

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

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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 Vattel's 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.

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I. INTRODUCTION

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;¹ its multiple meanings undermine the shared knowledge actors need to guide the application of R2P. The concept

1. See generally Santiago Villapando, *The Legal Dimension of the International Community: How Community Interests Are Protected in International Law*, 2 EUR. J. INT'L L. 387, 387–419 (2010) (labeling the term “international community” as evasive); David C. Ellis, *On the Possibility of “International Community,”* 11 INT'L STUD. REV. 1 (2009) (discussing the term’s ubiquitous and varied meanings); Barry Buzan & Ana Gozalez-Pelaez, *“International Community” After Iraq*, 81 INT'L AFF. 31 (2005) (noting various definitions from amorphous to concrete).

of responsibility cannot be applied if it is unknown where “responsibility resides.”² Locating where the R2P resides requires focusing anew on the meaning of the international community and familiar questions relating to R2P’s authorization, operationalization, and evaluation:³ Is the international community thickly representative of historical processes, or thinly embodied as an aspiration?⁴ Is it a change agent or an abstract ethical referent to an ideal archetype of behavior?⁵ Is it a unitary actor or a fragmented compilation of interests?⁶ Are there multiple international communities, agglomerated as states, institutions, and/or civil society? Is it a legal community or is it a political community? Is it compelled by moral necessity or motivated by hegemonic design? Is it paternalistic? The term escapes precise definition⁷ and its multiple usages obfuscate understanding.⁸ 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 Lu, *Humanitarianism and the Use of Force*, in THE ETHICS OF GLOBAL GOVERNANCE 85, 92–100 (Antonio Franceschet ed., 2009) (discussing 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 international community). ‘Thin’ and ‘thick’ categories have developed in international 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 international community as a moral collective or ethical referent); Alex J. Bellamy & 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 responses to crises in Côte d’Ivoire and Libya, interchanging the term international society in connection to international community vis-à-vis R2P); Andrew Gowers, *The Power of Two*, FOREIGN POL’Y, Sept.–Oct. 2002, at 32–33 (arguing the need to set aside abstract international community usages).

6. See Monica Hakimi, *Toward a Legal Theory on the Responsibility to Protect*, 39 YALE J. INT’L L. 247, 254–59 (2014) (questioning the utility of envisioning R2P as a collective responsibility of states or international organizations).

7. For various considerations of the meaning of “international community,” see FOREIGN POL’Y, Sept.–Oct. 2002, at 28, 28–46.

8. See Foluke Ipinoyomi, *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,

cates 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 *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”).

9. See Samantha Besson, *Ubi Ius, Ibi Civitas: A Republican Account of the International Community*, in LEGAL REPUBLICANISM: NATIONAL AND INTERNATIONAL PERSPECTIVES 203, 208 (Samantha Besson & José Luis Martí eds., 2009) (noting a lack of clear conception about the boundaries and constituency of the international community). For a general discussion of international norm diffusion, see Marth Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887 (1998); and Ronald L. Jepperson, Alexander Wendt & Peter J. Katzenstein, *Norms, Identity, and Culture in National Security*, in THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS 33–78 (Peter J. Katzenstein ed., 1996).

10. Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

11. See HANNES PELTONEN, INTERNATIONAL RESPONSIBILITY AND GRAVE HUMANITARIAN CRISES: COLLECTIVE PROVISION FOR HUMAN SECURITY 103 (2013) (arguing that the concept of the international community extends beyond state-centric definitions).

12. See, e.g., Foluke Ifejola Ipinoyomi, *The Impact of African Philosophy on the Realisation of International Community and the Observance of International Law*, 18 INT’L COMMUNITY L. REV. 3, 3–5 (2016) (noting the exclusivity of the ‘international community paradigm’ and its exclusion of sub-Saharan Africa values); Frank Ching, *Who Defines the ‘International Community?’*, THE DIPLOMAT (Sept. 12, 2012), <http://thediplomat.com/2012/09/who-defines-the-international-community/> (noting Chinese Communist Party complaints about Western-defined norms of international community).

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.¹³ 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.¹⁴ Such interpretations revive the nineteenth century axiom later popularized by Carl Schmitt: “Whoever invokes humanity wants to cheat.”¹⁵ 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.¹⁶ 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.”¹⁷ 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-

13. See LEONHARD PRAEG, *A REPORT ON UBUNTU*, at xi (2014) (discussing *Ubuntu* as opposed to the western liberal tradition).

14. See, e.g., Noam Chomsky, *The Crimes of “Intcom,”* FOREIGN POL’Y, Sept.–Oct. 2002, at 34, 34 (2002) (noting parochial usages of the term international community that make it logically impossible for the United States and its allies to defy).

15. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL: EXPANDED EDITION* 54 (George Schwab trans., Univ. of Chicago Press 2007) (1932) (“Here one is reminded of a somewhat modified expression of Proudhon’s: whoever invokes humanity wants to cheat.”).

16. Amitav Acharya, *The Responsibility to Protect and a Theory of Norm Circulation*, in *THEORISING THE RESPONSIBILITY TO PROTECT* 59, 62–63 (Ramesh Thakur & William Maley eds., 2015) (referencing the seminal work of FRANCIS M. DENG ET AL., *SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA* (1996)).

17. Theresa Reinold, *Africa’s Emerging Regional Security Culture and the Intervention in Libya*, in *LIBYA, THE RESPONSIBILITY TO PROTECT AND THE FUTURE OF HUMANITARIAN INTERVENTION* 83, 83 (Aidan Hehir & Robert Murtagh eds., 2013).

ally specific and context dependent.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,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 Vattelian-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, *supra* note 4, at 486 (interpreting the international community as potential, context-dependent groupings of agents).

19. See Ellis, *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, *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. See, e.g., 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-

20. For a discussion of R2P's failings 'in action', see CIARÁN BURKE, *AN EQUITABLE FRAMEWORK FOR HUMANITARIAN INTERVENTION* 73–89 (2013).

21. Edward C. Luck, *From Promise to Practice: Implementing the Responsibility to Protect*, in *THE RESPONSIBILITY TO PROTECT: THE PROMISE OF STOPPING MASS ATROCITIES, IN OUR TIME* 85, 85 (Jared Genser & Irwin Cotler eds., 2012).

22. Richard W. Wilson, *Sudan and the Implications for Responsibility to Protect* 8 (Stanley Foundation, Policy Analysis Brief, October 2009), <http://www.stanleyfoundation.org/publications/pab/WilliamsonPAB1009.pdf>.

23. Alan J. Kuperman, *Rethinking the Responsibility to Protect*, *WHITEHEAD J. DIPL. & INT'L REL.* 19, 24 (2009).

24. See generally Int'l Comm'n on Intervention & State Sovereignty [ICISS], *The Responsibility to Protect* (December 2011), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

25. JEREMY MOSES, *SOVEREIGNTY AND RESPONSIBILITY: POWER, NORMS AND INTERVENTION IN INTERNATIONAL RELATIONS* 38 (2014).

26. See *The Responsibility to Protect*, *supra* note 24, ¶ 2.4. See also Tom Kabau, *The Responsibility to Protect and the Role of Regional Organizations: An Appraisal of the African Union's Interventions*, 4 *GOETTINGEN. J. INT'L L.* 49, 52 (2012) (noting the doctrine's change into more acceptable and less controversial form).

build.²⁷ 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.²⁸ This change in the meta-value of sovereignty—as something that could be withdrawn—suggested the transformation from a pluralist conception of world order,²⁹ where “un-humanitarian non-intervention” prevailed as an intolerable norm,³⁰ to a solidarist conception, where the structure and primary institutions of world order support “the purposes and interests of peoples.”³¹ 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.³²

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-

27. See *The Responsibility to Protect*, *supra* note 24, ¶ 2.29.

28. See RICHARD FALK, HUMANITARIAN INTERVENTION AND LEGITIMACY WARS: SEEKING PEACE AND JUSTICE IN THE 21ST CENTURY 55–56 (2015) (noting the shift in thinking).

29. Pluralism attaches primary significance to rules of coexistence accepted by sovereign states as a means of maintaining world order. It is based on reciprocally recognized structural principles such as sovereign equality, multilateralism, and non-intervention, which support primary institutions, such as sovereignty, balance of power, customary international law, and the limited but recognized utility of use of force, on which specific regimes such as the United Nations and international organizations are based. See Tim Dunne, *The Responsibility to Protect and World Order* (discussing pluralism's transformation), in THEORISING THE RESPONSIBILITY TO PROTECT, *supra* note 16, at 81, 87–91.

30. See *id.* at 95 (attributing the phrase to Simon Chesterman).

31. *Id.* at 91.

32. See ROBERT JACKSON, THE GLOBAL COVENANT: HUMAN CONDUCT IN A WORLD OF STATES 105 (2003); Buzan & Gonzalez-Pelaez, *supra* note 1, at 33 (discussing the classical sociological distinction between *Gemeinschaft* (community: shared-values, organic, pre-modern, small-scale social bonding of clans and tribes), *Gesellschaft* (society: rational, contractual, large-scale facet of social organization since modernity's onset), and ‘system’ (a mechanistic pattern of interaction among agents based on material power)).

tions Charter Chapter VII provisions.³³ This refinement tethered its application to powers possessed by the Security Council.³⁴ R2P has been questioned by supporters for sometimes contributing to tragedies it intended to prevent,³⁵ and has been attacked as redecorated colonialism by critical legal scholars and from developing country perspectives.³⁶ 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.³⁷ It has been described as a *pharmakon*—a solution likely to produce consequences as bad as those complained against³⁸—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.³⁹ And it has been criticized for framing intervention in military rather than economic assistance terms, which could address preconditions to violence besetting developing countries.⁴⁰ 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).

36. U.N. President of the G.A., Concept Note on the Responsibility to Protect Populations from Genocide, War, Crimes, Ethnic Cleansing and Crimes Against Humanity, at 3, U.N. Doc. A/63/958 (Sept. 9, 2009).

37. Ipinyomi, *supra* note 12, at 24 (discussing the problem of the *mission civilisatrice*); see also Roland Paris, *International peacebuilding and the ‘mission civilisatrice,’* 28 REV. INT’L STUD. 637 (2002) (noting Western-liberal transmissions of particular visions for peacebuilding of war-torn states).

38. See Rossi, *supra* note 34, at 383 (borrowing from Plato’s and Derrida’s understandings that remedies can also be poisonous).

39. See, e.g., Statement by Professor Noam Chomsky to the U.N. G.A., Thematic Dialogue on the Responsibility to Protect (July 23, 2009), <http://www.un.org/ga/president/63/interactive/protect/noam.pdf> (describing R2P as a pretext for the invasions of Iraq and Afghanistan).

40. See, e.g., David Chandler, *The Responsibility to Protect? Imposing the ‘Liberal Peace,’* 11 INT’L PEACEKEEPING 59 (2004) (contrasting Realist and Liberal justifications for humanitarian intervention); Mary Ellen O’Connell, *Respon-*

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

sibility to Peace: A Critique of R2P, 4 J. INTERVENTION & STATEBUILDING 39 (2010) (emphasizing non-lethal means to peace as most likely to succeed).

41. See H.E. Dilma Rousseff, President of the Federative Republic of Brazil, Remarks at the Opening of the General Debate of the 66th U.N. G.A. (Sept. 21, 2011) (transcript available at https://gadebate.un.org/sites/default/files/gastatements/66/BR_en_0.pdf) (noting much discussion about the “the responsibility to protect . . . yet [] little about responsibility in protecting.”); see also Permanent Rep. of Brazil to the U.N., Letter dated Nov. 9, 2011 from the Permanent Rep. of Brazil to the United Nations addressed to the Secretary-General, U.N. Doc. A/66/551-S/2011/701 (Nov. 11, 2011). Richard Falk complained that the Security Council’s limited ‘no-fly zone’ mandate authorizing R2P in Libya was almost immediately violated by NATO forces, transforming it into an opportunity to oust rather than protect. Richard Falk, *Libya After Qaddafi*, THE NATION (Nov. 14, 2011), <http://www.thenation.com/article/164221/libya-after-qaddafi#>. Most recent adaptations of R2P have attached it to the U.N. Security Council, introducing the concept of a Responsibility Not to Veto (RN2V). See generally CITIZENS FOR GLOBAL SOLUTIONS, THE RESPONSIBILITY NOT TO VETO: A WAY FORWARD (2014); Nadia Banteka, *Dangerous Liaisons: The Responsibility to Protect and a Reform of the U.N. Security Council*, 54 COLUM. J. TRANSNAT’L L. 382 (2016).

42. See Thorsten Benner, *Brazil as a Norm Entrepreneur: The “Responsibility While Protecting” Initiative 4* (Glob. Pub. Policy Inst., Working Paper, Mar. 2013), http://www.gppi.net/fileadmin/user_upload/media/pub/2013/Benner_2013_Working-Paper_Brazil-RWP.pdf (noting skeptical responses to RWP from Washington, Berlin, Paris, and London).

43. G.A. Res. 60/1, 2005 World Summit Outcome, ¶¶ 138–39 (Sept. 16, 2005).

44. See Jutta Brunnée & Stephen J. Toope, *Norms, Institutions and UN Reform: The Responsibility to Protect*, 2 J. INT’L L. & INT’L REL. 121, 127–28 (2006) (discussing R2P’s transformative potential). Since 2009, U.N. Secretary-General Ban has issued six reports on the Responsibility to Protect, making him among the doctrine’s chief norm entrepreneurs. See U.N. Secretary General, *Fulfilling Our Collective Responsibility: International Assistance and the Responsibility to Protect: Rep. of the Secretary-General*, U.N. Doc. A/68/947-S/2014/449 (July 11, 2014); U.N. Secretary-General, *Responsibility to Protect: State Responsibility and Prevention: Rep. of the Secretary-General*, U.N. Doc. A/67-/929-S/2013/399 (July 9, 2013); U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response: Rep. of the Secretary-General*, U.N. Doc. A/66/874-S/2011/578 (July 25, 2012); U.N. Secretary-General, *The Role of Regional and Sub-re-*

by the Security Council,⁴⁵ and may be on its way to becoming an accepted part of customary international law.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."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.⁴⁸

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-

gional Arrangements in Implementing the Responsibility to Protect: Rep. of the Secretary-General, U.N. Doc. A/65/877-S/2011/393 (June 27, 2011); U.N. Secretary-General, *Early Warning, Assessment and the Responsibility to Protect: Rep. of the Secretary-General*, U.N. Doc. A/64/864 (July 14, 2010); and U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, U.N. Doc. A/63/677 (Jan. 12, 2009). In 2007, Secretary-General Ban and the Security Council created a special advisor position to build consensus and develop the concept. See Appointment Confirmed of UN Special Adviser on Responsibility to Protect, UN NEWS CENTRE (Dec. 11, 2017), <http://www.un.org/apps/news/story.asp?Newsid=25010&Cr=appoint&Cr1=>.

45. Gareth Evans, *Does the Responsibility to Protect Have a Future?*, AUSTL. INST. OF INT'L AFF. (Dec. 16, 2014), http://www.internationalaffairs.org.au/australian_outlook/does-the-responsibility-to-protect-have-a-future/ (noting the Security Council "continues to endorse the R2P principle and use its language").

46. FALK, *supra* note 28, at 59.

47. Evans, *supra* note 45.

48. See Acharya, *supra* note 16, at 68–69 (citing Mbeki, Obasanjo, Salim, Deng, Annan, and Sahnoun). Art. 4(h) of the Constitutive Act of the African Union grants "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity." Constitutive Act of the African Union [AU] art 4(h), June 11, 2000, http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf.

glish School of international relations.⁴⁹ Bull traced the solidarist assumption of an international society respectful of law and its enforcement to modern-day followers of Hugo Grotius (1583–1645).⁵⁰ 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.⁵¹

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.⁵² 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;⁵³ 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,⁵⁴ obliquely discussed the normative value “to be attached to the society of states.”⁵⁵ Jackson described the pluralist view in terms of a global covenant, neither narrowly Machiavellian in pursuit of

49. See generally Hedley Bull, *The Grotian Conception of International Society*, in DIPLOMATIC INVESTIGATIONS 51 (Herbert Butterfield & Martin Wight eds., 1966) (discussing pluralism and solidarism). A fine overview of the English School is presented by Hidemi Suganami, *The English School in a Nutshell*, 9 RITSUMEIKAN ANN. REV. INT’L STUD. 15–28 (2010).

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

51. See *id.*

52. Dunne, *supra* note 29, at 88.

53. See Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT’L L.J. 703, 706 (2006) (citing humanitarian intervention debacles in the 1990s).

54. See generally HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (4th ed. 2012); JACKSON, *supra* note 32. Bull’s later writing inclined more toward the solidarist perspective. See generally Hedley Bull, *Justice in International Relations: The 1983 Hagey Lectures (1984)*, in HEDLEY BULL ON INTERNATIONAL SOCIETY 206 (Kai Alderson & Andrew Hurrell eds., 2000).

55. NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* 27 & n.23 (2000).

power politics nor expansively framed by a Kantian community of mankind.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.⁵⁷ The pluralist covenant represented a balancing of procedural stabilizing norms (such as non-intervention) and prudential national security interests.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."⁵⁹

1. *Vattel's Influence on Pluralism*

Bull identified Vattel as the intellectual progenitor of pluralism. His *Les droit des gens* (1758) presented a realistic view of the world that rejected the existence of a superior political community.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,⁶¹ and Joseph Chitty (1775–1841) in England.⁶² Vattel's influence made an indelible mark on American juridical thinking and on America's Founding Fathers,⁶³ and dominated interna-

56. See JACKSON, *supra* note 32, at 16.

57. *Id.* at 8.

58. *See id.* at 5.

59. Nicholas J. Wheeler & Timothy Dunne, *Hedley Bull's Pluralism of the Intellect and Solidarism of the Will*, 72 INT'L AFF. 91, 95 (1996).

60. Martti Koskenniemi, 'International Community' from Dante to Vattel, in VATTEL'S INTERNATIONAL LAW IN A XXIST CENTURY PERSPECTIVE 51, 51 (Vincent Chetail & Peter Hagggenmacher eds., 2011) [hereinafter CHETAUL & HAGGENMACHER].

61. See NICHOLAS ONUF & PETER ONUF, NATIONS, MARKETS, AND WAR: MODERN HISTORY AND THE AMERICAN CIVIL WAR 63 (2006) (discussing the importance of Wheaton).

62. Ian Hunter, *Kant and Vattel in Context: Cosmopolitan Philosophy and Diplomatic Casuistry*, 39 HIST. EUR. IDEAS 477, 480 (2013) (discussing Joseph Chitty's heavily annotated English language version of Vattel's LAW OF NATIONS, published in 1834).

63. See Hunter, *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.⁶⁴ He emphasized the autonomy of state actors in their voluntary and external relations.⁶⁵ Eighteen chapters of *Les droit des gens* reflected this autonomy by presenting nations' voluntary adherence to rules regulating war.⁶⁶ And, although deeply indebted to the teachings of Wolff,⁶⁷ Vattel famously rejected his teacher's proposition that the international community formed a "great republic" of states—a *civitas maxima*.⁶⁸

2. *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-

and Mary College, the "cradle of US statesmen"); Andrew Tutt, *Treaty Textualism*, 39 YALE J. INT'L L. 283, 295 (2014) ("Early American lawyers and jurists were exuberant Vattelophiles."). See also Lucius Caflisch, *Vattel and the Peaceful Settlement of International Disputes*, in CHETAİL & HAGGENMACHER, *supra* note 60, at 257, 266 (noting the frequent citing of Vattel in early American law cases). See generally Brian Richardson, *The Use of Vattel in the American Law of Nations*, 106 AM. J. INT'L L. 547 (2012) (acknowledging Vattel's vaunted position but recognizing other influences as well).

64. See CORNELIS VAN VOLLENHOVEN, *LES TROIS PHASES DU DROIT DES GENS* 32 (1919) ("Mais voici ce qui est le plus fâcheux. Vattel a eu un succès énorme . . . a été favorisé d'une telle vogue que l'on peut appeler le second droit des gens de 1770 à 1914, le droit des gens de Vattel.").

65. See I E. DE VATTEL, *LE DROIT DE GENS OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUIT ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* 9 (James Brown Scott ed., Carnegie Institution of Wash. 1916) (1758) ("De cette Liberté & indépendance, il suit que c'est à chaque Nation de juger de ce que sa conscience exige d'elle, de ce qu'elle peut ou ne peut pas, de ce qu'il lui convient ou ne lui convient pas de faire.").

66. See generally II E. DE VATTEL, *LE DROIT DE GENS OU PRINCIPES DE LA LOI NATURELLE: APPLIQUÉS À LA CONDUIT ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS*, Livre III (James Brown Scott ed., Carnegie Institution of Wash. 1916) (1758).

67. See Vincent Chetail, *Vattel and the American Dream: An Inquiry into the Reception of the Law of Nations in the United States*, in *THE ROOTS OF INTERNATIONAL LAW/ LES FONDEMENTS DU DROIT INTERNATIONAL: LIBER AMICORUM* PETER HAGGENMACHER 251, 288 n.178 (Vincent Chetail & Pierre Marie Dupuy eds., 2013) (noting Vattel's intellectual indebtedness to Wolff).

68. See generally II CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* 9–19 (Joseph H. Drake trans., Oxford: Clarendon Press 1934) (1764) (introducing the *civitas maxima*, translated as "supreme state").

ceived or supposed to subsist between nations.”⁶⁹ Wolff construed 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 individual nations if they should be unwilling to perform their obligations or show themselves negligent in their performance.”⁷¹ To operationalize the international community’s virtuous 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 international executive;⁷⁵ and it was devoid of an institutional form, as suggested by a communal or organizational jurying mechanism to oversee legitimacy concerns involved in humanitarian intervention.⁷⁶ Additionally, Wolff’s rector had no power to

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

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 359–60 (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 fictional 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 Hammarskjöld).

76. See Thomas Franck, *Legality and Legitimacy in Humanitarian Intervention*, 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*).⁷⁷ Wolff's rector merely collated the community's peace and security interests.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."⁷⁹ Similarly, societies embrace powerful functional motivations to carry on communication and commerce with each other for mutual benefit.⁸⁰ But fundamentally, "[s]tates conduct themselves in a different manner from individuals."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."⁸² Vattel's pluralistic legacy located international responsibility, and situated it resoundingly in the voluntary actions of individual states.

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.

78. See Onuf, *supra* note 72, at 298 (noting the voluntaristic functions of Wolff's rector consistent with natural law).

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 femblables, 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").

80. *Id.* at xviii–xix ("Ces Sociétés ont encore, il est vrai, de grands motifs de communiquer & de commercer ent'elles, & ells y font même obliges.").

81. *Id.* at xix ("Les Etats se conduisent autrement que des particuliers.").

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.⁸³ This meta-value coalesced through a Feuerbachian inversion of the sovereign-subject relationship, where notions of legitimacy conformed the image of the state in terms of the subjects it served.⁸⁴ Legal obligations protected individuals against the power of the state,⁸⁵ 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 circles⁸⁶ and beyond. Despite egocentric understandings of universalism that encroach on the historiography of international law,⁸⁷ 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-

83. See Christian Reus-Smit, *The Constitutional Structure of International Society and the Nature of Fundamental Institutions*, 51 INT'L ORG. 555, 565 (1997) (noting the need for a larger complex of values to form the social identity of states in a community).

84. Ludwig Feuerbach inverted Christian paradigmatic foundation myth, arguing man created God in his own image. For an application of Feuerbach's thesis to the question of sovereignty and R2P, see Charles Sampford & Ramesh Thakur, *From the Right to Persecute to the Responsibility to Protect: Feuerbachian Inversions of Rights and Responsibilities in State-Citizen Relations*, in THEORISING THE RESPONSIBILITY TO PROTECT, *supra* note 16, at 38, 40–41.

85. See, e.g., U.N. Charter art. 2; G.A. Res. 260 (III) A, Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948).

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.⁸⁸ Taslim O. Elias connected Europe's pre-colonial international community to sub-Saharan Africa.⁸⁹ 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.⁹⁰ 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.⁹¹ 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.⁹² 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.”⁹³ Centuries of

88. See generally Roberto Ago, *Pluralism and the Origins of the International Community*, 3 *Ir. Y.B. INT'L L.* 3 (1977) (sketching out a broad Euro-Mediterranean pluralistic history).

89. See generally T.O. ELIAS, *AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW* (1972) (noting commercial relations); James Thuo Gathii, *A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias*, 21 *LEIDEN J. INT'L L.* 317 (2008) (discussing Elias' efforts to reclaim Africa's place in international legal history).

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

91. See *id.* at 51.

92. See Robert H. Jackson, *International Community Beyond the Cold War, in BEYOND WESTPHALIA?: STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION* 59, 61 (Gene M. Lyons & Michael Mastanduno eds., 1995).

93. For presentations from African perspectives, see Ipinyomi, *supra* note 12, at 18; and POLYCARP IKUENOBE, *PHILOSOPHICAL PERSPECTIVES ON COMMUNALISM AND MORALITY IN AFRICAN TRADITIONS* (2006) (see especially ch. 2: “African Conceptions of Personhood and Community”). For other leading African perspectives, see generally KWAME GYEKYE, *TRADITION AND MODERNITY: PHILOSOPHICAL REFLECTIONS ON THE AFRICAN EXPERIENCE* (1997);

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”⁹⁴ or ‘miserable comforters’ of a pedantic *jus gentium*—law of nations—that accommodated a right of war.⁹⁵ Kant’s call for the creation of a *civitas gentium*,⁹⁶ a federation of states to supersede the Vattelian law of nations, provided a pathway for a cosmopolitan future once Vattel’s powerful influence waned.⁹⁷

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.⁹⁸ Informed by the tools of the positivist tradition, Simma was a shy cosmopolitan who searched to achieve those ends without pulling up roots,⁹⁹ presumably roots grounded in Simma’s acknowledged state-centric soil. Others, principally liberal cosmopolitans, have become among

Kwame Gyekye, *The Akan Concept of a Person*, 18 INT’L PHIL. Q. 277–87 (1978); Ifeanyi A. Menkiti, *Person and Community in African Traditional Thought*, in AFRICAN PHILOSOPHY: AN INTRODUCTION 171–81 (Richard A. Wright ed., 3d ed. 1984); and JOHN MBITI, AFRICAN RELIGIONS AND PHILOSOPHIES (1970).

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 CAVALLAR, 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.

97. See Hunter, *supra* note 62, at 480–81.

98. Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL 217, 267–68 (2009) (discussing international law’s authorization model, under which states assume the role of agents of the international community, making possible for the first time effective community action).

99. Steven R. Ratner, *From Enlightened Positivism to Cosmopolitan Justice: Obstacles and Opportunities*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 155, 168–69 (Ulrich Fastenrath et al. eds., 2011) (summarizing Simma’s intellectual shift).

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

100. For her presentation of views on the disaggregated state system, see generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); Anne-Marie Slaughter, *The Real New World Order*, 76 *FOREIGN AFF.* 183 (1997); and Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 *EUR. J. INT'L L.* 503 (1995).

101. See generally Fernando R. Tesón, *Eight Principles for Humanitarian Intervention*, 5 *J. MIL. ETHICS* 98 (2006) (articulating a liberal basis for humanitarian intervention).

102. See Julian Junk, *Testing Boundaries: Cyclone Nargis in Myanmar and the Scope of R2P*, 30 *GLOBAL SOC'Y* 78, 81–83 (2016) (noting Kouchner's controversial formulation).

103. See Jürgen Habermas, *Bestialität un Humanität: Ein Krieg an der Grenze zwischen Recht und Moral*, *ZEIT ONLINE* (Apr. 29, 1999), <http://www.zeit.de/1999/18/199918.krieg.xml> ("Nach dieser westlichen Interpretation könnte der Kosovo-Krieg einen Sprung auf dem Wege des klassischen Völkerrechts der Staaten zum kosmopolitischen Recht einer Weltbürgergesellschaft bedeuten."). A longer, English version of Habermas' article can be found in: Jürgen Habermas, *Bestiality and Humanity: A War on the Border Between Legality and Morality*, 6 *CONSTELLATIONS* 263, 264 (1999).

104. See generally RUTI G. TEITEL, *HUMANITY'S LAW* (2011) (suggesting a convergence around a new narrative of progressive law).

construct a theory of ethical statecraft,¹⁰⁵ 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.¹⁰⁶ 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,¹⁰⁷ either in terms of liberalism's co-optation of the language of universality and humanity as useful instruments of imperialist or militarist expansion¹⁰⁸ or, in its targeting of states or regions such as Africa with a civilizing mission.¹⁰⁹

105. See generally NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* (2000).

106. See Allen Buchanan, *From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform*, 111 *ETHICS* 673, 698 (2001).

107. See Martti Koskenniemi, *Humanity's Law* by Ruti G. Teitel, *ETHICS & INTERNATIONAL AFFAIRS* (Sept. 13, 2012) (book review), <http://www.ethicsandinternationalaffairs.org/2012/humanitys-law-by-ruti-g-teitel/> (cautioning of hegemonic abuses in solidarism's name).

108. See, e.g., Richard Devetak, *Between Kant and Pufendorf: Humanitarian Intervention, Statist Anti-Cosmopolitanism and Critical International Theory*, 33 *REV. OF INT'L STUD* 151, 156 (2007) (associating liberal internationalism with neo-conservative foreign policy pursuits); Patricia Owens, *Hannah Arendt, Violence, and the Inescapable Fact of Humanity*, in *HANNAH ARENDT AND INTERNATIONAL RELATIONS: READINGS ACROSS THE LINES* 41, 42–43 (Anthony Lang Jr. & John Williams eds., 2005) (casting suspicion on efforts to legitimate wars in the name of humanity); MOSES, *supra* note 25, at 169 (claiming liberalism through R2P presents a pacifist orientation in its commitment to capacity building and conflict prevention while supporting violent, sovereign rationality during its interventionist phase); O'Connell, *supra* note 40 (noting R2P's potential association with new militarism).

109. See Koskenniemi, *supra* note 107 (noting "the objections of African states that see themselves as the unique targets" of universal jurisdiction and questioning whether new forms of solidarism "operate as a new language for the civilizing mission?"); Jeremy Moses, *Challenging Just War and Democratic Peace: A Critical Perspective on Kant and Humanitarian Intervention*, in *ETHICS OF WAR IN A TIME OF TERROR* 71, 72 (Christian Enemark ed., 2006) (defining individual rights by 'civilized' international lawyers).

“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.¹¹⁰ 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,¹¹¹ 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.¹¹² 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.¹¹³ Schimmelfennig noted the features of this ethos are most strongly developed in the highly institutionalized and integrated liberal community of Europe,¹¹⁴ 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.¹¹⁵ 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.¹¹⁶ This wider project presupposes the existence of a super norm—the cosmopolitan community—which serves as the virtuous stop-gap agency to

110. FRIEDRICH KRATOCHWIL, *THE STATUS OF LAW IN WORLD SOCIETY: MEDITATIONS ON THE ROLE AND RULE OF LAW* 167 (2014).

111. *See generally* ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959) (applying dramaturgy to sociological inquiry).

112. Frank Schimmelfennig, *Goffman Meets IR: Dramaturgical Action in International Community*, 12 INT’L REV. SOC. 417, 426–27 (2002).

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 110, 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 *ghuons* that initiate the novel sovereignty-shifting procedure of R2P.¹¹⁷ 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-Confering Standards*

R2P construes sovereignty as a union of primary duty-imposing standards on individual countries and secondary power-conferring standards on the international community.¹¹⁸ This interplay between primary and secondary standards reflected H.L.A. Hart's understanding of a legal system,¹¹⁹ which profoundly influenced English School theorists, principally Bull.¹²⁰ 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).¹²¹ 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.¹²² They stem from the law of contract, wills, and marriage (more broadly, from public law).¹²³ 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.

119. See generally H.L.A. HART, *THE CONCEPT OF LAW* (1961) (discussing primary rules).

120. See Kai Alderson & Andrew Hurrell, *International Society and the Academic Study of International Relations*, in HEDLEY BULL ON INTERNATIONAL SOCIETY, *supra* note 54, at 30 (noting Hart's particularly important influence on Bull).

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").

122. See Nicholas Onuf, *The Constitution of International Society*, 5 EUR. J. INT'L L. 1, 13 (1994) (discussing secondary rules).

123. See HART, *supra* note 119, at 27.

coercive framework of the law.”¹²⁴ How would rules of “do” and “don’t” come into being without secondary rules specifying the allowable conditions under which they come into being?¹²⁵ Secondary rules are rules of recognition. They are the rules of process for legislative and administrative rulemaking.¹²⁶

Anne Orford claimed R2P has been misconstrued in a Hartian sense.¹²⁷ Orford claimed commentators improperly tend to associate R2P with duty-imposing standards,¹²⁸ when it “can best be understood as a form of law that confers powers ‘of a public or official nature’ and that allocates jurisdiction”¹²⁹—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.¹³⁰ 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.¹³¹ 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.¹³²

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.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.”¹³⁴ Moral norms can only achieve their highest legitimate form of expression when established as legally enforceable norms.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.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.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-

133. MICHAEL N. BARNETT, *THE INTERNATIONAL HUMANITARIAN ORDER* 213 (2010) (“Paternalism is a latent or manifest feature of all relations of compassion.”). 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).

134. Habermas, *Bestiality and Humanity*, *supra* note 103, at 270.

135. See *id.* (“Moral norms appealing to our better judgment may not be enforced in the same fashion as established legal norms.”).

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. See generally JEAN L. COHEN, *GLOBALIZATION AND SOVEREIGNTY: RETHINKING LEGALITY, LEGITIMACY, AND CONSTITUTIONALISM* (2012).

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. See *Theory Talk #70: Nicholas Onuf*, THEORY TALKS (July 2, 2015), <http://www.theory-talks.org/2015/07/theory-talk-70.html?m=1>.

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—itsself 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-

138. See Mehari Taddele Maru, *South Sudan: Independence Movement Gone Wrong*, ALJAZEERA (July 17, 2015), <http://www.aljazeera.com/indepth/opinion/2015/07/south-sudan-independence-movement-wrong-150713115433659.html>.

139. See generally DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2005) (noting unintended problems with humanitarian intervention).

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.

cil;¹⁴² the International Court of Justice has acknowledged it in an assortment of cases.¹⁴³ Even accounting for its widespread appearance in international law, Kratochwil is not sure its meaning is equally understood,¹⁴⁴ 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.”¹⁴⁵ Kratochwil noted that international law traditionally derived much of its meaning in its development of narratives of progress and universality,¹⁴⁶ but his suspicion that law “might have become part of the problem rather than the solution” is more evident today.¹⁴⁷ The realization of such a meta-narrative requires a “tending to”—practical or praxis-oriented correctives (*Aufgaben*) and adjustments to unforeseen problems.¹⁴⁸ Daniele Archibugi, a cosmopolitan supporter of humanitarian intervention, recognized (like Schmitt) the problem of *who* decides when exceptional circumstances call

142. See Bruno Simma & Andreas L. Paulus, *The ‘International Community’: Facing the Challenge of Globalization*, 9 EUR. J. INT’L L. 266, 266 (1998) (noting increasing references to the international community).

143. Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Second Phase, 1970 I.C.J. Rep. 3, ¶ 33 (Feb. 5) (recognizing obligations *erga omnes*); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 3, ¶ 92 (May 24) (drawing to the attention of the entire international community prospects for irreparable harm); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 126 (June 21) (advising that South Africa’s continuing presence in Namibia was illegal and opposable to all states (*erga omnes*)); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8) (referencing the international community six times).

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.¹⁴⁹ Archibugi acknowledged that this point required refinement because nongovernmental institutions also lacked power-conferring agency.¹⁵⁰ 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.”¹⁵¹ Even among solidarism’s proponents, ambivalence marks much of the discourse on agency and the tending 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.¹⁵² 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.¹⁵³ 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

149. See Daniele Archibugi, *Cosmopolitan Guidelines for Humanitarian Intervention*, 29 *ALTERNATIVES* 1, 8–10 (2004) (suggesting, ideally, a World Parliament, followed by a Council of Experts or possibly the World Court).

150. *Id.* at 10 (“[I]t is unlikely that such an institution will be created in the short term.”).

151. Daniele Archibugi, *Cosmopolitan Democracy and its Critics: A Review*, 10 *EUR. J. INT’L REL.* 437, 438 (2004).

152. See *infra* notes 191–92.

153. See Ipinoyomi, *supra* note 12, at 5.

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 2011.¹⁵⁴ The referendum concluded a six-year transition period launched by a Comprehensive Peace Agreement (CPA) in 2005.¹⁵⁵ The CPA attempted to promote wealth and power sharing in hope of preserving unity for the deeply divided country.¹⁵⁶ Unity did not prevail,¹⁵⁷ and the southern Sudanese voted almost unanimously to secede.¹⁵⁸ The northern

154. See Press Release, Security Council, Southern Sudan Referendum Was Timely, Fair, Peaceful, Credible, Chair of Monitoring Panel Tells Security Council, U.N. Press Release SC/10155 (Jan. 18, 2011) (noting the monitors' conclusion that the vote was "timely, peaceful and credible").

155. The Comprehensive Peace Agreement between the Government of the Republic of The Sudan and The Sudan People's Liberation Movement/Sudan People's Liberation Army, <http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf>.

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.

158. See SOUTHERN SUDAN REFERENDUM COMM'N, SOUTHERN SUDAN REFERENDUM: FINAL RESULTS REPORT (July 2, 2011), http://southernsudan2011.com/sites/default/files/Final_Results_Report_20110206_1512.pdf (tabulating 3,792,518 votes in favor of independence (98.83%), 44,888 against (1.17%)). But see *Sudan Expert: International Community Enabled South Sudanese Corruption*, ALJEZEERA AMERICA (Apr. 12, 2015, 1:30 PM), <http://america.aljazeera.com>

country retained its name, Sudan.¹⁵⁹ The southern state became The Republic of South Sudan, which the U.N. General Assembly admitted as its newest member on July 14, 2011.¹⁶⁰

Negotiations leading to independence were drawn-out in Sudan, the site of Africa's longest-running civil war.¹⁶¹ Secession, brokered by IGAD, signified a major diplomatic accomplishment for African regional diplomacy.¹⁶²

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

zeera.com/watch/shows/fault-lines/articles/2015/4/12/sudan-expert-inter-national-community-enabled-south-sudanese-corruption.html (quoting Alex de Waal: “[T]here are very, very few places in the world you could get a vote of 99 percent, and Western countries and democracy advocates would be applauding it. Most of them would be looking, more carefully they’d be saying, ‘There must be something fishy here.’”). Eric Reeves strongly disputes this insinuation cast against the referendum results, calling de Waal “disingenuous” and his suggestion “perversely inaccurate.” Eric Reeves, “*Alex de Waal and Sudan: A Brief History of One Man’s Destructive Misrepresentations*,” *September 14, 2015 (update to a brief in Sudan Tribune, 17 April 2015)*, SUDAN: RESEARCH, ANALYSIS, AND ADVOCACY (Sept. 4, 2015), <http://sudanreeves.org/2015/09/04/alex-de-waal-and-sudan-a-brief-history-one-mans-destructive-misrepresentations-17-april-2015/>.

159. Its formal name is the Republic of the Sudan. See *The Permanent Mission of the Republic of the Sudan to the United Nations*, UNITED NATIONS, <https://www.un.int/sudan/> (last visited Oct. 5, 2016).

160. See *Member States*, UNITED NATIONS, <http://www.un.org/en/members/#s> (last visited Oct. 5, 2016).

161. BARBARA P. THOMAS-SLAYTER, *SOUTHERN EXPOSURE: INTERNATIONAL DEVELOPMENT AND THE GLOBAL SOUTH IN THE TWENTY-FIRST CENTURY* 122 (2003).

162. The heads of states from Eritrea, Ethiopia, Uganda, and Kenya principally led the negotiations. See Sally Healy, *Seeking Peace and Security in the Horn of Africa: The Contribution of Inter-Governmental Authority on Development*, 87 INT’L AFF. 105, 109–11 (2011) (discussing IGAD’s crucial reconciliation role in Sudan between 1993–2005). See also FRANCIS K. MULU, *THE ROLE OF REGIONAL ORGANIZATIONS IN CONFLICT MANAGEMENT: IGAD AND THE SUDANESE CIVIL WAR* 46–57 (2008) (discussing IGAD’s role in managing drawn-out peace talks); *Welcoming South Sudan as Africa’s Newest Nation*, IGAD (July 8, 2011), http://igad.int/index.php?option=com_content&view=article&id=327:welcoming-south-sudan-as-africas-newest-nation&catid=61:statements&Itemid=150 (discussing IGAD’s leading role in the CPA negotiations).

agreement governed this colonial period,¹⁶³ 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.¹⁶⁴ A second protracted period of civil war prevailed from 1983 to 2005, resulting in more than two million deaths and four million persons displaced.¹⁶⁵ It was during this period that IGAD began directing negotiations to end that violence.¹⁶⁶ In 1994, a Declaration of Principles established guideposts for peace,¹⁶⁷ 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”).

164. See CATHERINE JENDIA, *THE SUDANESE CIVIL CONFLICT 1969–1985*, 94–99 (2002) (discussing salient features of the 1972 Addis Ababa agreement).

165. U.S. DEP'T OF ST., *SOUTH SUDAN* (09/22/11) (Sept. 22, 2011), <http://www.state.gov/outofdate/bgn/southsudan/178466.htm>.

166. IGAD formed initially as the Heads of State of the Intergovernmental Authority on Drought and Development (IGADD). It mediated negotiations between the Government of Sudan and the opposition forces, which in the early 2000s produced a series of six agreements leading to the CPA. See *The Background to Sudan's Comprehensive Peace Agreement*, UNMIS, <https://unmis.unmissions.org/Default.aspx?tabid=515> (last visited Jan. 14, 2016). Formed in 1986, membership within IGAD expanded to form IGAD-Plus, which in 2015 included IGAD's original members (Djibouti, Ethiopia, Kenya, Somalia, Sudan, Uganda), followed by Eritrea (1993), five countries from the African Union (Algeria, Chad, Nigeria, Rwanda, and South Africa), the A.U. Commission, the People's Republic of China, the European Union, Norway, the United Kingdom, the United States, and the co-chair of the IGAD Partners Forum. See Press Release, Office of the IGAD Special Envoys for South Sudan, *Participation of the IGAD Plus Peace Process* (Aug. 7, 2015), http://igad.int/index.php?option=com_content&view=article&id=1187:press-release-participation-of-the-igad-plus-peace-process&catid=1:latest-news&Itemid=150.

167. See RUTH IYOB & GILBERT M. KHADIAGALA, *SUDAN: THE ELUSIVE QUEST FOR PEACE* 102–07 (2006) (discussing negotiations leading up to the 1994 Declaration of Principles).

tion and federalism issues dividing North and sub-Saharan Sudan,¹⁶⁸ which eventually led to the establishment of the CPA.

A. *Optimism Followed by Despair*

A sense of opportunity accompanied the state's creation. Diplomats,¹⁶⁹ liberal human rights groups,¹⁷⁰ world leaders,¹⁷¹ and the World Council of Churches¹⁷² joined in celebration. But sentiments quickly devolved into feelings of "despair," "anger," and "betrayal" toward the political leadership of South Sudan.¹⁷³ Deep suspicions between South Sudan's President, Salva Kiir Mayardit and former Vice President, Riek Machar

168. See generally Declaration of Principles (IGADD/IGAD) (July 20, 1994), reprinted in KEY TEXTS AND AGREEMENTS: ACCORD SUDAN (2006), http://www.c-r.org/downloads/Accord18_26Keytextsandagreements_2006_ENG.pdf.

169. See Rebecca Tynsley, *Premature Adulation in Sudan*, in YEAR ONE OF A NATION: SOUTH SUDAN'S INDEPENDENCE 14 (Dec. 2012), <http://www.e-ir.info/wp-content/uploads/Sudan-publication.pdf> (mentioning diplomatic celebrations).

170. Colum Lynch, *How the U.S. Triumph in South Sudan Came Undone*, FOREIGN POL'Y (Dec. 24, 2013), <http://foreignpolicy.com/2013/12/24/how-the-u-s-triumph-in-south-sudan-came-undone/> (noting the wide coalition of human rights, political, and religious supporters backing South Sudan independence); see also ALJAZEERA AMERICA, *supra* note 158 (quoting Alex de Waal on the instinctively secessionist positions of liberal human rights groups and churches).

171. *World Congratulates South Sudan on Independence*, DW (Jul. 9, 2011), <http://www.dw.com/en/world-congratulates-south-sudan-on-independence/a-15222851> (citing congratulations from leaders from the United States, Germany, the European Union, South Africa, and the United Nations).

172. Congratulation Letter for the Independence of South Sudan, World Council of Churches (July 7, 2011), <https://www.oikoumene.org/en/resources/documents/general-secretary/messages-and-letters/congratulation-letter-for-the-independence-of-south-sudan> (from World Council of Churches General Secretary Rev. Dr. Olav Fykse Tveit). Francis Deng, an original proponent of R2P, claimed religious strife was the pivotal factor in Sudan's internal conflict. See Francis Deng, *Sudan-Civil War and Genocide: Disappearing Christians of the Middle East*, MIDDLE EAST Q. 13, 13 (2001).

173. See *Independent South Sudan: A Failure of Leadership: Hearing Before the S. Foreign Relations Comm.*, 114th Cong. (2015) [hereinafter *Independent South Sudan*] (statement of Princeton N. Lyman, Senior Advisor to the President, U.S. Institute of Peace), http://www.foreign.senate.gov/imo/media/doc/121015_Lyman_Testimony.pdf; see also S.C. Res. 2132 (Dec. 24, 2013) (expressing grave alarm concerning the rapidly deteriorating humanitarian crisis in South Sudan).

exploded on December 15, 2013,¹⁷⁴ 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,¹⁷⁵ the U.N. High Commissioner for Human Rights¹⁷⁶ 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.¹⁷⁷ 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.¹⁷⁸ Marauding and loosely formed militias—the Nuer White Army, the Dinka Gulweng, the Otuho Monyimiji of Eastern Equatoria, the Azande Arrow Boys, the Ugandan Lord's Resistance Army in Western Equatoria, and lesser known or previously unknown

174. See Isma'il Kushkush, *President Says a Coup Failed in South Sudan*, N.Y. TIMES (Dec. 16, 2013), <http://www.nytimes.com/2013/12/17/world/africa/attempted-coup-in-south-sudan-president-says.html> (reporting on President Kiir's televised address of a failed *coup d'état* by soldiers aligned with Machar, who had been ousted in a cabinet shake-up in July 2013). The United States disputes evidence of the coup attempt. See *The Situation in South Sudan: Hearing Before the S. Foreign Relations Comm.*, 113th Cong. (2014) (statement of Linda Thomas-Greenfield, Assistant Secretary of State for African Affairs, Bureau of African Affairs), C-SPAN (Jan. 9, 2014), (22:58), <https://www.c-span.org/video/?317081-1/senate-foreign-relations-cmte-hearing-south-sudan> (“[W]e've not seen any evidence that this was a coup attempt.”).

175. Intergovernmental Auth. on Dev. [IGAD], Agreement on the Resolution of the Conflict in the Republic of South Sudan (Aug. 17, 2015), https://unmiss.unmissions.org/sites/default/files/final_proposed_compromise_agreement_for_south_sudan_conflict.pdf.

176. *South Sudan: Slaughter of Civilians, Gang Rapes Among 'Shocking' Crimes Committed by All Sides, Says UN*, UN NEWS CENTRE (Jan. 21, 2016), <http://www.un.org/apps/news/story.asp?NewsID=53061#.VqKWzfrKCg>.

177. See *Independent South Sudan*, *supra* note 173 (statement of Adotei Akwei, Managing Director, Government Relations, Amnesty International USA), http://www.foreign.senate.gov/imo/media/doc/121015_Akwei_Testimony.pdf.

See also UNMISS & OHCHR, *The State of Human Rights in the Protracted Conflict in South Sudan* (Dec. 4, 2015), http://www.ohchr.org/Documents/Countries/SS/UNMISS_HRD4December2015.pdf.

178. A.U. Commission of Inquiry on South Sudan, *Final Report of the African Union Commission of Inquiry on South Sudan, African Commission of Inquiry on South Sudan*, ¶¶ 380–83, at 117–18 (Oct. 15, 2015), <http://www.peaceau.org/uploads/auciss.final.report.pdf> (documenting various gross violations of human rights).

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.¹⁷⁹ Having “never seriously invested in building credible state institutions,” South Sudan has become a “hijacked state,” and a “violent kleptocracy.”¹⁸⁰ After only four years, it had earned the label of the “world’s most failed state.”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.¹⁸² A much delayed and most tenuous unity government brought the rivals together in late April 2016.¹⁸³ 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.¹⁸⁴ Invoking the name of

179. Brian Adeba, *Making Sense of the White Army’s Return in South Sudan* 6–7 (Centre for Security, Governance Papers No. 1, Feb. 2015), <http://www.ssrresourcecentre.org/wp-content/uploads/2015/02/CSG-Paper-1-Adeba-Feb-2015.pdf> (canvassing vigilante groups and noting the potentially devastating impact of the White Army).

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).

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>.

182. See *Independent South Sudan*, *supra* note 173 (statement of Princeton N. Lyman, Senior Advisor to the President, U.S. Institute of Peace), http://www.foreign.senate.gov/imo/media/doc/121015_Lyman_Testimony.pdf. It is estimated that two-and-a-half million people have died from war and privation in the north and south of Sudan during the second period of civil war between 1983 and 2005, which also displaced an estimated four million persons. See Mollie Zapata, *Sudan: Independence though Civil Wars, 1956–2005*, ENOUGH! (Dec. 13, 2011), <http://www.enoughproject.org/blogs/sudan-brief-history-1956>.

183. *South Sudan Rebel Chief Riek Machar Sworn in as Vice-President*, BBC NEWS (Apr. 26, 2016), <http://www.bbc.com/news/world-africa-36140423>.

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

(May 31, 2016) (transcript available at <http://usun.state.gov/remarks/7310>) (calling for the imposition of sanctions notwithstanding the formation of the Transitional Government of National Unity due to lack of meaningful progress on core elements of the peace agreement).

185. See Salva Kiir & Riek Machar, Opinion, *South Sudan Needs Truth, Not Trials*, N.Y. TIMES (June 7, 2016), http://www.nytimes.com/2016/06/08/opinion/south-sudan-needs-truth-not-trials.html?_r=0.

186. See Ty McCormick & Siobhán O'Grady, *The New York Times South Sudan Op-Ed That Wasn't*, FOREIGN POL'Y (June 9, 2016), <http://foreignpolicy.com/2016/06/09/the-new-york-times-south-sudan-op-ed-that-wasnt/> (quoting statements by Machar's spokesman denying Machar had been a co-author).

187. See Paul Farhi, *Who Wrote That Op-Ed? The New York Times Isn't Sure*, WASH. POST (June 11, 2016), https://www.washingtonpost.com/lifestyle/style/who-wrote-that-op-ed-the-new-york-times-isnt-sure/2016/06/09/c4f286a6-2e8c-11e6-9b37-42985f6a265c_story.html. In July 2016, the unity government collapsed; heavy fighting erupted between the factions inside South Sudan's presidential palace and on the streets of the capital city, Juba. *South Sudan: 'Riek Machar Forces Under Fire' in Juba*, BBC NEWS (July 10, 2016), <http://www.bbc.com/news/world-africa-36757699>. Opposition leader Machar fled the capital along with loyalists amid widespread reports of gender-violence and crimes against civilians. *South Sudan Deputy Leader Riek Machar Replaced by Taban Deng After Fleeing Capital*, WALL ST. J. (July 23, 2016), <http://www.wsj.com/articles/south-sudan-deputy-leader-riek-machar-replaced-by-taban-deng-after-fleeing-capital-1469289217>; Simona Foltyn, *'I Begged Them to Kill Me Instead': Women in South Sudan Raped Under Nose of UN*, GUARDIAN (July 29, 2016), <https://www.theguardian.com/global-development/2016/jul/29/women-south-sudan-raped-un-compound-juba-kill-me-instead>. Ugandan troops have intervened to protect its citizens but concerns arise that the forces will remain to support the government. *Ugandan Army Crosses into S Sudan to Evacuate Citizens*, ALJAZEERA (July 14, 2016), <http://www.aljazeera.com/news/2016/07/ugandan-army-crosses-sudan-evacuate-citizens-160714094029720.html>. Machar resurfaced in the neighboring Dem-

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,¹⁸⁸ and poured billions of dollars into achieving that result.¹⁸⁹ An independent South Sudan represented an important foreign policy accomplishment for the United States in sub-Saharan Africa,¹⁹⁰ seemingly accomplishing democratization and religious freedom objectives¹⁹¹ and counterbalancing concerns that Sudan provided a safe haven for terrorists.¹⁹² The United States remains the largest provider of bilateral foreign assis-

ocratic 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>.

188. SEN. JOHN KERRY, STATEMENT FOR THE RECORD ON CUTS TO THE INTERNATIONAL AFFAIRS BUDGET IN THE FY11 CONTINUING RESOLUTION I, <http://www.usglc.org/USGLCdocs/Sen-Kerry-IAB-FY11-IAB-Statement.pdf> (United States diplomats helping to "midwife the birth of this new nation").

189. Siobhán O'Grady, *South Sudanese Rebel Leader Blasts the U.S. After Cold Shoulder from the White House*, FOREIGN POL'Y (Oct. 6, 2015), <http://foreignpolicy.com/2015/10/06/south-sudanese-rebel-leader-blasts-the-u-s-after-cold-shoulder-from-the-white-house/> (noting the United States "poured billions of dollars into South Sudan to help the country break away from Sudan"). The bipartisan United States Congressional Sudan Caucus, together with the Save Darfur allies, are credited with securing over six billion dollars in humanitarian aid for war-torn Sudan between 2005 and 2010—making Sudan the third largest recipient of United States aid, behind Iraq and Afghanistan. Rebecca Hamilton, *U.S. Played Key Role in Southern Sudan's Long Journey to Independence*, PULITZER CTR. ON CRISIS REPORTING (July 9, 2011), <http://pulitzercenter.org/articles/south-sudan-independence-khartoum-southern-kordofan-us-administration-role>.

190. See Lynch, *supra* note 170.

191. See ROBERT B. MUNSON, PEACEKEEPING IN SOUTH SUDAN: ONE YEAR OF LESSONS FROM UNDER THE BLUE BERET 32 (2015) (discussing bipartisan Congressional support against tyranny and religious persecution).

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-JAZEERA 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.¹⁹³ The African Union, IGAD, and the United States contemplated punitive measures against both warring factions,¹⁹⁴ and the Security Council tacitly acknowledged the facade of the unity government by extending sanctions until May 31, 2017.¹⁹⁵ 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,¹⁹⁶ 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;”¹⁹⁷ U.S. Secretary of State John Kerry noted his “very personal stake” in the deteriorating situation;¹⁹⁸ and President Barack Obama, recognizing

193. LAUREN PLOCH BLANCHARD, CONG. RESEARCH SERV., R43344, *The Crisis in South Sudan* 9 (2014), <https://www.fas.org/sgp/crs/row/R43344.pdf>.

194. *AU Threatens Sanctions on Defiant South Sudanese Warring Parties*, SUDAN TRIB. (June 15, 2015), <http://www.sudantribune.com/spip.php?article55345> (noting A.U. sanctions pronouncement in coordination with IGAD); Peter Baker & Marc Santora, *Obama Gathers Leaders in Effort to End South Sudan War*, N.Y. TIMES (July 27, 2015), http://www.nytimes.com/2015/07/28/world/af-rica/obama-ethiopia-south-sudan.html?_r=0 (noting President Obama’s threat of sanctions).

195. See S.C. Res. 2290 (May 31, 2016).

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).

197. Press Release, Susan E. Rice, The White House, Statement by National Security Advisor Susan E. Rice on South Sudan Independence Day (July 9, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/09/statement-national-security-advisor-susan-e-rice-south-sudan>.

198. Press Release, John Kerry, Secretary, U.S. Dep’t of State, Kerry Press Briefing in Jerusalem on Middle East, South Sudan (Jan. 5, 2014), <http://iipdigital.usembassy.gov/st/english/texttrans/2014/01/20140105289933.html#axzz3xiMHxTaq>.

the threat to U.S. interests, took the dramatic step of engaging directly in South Sudanese negotiations.¹⁹⁹

1. *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,²⁰⁰ but abject conditions of poverty belied its ability to provide a comprehensive solution.²⁰¹ Although the country is resource rich,²⁰² South Sudan's people are among the poorest in the world.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.²⁰⁴ Its economy is the

199. Peter Baker & Marc Santora, *Obama Gathers Leaders in Effort to End South Sudan War*, N.Y. TIMES (July 27, 2015), http://www.nytimes.com/2015/07/28/world/africa/obama-ethiopia-south-sudan.html?_r=0 (noting Obama's threat of sanctions).

200. See Crockett, *supra* note 156, at 251 (calling the CPA extraordinarily complex and bewildering). For a compilation of instruments relating to the CPA, see *Peace Agreements: Sudan*, U.S. INST. OF PEACE, <http://www.usip.org/publications/peace-agreements-sudan> (last updated Mar. 15, 2005).

201. See, e.g., Rupa Ranganathan & Cecilia M. Briceño-Garmendia, *South Sudan's Infrastructure: A Continental Perspective* (World Bank Research Policy, Working Paper No. 5814, 2011) (noting South Sudan's negligible infrastructure).

202. See *South Sudan Overview*, THE WORLD BANK, <http://www.worldbank.org/en/country/southsudan/overview> (last updated Apr. 9, 2016) (noting "South Sudan has vast and largely untapped natural resources").

203. In 2015, South Sudan ranked 169 out of 188 countries listed by the U.N. in terms of population in multidimensional poverty. See *Human Development Data (1980–2015)*, U.N. DEV. PROGRAMME: HUMAN DEV. REPORTS, <http://hdr.undp.org/en/data> (last visited Oct. 5, 2016).

204. *South Sudan Joins the World Bank Group: Frequently Asked Questions*, WORLD BANK, <http://siteresources.worldbank.org/INTSOUTHSUDAN/Resources/south-sudan-membership-FAQs.pdf>. As of July 2015, South Sudan's population estimate was 12,042,910. *Africa: South Sudan*, CIA: THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/od.html> (last updated Sept. 28, 2016).

most oil-dependent in the world,²⁰⁵ 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.²⁰⁶ The World Food Program regards it as one of the most food-insecure countries in the world.²⁰⁷ 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.²⁰⁸ Also present were *ad hoc*, undisciplined, but well-armed and mobilized militias, creating widespread security sector concerns.²⁰⁹ 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.*

207. See *South Sudan*, WORLD FOOD PROGRAMME, <https://www.wfp.org/countries/south-sudan> (last visited Oct. 5, 2016).

208. See S.C. Res. 1990 (June 27, 2011). The Abyei Area (formerly Abyei district) is the traditional homeland of the Ngok Dinka people (linguistically associated with South Sudanese Dinka) and the Misseriya (Arab nomadic herdsman associated with tribes in North Sudan). Its administration was subject of a special protocol in the CPA (repeatedly postponed), a 2009 award by the Permanent Court of Arbitration (disputed, with the coveted Heglig oil field awarded to the North), an invasion by Sudan in May 2011, and a series of forestalled peace negotiations by the A.U. High-Level Implementation Panel and the A.U. Peace and Security Council. See Mollie Zapata, *Enough 101: What is the Abyei Area and Why is it Disputed*, ENOUGH! (Jan. 15, 2013), <http://www.enoughproject.org/blogs/enough-101-what-abyei-area-and-why-it-disputed>. The security situation in Abyei is stable but unpredictable. See U.N. Secretary-General, *Report of the Secretary-General on Abyei*, ¶ 2, U.N. Doc. S/2015/700 (Sept. 11, 2015).

209. See Marius Kahl, *The Challenge of Increasing the Security of the People in South Sudan*, in FORGING TWO NATIONS: INSIGHTS ON SUDAN AND SOUTH SUDAN 201 (Elke Grawert ed., 2013) (canvassing security sector disarmament, demobilization, police, and reintegration challenges in South Sudan).

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 responsibility 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%200205/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.

212. *See* Charles Anthony Smith & Antonio Gonzalez, *The International Criminal Court: Globalizing Peace or Justice?*, in *THE POLITICS OF THE GLOBALIZATION OF LAW: GETTING FROM RIGHTS TO JUSTICE* 48, 55 (Alison Brysk ed., 2013) (noting President al-Bashir's efforts to interfere with the referendum).

213. *See, e.g.*, Daniel Sullivan, *A Trip to the US Must End Bashir's "Endemic Impunity"*, UNITED TO END GENOCIDE (Aug. 28, 2015), <http://endgenocide.org/a-trip-to-the-us-must-end-bashirs-endemic-impunity/>; Alan Wallis, *Diplomatic Impunity: South Africa Flouts International and Domestic Law by Failing to Arrest al-Bashir*, DAILY MAVERICK (June 15, 2015), http://www.dailymaverick.co.za/opinionista/2015-06-15-diplomatic-impunity-south-africa-flouts-international-and-domestic-law-by-failing-to-arrest-al-bashir/#.VpkYY_krKcG; Netsanet Belay, *Impunity vs Immunity: Africa and the ICC*, AMNESTY INTERNATIONAL (June 24, 2015), <https://www.amnesty.org/en/latest/news/2015/06/impunity-vs-immunity-africa-and-the-icc/>. The Obama Administration also has been criticized for contributing to a sense of impunity among pepe-

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

trators of atrocity given its decision not to strike against Syria after warning its government not to cross a "red-line" by using chemical weapons against its citizenry, which it unleashed in August 2013 in an attack on Ghouta. See Stephen J. Rapp, *Overcoming the Challenges to Achieving Justice for Syria*, 30 EMORY INT'L L. REV. 155, 159–60 (2015) (discussing the Obama Administration's non-action in response to the Syrian government's use of chemical weapons in Ghouta in August 2013).

214. See MATTHEW LERICHE & MATTHEW ARNOLD, *SOUTH SUDAN: FROM REVOLUTION TO INDEPENDENCE* 5 (Oxford Univ. Press 2013) (2012) (noting binary presentations of conflict afflicting South Sudan).

215. Deng, *supra* note 172 (noting religion as the pivotal factor in the conflict).

216. E.E. EVANS-PRITCHARD, *THE NUER: A DESCRIPTION OF THE MODES OF LIVELIHOOD AND POLITICAL INSTITUTIONS OF A NILOTIC PEOPLE* 125–32 (1972).

ethnographic record.”²¹⁷ 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.²¹⁸ 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,²¹⁹ and made the post-colonial adoption of *uti possidetis* (as you possess, so you may possess) attractive, but complicated, posing

217. RAYMOND C. KELLY, *THE NUER CONQUEST: THE STRUCTURE AND DEVELOPMENT OF AN EXPANSIONIST SYSTEM I* (1985).

218. LERICHE & ARNOLD, *supra* note 214, at 4. For seminal studies of Sudan’s multi-textured ethnography, see generally C.G. SELIGMAN & BRENDA Z. SELIGMAN, *PAGAN TRIBES OF THE NILOTIC SUDAN* (1932); E.E. EVANS-PRITCHARD, *WITCHCRAFT, ORACLES AND MAGIC AMONG THE AZANDE* (1937); S.F. NADEL, *THE NUBA: AN ANTHROPOLOGICAL STUDY OF THE HILL TRIBES IN KORDOFAN* (1947); GODFREY LIENHARDT, *DIVINITY AND EXPERIENCE: THE RELIGION OF THE DINKA* (1961); IAN CUNNISON, *BAGGARA ARABS: POWER AND THE LINEAGE IN A SUDANESE NOMAD TRIBE* (1966).

219. See Elke Grawert, *Introduction to FORGING TWO NATIONS*, *supra* note 209, at 15, 16–19 (noting British colonial policy and land management).

serious consequences for political stability.²²⁰ 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.²²¹

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,²²² and poses major peacekeeping problems for the United Nations.²²³ 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),²²⁴ became "completely overwhelmed"²²⁵ 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-

220. See generally SAADIA TOUVAL, *THE BOUNDARY POLITICS OF INDEPENDENT AFRICA* (1972); GIUSEPPE NESI, *L'UTI POSSIDETIS IURIS NEL DIRITTO INTERNAZIONALE* (1996); JOSHUA CASTELLINO & STEVE ALLEN, *TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS* (2003).

221. 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 *South Sudan's Kiir Appoints Governors of 28 New States*, SUDAN TRIB. (Dec. 25, 2015), <http://www.sudantribune.com/spip.php?article57484> (discussing President Kiir's Republican Order to appoint twenty-eight new governors); *Troika Urges Delay to Plan for New South Sudan States*, REUTERS (Oct. 6, 2015), <http://www.reuters.com/article/us-southsudan-troika-idUSKCN0S029620151006> (mentioning border demarcation issues as a possible rationale and internal and international objections).

222. See *South Sudan Crisis Deepens as Once-Stable Areas Fall into Violence—UN Relief Chief*, UN NEWS CENTRE (Aug. 2, 2016), <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).

223. Spencer Zifcak, *What Happened to the International Community? R2P and Conflicts in South Sudan and the Central African Republic*, 16 MELB. J. INT'L L. 52, 72 (2015) (noting financial constraints regarding South Sudan peacekeeping).

224. UNMIS: UNITED NATIONS MISSION IN SUDAN, <https://unmis.unmisions.org/> (last visited Oct. 5, 2016).

225. Zifcak, *supra* note 223, at 53.

tivities to protecting civilians.²²⁶ Additional peacekeeping operations include the UNISFA,²²⁷ the U.N.-A.U. Hybrid Operation in Darfur (UNAMID),²²⁸ and the U.N. Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), complicating and regionalizing migratory aspects of this unfolding humanitarian crisis.²²⁹

Solidarism's inchoate understanding of the peace process itself—including external approaches toward it—also challenged peaceful transition in South Sudan.²³⁰ Secession proponents fell into humanitarianism's morality hazard by insufficiently accounting for unintended consequences that contributed to the violence secession was meant to prevent.²³¹ 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

226. *UNMISS Mandate*, UNMISS: UNITED NATIONS MISSION IN THE REPUBLIC OF SOUTH SUDAN, <http://www.un.org/en/peacekeeping/missions/unmiss/mandate.shtml> (last visited Oct. 5, 2016).

227. *Mission Home*, UNISFA: UNITED NATIONS INTERIM SECURITY FORCE FOR ABYEI, <http://www.un.org/en/peacekeeping/missions/unisfa/> (last visited Oct. 5, 2016).

228. *UNMIS Background*, UNMIS: UNITED NATIONS MISSION IN SUDAN, <http://www.un.org/en/peacekeeping/missions/past/unmis/background.shtml> (last visited Oct. 5, 2016) (discussing the expansion efforts of UNMIS and the establishment of UNAMID). *See also* S.C. Res. 2155 (May 27, 2014) (authorizing troop ceiling of 12,500).

229. *Mission Home*, MINUSCA: UNITED NATIONS MULTIDIMENSIONAL INTEGRATED STABILIZATION MISSION IN THE CENT. AFR. REP., <http://www.un.org/en/peacekeeping/missions/minusca/> (last visited Sept. 17, 2016).

230. *See generally* JOHN YOUNG, *THE FATE OF SUDAN: THE ORIGINS AND CONSEQUENCES OF A FLAWED PEACE PROCESS* (2012).

231. *See generally* GAMBLING ON HUMANITARIAN INTERVENTION: MORAL HAZARD, REBELLION AND CIVIL WAR (Timothy W. Crawford & Alan J. Kuperman eds., 2006).

of Sudan.²³² 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.”²³³ 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.²³⁴ 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.”²³⁵ The opposition parties—the SPLM and NCP—did not want elections before concluding the peace process, but international backers of that process insisted.²³⁶ 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.²³⁷ R2P relies on the residual and remedial powers of the interna-

232. See Young, *supra* note 230, at 218-25.

233. Mark Tran, *South Sudan Failed by Misjudgment of International Community, Says UN Chief*, GUARDIAN (Jan. 22, 2014), <http://www.theguardian.com/global-development/2014/jan/22/south-sudan-failed-international-community> (quoting UNDP Chief, Helen Clark).

234. See Sara Pantuliano, *Donor-Driven Technical Fixes Failed South Sudan: It’s Time to Get Political*, RELIEFWEB (Jan. 9, 2014), <http://reliefweb.int/report/south-sudan-republic/donor-driven-technical-fixes-failed-south-sudan-it-s-time-get-political>.

235. Gilbert M. Khadiagala, *South Sudan: The Perils of New States*, E-INTERNATIONAL REL. (Apr. 15, 2014), <http://www.e-ir.info/2014/04/15/south-sudan-the-perils-of-new-states/>.

236. See YOUNG, *supra* note 230 at xvii (noting the insistence of international backers on holding elections before the end of the peace process).

237. See generally TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION (1955) (discussing the dynamics of social upheaval and the misrepresentation of genuine wants). See also Rossi, *supra* note 34, at 352 (discussing preference falsification in the context of R2P).

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,²³⁸ a report card unusual for what solidarism's proponents could not detail. Ongoing border negotiations rendered the new country's exact size indeterminate.²³⁹ GDP, per capita income, and annual growth and inflation rates could not be calculated.²⁴⁰ The central government had no budget and the country had no constitution;²⁴¹ 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.²⁴² Questions of citizenship among nomadic peoples and the status of millions of southerners living in the north remained unaddressed.²⁴³ 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.²⁴⁴ This profound lack of effectiveness impacted South Sudan's central governing authority,²⁴⁵ 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 percent—coming from deposits in the South.²⁴⁶ Under the CPA, oil revenues were shared equally.²⁴⁷ This forced condominium arrangement prevailed because the export of South Sudanese oil required pipeline transport through the North to Port Sudan, located on the Red Sea. Suspicions of graft and price manipulation marred prospects for confidence building measures connected to both countries' oil lifeline;²⁴⁸ the prospect of a revenue sharing agreement was itself a hard fought achievement of peace in 2005.²⁴⁹ The SPLM and NCP agreed if the South voted for independence, "arrangements would be made to cushion the blow to the north."²⁵⁰ But details regarding post-independence revenue sharing were never worked out and produced violence that intersected with border demarcation disputes.²⁵¹ Astonishingly, South Sudan suspended oil production barely six months after achieving statehood in response to grievances against Sudan, a damaging decision for both economies. Less than a year after facilitating independence, 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.²⁵² Despite

EREIGNTY AND EFFECTIVENESS: LEGAL LESSONS FROM THE DECOLONIZATION OF SUB-SAHARAN AFRICA (2004).

246. See U.S. DEP'T OF ST., *supra* note 165 (estimating oil reserves).

247. Young, *supra* note 230, 183 ("Under the CPA oil revenues were shared 50-50").

248. *The Nexus of Corruption and Conflict in South Sudan*, THE SENTRY (July 2015), https://thesentry.org/wp-content/uploads/2015/07/report_Nexus_CorruptionConflict_SouthSudan_TheSentry.pdf (noting complaints from Juba that Khartoum controlled oil meter measurements and was taking more than its agreed-upon share).

249. See RICHARD A. LOBBAN, JR., GLOBAL SECURITY WATCH: SUDAN 119-22 (2010) (discussing problems of revenue sharing).

250. YOUNG, *supra* note 230, 184.

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).

252. See *Security Council May Take Further Action if Sudan-South Sudan Fighting 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.’”²⁵³

Crosscutting alliances within IGAD now contribute to regional intrigue.²⁵⁴ Shortly after the rift in December 2013, Uganda sent troops to South Sudan in support of Kiir’s regime against Machar.²⁵⁵ 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.²⁵⁶ 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,²⁵⁷ 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>.

254. See generally Berouk Mesfin, *The Crisis in South Sudan: A Game of Regional Chess*, ISS: INSTITUTE FOR SECURITY STUDIES (May 26, 2014), <https://www.issafrika.org/iss-today/the-crisis-in-south-sudan-a-game-of-regional-chess>.

255. See generally Kasajja Phillip Apuuli, *Explaining the (Il)legality of Uganda’s Intervention in the Current South Sudan Conflict*, 24 AFR. SEC. REV. 352 (2014).

256. *Regional Interests at Stake in the South Sudan Crisis*, IRIN (Mar. 19, 2014), <http://www.irinnews.org/report/99802/regional-interests-at-stake-in-the-south-sudan-crisis>.

257. John Prendergast, *U.S. Policy Toward Sudan and South Sudan: Testimony Before The House Committee on Foreign Affairs Subcommittee on Africa, Global Health, Human Rights, and International Organizations*, ENOUGH! (Feb. 26, 2014), <http://enoughproject.org/files/Sudans-House-Hearing-Prendergast-Testimony.pdf> (“[A]llegations are increasing that both Eritrea and Sudan are covertly providing support to the South Sudanese opposition forces”).

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).

260. See A.U. Commission of Inquiry on South Sudan, *supra* note 178, ¶¶ 832–40. On concerns generated by the report's long overdue publication, see David Deng, *The Silencing of the AU Commission of Inquiry on South Sudan*, SUDAN TRIB. (Feb. 6, 2015), <http://www.sudantribune.com/spip.php?article 53903>.

261. See Jacey Fortin, *Power Struggles Stall South Sudan's Recovery From War*, N.Y. TIMES (May 30, 2016), http://www.nytimes.com/2016/05/31/world/africa/south-sudan-struggles-to-collect-taxes-after-years-of-war.html?rref=collection%2Ftimestopic%2FSouth%20Sudan&action=click&contentCollection=world®ion=stream&module=stream_unit&version=latest&contentPlacement=3&pgtype=collection (discussing challenges to the delicate peace between warring factions).

262. Gilbert Khadiagala, *South Sudan: Proliferation of Peace Agreements; Will They Bring Long Lasting Peace?*, AFRICANIST VIEW (Feb. 4, 2015), <https://weke.sasylvanus.wordpress.com/tag/gilbert-khadiagala/>.

263. See Okech Francis & Neo Khanyile, *South Sudan Devalues Currency by 84% as Dollar Peg Abandoned*, BLOOMBERG (Dec. 15, 2015, 1:35 PM), <http://www.bloomberg.com/news/articles/2015-12-15/south-sudan-devalues-currency-by-84-as-dollar-peg-abandoned>; Okech Francis, *Hyperinflation Stalks War-Torn South Sudan as Prices Spike*, BLOOMBERG (Jan. 15, 2016, 10:04AM), <http://www.bloomberg.com/news/articles/2016-01-14/war-ravaged-south-sudan-faces-new-crisis-of-hyperinflation>; *South Sudan Inflation at 202.5 Pct Yr/ Yr in February*, REUTERS AFR. (Mar. 14, 2016, 12:45 PM), <http://af.reuters.com/article/investingNews/idAFKCN0WG1E0>.

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

264. See generally Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 1–38 (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999) (presenting a five-phase spiral model of norms socialization); CHRISTINA LAFONT, *GLOBAL GOVERNANCE AND HUMAN RIGHTS* 62–71 (2012) (applying the spiral model to global governance institutions).

international community to instantiate the arrival of solidarity as a form of global governance, absent a tether to context, reveals insufficient concern for power-conferring capabilities that authorize and instrumentalize the critical need for responsible sovereignty in South Sudan. The international community's failure to respond to South Sudan's crisis indicates solidarity's need to shore up normative acceptance of agreed upon secondary power-conferring rules of agency, a point that applies to R2P as well. South Sudan's plight indicates solidarity has yet to establish the international community standard as an autonomous standard of agency. The rhetorical and metaphorical presentation of the international community as a united construct is misleading. The heteronomy that more properly lends a legal quality to the concept comes from outside the *communitas* and reflects parochial interests of the plurality. R2P's greatest obstacle to achieving the moral status envisioned by its progenitors has been and remains the heteronomy of the international community.

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,²⁶⁵ 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.²⁶⁶

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.²⁶⁷ 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

265. See Adama Dieng, *Accountability in South Sudan—The African Union Steps Up*, AFRICARENEWAL (Apr. 22, 2014), <http://www.un.org/africarenewal/web-features/accountability-south-sudan-%E2%80%93-african-union-steps>.

266. On Article 4(h), see *supra* note 48. See also Getachew Gebrekidan, *The South Sudan Conflict: Where is the AU's Commitment to Action?*, AFR. UP CLOSE (Aug. 14, 2015), <https://africaupclose.wilsoncenter.org/the-south-sudan-conflict-where-is-the-aus-commitment-to-action/> (expressing concerns regarding the African Union's engagement policy in South Sudan).

267. Woodrow Wilson, A Memorial Day Address, 30 May 1916, in 37 THE PAPERS OF WOODROW WILSON, MAY 9-AUGUST 7, 1916, 123, 126 (1981).

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