the law.

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

### III. 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.  Balancing requirements of justice and order remains a central challenge and the pursuit of either goal often brings this collective security system into conflict. 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. 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; his ideas provide context for the West’s difficulty in dealing legally and politically with Russia’s annexation of Crimea, an annexation that has allowed Russian President Vladimir Putin, through his discursive encounters with the media, to hoist the West by its own moralizing petard.

A. Lacunae and the Desire to Normalize

Gouldner was interested in gaps or holes in the construction and maintenance of theory and structure. He investigated the role of contradictions in the specific development of critical

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65 See Burke-White, *supra* note 38, at 66 (2014) (arguing Washington has been unable to fully counteract Moscow’s legal argument that its support for Crimea’s annexation is grounded in international law).


68 This recurring theme first appeared in his treatment of the origins of western social theory, *ENTER PLATO* (1965), which carried over into his critical examination of Marxism in *THE
social theory. His interest centered on the challenges contradictions presented to a “common-language-speaking community.” Gouldner, supra note 64, at 165. 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. That focus is of no interest here, but Gouldner’s insights on contradictions inform the community of scholars who speak the evolving legalect of international humanitarian law and state creation/secession.

Gouldner sensed the strong desire among scholars to “normalize theory” – to render observations consistent with expectations, or to “interpret[] ambiguous outcomes in conformity with their wishes and needs” as means of reducing dissonance, contradictions, and anomalies. He criticized classically construed notions of “objectivity,” which bore the imprint of Max Weber’s


69 Gouldner, supra note 64, at 165.
70 Id. at 16-17
71 However, the influence of the Critical Marxism had a profound effect on 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).
72 See Gouldner, supra note 64, at 15. See also id. 16-19.
powerful emphasis on ‘value free’ epistemology\textsuperscript{74} -- the basis of Weber’s admiration of the ‘logical formal rationality’ of western law.\textsuperscript{75} 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.”\textsuperscript{76} The Kosovo bombardment and later its secession challenged the theoretical integrity of international law at concrete levels. 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. Reconciling (“normalizing”) these tensions fomented doctrinal confusion and a sense that something was internally wrong with the Charter paradigm. The Independent International Commission on Kosovo consciously acknowledged the need to close this gap\textsuperscript{77} as legal scholars struggled to ‘normalize’ the dissonance through the articulation of a theoretical fix, which took the patchwork form of the unique exception.\textsuperscript{78}

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

\textsuperscript{74} 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).

\textsuperscript{75} Weber’s interest in the rule-oriented rationality of western jurisprudence, i.e., his formulation of the sociology of western legal though, derives from his massive three volume study (especially vol. 2, 641-901) entitled, \textit{Economy and Society: An Outline of Interpretive Sociology} (Guenther Roth & Claus Wittich eds., 1968). For discussion of logical formal rationality, see Christopher R. Rossi, \textit{Equity and International Law: A Legal Realist Approach to International Decisionmaking} 53 (1993), and Duncan Kennedy, \textit{The Disenchantment of Logically Formal Legal Rationality, or Max Weber’s Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought}, 55 \textit{Hastings L.J.} 1031-76 (2003).

\textsuperscript{76} Gouldner, \textit{supra} note 64, at 169-70.

\textsuperscript{77} See \textit{Kosovo Report}, \textit{supra} note 2, at 10.

\textsuperscript{78} See infra.
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.\(^79\)

Gouldner noted that contradictions could be external or internal to theory.\(^80\) External contradictions generate polemics, which contribute to theoretical boundary formation and “are identity-defining for a theory.”\(^81\) For instance, developing 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. 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.”\(^82\)

Internal contradictions, however, “constitute improprieties that generate powerful impulses to conceal them and to resist efforts to uncover or even discuss them.”\(^83\) Internal contradictions need to be explained away to prevent corroding normative and theoretical structure. But they are sometimes simply repressed or ignored, particularly when they inhibit change or demonstrate acute gaps in theoretical completeness.\(^84\) Was the *sui generis* claim constructed as a means of

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\(^79\) Gouldner, *supra* note 64, at 169.

\(^80\) See *id.* at 16.

\(^81\) *Id.* at 15.


\(^83\) Gouldner, *supra* note 64, at 16.

\(^84\) Gouldner charges that the “textual skimpiness” of the Asiatic Mode of Production was left so underdeveloped in the body of Marx’ work because it so sharply contradicted Marx’ primary
avoiding Charter contradictions? Left unattended, internal contradictions “proliferate pathologies of action,” leading to: A paralysis of choice, ambivalence, or an awareness of theoretical crisis – anomie. Moreover, a “double bind” may arise; internal contradictions can result from avoidance of the problem or the effort to conform to them through normalizing efforts. Deviance from one set of rules produces anomie by deteriorating normative structure precisely as a result of faithful conformity to another set of rules. In each case, contradictions do not result from anomie, they produce anomie. 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] was so unique [sic] it is situated out of the realm of international law and cannot be considered in any way as a ‘precedent for future secessionist attempts.’ As if situated in a ‘twilight zone,’ normalizing the exceptional circumstance of Kosovo necessitated the conclusion ‘in the interest of international stability, that international law does not apply anymore’. 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 [but] we won’t do it again, and you

paradigm that all of history was a history of class struggle. Unable to address the contradiction, Marx repressed it. See id. at 325-28.

85 Id. at 69. Pathologies of action is a concept found throughout the work of Durkheim; it occupies a significant place in modern sociological inquiry.
86 Id.
87 See id.
88 Id. at 170.
89 Id.
90 See id.
91 Id. at 170.
92 Christakis, supra note 37, at 80-81.
93 Id.
“better not, either.” 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*.

The ICJ not only avoided the question put to it, 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 may have been so “parsimonious” and “solipsistic” as to deprive its opinion of legal relevance. The advisory opinion may now serve as an unfortunate example of the Court’s own pathological paralysis of (in)decision.

The *sui generis* exception attempted to avoid the problem of Charter contradictions exposed by Kosovo. 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 helped develop the Responsibility to Protect and remedial secession doctrines. But these doctrines not only grew beyond their *sui generis* conditions precedent, giving rise to enthusiastic assessments about new directions in international law, they 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.

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95 See *supra* note 48.

96 *Infra*


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. Gaps at the foundation of the Charter system, out of which these doctrines arose, may now account for the doctrinal backsliding affecting both concepts.

IV. The Doctrinal Making of the Sui Generis Exception and the Attempt to Normalize

Discussion about the legality and legitimacy of the NATO bombardment evidenced an awareness of theoretical anomie, prompting attempts to reconcile tensions between the two. The Kosovo Commission, chaired by Richard Goldstone and Carl Tham, concluded the NATO campaign was “illegal, yet legitimate,”99 a conclusion that muted the significance of wrongfulness central to the ex injuria principle. Martti Koskenniemi argued: “NATO was either entitled to bomb Serbia or it was not. Tertium non datur.”100 Society contained no dark corner exempt from international law’s reach.101 Koskenniemi, however, adopted the painfully ambivalent position that it “was both formally illegal and morally necessary.”102 He noted that for international lawyers “Kosovo has come to be a debate about … what we hold as normal and what exceptional.”103 Michael Reisman noted NATO’s action “did not accord with the designs of the Charter” -- unless it could

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99 KOSOVO REPORT, supra note 2, at 186. See also Anthea Roberts, Legality Versus Legitimacy: Can Uses of Force be Illegal but Justified?, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE (Philip Alston & Euan MacDonald eds., 2008).
101 See Koskenniemi, supra note 100, at 162.
102 Id. (noting NATO’s action “was both formally illegal and morally necessary”).
103 Id.
be construed as “the exceptio for that very small group of events that warrant or even require unilateral action . . .”.\footnote{W. Michael Reisman, \textit{Editorial Comments: NATO’s Kosovo Intervention: Kosovo’s Antinomies}, 93 AM. J. INT’L L. 860, 860 (1999).} He predicted some international lawyers “will strain to weave strands [from various UN statements and resolutions] into a retrospective tapestry of authority.”\footnote{\textit{Id.}} Indeed, those strands would find future support in the Responsibility to Protect doctrine, which retrospectively derived in part from Kosovo,\footnote{See generally Gareth Evans and Mohamed Sahnoun, \textit{The Responsibility to Protect}, 81(6) FOREIGN AFF., 99-110 (2002)} and in Security Council Resolution 1244, which directly came about from Kosovo.\footnote{107}

Bruno Simma, acknowledged the illegal nature of the act and the ‘thin red line’ separating NATO’s response from international legality. He suggested the gap could be minimized by characterizing the lessons of Kosovo as \textit{sui generis}.\footnote{Bruno Simma, \textit{NATO, the UN and the Use of Force: Legal Aspects}, 10 EUR. J. INT’L L. 1, 6 (1999) (“thin red line”) and 14 (“regard the Kosovo crisis as a singular case”). \textit{See also} Kosovo Declaration of Independence, Republic of Kosovo Assembly, Feb. 17, 2008, \url{http://www.assembly-kosova.org/?cid=2,128,1635}.} Siegfried Schieder grouped him into the “rational ‘moralist[]’” camp, which (\textit{minimally}),\footnote{Siegfried Schieder, \textit{Pragmatism as a Path towards a Discursive and open Theory of International Law}, 11 EUR. J. INT’L L. 663, 692-3 (2000). Schieder conceives of rational moralists as supporting minimalists and maximalist interpretations of international law. Minimalists interpret the Kosovo case as excusable as long as the UN 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 (\textit{jus cogens}, human rights) that are of importance to the community of states as a whole). \textit{Id.}} attempted to ‘wipe clean’ the ‘venial [not ‘mortal’] sin’ of Kosovo because of its “special marginal situation.”\footnote{\textit{Id.} at 692.} “It would become a
mortal sin only if a precedent for the future were to be drawn from it.”

Antonio Cassese, another ‘rational moralist’, 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 line’. Out of this flagrant breach of lex lata, the law as it is, he more broadly (maximally) suggested something new. Avoiding Posner’s ‘exquisitely tortured’ critique, Cassese suggested ex injuria ius non oritur might be evolving into a new customary law legitimizing the use of force absent Security Council authorization in stringently circumscribed instances: “[I]t would amount to an exception similar to that laid down in Article 51 of the Charter (self-defense).”

Similarly, Thornberry noted an emerging trend: International law was “witnessing the rapid development of [a new] international law of humanitarian emergency, where the UN 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.

A. The Antinomies of NATO’s Bombardment of Kosovo

“Faced with such antinomies” in reconciling Kosovo’s legality and legitimacy, Reisman wrote no international lawyer could “look back at the incident without disquiet.” For too many

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111 Id.
112 Id. 693.
114 See id. at 29 (“for the exclusive purpose of putting an end to large-scale atrocities”).
115 Id.
116 Thornberry, supra note 17, at 56.
117 Reisman, supra note 104, at 860.
analysts and commentators, “the Kosovo crisis offer[ed] a dubious precedent for future international interventions in Europe.” NATO’s action stimulated as much concern about future self-deputized vigilantism as it did complaints about the veto-addled Charter system and its critical inability to fulfil its collective security function. 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[?]”

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 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 to manage 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. UN Secretary-General Ban, in the footsteps of Gareth Evans and


119 Latawski and Smith, supra note 118, at 32-33.

120 On constructivism, agency, and the formation of interactive social rules, see generally Nicholas Onuf, Constructivism: A User’s Manual in societal rules in INTERNATIONAL RELATIONS IN A CONSTRUCTED WORLD 58-78 (Vendulka Kubálková, Nicholas Onuf, & Paul Kowert eds., 1998); see also Vendulka Kubálková, Reconstructing the Discipline: Scholars as Agents, in id., 193-201.
Mohamed Sahnoun, co-chairs of the commission that forwarded the Responsibility to Protect doctrine, later would become the principal norm entrepreneur for this position. 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.” The declaration reworked the right of self-determination, an irreproachable right of an *erga omens* character, which historically serves as a narrow exception to international law’s support of territorial integrity of States for the rights of peoples transitioning from colonial rule. The Kosovo declaration did not fit squarely in the colonial context but drew support from an inverted or *a contrario* reading of the 1970

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121 See supra note __
122 See Rossi, supra note 27, at 369-37 and accompanying footnotes (noting Secretary-General Ban’s creation of a special advisor position for the Responsibility to Protect and issuance of six reports on the Responsibility to Protect since 2009).
Declaration on Friendly Relations. The Safeguard Clause of that declaration precluded the dismemberment of States “conducting themselves in compliance with the principle of equal rights and self-determination of peoples.” 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.”

If this reading of the Safeguard Clause constituted an example of Reisman’s ‘strained retrospective search for legal authority,’ Security Council Resolution 1244 (1999) and its annexes may have provided another. The EU 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. The General Assembly specifically requested advice from the ICJ on

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126 Vidmar, supra
127 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, 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 UN Charter art. 1(2); See also Oliver Corten, Territorial Integrity Narrowly Interpreted: Reasserting the Classical Inter-State Paradigm of International Law, 24(1) LEIDEN J. INT’L L. 87, 91-2 (2011) (noting the a contrario implication of the Saving Clause).
128 Numerous states contested the a contrario significance of G.A. Res. 2625 (XXV), arguing the remedial secession thesis cannot be deduced from the resolution or from international practice. See Corten, supra note 127, at 92 fn. 30.
129 Supra note 7, and annexes 1 and 2(5). which authorized 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
the question: “Is [Kosovo’s] unilateral declaration . . . in accordance with international law.”

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. 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.

One wonders what new meaning the Court imparted to advisory opinions? In contentious cases, the presumption of jura novit curia reigns: ‘The 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). The same maxim applies in advisory opinions, although they have no legal effect. But not to opine on the question presented negates 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.”

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131 Advisory Opinion on Kosovo, ¶ 1, 407.
132 Kosovo Advisor Opinion, ¶ 56, 425-26; see also id. ¶ 1, 478 (J. Simma, Declaration).
133 Advisory Opinion on Kosovo, ¶ 56, 426.
134 See Rossi, supra note 58, at __.
136 Advisory Opinion on Kosovo, ¶¶ 67 and 69, 514 (J. Bennouna, Dissenting Opinion).
judicial institution [is] unable to pronounce itself on a point of law. . .”.

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. Scholars roundly derided the opinion for its circumvention of the real issue: Remedial secession.

The ICJ then examined Security Council Resolution 1244 in light of Kosovo’s declaration of independence. It avoided discussion of whether Security Council Resolution 1244 created a sui generis circumstance, but it did label it “an exceptional measure” 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. Having arrived at this conclusion, the only question it needed to

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137 Id. ¶ 9, 481 (J. Simma, Declaration).
140 Advisory Opinion on Kosovo, ¶ 83, 438.
141 Id. ¶ 97, 443 (noting it was “aimed at addressing the crisis existing in that territory”).
142 See Advisory Opinion on Kosovo, ¶ 97, 443 (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
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[?]”\textsuperscript{143}

The Court advised that Kosovo’s declaration did not violate general international law – opining that no such prohibition existed.\textsuperscript{144} 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?\textsuperscript{145} Did it introduce “a specific prohibition on issuing a declaration of independence[?]”\textsuperscript{146} This question again touched on the thorny problem of remedial secession, where the Court might have been required “to opine on 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[?]” \textsuperscript{147}

\textsuperscript{143} Advisory Opinion on Kosovo, \textsuperscript{¶} 83, p. 438.
\textsuperscript{144} It advised “that general international law contains no applicable prohibition of declarations of independence,” and was not violated, \textit{id.} at \textsuperscript{¶} 84, 438; and that the legal relevance of Security Council Resolution 1244 established a ‘Constitutional Framework’ deriving from international law, \textit{id.} at \textsuperscript{¶} 88, 440; and functioning “as part of a specific legal order . . . which is applicable only in Kosovo . . .”. \textit{Id.} at \textsuperscript{¶} 89, 440. The ICJ noted the Constitutional Framework was “still in force and applicable at the time of Kosovo’s declaration, \textit{id.} at \textsuperscript{¶} 91, 441.

\textsuperscript{145} See Corten, \textit{supra} note 128, at 94.

\textsuperscript{146} Advisory Opinion on Kosovo, \textsuperscript{¶} 101, 444; see also \textsuperscript{¶} 111, 448 (noting this question was a matter of controversy in the proceedings). See Summers, \textit{supra} note 48, at 46-7.

\textsuperscript{147} Murphy at 3 [reflections on the icj advisory opinion on Kosovo]
The **Advisory Opinion on Kosovo** recognized that 1244 “was mostly concerned with setting up an interim framework of self-government;” 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. The Court stressed that Security Council Resolution 1244 was mindful but not dispositive of Kosovo’s final status process. 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. But the Court recognized that all matters relating to external relations of Kosovo fell within the exclusive prerogative of the Secretary-General’s Special Representative for Kosovo, whose duties supervised the *lex specialis* created by the Security Council for Kosovo’s administrative rule. Had the Special Representative considered Kosovo’s declaration of independence an act *ultra vires*, he would have been duty-bound to “take action.” 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.”

148 **Advisory Opinion on Kosovo**, ¶ 104, 445.
149 *Id.* ¶¶ 96-99; 443 – 44 (discussing the three distinct features of Security Council Resolution 1244).
150 *Id.* ¶ 104, 445.
151 See *id* ¶ 105, 446.
153 See **Advisory Opinion on Kosovo**, ¶ 106, 446.
154 See **Advisory Opinion on Kosovo**, ¶¶ 108-109, 447-48 (concluding the authors of the declaration acted outside the framework of the interim administration).
Special Representative’s silence suggests the UN’s chief administrator in Kosovo lacked power to take action over an internal secession movement in a territory over which he had prerogative power. 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. Already the dye 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 Secretary-General Kofi Annan that “the time has come to move to the next phase of the political process[,]” -- the determination of the “highly sensitive political issue” of the future status of Kosovo. Eide’s successor, Martti Ahtisaari, reinforced the UN’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, and by 2007, were not part of the UN’s plan.

Attempts to normalize the ICJ’s ambiguous conclusion on Kosovo’s independence made Security Council Resolution 1244 a source of authority for all sides; a point facilitated by the

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157 *Id.* at 18.

158 See Ker-Lindsay, *supra* note 8, at 845-46 and nn. 28-29 (criticizing

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

ICJ’s conclusion that it “is a best ambiguous” on the question of a *lex specialis* prohibiting a unilateral declaration of independence. 161 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 undermined the authority of the Security Council and its exercise of Chapter VII responsibilities under Security Council Resolution 1244. Gouldner noted internal contradictions present powerful impulses to conceal or ignore inconsistencies when presented with contradictory values. If these tensions were not ignored or repressed, they were not adroitly addressed. More sublime was the residual sense of *anomie* pertaining to the judicial treatment of remedial secession.

V. The Double Bind: Conforming Kosovo to International Law while Avoiding a Precedent

Kosovo’s unilateral declaration eventually received strong support from the West,162 except notably in Spain and Cyprus, which faced separatist concerns in Catalonia and the Basque

161 See Advisory Opinion on Kosovo, ¶ 118, 451.

Country; it also faced opposition in Turkish-occupied Northern Cyprus. By November 2012, over 90 countries recognized Kosovo’s declaration. But there were notable objectors, including Russia, China, India, Brazil and four NATO members. Interestingly, support among the US 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. 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. 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. Appeals for Kosovo’s self-determination had been parried during the Dayton peace


164 Ker-Lindsay, supra note 8, at 838.

165 Spain, Turkey, Romania and Slovakia.

166 See Ker-Lindsay, supra note 8, at 838.


168 See Badinter Arbitration Commission Opinion No. 1, reprinted in Pellet, supra note 34, at 182 (holding that the Socialist Federative 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.” See id. at 87ff. See also Badinter Arbitration Commission Opinions Nos. 4-7, (holding that Bosnia-Herzegovina,
process, which ended the Bosnian War in 1995. The principals again avoided discussing Kosovo’s right of constitutional self-determination during the 1997 Rambouillet Peace Conference and during the initial post-bombardment period of UNMIK’s administration of Kosovo as an autonomous region. Indeed, there did not appear initially to be any “appetite for an independent Kosovo even after the NATO intervention.” 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.” 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.” Critical as the West has been about Russia’s motivations and actions in Crimea, it was Russia’s legal position (motivations aside) in Croatia, Macedonia, and Slovenia had met the requirements for recognition. Serbia and Montenegro did not apply for recognition; instead, they became in 2003 the State Union of Serbia and Montenegro, disuniting in 2006. See Jure Vidmar, Montenegro’s Path to Independence: A Study of Self-Determination, Statehood and Recognition, 3(1) HANSE LAW REV. 73, at 73 and 89 (2007). “Polities 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, supra note 8, at 843.

169 See Ker-Lindsay, supra note 8, at 843
171 See Ker-Lindsay, supra note 8, at 844.
172 Id. at 847.
174 Id.
the UN-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.\textsuperscript{175} But the subsequent collapse of the 2007 Ahtisaari Plan to establish supervised independence,\textsuperscript{176} followed by the similarly unsuccessful 2007 Troika negotiations between the US, EU, and Russia,\textsuperscript{177} tilted US declaratory policy toward supporting Kosovo’s independence.\textsuperscript{178} 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, or Serbs in the tenuously connected Republika Srpska or in what is left of Serbian ancestral homes in Croatia’s Krajina region?\textsuperscript{179} From Katanga to Kosovo, past and present remedial secession grievances threatened to appear.\textsuperscript{180} Shortly thereafter, the US would support the break-up of Sudan and the creation of

\textsuperscript{175} See Ker-Lindsay, supra note 163, at 176.
\textsuperscript{178} \textit{Bush insists Kosovo must be independent and receives hero’s welcome in Albania}, \textit{The Guardian} (London) (June 10, 2007), \url{http://www.theguardian.com/world/2007/jun/11/balkans.usa}.
\textsuperscript{179} See Ker-Lindsay, supra note 8, at 838 and 848.
\textsuperscript{180} See generally Simon, supra note 127.
South Sudan in 2011— a secession that almost immediately devolved into chaos—but that case was controlled by a referendum negotiated ‘within the political order’, as part of a six-year interim Comprehensive Peace Agreement, making this case truly more an exception than a precedent. 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. Rampant intercommunal violence in Iraq prompted proposals in 2006 to divide up that country into Kurdish, Sunni, and Shiite autonomous regions. But those proposals never gained acceptance or de jure recognition,

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182 See generally Alex de Waal, When kleptocracy becomes insolvent: Brute causes of the civil war in South Sudan, 113(452) AFRICAN AFF. 347-69 (2014) (discussing South Sudan’s ensuing civil war and 2012 shutdown of its oil industry).

183 See generally Agreement Between the Government of the Sudan (GOS) and the Sudan People’s Liberation Movement/Sudan People’s Liberation Army (SPLM/SPLA) in Implementation Modalities of the Protocols the Protocols and Agreements, signed Jan. 9, 2005, United States Institute of Peace, http://www.usip.org/publications/peace-agreements-sudan.

184 See Terence McNamee, Secession and Self-Determination after South Sudan: The first crack in Africa’s map? BRENTHURST FOUNDATION DISCUSSION PAPER 19 (2012).

185 Ker-Lindsay, supra note 8, at 842 (noting 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)

186 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 (Jul. 4, 2014), http://blogs.reuters.com/great-debate/2014/07/03/if-iraq-must-be-divided-heres-the-right-way-to-do-it/.
although, ironically, as of 2015, tri-partition may come closest to describing the *de facto* situation in the ‘cradle of civilization’.\(^{187}\)

Kosovo was different. With Russia in the throes of post-Soviet stagnation, magnified by the 2008 global financial crisis,\(^{188}\) NATO confidently pursuing its ‘open door’ policy with eastern Europe,\(^{189}\) 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.”\(^{190}\)

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\(^{187}\) With northeast Iraq now controlled by Kurdish Peshmerga militias, the south controlled by Iranian-backed Shi’i militias, and the northwest controlled by the Sunni Islamic State caliphate, an argument could be made that the country (and more if east-central Syria is considered) effectively has been partitioned.\(^{188}\) See Barry W. Ickes & Clifford G. Gaddy, *Russia after the Global Financial Crisis*, BROOKINGS, May-June 2010, [http://www.brookings.edu/research/articles/2010/05/russia-financial-crisis-gaddy](http://www.brookings.edu/research/articles/2010/05/russia-financial-crisis-gaddy); Jeffrey Mankoff, *The Russian Economic Crisis*, COUNCIL ON FOREIGN RELATIONS SPECIAL REPORT (2010) (discussing Russia’s deep economic crisis beginning in 2008 and western assertiveness).\(^{189}\) 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 NATO enlargement, [http://www.nato.int/cps/en/natolive/topics_49212.htm#](http://www.nato.int/cps/en/natolive/topics_49212.htm#) (last updated June 12, 2014) (discussing NATO’s enlargement process).\(^{190}\) Kosovo Declaration of Independence, *supra* note 108.
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 force\textsuperscript{191} -- it “has come to be seen as an unacceptable redefinition of international principles designed to extricated [the US and leading EU members] from a ‘mess’ of their own making, while denying other peoples the right to apply the same principles elsewhere.”\textsuperscript{192}

\textbf{VI. Enter Crimea}

Dogged concerns of an overworked reliance on the \textit{sui generis} exception produced claims of hypocrisy. Special circumstances had been invoked before, to justify western actions in Grenada (1983), Panama (1989), Iraq (2003), and Libya (2011).\textsuperscript{193} Critics long have viewed these justifications as window-dressing for regime change,\textsuperscript{194} or as “philanthropic imperialism.”\textsuperscript{195} Russia’s response to Georgia’s 2008 attempt to reclaim the autonomous regions of South Ossetia

\begin{footnotesize}
\begin{enumerate}
\item See Ker-Lindsay, \textit{supra} note 8 at 854 (noting that NATO and the UN administration ran the risk of becoming seen an occupying power in Kosovo).
\item \textit{Id.} at 838.
\item E. Posner, \textit{supra} note 94.
\end{enumerate}
\end{footnotesize}
and Abkhazia engendered similar criticisms of pretext, but that conclusion was muddled by an EU fact-finding report that Georgia actually started the war.

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. In response, the eastern region of Crimea broke away from Ukraine, declared independence, and through a widely-viewed sham referendum, reconstituted itself as an independent state only long enough to accede to a treaty allowing absorption by Russia. Russian President Vladimir Putin made repeated reference to the “well-known Kosovo precedent – a precedent our western colleagues created with their own hands in a very similar situation;” likening Crimea’s unilateral separation from Ukraine with Kosovo’s split from Serbia, President Putin dismissed the claim that Kosovo was “some special case. What makes it so special in the eyes of our colleagues?”

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196 See Gareth Evans, Russia, Georgia and the Responsibility to Protect, 1(2) AMSTERDAM LAW FORUM, http://amsterdamlawforum.org/article/view/58/115 (discussing inappropriate invocation by Russia of the Responsibility to Protect)
197 A fact-finding report commissioned by the EU [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 Caucus region and described as “a combined inter-state and intrastate-conflict between involving Russian, Georgian, South Ossetian and Abkhaz military units.” 1 INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA 10 (Sept. 30, 2009), https://app.box.com/shared/ua268fpfxf; see also Rossi, supra note 16, at __ (noting the report’s cross-cutting assessments of blame for the aggression); and Charles King, The Five-Day War: Managing Moscow After the Georgia Crisis (Nov/Dec 2008), http://www.foreignaffairs.com/articles/64602/charles-king/the-five-day-war (claiming “what 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.”).
199 See Christopher R. Rossi __.
Some scholars also found the cases of Kosovo and Crimea too close for legal comfort, with Kosovo establishing a legal precedent for Russia’s annexation of Crimea. 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)? Several scholars agree that even if Kosovo did not create a precedent, *stricto sensu*, it serves as a dangerous complication. John Dugard thought it naïve that Kosovo would be accepted as a *sui generis* circumstance; the only surprise was how quickly it was invoked as precedent “by Russia in respect of Abkhazia and South Ossetia.” Vaughn Lowe forewarned that if NATO labled the Kosovo campaign as an action *sui generis*, “it will surely come to be regarded …as a precedent.” Many years before, in view of NATO’s bombing campaign, Michael Mandelbaum predicted the boomerang

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204 Dugard, *supra* note 125, at 212-3.

205 *Id.* at 213.

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 mistreated ethnic Russians. 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*; secession movements are absurdly *sui generis*: “For every State, its statehood is *sui generis*, and dependent on its own history and power, not on the discretion of others.” 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.” “Statehood is not a gift that is mercifully given by others;” it does not come about by procedural routine, as if “distributing parking tickets.” 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.”

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207 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 claims 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 Matthew Rojansky, *Prospects for Unfreezing Moldova’s Frozen Conflict in Transnistria*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, June 14, 2011, http://carnegieendowment.org/files/Rojansky_Transnistria_Briefing.pdf.

208 *Advisory Opinion on Kosovo*, Pleadings of Ms. Päivi Kaukorante, ¶ 9, 55.

209 Id. ¶ 7, 54.


211 Id. at ¶ 7, p. 54.

212 Id. at ¶ 8, p. 55.

213 Id. at ¶ 9, p. 55.
Russia’s actions in defense of Ukraine’s dismemberment exploited the tensions between territorial acquisition by force and self-determination -- decidedly and dangerously in favor of the latter.214 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.215 President Putin’s omnibus co-optation of this language of international law exposed doctrinal falsehoods of the *sui generis* claim. He failed, however, to address one decisive consideration: Russia’s 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.

**VII. 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.216 But international legal doctrine is left to deal with two important consequences for the Charter *jus ad bellum* system: The Responsibility to Protect and remedial secession as a legitimate form of self-determination. Both of these legacies of Kosovo’s *sui generis* status present challenges to the theoretical integrity of the Charter system. As some scholars suggest, they may represent next steps in the development of international law. A constructivist orientation underscores this possibility. Constructivists

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214 Burke-White, *supra* note 38, at 65.
215 See Rossi, *supra* note 16, at __.
articulate the nuances, social processes, and informal richness of international law creation; they embrace formal and informal interactive pathways from norm emergence to acceptance.\textsuperscript{217} 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.\textsuperscript{218} 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 \textit{lex lata}.”\textsuperscript{219}

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.\textsuperscript{220} The shared understanding of Kosovo’s final and independent status, which the US, EU, and UN Secretary-Generalship embraced, also may have supported the currency of remedial secession as an emerging variation of the right of self-determination. But the rise of these ideas coincide with serious indications of doctrinal backsliding, the Responsibility to Protect remains

\textsuperscript{217} See Rossi, supra note 27, at 383 and accompanying notes.

\textsuperscript{218} See Jutta Brunnée & Stephen J. Toope, \textit{Legitimacy and Legality in International Law: An Interactional Account} 13 (2010).

\textsuperscript{219} Cassesse 30

\textsuperscript{220} See generally Rossi, supra note 27. The doctrine found first expression in the \textit{International Commission on Intervention and State Sovereignty, The Responsibility To Protect} (Dec. 2001), \textit{available at} http://responsibilitytoprotect.org/ICISS%20Report.pdf (last accessed Sept. 9, 2014) (\textit{ICISS Report}). The \textit{ICISS Report} was published under the auspices of the Canadian International Development Research Center and was initiated by Canadian Foreign Affairs Minister Lloyd Axworthy. \textit{Id.} at ix.
very much a “work in progress,” and remedial secession may be a more unstable and explosive doctrine than its western advocates can abide.

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

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222 Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138-40, UN Doc. A/RES/60/1 (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 UN, 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 are manifestly failing 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.
sovereignty.” 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.” 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.” 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 its most consequential component. This act indicates the Responsibility to Protect’s hidden doctrinal complexity based on non-normalized fissures deep in the Charter system. The state-sponsored acceptance of the idea (as indicated by its inclusion in the World 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. 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

223 J Brunnée & S. Toope, Norms, Institutions and UN Reform: The Responsibility to Protect, 2 J. Int’l L. & Int’l Rel. 121 at 127 and 128 (2005-2006) (noting, however, it was not at all clear the concept will fulfill its promise and “may prove to be mere rhetorical flourish.”)
225 Rossi, supra note 27, at 372.
meteor strike on a barren field.”

Scholars have criticized it for its “shallow and dangerous moralization” at the hands of powerful and privileged states; Secretary-General Ban overhauled the concept in 2008, presented it as a three-pillar approach to policy formation, and affirmed its coercive application only in accordance with Chapter VII provisions. This reworking seems to have down-scaled the beyond-the-Charter-paradigm implications of the doctrine, turning it into a less inventive restatement of powers the Security Council always possessed. 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 pretext for [Russia’s] annexation of Crimea and aggressive sabre rattling toward eastern Ukraine.”

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228 Rossi, supra note 27, at 367.
231 Pillar one stressed the State’s responsibility to protect its own population; pillar two emphasized the international community’s responsibility to provide proactive, as opposed to reactive, assistance; and pillar three affirmed coercive action but rejected unauthorized measures beyond the ambit of Chapter VII Security Council action. See Rossi, supra note 27, at 376.
232 See Rossi, supra note 27, at 376.
233 See id. (summarizing Chesterman).
234 Id. at 374–75.
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. 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 Shi’i militias in southern Iraq, which openly proclaim allegiance to Tehran. 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. 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 form. 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. 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 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.