THE INTERNATIONAL COMMUNITY, SOUTH SUDAN, AND THE RESPONSIBILITY TO PROTECT

CHRISTOPHER R. ROSSI*

This Article investigates the problem of implementing the Responsibility to Protect (R2P) doctrine against the backdrop of South Sudan’s dire circumstance. It investigates the problématique of the international community in relation to R2P and the imploding new-born country. The international community maintains residual responsibility to implement the doctrine during time of humanitarian crisis internal to states, making the international community a constitutive norm that shapes the language of R2P. But marshaling international support to confront internal abuse in South Sudan proves difficult because of an elusive understanding of the international community. In South Sudan’s case, the international community appears fragmented and heteronomous. Operationalizing it encounters the problem of agency; the problematic puzzle piece at the heart of an effective international response. This Article views R2P as a rejection of Vattelian pluralism but seeks to understand why a solidarist formulation has forestalled within the growing internal emergency presented by South Sudan, the world’s newest country. Situating R2P within the context of South Sudan reveals the need to bolster pluralist pathways to solidarist norm construction rather than to abandon pluralist perspectives completely. This Article suggests that the general abandonment of pluralist teachings has hindered the normative reception and development of R2P and has contributed to the swift turn South Sudan has made in the direction of failed state status.

I. INTRODUCTION .................................. 130

II. R2P AND ITS ASSOCIATION WITH PLURALISM AND SOLIDARISM ..................................... 135

A. R2P and the Rejection of Pluralism ............ 139
   1. Vattel’s Influence on Pluralism............. 141
   2. The Rejection of Wolff’s Civitas Maxima .. 142

B. Solidarist Views .............................. 145
   1. Solidarism in Historical Context ......... 145

* Adjunct faculty member, University of Iowa College of Law; Ph.D. and M.A., Johns Hopkins University School of Advanced International Studies; LL.M., University of London; J.D., University of Iowa; B.A., Washington University. The author thanks Antonio I. Martinez and Iowa Law College librarian John Bergstrom for research assistance, and Peter Varlan and the other editors of this journal for helpful suggestions. Translations provided by the author.
This Article investigates the problem of implementing the Responsibility to Protect (R2P) doctrine against the backdrop of the dire situation in South Sudan. It investigates the issues faced by the international community in relation to R2P and the imploding newborn country. It suggests the need to bolster pluralist pathways to solidarist norm construction rather than abandoning pluralist perspectives completely. The international community maintains residual responsibility to implement R2P during times of internal state humanitarian crises, making the international community a constitutive norm that shapes the meaning of R2P. But marshaling international support to confront internal abuse in South Sudan proves difficult because of an elusive understanding of the international community; its multiple meanings undermine the shared knowledge actors need to guide the application of R2P. The concept

of responsibility cannot be applied if it is unknown where “re-
ponsibility resides.” Locating where the R2P resides requires 
focusing anew on the meaning of the international community 
familiar questions relating to R2P’s authorization, opera-
tionalization, and evaluation: Is the international community 
.thickly representative of historical processes, or thinly embod-
ied as an aspiration? Is it a change agent or an abstract ethical 
refere to an ideal archetype of behavior? Is it a unitary actor 
or a fragmented compilation of interests? Are there multiple 
international communities, agglomerated as states, institu-
tions, and/or civil society? Is it a legal community or is it a 
political community? Is it compelled by moral necessity or mo-
tivated by hegemonic design? Is it paternalistic? The term 
escapes precise definition and its multiple usages obfuscate un-
derstanding. Like Procrustes, the mythical Greek giant who 
stretched or shortened his victims to fit his iron bed, R2P advo-

2. Alex J. Bellamy, Conflict Prevention and the Responsibility to Protect, 14 
GLOBAL GOVERNANCE 135, 147 (2008).

3. See Catherine Liu, Humanitarianism and the Use of Force, in THE ETHICS 
OF GLOBAL GOVERNANCE 85, 92–100 (Antonio Franceschet ed., 2009) (dis-
cussing these three contemporary challenges to R2P).

4. See Hannes Peltonen, In or Out? International Community Membership: 
Beliefs, Behavior, Contextuality and Principles, 27 CAMBRIDGE REV. INT’L AFF. 
475, 476 (2014) (discussing ‘thick’ and ‘thin’ classifications of the interna-
tional community). ‘Thin’ and ‘thick’ categories have developed in interna-
tional relations theory to facilitate discussion of identity and membership 
within associational groups or communities. For a more involved discussion 
and survey of the literature, see Karl Gustafsson, Recognising Recognition 
Through Thick and Thin: Insights from Sino-Japanese Relations, 51 COOPERATION 
& CONFLICT 255 (2016).

5. See Buzan & Gonzalez-Pelaez, supra note 1, at 32 (juxtaposing the in-
ternational community as a moral collective or ethical referent); Alex J. Bel-
lamy & Paul D. Williams, The New Politics of Protection? Côte d’Ivoire, Libya and 
the Responsibility to Protect, 87 INT’L AFF. 825, 827, 847 (2011) (suggesting a 
new politics of protection may be emerging from ‘international society’s re-
sponses to crises in Côte d’Ivoire and Libya, interchanging the term interna-
tional society in connection to international community vis-à-vis R2P); An-
(arguing the need to set aside abstract international community usages).

6. See Monica Hakimi, Toward a Legal Theory on the Responsibility to Protect, 
R2P as a collective responsibility of states or international organizations).

7. For various considerations of the meaning of ”international com-

8. See Foluke Ipinyomi, Is Côte d’Ivoire a Test Case for R2P? Democratization 
as Fulfilment of the Internal Community’s Responsibility to Prevent, 56 J. AF. L. 151,
icates conform interpretations of the international community to fit respective forms of humanitarian disaster. The unclear boundaries of the international community result in norm diffusion;\(^9\) the penumbra emanating from this norm diffusion frustrates application of R2P to South Sudan and inhibits its utility as an international standard.

The international community finds unitary and legal expression in Article 53 of the Vienna Convention on the Law of Treaties, where it is assigned the role of validating norms of \textit{jus cogens} (which must be “accepted and recognized by the international community of States”).\(^10\) But this usage does not address the nature of this community and it begs the question of whether the community is limited to states.\(^11\)

Diffuse regional and scholarly interpretations confound the meaning of international community. African and Asian critiques now question whether the international community is indeed international, arguing instead that the term is a rhetorical trope to forward hegemonic policies of western governments.\(^12\) Alternatively, other African perspectives promote an

\(^{162}\) (2012) (“The problem with the use of the phrase ‘international community’ is that it invites obfuscation”).


understanding of international community around the nomos of Ubuntu, the unique humanistic order of African subjectivity that conflicts with the contractarian and axiomatic identity-politics of liberal constitutionalism. Critical theorists of international law and international relations note self-styled usages of the term by powerful countries that make it impossible for them to defy its norms. Such interpretations revive the nineteenth century axiom later popularized by Carl Schmitt: “Whoever invokes humanity wants to cheat.” Complaints arise that the international community has been coopted as a pretext to justify meddling in domestic affairs, that it has been ideologically weaponized, and that it now impedes application of R2P in Africa, the region where responsible sovereignty was first meant to be applied. R2P’s doctrinal opaqueness “has made it possible for regional actors to attach markedly different meanings to it and thus make it congruent with their respective political agendas.” The international community’s responsibility to end the suffering of millions of people in South Sudan appears as much a shibboleth as an agency of change, prompting this Article’s investigation of R2P’s one-size-fits-all characterization of the international community.

A diagnostic of South Sudan provides the opportunity for a better understanding of R2P and the international community. Viewing the international community through a problem-driven perspective suggests an interpretation that is situation-


ally specific and context dependent.\(^\text{18}\) This grounded perspective establishes a much-needed mooring line as a check against normative drift, as difficult as that may be. It also tethers the drift toward solidarism to pluralist pathways that may ultimately yield more practical, less abstract, solidarist solutions. The international community has become a paradox in the dialect of international law and international relations: The power of invoking the international community is obvious, as it is referenced thousands of times in the literature,\(^\text{19}\) but its function and elements escape precise understanding. A meaningful R2P hinges on contextualizing various, sometimes conflicting, interpretations of the international community in the globalizing present.

To situate the idea of the international community within the context of R2P and South Sudan, this Article will proceed as follows: Part II will discuss the evolution of R2P as a movement away from Vattellian-inspired pluralism and toward a solidarist understanding of international agency. Within this context, the international community’s problem with operationalizing agency will be discussed in reference to H.L.A. Hart’s conception of a legal system and the interplay between primary duty-imposing and secondary power-conferring standards. Problems of paternalism and norm development will also be reviewed. Part III will contextualize the international community’s missing puzzle piece—agency—with specific regard to South Sudan. Part IV will conclude this discussion with a reminder to bolster solidarist schemes of norm development for R2P by building on the teachings of pluralism, rather than severing the important mooring lines pluralism contributes to efforts to halt internal atrocity.

\(^{18}\) See Peltonen, \textit{supra} note 4, at 486 (interpreting the international community as potential, context-dependent groupings of agents).

\(^{19}\) See Ellis, \textit{supra} note 1, at 1 (noting 15,800 stories referencing “international community” in European and North and South American newspapers from 2003 to 2005); Dino Kritsiotis, \textit{Imagining the International Community}, 12 Eur. J. Int’l L. 961, 966 (noting extended discussions about the reach and meaning of international community in the literature of international law). The term occupies a seminal place in international legal scholarship. \textit{See, e.g.}, \textit{Hersch Lauterpacht, The Function of Law in the International Community} (1933) (representing a seminal text on the subject of the international community).
II. R2P AND ITS ASSOCIATION WITH PLURALISM AND SOLIDARISM

South Sudan represents a major challenge to the UN’s controversial reconfiguration of its collective security system, as presented by R2P. The doctrine has never been embraced fully, has undergone a substantial scaling down, and has arguably failed Africa and neighbors in a wide variety of circumstances, including Libya, Syria, Yemen, Mali, Cote d’Ivoire, the Central African Republic, Sudan, and now South Sudan.20 Consequently, it has been described as a work in progress,21 an abstract aspiration,22 and a doctrine in need of serious rethinking.23

Promoted originally by Canada as a new interventionist norm for human protection purposes,24 R2P holds that while every sovereign state has the primary responsibility to protect its citizens from avoidable catastrophe, the international community retains a “residual sovereignty”25—a secondary responsibility to avert serious harm when internal war, insurgency, repression or state failure is unwilling or unable to prevent it. By conceiving of sovereignty in terms of responsibility, rather than in terms of control, R2P transformed from a right of intervention into a less coercive responsibility to protect,26 supplemented additionally by responsibilities to prevent and to re-

This transformation shifted emphasis from the rights of the intervener to the duties of the international community and it repudiated the absolute and classical view of sovereignty as an unconditional form of control within a state into an attribute of statehood conditioned by the state’s duty to protect inhabitants. This change in the meta-value of sovereignty—as something that could be withdrawn—suggested the transformation from a pluralist conception of world order, where “un-humanitarian non-intervention” prevailed as an intolerable norm, to a solidarist conception, where the structure and primary institutions of world order support “the purposes and interests of peoples.” Embedded in this transformation was the embrace of the solidarist idea that state relations conformed to a universitas, a unitary, substantive, and purposive community enterprise in its own right, over the pluralist idea that interstate relations presented an independent societas of sovereign equals.

Secretary-General Ban reworked R2P in 2008 to emphasize that the international community’s responsibility to protect could only be undertaken in accordance with United Na-
tions Charter Chapter VII provisions. This refinement tethered its application to powers possessed by the Security Council. R2P has been questioned by supporters for sometimes contributing to tragedies it intended to prevent, and has been attacked as redecorated colonialism by critical legal scholars and from developing country perspectives. It has been denounced as an exclusive construction of the international community, representing “an unconscious continuation of the mission civilisatrice”—a persistently failed undertaking to make Africa, particularly sub-Saharan Africa, more European. It has been described as a pharmakon—a solution likely to produce consequences as bad as those complained against—and as thread-worn legal drapery, cloaking unlawful violations of sovereignty or schemes of regime change in a language that thinly insulates aggressors from an accounting of their own abuses. And it has been criticized for framing intervention in military rather than economic assistance terms, which could address preconditions to violence besetting developing countries. Since 2011, Brazil has led efforts to recast

33. Chapter VII provisions detail what actions the Security Council may take with respect to threats to the peace, breaches of the peace, and acts of aggression while also conferring on member states an inherent right of individual or collective self-defense. See U.N. Charter arts. 39–51.
34. See Christopher R. Rossi, The Responsibility to Protect and the Plenitudinal Mindset of International Humanitarian Law, 5 J. INT’L HUM. LEGAL STUD. 352, 376 (2014) (noting criticisms that the reworked doctrine added little to Chapter VII).
35. See Kuperman, supra note 23, at 22 (discussing moral hazard theory and R2P).
38. See Rossi, supra note 34, at 383 (borrowing from Plato’s and Derrida’s understandings that remedies can also be poisonous).
R2P as Responsibility While Protecting (RWP), and recent permutations advance the Responsibility Not to Veto (RN2V) in attempts to deal with the growing perception that R2P might be misused.41

Despite the political complications radiating from the doctrine and its much-debated proposed revisions,42 it was included in the 2005 World Summit Document,43 enthusiastically embraced by leading scholars and diplomats,44 affirmed...
by the Security Council,\textsuperscript{45} and may be on its way to becoming an accepted part of customary international law.\textsuperscript{46} The international legal framework’s rigid approach toward humanitarian intervention forces the choice between legality (non-intervention) and legitimacy (human rights), prompting a turn toward a new ethic of sovereignty as a function of state responsibility. “[N]ot for a moment,” argued the doctrine’s progenitor, Gareth Evans, should past frustrations and disappointments “lead us to conclude that the whole R2P enterprise has been misconceived.”\textsuperscript{47} Nowhere has R2P’s ideational reception been stronger than in Africa, where its letter and spirit have been embraced by the African Union (A.U.), the Economic Community of West African States (ECOWAS), the Southern African Development Community (SADC), and a host of African norm entrepreneurs.\textsuperscript{48}

\section*{A. R2P and the Rejection of Pluralism}

R2P emphasized a shift away from the pluralist conception of world order toward a solidarist position, terms associated with the influential writings of Hedley Bull and the En-

\begin{itemize}
\item \textsuperscript{46} Falk, supra note 28, at 59.
\item \textsuperscript{47} Evans, supra note 45.
\end{itemize}
glish School of international relations. Bull traced the solidarist assumption of an international society respectful of law and its enforcement to modern-day followers of Hugo Grotius (1583–1645). The pluralist view only minimally estimated the possibility for state agreement and international society of this kind. Bull identified Lassa Oppenheim and his first two volumes on *International Law* (*Peace*, 1905; *War and Neutrality*, 1906), and more classically Emmerich de Vattel (1714–1767), as advocates of the pluralist view.

Supporters of R2P rejected pluralism because of the belief that governing sovereignty norms did not deter state predation, or curb internal abuses caused by the state. Untimely, incomplete, and haphazard responses to internal atrocities during the 1990s attested to the muddled pluralist conceptions of humanitarian intervention. Crises in Somalia (1992–93), Bosnia (1992–95), Rwanda (1994), and Kosovo (1998–99) indicated pluralism’s doctrinal disarray; the international community was unable to predictably reconcile norms of sovereignty with intervention and obligation.

Pluralist views of international society attempted to defend plural conceptions of what was good, even though its champions, such as Bull and Robert Jackson, obliquely discussed the normative value “to be attached to the society of states.” Jackson described the pluralist view in terms of a global covenant, neither narrowly Machiavellian in pursuit of

---


50. See Bull, supra note 49, at 52.

51. See id.

52. Dunne, supra note 29, at 88.


power politics nor expansively framed by a Kantian community of mankind.\textsuperscript{56} His construction of pluralism attempted to move away from false dichotomies prevalent in the second half of twentieth century international relations scholarship, which made ethics and politics mutually exclusive.\textsuperscript{57} The pluralist covenant represented a balancing of procedural stabilizing norms (such as non-intervention) and prudential national security interests.\textsuperscript{58} Pluralism accounted for perceived inconsistencies toward humanitarian interventions by recognizing competing interests. Nicholas Wheeler and Timothy Dunne reduced pluralism to states’ understanding that they did not share substantive goals, but they legally and morally were held together by “a common code of co-existence.”\textsuperscript{59}

1. \textit{Vattel’s Influence on Pluralism}

Bull identified Vattel as the intellectual progenitor of pluralism. His \textit{Les droit des gens} (1758) presented a realistic view of the world that rejected the existence of a superior political community.\textsuperscript{60} Vattel’s world drew on a legal line of intellectual descent from Grotius to Samuel Pufendorf (1632–1694) to Christian Wolff (1679–1754); after Vattel, it would carry on through Henry Wheaton (1785–1848) in America,\textsuperscript{61} and Joseph Chitty (1775–1841) in England.\textsuperscript{62} Vattel’s influence made an indelible mark on American juridical thinking and on America’s Founding Fathers,\textsuperscript{63} and dominated interna-

\textsuperscript{56.} \textit{See} \textit{Jackson, supra} note 32, at 16.

\textsuperscript{57.} \textit{Id.} at 8.

\textsuperscript{58.} \textit{See} \textit{id.} at 5.


\textsuperscript{60.} Martti Koskenniemi, \textit{International Community’ from Dante to Vattel, in Vattel’s International Law in a XXIst Century Perspective} 51, 51 (Vincent Chetail & Peter Haggenmacher eds., 2011) [hereinafter Chetail & Haggenmacher].

\textsuperscript{61.} \textit{See} Nicholas Onuf & Peter Onuf, \textit{Nations, Markets, and War: Modern History and the American Civil War} 63 (2006) (discussing the importance of Wheaton).


\textsuperscript{63.} \textit{See} Hunter, \textit{supra} note 62, at 480 (noting Vattel’s tome provided vocabulary for the Declaration of Independence, was regarded as a diplomatic handbook for the Founding Fathers, and became a key textbook at William
tional legal thinking into the twentieth century.\textsuperscript{64} He emphasized the autonomy of state actors in their voluntary and external relations.\textsuperscript{65} Eighteen chapters of \textit{Les droit des gens} reflected this autonomy by presenting nations’ voluntary adherence to rules regulating war.\textsuperscript{66} And, although deeply indebted to the teachings of Wolff,\textsuperscript{67} Vattel famously rejected his teacher’s proposition that the international community formed a “great republic” of states—a \textit{civitas maxima}.\textsuperscript{68}

2. \textit{The Rejection of Wolff’s Civitas Maxima}

Vattel rejected Wolff’s image of an international community. “This idea does not satisfy me at all;” he wrote: “I do not find the fiction of such a republic . . . solid enough to deduce the rule of a law of nations universally and necessarily admitted among sovereign states. . . . Nothing like this can be con-

ceived or supposed to subsist between nations." 69 Wolff con-
strued his civitas maxima as a voluntary union of states standing
above the states themselves, forming a great republic of laws
binding and superior to the individual wills of states. 70 In his
vision, nations as a whole were granted "a right to coerce indi-
vidual nations if they should be unwilling to perform their
obligations or show themselves negligent in their perform-
ance." 71 To operationalize the international community’s vir-
tuous coercive power, Wolff conceived of an inexact
equivalent of the Security Council—a headmaster (rector) 72—
who was responsible for implementing “what nations ought to
consider as law among themselves.” 73 Wolff’s rector had no
power to rule, as would a leader in a sovereign civitas; 74 it
lacked a discretionary power-conferring status of an interna-
tional executive; 75 and it was devoid of an institutional form, as
suggested by a communal or organizational jurying mecha-
nism to oversee legitimacy concerns involved in humanitarian
intervention. 76 Additionally, Wolff’s rector had no power to

69. I VATTÉL, supra note 65, at xvii (“Cette idée ne me satisfait point, & je ne
trouve la fiction d’une pareille République ni bien juste, ni affez solide pour en déduire
les règles d’un Droit des Gens universel & nécessairement admis entre les Etats souvera-
ins. . . . On ne peut rien concevoir, ni rien supposer de semblable entre les Na-
tions.”).

70. See II WOLFF, supra note 68, §§ 13–15, at 14–15 (locating the civitas
maxima in relation to states). The translation by Joseph H. Drake refers to
the civitas maxima as a ‘supreme state,’ rather than the preferred and more
accurate reference to the term as a ‘grand republic.’ See PETER ONUF &
NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN
AN AGE OF REVOLUTIONS, 1776-1814, 12 n.20 (1993) (referring to Drake’s
rendition of “civitas maxima” as supreme state “wildly inappropriate.”).

71. Id. § 13, at 14. See also Rossi, supra note 34, at 559–60 (discussing
Wolff’s granting of invasive legal rights to nations as a whole).

72. See Nicholas Greenwood Onuf, Civitas Maxima: Wolff, Vattel and the
Fate of Republicanism, 88 Am J. Int’l L. 280, 298 (1994) (noting Wolff’s fic-
tional construction of a rector).

73. II WOLFF, supra note 68, § 21, at 17.

74. Onuf, supra note 72, at 298.

75. See ANNE ORFORD, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY
TO PROTECT 10–13, 25–26 (2011) (reviewing the chief administrative officer
provisions of the U.N. Charter and the broad and discretionary operational
expansion of executive action under the Secretary-Generalship of Dag Ham-
marskjöld).

76. See Thomas Franck, LEGALITY AND LEGITIMACY IN HUMANITARIAN INTERVEN-
TION, 47 HUMANITARIAN INTERVENTION 143, 150 (2006) (discussing the idea of
a Grand Jury mechanism).
step outside the legal order to deal with concrete existential threats to the system, as required by Carl Schmitt’s twentieth century reconstruction of sovereign duty during an exceptional state of emergency (Ausnahmezustand).\footnote{77} Wolff’s rector merely collated the community’s peace and security interests.\footnote{78}

Vattel rejected even that idea, along with its construction of the international community as a unitary actor. To Vattel, the law of nature rationally disposed individuals to assist each other in civil society because individuals were “capable of doing so little by themselves, that they can scarcely subsist without the succors and laws of civil society.”\footnote{79} Similarly, societies embrace powerful functional motivations to carry on communication and commerce with each other for mutual benefit.\footnote{80} But fundamentally, “[s]tates conduct themselves in a different manner from individuals.”\footnote{81} Vattel espoused a concept of autonomy, vesting in the state authority to interpret its own obligations, thereby loosening “considerably the social bonds that existed among [s]tates according to previous natural law concepts of international community.”\footnote{82} Vattel’s pluralistic legacy located international responsibility, and situated it resoundingly in the voluntary actions of individual states.

\footnote{77. See generally Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty (George Schwab trans., 2005) (1922) (emphasizing the sovereign’s state of emergency capability). Schmitt’s sovereign was “he who decides on the exception.” Id. at 1.}

\footnote{78. See Onuf, supra note 72, at 298 (noting the voluntaristic functions of Wolff’s rector consistent with natural law).}

\footnote{79. I Vattel, supra note 65, at xviii (“Or la Nature a bien établi une Société générale entre tous les hommes, lorsqu’elle les a faits tels qu’ils ont absolument besoin du secours de leurs semblables, pour vivre comme il convient à des hommes de vivre; mais elle ne leur a point imposé précisément l’obligation de s’unir en Société Civile proprement dite”).}

\footnote{80. Id. at xviii–xix (“Ces Sociétés ont encore, il est vrai, de grands motifs de communiquer & de commercer ent’elles, & eûs y font même obligations.”).}

\footnote{81. Id. at xix (“Les Etats se conduisent autrement que des particuliers.”).}

\footnote{82. Anthony Carty, Vattel’s Natural Liberty of Conscience of Nations in a New Age of Belief and Faith, in Chetail & Haggenmacher, supra note 60, at 189.}
B. Solidarist Views

Solidarist views configured a new framework of state identity around a larger value of international community. This meta-value coalesced through a Feurbachian inversion of the sovereign-subject relationship, where notions of legitimacy conflated the image of the state in terms of the subjects it served. Legal obligations protected individuals against the power of the state, but the solidarist perspective embraced legitimacy arguments external to the international legal framework, which itself inadequately dealt with the problem of internal abuse.

1. Solidarism in Historical Context

The notion of an international community as an expression of universal values and solidarity beyond political division has a deep intellectual tradition in western jurisprudential circles and beyond. Despite egocentric understandings of universalism that encroach on the historiography of international law, Roberto Ago made the case for a sole pluralistic international community—not a plurality of distinct communities—arising in the Euro-Mediterranean world and involving Western-Catholic, Byzantine-Orthodox, and Arab-Islamic interac-


86. See Koskenniemi, supra note 60, at 51 (detailing that history from a western legal perspective).

87. Yasuaki Onuma noted the problem of egocentric universalism repeats in history, referencing the Han dynasty’s Sinocentric notion of universality in the third century B.C.E., the doctrine of the siyar in Islam from the seventh century, and Eurocentric constructions of universality after the birth of the state system. See generally Yasuaki Onuma, When Was the Law of International Society Born?—An Inquiry of the History of International Law from an Intercivilizational Perspective, 2 J. Hist. INT’L L. 1 (2000).
tions in the Middle Ages. Taslim O. Elias connected Europe’s pre-colonial international community to sub-Saharan Africa. Martti Koskenniemi reviewed the genealogy of international community from the western perspective, beginning with the teachings of Seneca (4 B.C.E.–65), Cicero (106 B.C.E.–43 B.C.E.), and the Stoics in Rome, tracing its development through Dante’s (1265–1321) universal, secular authority of the emperor in *De Monarchia* (c.1310), Machiavelli’s (1469–1527) *Discorsi*, the scholastic writings of Francisco de Vitoria (1492–1546) and Vázquez de Menchaca (1512–1569), Grotius, and leading jurisprudential figures of the German Enlightenment (*Aufklärung*), Pufendorf, Leibniz (1646–1716), and Wolff, and up to the writings of Vattel. Koskenniemi noted the unreconciled and historical tension between the idea of international community and its institutional realization result in the norm serving only as metaphor, and not as a change agent. Jackson made a similar point, arguing evidence of an operative international community as opposed to a conceptual international community is harder to come by in a world where the centrality of sovereignty is impossible to ignore. African scholars have noted western narratives on international community overlook operative and conceptual African understandings of community, which construe the individual and the collective differently than western emphases, and “limit the operation of Westphalianism.”


90. See generally Koskenniemi, *supra* note 60.

91. See id. at 51.


ontological development and study reveal multiple understandings of the concept of international community.

Solidarists drew intellectual sustenance from Immanuel Kant (1724–1804), who regarded his near contemporary Vattel and his intellectual forbearers, Pufendorf and Grotius, as “useless and impotent defenders” or ‘miserable comforters’ of a pedantic jus gentium—law of nations—that accommodated a right of war. Kant’s call for the creation of a civitas gentium, a federation of states to supersede the Vattelian law of nations, provided a pathway for a cosmopolitan future once Vattel’s powerful influence waned.

2. Modern Solidarists

In his Hague lectures, Bruno Simma helped popularize the idea that international law was transitioning from a statist order built on a bilateralist structure of consent-based legal relations to a system incorporating common interests of the international community. Informed by the tools of the positivist tradition, Simma was a shy cosmopolitan who searched to achieve those ends without pulling up roots, presumably roots grounded in Simma’s acknowledged state-centric soil. Others, principally liberal cosmopolitans, have become among


94. IMMANUEL KANT, PERPETUAL PEACE 31 (1932) (1796).
95. See Hunter, supra note 62, at 478 (referencing the Second Definitive Article of Perpetual Peace); GEORG CAVALAR, IMPERFECT COSMOPOLIS: STUDIES IN THE HISTORY OF INTERNATIONAL LEGAL THEORY AND COSMOPOLITAN IDEAS 70–71 (2011) (interpreting leidige Tröster as an attack against natural law lawyers and the gloss they put on the state of nature).
96. KANT, supra note 94, at 34.
the most ardent supporters of R2P. Anne-Marie Slaughter argued that the disaggregated state system’s roots are being supplanted by trans-governmental, liberally-inspired networks of democratic governance, which remain accountable to the world’s peoples.100 Fernando Tesón interpreted R2P as license to support regime change in order to restore liberalism’s grander community virtues and a Kantian center of gravity between the autonomous person and the ethically-personified state.101 French Foreign Minister Bernard Kouchner proposed a militant version of R2P to force humanitarian assistance to Burma over objections of Burma’s military dictators following a natural disaster in 2008.102 Jürgen Habermas located R2P’s legitimacy in a rejection of international law’s legal pacifism (Rechtspazifismus) and the elevation of the international community’s leap in the direction of the “cosmopolitan law of a world civil society.”103 Ruti Teitel put forth a new narrative of progressive law, *Humanity’s Law* (2011), where the vocabulary of humanity and the ascendancy of humanity-based discourse converge around a global rule of law.104 Alternatively, Nicholas Wheeler, in his influential work, *Saving Strangers* (2000), attempted to step outside the framework of international law to


construct a theory of ethical statecraft, as did Alan Buchanan, who proposed reformist moral guidelines justifying illegal acts done to improve the defective international legal system and its inadequate response to atrocity. Solidarism’s supporters interpret the structure of international relations as receptive to ethical transformations that operationalize Kant’s call for establishment of a *civitas gentium*.

C. Agency—The Missing Puzzle Piece

Solidarist justifications for humanitarian intervention continue to search for the balance between the idea of the international community and its expression in institutional form. Skeptics point to hegemonic and dubious purposes undergirding solidarism and its connection to liberal internationalism, either in terms of liberalism’s co-optation of the language of universality and humanity as useful instruments of imperialist or militarist expansion or, in its targeting of states or regions such as Africa with a civilizing mission.

---


“Without a substantive entrenchment in the political process,” noted Friedrich Kratochwil, appeals to international community invite, at worst, unilateral actions and at best tenuous outcomes reflective of metaphors and conceptual constructs rather than settled practice. Frank Schimmelfennig described this political entrenchment in terms of the relationship between societal interaction and the presence of a common ethos among states. Drawing a metaphor to dramaturgy, Schimmelfennig analyzed the international community as a theatrical stage of state relations. Where a common ethos converges around tightly-knit constitutive values that define a collective identity and the procedural and socio-psychological effects of the cultural environment reflect a “high interaction density,” a conformity-inducing community is created. This community functions as a cohesive script, shaming actors into compliance because of the expected and understood roles they play. This “we-feeling” produces a “common in-group identity;” it is endogenous to interaction and it invests actors with an interest in preserving their culture, making the welfare of the group an end in itself. Schimmelfennig noted the features of this ethos are most strongly developed in the highly institutionalized and integrated liberal community of Europe, although this point is now more contested following Britain’s June 2016 vote to exit the European Union.

Disconfirming evidence does not undermine faith in goals. But if the goal is to implement R2P in areas of low interaction density, then Kratochwil suggested paying attention to the tensions among, not simply within, states that form part of R2P’s wider political project. This wider project presupposes the existence of a super norm—the cosmopolitan community—which serves as the virtuous stop-gap agency to

111. See generally ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959) (applying dramaturgy to sociological inquiry).
113. ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS 339 (1999); see also Peltonen, supra note 4, at 479–81.
114. See Schimmelfennig, supra note 112, at 434.
115. KRATOCHWIL, supra note 112, at 135.
116. Id. at 105.
combat atrocity when individual states violate their primary responsibility to do the same. The community’s cosmopolitan values are the *gluons* that initiate the novel sovereignty-shifting procedure of R2P. In the form of the international community, these values reverberate as R2P’s prophetic savior. But can a collective identity form around R2P to make it more concrete?

1. Hartian Power-Conferring Standards

R2P construes sovereignty as a union of primary duty-imposing standards on individual countries and secondary power-conferring standards on the international community. This interplay between primary and secondary standards reflected H.L.A. Hart’s understanding of a legal system, which profoundly influenced English School theorists, principally Bull. Hart construed primary duty-imposing rules as rules of “do” and “don’t;” they stem from criminal law and tort; they punish; and they derive from the positivistic teaching of John Austin (1790–1859). Secondary power-conferring standards provide the facilities for “realizing wishes.” They are not rules that require something to be avoided or done, but are instead rules of change—enabling rules, which add to, modify, or eliminate old primary rules. They stem from the law of contract, wills, and marriage (more broadly, from public law). They provide the creative and generative “procedures” and structures to fill gaps, keep the system running, and create new “rights and duties within the

117. See id. at 135.
118. Rossi, *supra* note 34, at 357.
121. See Hart, *supra* note 119, at 27 (discussing rules to be avoided or done). See also John Austin, *The Province of Jurisprudence Determined* 5 (2d ed., Burt Franklin 1970) (1861) (“laws or rules, properly so called, are a species of commands”).
coercive framework of the law.” How would rules of “do” and “don’t” come into being without secondary rules specifying the allowable conditions under which they come into being? Secondary rules are rules of recognition. They are the rules of process for legislative and administrative rulemaking.

Anne Orford claimed R2P has been misconstrued in a Hartian sense. Orford claimed commentators improperly tend to associate R2P with duty-imposing standards, when it “can best be understood as a form of law that confers powers ‘of a public or official nature’ and that allocates jurisdiction”—akin to the power-conferring language of Article 99 of the U.N. Charter. Article 99 establishes the political authority of the Secretary-General to pursue a discretionary mandate of executive action. It does not instruct the Secretary-General on “do’s” and “don’ts,” or of the obligations of office, but rather serves as a means of conferring or expanding authority. Orford oscillated between operationalizing the Secretary-General as R2P’s headmaster for Hartian power-conferring and the United Nations itself as the institutional substitute for the role of rector.

2. Paternalism, Agency, and the “Tending To” of Norm Development

Operationalizing the role of the rector—determining who gets to decide the general will of the international community—generates concerns about paternalism. Michael Barnett claimed some form of residual paternalism inhered in any intervention to prevent internal atrocity, making it not neces-

124. Id.
125. See Onuf, supra note 122, at 13.
126. See Hart, supra note 119, at 27–32.
127. See Orford, supra note 75, at 25–26 (noting R2P and Hart’s jurisprudential views).
128. Id. at 25.
129. Id.
130. See id. at 26. U.N. Charter art. 99 holds: “The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.”
131. See Orford, supra note 75, at 26.
132. See id. at 26–27.
sarily desirable to remove.\textsuperscript{133} But, according to Habermas, even morally necessary paternalism would “still lack[] the quality of a compulsory legal action legitimated by a democratic civil society of global citizens.”\textsuperscript{134} Moral norms can only achieve their highest legitimate form of expression when established as legally enforceable norms.\textsuperscript{135}

But the international community’s transitory appearance in the discourse surrounding R2P makes its legal and societal power-conferring identity difficult to pinpoint. Agency—the medium capable of crystallizing and sustaining power-conferring authority—is a missing puzzle piece from solidarism’s project, prompting Kratochwil’s meditation on the need for practical diagnostics instead of ideal theorizing of a new constitutional order.\textsuperscript{136} Seductions of theory have taken for granted basic considerations that make the norm of the international community normative; the unreflective imputation of agency to the imagined collectivity of the international community weakens R2P of much of its promise as a tool of social construction.\textsuperscript{137} Solidarist interpretations of R2P conform rhetorical and metaphoric images of the international community to fit preconceived expectations and outcomes. These outcomes may imperfectly represent the interests of the people or cultures R2P purportedly represents and defends. These out-

\begin{itemize}
  \item \textsuperscript{133} Michael N. Barnett, The International Humanitarian Order 213 (2010) (“Paternalism is a latent or manifest feature of all relations of compassion.”). \textit{See also} Russell Buchan, A Clash of Normativities: International Society and International Community, 10 Int’l Community L. Rev. 3, 5 (2008) (framing the international community as a distinct and normatively superior community of liberal states than states represented by international society).
  \item \textsuperscript{134} Habermas, Bestiality and Humanity, supra note 103, at 270.
  \item \textsuperscript{135} See id. (“Moral norms appealing to our better judgment may not be enforced in the same fashion as established legal norms.”).
  \item \textsuperscript{136} See Kratochwil, supra note 110, at 25. Jean Cohen has recently critiqued pluralist and solidarist (monist) constructions of the globalizing present and the consequences for the dual state/international institution-system, articulating a model of constitutional pluralism as a third way, which itself, is in need of greater explication. \textit{See generally} Jean L. Cohen, Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism (2012).
  \item \textsuperscript{137} Nicholas Onuf makes these points as part of a self-criticism of the theoretical failings of constructivism, as developed by adherents who came to prominence in the 1990s. \textit{See Theory Talk #70: Nicholas Onuf, Theory Talks} (July 2, 2015), http://www.theory-talks.org/2015/07/theory-talk-70.html?m =1.
\end{itemize}
comes may even reshape the identity of the so-called international community, empaneled to configure a benignly paternalistic solution to internal crisis. What is the value of an international community response if the community is so fragmented as to also be part of the problem? The international community engaged originally through mediations led by the Intergovernmental Authority for Development (IGAD). Subsequently, IGAD transformed into IGAD-Plus, a multi-stakeholder amalgam of the A.U. Peace and Security Council (Algeria, Nigeria, South Africa, Chad, and Rwanda), the United Nations, the European Union, the so-called Troika (the United States, the United Kingdom, and Norway), and now China.138 This international community is heavily invested in South Sudan’s fate, and yet is seemingly powerless to prevent its collapse. The emergent dark side of humanitarianism139 contrasts the heteronomous will of the international community—itself fragmented, disunited, and partly responsible—against the destructive practices of the quasi-state of South Sudan, now fractured into warring factions.

Important twentieth century scholars have attempted to update Wolff’s powerful notion of the civitas maxima to a solidarist perspective. Kratochwil traced the international community’s evolving storyline in general international law, from Oppenheim to Kelsen, Lauterpacht, Friedmann, Allott, Falk, and more recently Tomuschat and Simma.140 Georg Cavallar summarized it as a sufficiently formed international community school, which synthesizes legal, moral and political considerations around emergent common values and cosmopolitan law enforcement.141 Simma and Paulus recorded its inflationary invocation by the U.N. General Assembly and Security Coun-


140. See Kratochwil, supra note 110, at 104, 136 (identifying authors of evolving narratives of international community).

141. Cavallar, supra note 95, at 134–35.
the International Court of Justice has acknowledged it in an assortment of cases. Even accounting for its widespread appearance in international law, Kratochwil is not sure its meaning is equally understood, or that the implementation of cosmopolitan law can be simply left hanging “to an ‘international community as a whole,’ or even a ‘humanity’ that cannot act.” Kratochwil noted that international law traditionally derived much of its meaning in its development of narratives of progress and universality, but his suspicion that law “might have become part of the problem rather than the solution” is more evident today. The realization of such a meta-narrative requires a “tending to”—practical or praxis-oriented correctives (Aufgaben) and adjustments to unforeseen problems. Daniele Archibugi, a cosmopolitan supporter of humanitarian intervention, recognized (like Schmitt) the problem of who decides when exceptional circumstances call


144. See KRATOCHWIL, supra note 110, at 135–36 (referencing the ontological development of a new cosmopolitan community order and the metaphoric fits and starts, far from smooth joyride of community values).

145. Id. at 89. Monica Hakimi recently has called for a retreat from R2P’s relation to the international community, proposing an interpretation of R2P that bundles the duties and responsibilities of the doctrine into external state-specific legal obligations conditioning external state conduct or relations rather than imposing on the entire international community all-encompassing responsibility for at-risk populations. See generally Hakimi, supra note 6.

146. See KRATOCHWIL, supra note 110, at 11 (noting the special importance in the international arena of narratives of progress and universality).

147. Id. at 2.

148. Id. at 291 (“Praxis directs our attention to the Aufgaben, that is tasks that are given and entrusted to us, which must be ‘taken care of.’”).
for international remediation. He cast suspicion on the impartiality of individual states, military alliances, and intergovernmental institutions to make this decision, favoring instead nongovernmental institutions.\footnote{149. \textit{See} Daniele Archibugi, \textit{Cosmopolitan Guidelines for Humanitarian Intervention}, 29 \textit{Alternatives} 1, 8–10 (2004) (suggesting, ideally, a World Parliament, followed by a Council of Experts or possibly the World Court).} Archibugi acknowledged that this point required refinement because nongovernmental institutions also lacked power-conferring agency.\footnote{150. \textit{Id.} at 10 ("[I]t is unlikely that such an institution will be created in the short term.").} Elsewhere, he acknowledged dangerous double standards among Western liberal states, which not only speciously immunize themselves against crimes democracies logically cannot commit, but demonstrate a weak record of cosmopolitan community-building: “With the sole exception of the International Criminal Court, Western liberal states have not responded to major institutional reforms of the system since the end of the Cold War.”\footnote{151. Daniele Archibugi, \textit{Cosmopolitan Democracy and its Critics: A Review}, 10 \textit{Eur. J. Int’l Rel.} 437, 438 (2004).} Even among solidarism’s proponents, ambivalence marks much of the discourse on agency and the tendency to of the international community.

As revealed in the following context-dependent discussion of South Sudan, two factors contribute to the international community’s normative diffusion regarding South Sudan. First, a unified expression of community interest never aligned. Cross-cutting political interpretations made South Sudan’s secession of paramount importance in the global war on terror. Its independence dovetailed with parochial domestic political interests, especially in the United States.\footnote{152. \textit{See infra} notes 191–92.} But its independence also contributed to fragmentation within the regional context of IGAD and among emerging powers such as China, Russia, and Brazil, where the western ideological construct of community does not monolithically coalesce.\footnote{153. \textit{See} Ipinyomi, supra note 12, at 5.} Second, the region specific context for the adaptation of community standards emerged as an important but overlooked consideration. South Sudan’s dire circumstance suggests an international community response impatient with pluralist discourse but deprived of a solidarist response. The situation calls

\begin{itemize}
\item \footnote{149. \textit{See} Daniele Archibugi, \textit{Cosmopolitan Guidelines for Humanitarian Intervention}, 29 \textit{Alternatives} 1, 8–10 (2004) (suggesting, ideally, a World Parliament, followed by a Council of Experts or possibly the World Court).}
\item \footnote{150. \textit{Id.} at 10 ("[I]t is unlikely that such an institution will be created in the short term.").}
\item \footnote{152. \textit{See infra} notes 191–92.}
\item \footnote{153. \textit{See} Ipinyomi, \textit{supra} note 12, at 5.}
\end{itemize}
for a solution, or at a minimum, an approach to R2P grounded in shared understandings and common denominators.

III. The Problem of South Sudan: A Brief History in Context

Sudan split into two countries on July 9, 2011 following an internationally monitored referendum held in January 2011. The referendum concluded a six-year transition period launched by a Comprehensive Peace Agreement (CPA) in 2005. The CPA attempted to promote wealth and power sharing in hope of preserving unity for the deeply divided country. Unity did not prevail and the southern Sudanese voted almost unanimously to secede. The northern


156. See, e.g., AFTER THE COMPREHENSIVE PEACE AGREEMENT IN SUDAN (Elke Grawert ed., 2010). Foreign countries facilitating the CPA (principally the troika—U.S., Norway, and UK) much preferred keeping Sudan united to avoid the “dangerous precedent” secession would set for other fragile states. RICHARD CROCKETT, SUDAN: DARFUR AND THE FAILURE OF AN AFRICAN STATE 251 (2010).

157. See BONA MALWAL, SUDAN AND SOUTH SUDAN: FROM ONE TO TWO 15 (2015) (claiming the parties did not use well the interim six-year period). Southern Sudan’s leader, John Garang de Mabior, who briefly served as First Vice President of Sudan, following the peace accord, perished in a helicopter crash on July 30, 2005, three weeks after assuming office. His death created a power and leadership vacuum that respected authorities indicate may have doomed prospects for unity. On Garang’s untimely death and its impact on the fate of South Sudan, see Jok Madut Jok, Orphaned: Sudan after John Garang and the Specter of Disintegration, in NEW SUDAN IN THE MAKING?: ESSAYS ON A NATION IN PAINFUL SEARCH OF ITSELF 457 (Francis M. Deng ed., 2010); and Francis M. Deng, Tributes to Dr. John Garang de Mabior, in NEW SUDAN IN THE MAKING?, supra, at 475.

country retained its name, Sudan. The southern state became The Republic of South Sudan, which the U.N. General Assembly admitted as its newest member on July 14, 2011.

Negotiations leading to independence were drawn-out in Sudan, the site of Africa’s longest-running civil war. Secession, brokered by IGAD, signified a major diplomatic accomplishment for African regional diplomacy.

African countries first intensified efforts to end post-colonial violence in the early 1990s following endemic fighting over two extended periods. The first period began in 1955, foreshadowing the creation of Sudan in 1956 and the end of colonial rule (1899–1956). An Anglo-Egyptian condominium...
agreement governed this colonial period, after which the country quickly devolved into fractious self-rule. The Addis Ababa agreement in 1972 brought an end to this first seventeen-year period of warfare and resulted in some autonomy for southern Sudan. A second protracted period of civil war prevailed from 1983 to 2005, resulting in more than two million deaths and four million persons displaced. It was during this period that IGAD began directing negotiations to end that violence. In 1994, a Declaration of Principles established guideposts for peace, focusing on religious persecu-

163. British and Egyptian flags flew side-by-side in the Sudan between 1899 and 1955, during the Anglo-Egyptian condominium period. Despite appearances of an equal relationship, Egypt appointed Sudan’s governor-general who was nevertheless beholden to Britain as the occupying power. See P.M. Holt & M.W. Daley, A History of the Sudan: From the Coming of Islam to the Present Day 85–86 (6th ed. 2011); A Concise History of South Sudan 118–19 (Anders Breidlid et al. eds., 2010) (labeling the condominium a “farce”).


tion and federalism issues dividing North and sub-Saharan Sudan, which eventually led to the establishment of the CPA.

A. Optimism Followed by Despair

A sense of opportunity accompanied the state’s creation. Diplomats, liberal human rights groups, world leaders, and the World Council of Churches joined in celebration. But sentiments quickly devolved into feelings of “despair,” “anger,” and “betrayal” toward the political leadership of South Sudan. Deep suspicions between South Sudan’s President, Salva Kiir Mayardit and former Vice President, Riek Machar


exploded on December 15, 2013, propelling the new country into a third civil war in addition to ongoing border clashes with neighboring Sudan in the disputed oil-rich region of Heglig/Pathou. Despite an August 2015 permanent ceasefire agreement, the U.N. High Commissioner for Human Rights and Amnesty International reported continuing turmoil in the South Sudanese states of Unity and Upper Nile, with violence spreading into Western and Eastern Equatoria states. An A.U. Commission of Inquiry Report of October 27, 2015, found evidence of war crimes committed by Kiir’s government and Machar’s opposition forces. Marauding and loosely formed militias—the Nuer White Army, the Dinka Gulgeng, the Otuho Monyimijii of Eastern Equatoria, the Azande Arrow Boys, the Ugandan Lord’s Resistance Army in Western Equatoria, and lesser known or previously unknown

---


armed ethnic groups such as the Bor Youth, the Maban Defence Force, and armed cadres among the Shilluk people in Upper Nile—populate the countryside and contribute to widespread banditry and vigilantism.\footnote{179} Having “never seriously invested in building credible state institutions,” South Sudan has become a “hijacked state,” and a “violent kleptocracy.”\footnote{180} After only four years, it had earned the label of the “world’s most failed state.”\footnote{181} Since its inception, two million people have been displaced and seven million people desperately need food, making South Sudan one of the great tragedies in the world today.\footnote{182} A much delayed and most tenuous unity government brought the rivals together in late April 2016.\footnote{183} But this unity government was not united. The factions had warred to the limits that bankruptcy and voracious thievery allowed. A need for respite addressed the only unified interest—controlling outcomes to forestall a personal accounting of atrocities allegedly committed by the factions.\footnote{184} Invoking the name of

---


\footnote{180} Independent South Sudan, supra note 173 (statement of John Prendergast, Founding Director, Enough Project), http://www.foreign.senate.gov/imo/media/doc/121015_Prendergast_Testimony.pdf. See also Alex de Waal, When Kleptocracy Becomes Insolvent: Brute Causes of the Civil War in South Sudan, 113/452 AFR. AFF. 347 (2014).

\footnote{181} Ashish Kumar Sen, At Four Years Old, South Sudan is the ‘World’s Most Failed State’, ATLANTIC COUNCIL (July 9, 2015), http://www.atlanticcouncil.org/blogs/new-atlanticist/at-four-years-old-south-sudan-is-the-world-s-most-failed-state.


\footnote{184} See David Pressman, Alternate Representative to the U.N. for Special Political Affairs, U.S. Mission to the U.N., Explanation of Vote at the Adoption of U.N. Security Council Resolution 2290 on South Sudan Sanctions...
the international community to support their non-punitive plea for reconciliation, Kiir and Machar opined in the Op Ed pages of the *New York Times* in June 2016 that any use of international law to format a plan for disciplinary justice would destabilize reunification efforts. 185 But the disingenuous pieties to the international community unraveled and the political disunity of South Sudan was soon on full display, as Machar disavowed its contents following publication, 186 forcing the *New York Times* to admit it should not have relied on the opinion piece’s authenticity merely because it had been submitted by acknowledged representatives of the government of South Sudan. The misery continues in the wake of the unity government’s unsurprising collapse.187


B. Difficult Policy Options for the International Community

South Sudan’s astonishing degeneration presents difficult policy options. The United States strongly supported South Sudan’s independence, helped “midwife” its birth, and poured billions of dollars into achieving that result. An independent South Sudan represented an important foreign policy accomplishment for the United States in sub-Saharan Africa, seemingly accomplishing democratization and religious freedom objectives and counterbalancing concerns that Sudan provided a safe haven for terrorists. The United States remains the largest provider of bilateral foreign assistance to Democratic Republic of Congo. See Denis Dumo & Michelle Nichols, South Sudan Opposition Leader Machar Seeks Safety in Neighboring DRC, REUTERS (Aug. 18, 2016), http://www.reuters.com/article/us-southsudan-security-idUSKCN10T0N3?il=0. However, Sudan claims he is now in Khartoum receiving medical treatment. See Machar in Khartoum for “Medical Treatment,” Says Sudan’s Minister of Information, SUDAN TRIB. (Aug. 24, 2016), http://www.sudantribune.com/spip.php?article60015.


190. See Lynch, supra note 170.


192. See Staff of Nat’l Comm’n on Terrorist Attacks Upon the U.S., 9/11 COMMISSION REP. 57 (2004) (discussing Sudanese political leader Hassan al Turabi’s discussions with Osama Bin Laden about allowing Sudan to serve as a base of operations for Bin Laden’s world-wide jihad in exchange for assistance with Turabi’s campaign against southern Sudanese Christians); AL-jazeerah AMERICA, supra note 158 (quoting Alex de Waal on the Clinton Administration decision to support regime change by proxy).
tance and a major financial contributor to peacekeeping efforts in the country. The African Union, IGAD, and the United States contemplated punitive measures against both warring factions, and the Security Council tacitly acknowledged the facade of the unity government by extending sanctions until May 31, 2017. But the threat or use of sanctions to modify this extreme political behavior must strike the right balance between incentivizing positive change and avoiding counterproductive political and unanticipated humanitarian consequences. The United States already subjects Sudan to severe economic sanctions as a sponsor of state terrorism, and invites embarrassment or backlash by imposing sanctions against the country it motivated to reunite and so recently helped to gain independence. But embarrassment cannot disguise dismay: U.S. National Security Advisor Susan Rice expressed horror “of all that has been lost;” U.S. Secretary of State John Kerry noted his “very personal stake” in the deteriorating situation; and President Barack Obama, recognizing

---
196. Sudan’s designation as a state sponsor of terrorism by the United States Secretary of State results in economic sanctions pursuant to § 6(j) of the Export Administration Act, § 40 of the Arms Export Control Act, and § 620A of the Foreign Assistance Act. These measures require restrictions on United States foreign assistance, a ban on defense exports and sales, dual use export controls, and miscellaneous financial and other restrictions. See State Sponsors of Terrorism, U.S. Dep’t of St., http://www.state.gov/j/ct/list/c14151.htm (last visited Oct. 5, 2016).
the threat to U.S. interests, took the dramatic step of engaging directly in South Sudanese negotiations.\footnote{199}

1. \textit{Problems Present at the Creation of South Sudan}

Few experts were optimistic about the prospects of a smooth transition to democratic statehood for South Sudan. The CPA provided a roadmap, and a complicated one at that,\footnote{200} but abject conditions of poverty belied its ability to provide a comprehensive solution.\footnote{201} Although the country is resource rich,\footnote{202} South Sudan’s people are among the poorest in the world.\footnote{203} They live in a region riven by decades of conflict, and South Sudan itself has been at war for forty-two of the past sixty years. Half its population lives on less than one dollar a day; more than ninety percent of women cannot read or write; less than two percent of children complete primary school; and three-quarters of its estimated twelve million inhabitants have no access to health care.\footnote{204} Its economy is the


\footnote{202. See \textit{South Sudan Overview}, \textit{The World Bank}, \url{http://www.worldbank.org/en/country/southsudan/overview} (last updated Apr. 9, 2016) (noting “South Sudan has vast and largely untapped natural resources”).


most oil-dependent in the world, and revenue has declined dramatically due to a world-wide slide in oil price. Outside the oil sector, South Sudanese livelihoods hinge on agriculture and pastoral work, of which eighty-five percent is non-wage earning. The World Food Program regards it as one of the most food-insecure countries in the world. Serious ethnic violence in the border states of South Kordofan and Blue Nile attest to political and humanitarian problems present at the creation of South Sudan. Shortly before independence, U.N. peacekeepers (the U.N. Interim Security Force for Abyei or UNISFA) deployed to the strife-torn, fertile, oil-rich Abyei Area, where they remain to this day. Also present were ad hoc, undisciplined, but well-armed and mobilized militias, creating widespread security sector concerns. Underdeveloped accountability measures to foster truth-and-reconciliation efforts in the new state complicated transition efforts, and were exploited in an indiscreet form of blackmail with the New York Times Op Ed piece: If you attempt to bring us to justice, we will bring back war. This is a threat they may yet bring about on their own motion. Sudanese President Omar al-Bashir, the man accused of responsibility for genocide in Sudan’s western

205. THE WORLD BANK, supra note 202 (meaning oil accounts for almost the totality of exports and around sixty percent of South Sudan’s gross domestic product).
206. Id.
province of Darfur,210 actively attempted to subvert essential features of the CPA, in part by further destabilizing Darfur,211 and thwarting the referendum.212 The failed or delayed responses to humanitarian crises in Rwanda, Somalia, Ethiopia, Congo, and Sierra Leone indicated a lack of an international accounting, contributing to the sense President al-Bashir acts with impunity in the face of his alleged crimes in Sudan.213

210. The International Criminal Court issued two warrants of arrest for President al-Bashir, on March 4, 2009 and July 12, 2010, claiming his individual criminal responsible under art. 25(3)(a) of the Rome Statute as an indirect (co) perpetrator, including five counts of crimes against humanity, two counts of war crimes, and three counts of genocide. See Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Pre-trial, https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20ICC-02/05/related%20cases/icc02050109/Pages/icc02050109.aspx; see also Olivier Degomme & Debarati Guha-Sapir, Patterns of Mortality Rates in Darfur Conflict, 375 LANCET 294 (2010) (presenting overviews and analyses of mortality rates in Darfur including U.N. estimates of three hundred thousand excess deaths from February 2003 to April 2008).

211. Eric Reeves, The Slow Collapse of the Comprehensive Peace Agreement for South Sudan, SUDAN: RESEARCH, ANALYSIS, AND ADVOCACY (Sept. 24, 2005), http://sudanreeves.org/2005/09/24/the-slow-collapse-of-the-comprehensive-peace-agreement-for-south-sudan/. Reeve’s catalog of Khartoum’s interferences with implementing the CPA include problems with its military withdrawal from the south, disarming of proxy militia, accepting findings of the Abyei Boundary Commission, oil revenue sharing, and creating partnership opportunities in national governance. Reeves notes the NCP’s bad faith extends to all agreements it has signed with any Sudanese party including the Darfur Peace Agreement (Abuja, 2006), the Eastern Sudan Peace Agreement (October 2006), the Doha Document for Peace in Darfur (July 2011), the Status of Forces Agreement with UNAMID, and various humanitarian access agreements. See Reeves, supra note 158.


and opposition leaders in South Sudan may react the same way.

2. Perceptions of Binary Conflict

Perceptions of binary conflict may hinder the formation of solidarist solutions for South Sudan. Labeling this enduring conflict as between North and South may eclipse or simplify other binary portrayals of Sudan’s plight. Sudan’s human and ideological geography is sometimes contrasted as between Arabs and Blacks, Muslims and Christians, democrats and authoritarians, and secularists and theocrats.214 Francis Deng, an original proponent of R2P, an ethnic Dinka hailing from the disputed region of Abyei, and South Sudan’s first Ambassador to the United Nations, claimed religious strife along the North/South (Arab/sub-Saharan) divide was the pivotal factor in Sudan’s internal conflict.215 But ethnic divisions in South Sudan have long been identified as additional causes of societal conflict. These divisions among rebel southern factions often reduce to distinctions between the Dinka and Nuer peoples, famously studied by anthropologist E.E. Evans-Pritchard. His seminal ethnographic research described the Dinka people as the “immemorial enemies of the Nuer,” and he devoted considerable attention to the structure and function of Dinka and Nuer societies and their mutual practices of cattle raiding.216 Anthropologist Raymond Kelly added complexities associated with the Nuer’s nineteenth century historical displacement of the Dinka, summarizing it as “one of the most prominent instances of tribal imperialism contained in the
ethnographic record.”

Certainly ethnic tensions between these largest ethnic groups in South Sudan contribute to deep political and military suspicions within South Sudan’s principal civil society institutions and its governing political wing and army (the Sudan People’s Liberation Movement/Army or SPLM/A). Political brokering matched the ethnic Dinka President Salva Kiir with the ethnic Nuer Vice President Riek Machar, creating intricate cross-cutting allegiances among South Sudan’s key governing elite. But North and South Sudan are home an array of ethno-linguistic profiles “covering Hamitic, Semitic, Nilotic, Bantu” and other groupings. It is estimated that there are between one hundred and four hundred, tribal languages and dialects, fifty ethnic groups, and upwards of six hundred tribes, clans, and sub-clans. These considerations add complexity to solidarism’s binary classifications of the conflict. The international community’s intent on solving the North/South dispute belied an understanding of internecine tensions in the South that swiftly burst onto the scene.

3. Colonial Effects

Drawing a colonial boundary around this ethnological mix, followed by Britain’s imposition of “Closed District” ordinances in the early 1920s, separated areas in southern Sudan (Southern Kordofan, the Nuba Mountain region, southern Blue Nile, and Darfur). This imperial policy promoted indirect rule over the southern Sudanese chiefdoms, reinforced extant hierarchies pertaining to land management, and made the post-colonial adoption of *uti possidetis* (as you possess, so you may possess) attractive, but complicated, posing

---


serious consequences for political stability.\footnote{See generally \textit{Saadia Touval, The Boundary Politics of Independent Africa} (1972); \textit{Giuseppe Nesi, L’Utì Possidetis Iuris nel Diritto Internazionale} (1996); \textit{Joshua Castellino \\& Steve Allen, Title to Territory in International Law: A Temporal Analysis} (2003).} Taking a page from British colonial rule, President Kiir recently abandoned South Sudan’s ten state structure and replaced it with twenty-eight states, a sub-state division of power that has generated widespread criticism as a thinly-veiled means of disenfranchising and diluting opponents of his misrule.\footnote{President Kiir’s new federal structure has provoked constitutional criticism and internal and international complaint that it bypasses parliament to dilute opposition power and to sway future border demarcations. See \textit{South Sudan’s Kiir Appoints Governors of 28 New States}, \textit{Sudan Trib.} (Dec. 25, 2015), \url{http://www.sudantribune.com/spip.php?article57484} (discussing President Kiir’s Republican Order to appoint twenty-eight new governors); \textit{Troika Urges Delay to Plan for New South Sudan States}, \textit{Reuters} (Oct. 6, 2015), \url{http://www.reuters.com/article/us-southsudan-troika-idUSKCN0S029620151006} (mentioning border demarcation issues as a possible rationale and internal and international objections).}

\textbf{C. The International Community and the Flawed Peace Process}

Material complexities hinder solidarist solutions to the problems of South Sudan. The international situation taxes the finances and logistical efforts of relief agencies\footnote{See \textit{South Sudan Crisis Deepens as Once-Stable Areas Fall into Violence—UN Relief Chief, UN News Centre} (Aug. 2, 2016), \url{http://www.un.org/apps/news/story.asp?NewsID=54662#WATyxdUrLb0} (noting in addition to the increasing humanitarian disaster a seven hundred million dollar gap in humanitarian funding needs that is likely to increase).} and poses major peacekeeping problems for the United Nations.\footnote{Spencer Zifcak, \textit{What Happened to the International Community? R2P and Conflicts in South Sudan and the Central African Republic}, 16 \textit{Melb. J. Int’l L.} 52, 72 (2015) (noting financial constraints regarding South Sudan peacekeeping).} The U.N. Mission in Sudan (UNMIS), originally created to facilitate peace during the six-year interim period from July 2005 to January 2011, then re-created as the U.N. Mission in South Sudan (UNMISS)\footnote{UNMIS: \textit{United Nations Mission in Sudan}, \url{https://unmis.unmssions.org/} (last visited Oct. 5, 2016).},\footnote{Zifcak, \textit{supra} note 223, at 53.} became “completely overwhelmed”\footnote{Zifcak, \textit{supra} note 223, at 53.} by the crisis and has expanded its troop presence from seven thousand personnel to twelve thousand five hundred while shifting focus from post-conflict peacebuilding ac-

tivities to protecting civilians. Additional peacekeeping operations include the UNISFA, the U.N.-A.U. Hybrid Operation in Darfur (UNAMID), and the U.N. Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), complicating and regionalizing migratory aspects of this unfolding humanitarian crisis.

Solidarism’s inchoate understanding of the peace process itself—including external approaches toward it—also challenged peaceful transition in South Sudan. Secession proponents fell into humanitarianism’s morality hazard by insufficiently accounting for unintended consequences that contributed to the violence secession was meant to prevent. According to John Young, support coalesced around President al-Bashir’s evolution from a radical Islamist to a moderate, as false and dangerous as that estimation became, because his National Congress Party (NCP) had no realistic choice but to endorse the referendum it wished to forestall. Diplomats from the United Nations, African Union, United States, and European Union overlooked opposition voices in the North and South and focused on the referendum process rather than on key ingredients of democratic transformation. A lack of progress on post-referendum issues awaited resolution and few voices gave any consideration to the isolation from the negotiation process of non-SPLM groups in the south, and how the peace process might naturally inspire separatists in other parts

231. See generally GAMBLING ON HUMANITARIAN INTERVENTION: MORAL HAZARD, REBELLION AND CIVIL WAR (Timothy W. Crawford & Alan J. Kuperman eds., 2006).
of Sudan. Development agencies contributed to this oversight, according to U.N. Development Program head, Helen Clark, by focusing on “state and service delivery, but without addressing the rather profound legacy of long-term conflict.” Donor countries and agencies contributed to the “conceptual vacuum” of South Sudan’s statehood by overlooking entrenched internal divisions, offering instead technical fixes pertaining to socioeconomic indicators. Rather than rely on weak state capacities, international actors actively created a benignly paternalistic parallel system of sovereignty, developing institutions for service delivery and humanitarian assistance that has now hardened into a “status quo of international superintendence.” The opposition parties—the SPLM and NCP—did not want elections before concluding the peace process, but international backers of that process insisted. They announced their desire for liberal systemic transformation despite perceived social pressures and hidden complexities that misrepresented underlying circumstances. This resulted in what Timur Kuran labels a preference falsification—a tailored outcome that actually inhibits change, distorts knowledge of circumstances, and retrospectively explains the diplomatic bandwagoning, social engineering, and civil society support for an opportunistic outcome that spectacularly and almost immediately imploded in South Sudan’s case.

R2P relies on the residual and remedial powers of the interna-

---

232. See Young, supra note 230, at 218-25.
236. See Young, supra note 230 at xvii (noting the insistence of international backers on holding elections before the end of the peace process).
tional community to end atrocity, a charge complicated in South Sudan’s case by actions of that purported community that abetted the seceding state’s downward spiral.

Three months after independence, the U.S. State Department issued a South Sudan country profile, a report card unusual for what solidarism’s proponents could not detail. Ongoing border negotiations rendered the new country’s exact size indeterminate. GDP, per capita income, and annual growth and inflation rates could not be calculated. The central government had no budget and the country had no constitution. South Sudan’s draft transitional constitution, approved by the Council of Ministers, awaited review by a future National Constitutional Review Commission after action by the Legislative Assembly, which itself did not exist. Questions of citizenship among nomadic peoples and the status of millions of southerners living in the north remained unaddressed. The statutory court system implemented to supplant Shari’a law faced daunting structural challenges in addition to its tenuous relationship to tribal and customary dispute resolution practices within local communities. This profound lack of effectiveness impacted South Sudan’s central governing authority, imperiling state-building and reconciliation efforts. What could be calculated, however, were the former Sudan’s

238. See U.S. Dep’t of St., supra note 165.
239. Id. (listing the geographic area of the country as “TBD” [to be decided] pending outcome of disputed border negotiations between the North and South).
240. Id. (listing these economic factors as “TBD” or blank).
241. Id. (listing the central government budget as “TBD” and noting the need for the government to amend its December 2005 interim constitution).
242. Id.
243. See Tynsley, supra note 169, at 14 (noting unresolved questions of citizenship and status of the “millions of southerners living in the north.”).
244. See generally David Pimentel, Rule of Law Reform without Cultural Imperialism: Reinforcing Customary Justice through Collateral Review in Southern Sudan, 2 Hague J. on Rule L. 1 (2010) (noting the importance of traditional dispute settlement mechanisms in South Sudanese culture). On a broader scale, democratization attempts in Africa have been criticized for their disregard of African communalism and conceptions of democracy that differ fundamentally from the western model, turning such efforts into stratagems of power supporting African elites. See generally Claude Ake, The Unique Case of African Democracy, 69 Int’l Aff. 239, 240 (1993).
245. For a discussion of the lack of effectiveness thesis generally as applied to sub-Saharan statecraft, see generally Gerard Kreijen, State Failure, Sov-
significant oil reserves, estimated to total 470,000 bbl/d, with
the vast majority of those reserves—perhaps seventy-five per-
cent—coming from deposits in the South.\textsuperscript{246} Under the CPA,
oil revenues were shared equally.\textsuperscript{247} This forced condominium
arrangement prevailed because the export of South Sudanese
oil required pipeline transport through the North to Port Su-
dan, located on the Red Sea. Suspicions of graft and price ma-
ipulation marred prospects for confidence building measures
connected to both countries’ oil lifeline;\textsuperscript{248} the prospect of a
revenue sharing agreement was itself a hard fought achieve-
ment of peace in 2005.\textsuperscript{249} The SPLM and NCP agreed if the
South voted for independence, “arrangements would be made
to cushion the blow to the north.”\textsuperscript{250} But details regarding
post-independence revenue sharing were never worked out
and produced violence that intersected with border demarca-
tion disputes.\textsuperscript{251} Astonishingly, South Sudan suspended oil
production barely six months after achieving statehood in re-
sponse to grievances against Sudan, a damaging decision for
both economies. Less than a year after facilitating indepen-
dence, the U.N. Security Council threatened both countries
with economic sanctions, in response to border hostilities that
broke out in South Sudan’s oil-producing region.\textsuperscript{252} Despite

\textsuperscript{246} See U.S. Dep’t of St., supra note 165 (estimating oil reserves).
\textsuperscript{247} Young, supra note 230, 183 (“Under the CPA oil revenues were shared 50-50”).
\textsuperscript{248} The Nexus of Corruption and Conflict in South Sudan, The Sentry (July
CorruptionConflict_SouthSudan_TheSentry.pdf (noting complaints from
Juba that Khartoum controlled oil meter measurements and was taking
more than its agreed-upon share).
\textsuperscript{249} See Richard A. Lobban, Jr., Global Security Watch: Sudan 119-22
\textsuperscript{250} Young, supra note 230, 184.
\textsuperscript{251} See id. at 184 (noting that most of the oil was on or near the north-
south border and sovereignty over four hundred kilometers was in dispute).
See also Lobban, supra note 249, at 120 (noting violent clashes in the still
unresolved borders at Abyei).
\textsuperscript{252} See Security Council May Take Further Action if Sudan-South Sudan Fight-
ing Continues, UN News Centre (May 2, 2012), http://www.un.org/apps/
news/story.asp?NewsID=41903#.VpWHt_krKCh (noting that the Security
Council is voicing its intention to take “appropriate measures” under U.N.
Charter art. 41, dealing with threats not involving the use of armed force).
the economic investment into the countries, “oil and (in)security in Sudan and South Sudan continue to be ‘two faces of the same coin.’”

Crosscutting alliances within IGAD now contribute to regional intrigue. Shortly after the rift in December 2013, Uganda sent troops to South Sudan in support of Kiir’s regime against Machar. The intervention compromised IGAD’s station as an honest intermediary and raised regional instability concerns from Kenya, which shares a border with South Sudan, and disputes with Uganda the Migingo Island border in Lake Victoria. Ugandan forces helped Juba reclaim oil fields near the border with Sudan, raising concerns of an antagonistic response from Khartoum. Resolving internal tensions involving Uganda and Sudan within the IGAD mediation process would strengthen the prospect of a regional resolution to the immediate crisis, as would the greater inclusion in mediation efforts of civil society organizations and the particularly influential role of Church leaders in South Sudan. Allegations now suggest Eritrea and Sudan provide covert support for South Sudanese opposition forces, provoking strong warnings from Ethiopia, which has absorbed sixty thousand refugees.

253. Laura M. James, Fields of Control: Oil and (In)security in Sudan and South Sudan 53 (Small Arms Surv., HSBA Working Paper No. 40, 2015). South Sudan’s secession from Sudan has enhanced Sino-Sudanese oil relations. China has invested billions of dollars into developing and extracting oil from Sudan, and in a major policy shift has committed a battalion strength contingent of infantry to support the United Nations peacekeeping mission. See David Smith, China to Send 700 Combat Troops to South Sudan, GUARDIAN (Dec. 23, 2014), http://www.theguardian.com/world/2014/dec/23/china-700-combat-troops-south-sudan-africa-battalion-un-peacekeeping.


from South Sudan while dealing with the failed state of Somalia on its eastern border.258 An intra-SPLM dialog brokered in Arusha by Tanzania’s ruling party (the Chama Cha Mapinduzi), Kenyan-sponsored meetings in Nairobi, and Chinese and Sudanese-hosted meetings in Khartoum raise criticisms of forum-shopping as warring factions take advantage of regional fragmentation to circumvent accountability standards,259 as reinforced by the long-overdue A.U. report emphasizing criminal and civil accountability.260 Efforts to sustain the Transitional Government of National Unity remain tenuous.261 A proliferation of rebel groups has resulted in charges that the IGAD-led peace process lacks inclusivity, creating incentives among the principal rival stakeholders to sabotage peace talks;262 and the country’s precarious financial situation resulted in a massive devaluation of its feeble currency in December 2015; inflation is spiraling out of control.263 The

258. See Apuuli, supra note 256 (noting Ethiopian complaints against Uganda).

259. See Akshaya Kumar & John Prendergast, Creating a Cost for Those Destroying South Sudan, ENOUGH! 1 nn.3–4 (July 2015), http://www.enough-project.org/files/CreatingCostSouthSudan07232015.pdf (noting forum shopping and various negotiations outside the IGAD-led process).


center of South Sudan’s new unity government (as of late 2016) likely will not hold. The possible collapse of South Sudan threatens regional crisis, if not war, and calls into question the effectiveness of rhetorical ripostes invoking solidarism and international community assistance.

IV. Conclusion

Much emphasis on R2P generates from the distinction between norms and expectations of the international community and individual states that egregiously transgress fundamental internal standards of human decency. Solidarist interpretations of the international community project a unified vision of this norm—the historical product of an impatience with pluralism and a turn toward Kantian cosmopolitan ethics. Other interpretations of the international community focus more on actors’ interactions, which result in a normative socialization of formal and informal rules that shape its identity and in turn are shaped by that identity and the performative language that develops from intersubjective and context-driven interactions. Some constructivist interpretations highlight a process of norm socialization in the form of an ontological development of human rights norms that can lead transgressors through internal adaptation, strategic bargaining, or persuasion into to higher stages of normative compliance (habitualization) in a so-called spiral-model of human right development.264

But the context-dependent prism of the internal disaster unfolding in South Sudan suggests solidarist and constructivist presumptions embedded in R2P need more tending to. The international community—presented as an ethical, intersubjective norm that transgressor states purportedly can spiral toward—requires more explicit discussion. More attention needs to be paid to the context pluralist perspectives suggest but solidarist perspectives presume, if not ignore. Invoking the

The promise of R2P depends on an on-going, intersubjective, construction process. This process promises from a solidarist perspective the establishment of an autonomous, not heteronomous, international community will. But this community will remains fragmented, as indicated by this context-dependent review of South Sudan. Absent international rules of recognition establishing power-conferring authority on the international community, the fate of South Sudan depends on a pluralist call to action. These steps now take the form of a sanctions policy orchestrated by African regional powers and liberal western democracies to attempt a suspension of fratricidal rivalry. Coordinated Chinese and American influence would likely bring to bear considerable political pressure to end violence, but evidence of a will to forward such a condominium of separately-invested interests remains to be seen. Intervention by other African states hinges on whether regional stability concerns will outweigh internal differences within Africa’s regional organizational apparatuses. The prospect of an IGAD-sponsored intervention appear dim, if not counter-productive, given embedded suspicions principally between Uganda and Sudan, in addition to assorted domestic policy considerations. An A.U.-sponsored intervention beyond IGAD certainly appears in line with the dire circumstances detailed in the A.U. Commission of Inquiry on South Sudan report.
And yet the formation of the Commission of Inquiry in late December 2013, hailed as a watershed event in the history of the African Union, and a purposeful and indigenous African response to claims of a *mission civilisatrice*, nevertheless encountered delays that generated criticism about the African Union’s commitment to operationalizing Article 4(h) of its Constitutive Act.

Akin to Woodrow Wilson’s idea of internationalism, R2P represents a surrender of license in order to combat atrocious internal abuses abetted by old-order sovereignty. Wilson envisioned a new, disentangling alliance of community interest that disposed of the freedom to act indiscriminately. A concrete institution (the League of Nations) would house the security interests of the peoples of the world; it would form a responsible partnership in a world-wide guarantee against aggression. “There is liberty there, not limitation. There is freedom, not entanglement,” said Wilson. Understanding complex processes as part of the whole leads to an emphasis on context. Solidarist norm socialization, from the League of Nations to R2P, benefits from contextualization. Important weaknesses of agency and operation arise. These weaknesses require a tending to, certainly with regard to dire needs of the South Sudanese. Fortifying pluralist pathways are not necessarily inconsistent with the solidarist implications of R2P. In a time of exigency they may provide tools of agency that otherwise result in the empty rhetoric of international community action to forestall humanitarian disaster. As David Miller has explained, “an undistributed duty . . . to which everybody is subject is likely to be discharged by nobody unless it can be allocated in some way.”


268. DAVID MILLER, NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE 98 (2007).