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# ENFORCING INTERNATIONAL LAW: STATES, IOS, AND COURTS AS SHAMING REFERENCE GROUPS

*Professor Sandeep Gopalan\* and Dr. Roslyn Fuller†*

## INTRODUCTION

Does international law (“IL”) impose meaningful constraints on state behavior? Unabated drone strikes by the dominant superpower in foreign territories, an ineffective United Nations (“U.N.”), and persistent disregard for international law obligations—e.g., the continued killing of citizens by states with an obligation to protect<sup>1</sup>—all suggest that the skeptics have won the debate about whether international law is law in the sense in which the term is commonly understood and whether it affects state behavior.<sup>2</sup> This Article argues that such a conclusion would be in error because it grossly underestimates the complex ways in which IL affects state behavior. The scholars who claim that the lack of coercive power in IL deprives it of the attributes necessary for it to have the force of law err in imagining that the types of physical coercion typically used in domestic law enforcement are the only types of coercion available for the enforcement of legal rules.<sup>3</sup>

Incarceration is not the only type of coercion available for law enforcement. Granted, depriving the offender of his liberty by

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1. *Syria Chemical Weapons Attack Killed 1,429, Says John Kerry*, BBC NEWS (Aug. 30, 2013), <http://www.bbc.co.uk/news/world-middle-east-23906913>.

2. See generally JACK L. GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* 3–17 (2005) (applying “rational choice theory” to argue that IL is law).

3. See, e.g., Anthony D’Amato, *Is International Law Really “Law”?*, 79 NW. U.L. REV. 1293, 1293 (1985).

confining him in jail has severe expressive, deterrent, retributive, and incapacitative effects, but other punishments can achieve the same purposes and be just as coercive. If these alternative punishments can be shown to achieve the aforementioned effects, the central argument against IL being law in the strict conventional sense fails. This Article aims to do this by focusing on a relatively neglected kind of sanction in IL—shaming.<sup>4</sup> The authors show that IL is enforced by states, courts, and international organizations by the imposition of shame sanctions on offenders and that these sanctions affect state behavior in the same ways that traditional coercive sanctions do.

The emphasis on shaming is not new to legal scholarship: criminal law scholars, among others, have produced a rich vein of literature on shame sanctions.<sup>5</sup> In contrast, IL scholars have largely passed over the concept, although some have suggested that shaming may have a positive role in ensuring compliance with international law.<sup>6</sup> This is surprising since shaming is

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4. See Lesley Wexler, *The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Treaty*, 20 ARIZ. J. INT'L & COMP. L. 561, 565–66 (2003).

5. See Dan Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996) [hereinafter *Alternative Sanctions*]; Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1883 (1991) [hereinafter Massaro, *Shame and Criminal Law*] (analyzing whether “the assumed link between people’s sense of shame and their tendency to observe legal norms . . . is one that American criminal court judges can, or should, exploit”); James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1058–59 (1998); see generally Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365 (1999) (discussing the benefits shaming provides to the deterrence of white-collar crime).

6. See Louis Henkin, *Human Rights: Ideology and Aspiration, Reality and Prospect*, in REALIZING HUMAN RIGHTS: MOVING FROM INSPIRATION TO IMPACT 1, 24–25 (Samantha Powers & Graham Allison eds., 2000).

The various influences that induce compliance with human rights norms are cumulative, and some of them add up to an underappreciated means of enforcing human rights, which has been characterized as “mobilizing shame.” Intergovernmental as well as governmental policies and actions combine with those of NGOs and the public media, and in many countries also public opinion, to mobilize and maximize public shame.

*Id.* at 24.

pervasive in IL and matches up well with the cost-benefit type of prerequisites typically employed in the design of sanctions and incentives.<sup>7</sup> Moreover, both the impossibility of establishing a centralized system of traditional law enforcement methods for IL in the foreseeable future and the moral roots of many IL norms ought to make the study of shaming worthwhile.

Shaming, as it is used in this Article, refers to a deliberate attempt to negatively impact a state, regime, or leader's reputation by publicizing and targeting violations of international law norms.<sup>8</sup> Psychology literature contains rich material on shame, particularly as it relates to similar emotions such as guilt and embarrassment. For instance, Tangney and Miller write that "[w]hen experiencing shame, people felt physically smaller and more inferior to others; they felt they had less control over the situation. Shame experiences were more likely to involve a sense of exposure (feeling observed by others) and a concern with others' opinions of the event."<sup>9</sup> In experimental settings, shame was seen to be an intense, painful emotion involving feelings of "moral transgression," responsibility, and regret.<sup>10</sup> In other words, shaming can produce effects similar to other kinds of coercion.

IL actors have employed shaming to achieve coercive outcomes. Some of these shaming methods include labeling a state as an offender, creating a reputation as a bad actor and non-cooperator, marginalizing or expelling the state from international organizations, causing economic damage, shunning by other states, and mobilizing domestic public opinion against the offending regime or leader.<sup>11</sup> Coercion is employed against

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7. Wexler, *supra* note 4, at 564 ("[o]ne advantage of shaming penalties, as compared to incarceration, is their cheapness").

8. See Chad Flanders, *Shame and the Meanings of Punishment*, 54 CLEV. ST. L. REV. 609, 610 (2006) ("most scholars agree that shaming punishments involve the deliberate public humiliation of the offender[]").

9. June Price Tangney et al., *Are Shame, Guilt, and Embarrassment Distinct Emotions?*, 70 J. PERSONALITY & SOC. PSY. 1256, 1257 (1996).

10. *Id.*

11. See generally Katherine Butler, *Pakistan Told to Reform or Face Isolation*, INDEPENDENT (Oct. 19, 1999), <http://www.independent.co.uk/news/world/asia/pakistan-told-to-reform-or-face-isolation-739976.html> (discussing how Pakistan was removed from the U.K. Commonwealth following a military coup); Richard Dowden, *Blair Fails to Reach Commonwealth Agreement on Zimbabwe Exclusion*, INDEPENDENT (Dec. 6, 2003), *available at*

offenders with the objective of obtaining norm-conforming behavior in the future, and as a signaling device for other observers to show that breaching IL norms can be costly.

Criminal law scholarship shows that shame sanctions are most effective in tightly knit societies with shared norms.<sup>12</sup> If the ideal condition—a normative framework that is precise in terms of obligations and enforcement—is indicative of prerequisite criteria, the landscape for the enforcement of international law norms reveals a high degree of heterogeneity amongst nation states in terms of both normative frameworks and enforcement models. This suggests that shaming is unlikely to be effective. However, this facile conclusion is undermined by conditions that make shaming powerful despite the lack of precision in obligation and enforcement: complex webs of networked linkages between states that create co-dependent relationships akin to tight-knit local communities. Buttressing these co-dependent links between nation states are the shared epistemic, religious,<sup>13</sup> ethnic, gender,<sup>14</sup> economic, and language

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<http://search.proquest.com/docview/309612457/140EA768F6D1AFE2FA1/1?acountid=37371> (arguing that Prime Minister Blair was unable to convince other leaders to extend Zimbabwe's suspension from the Commonwealth due to a skewed portrayal of the Zimbabwe issue).

12. David Skeel, *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1811 (2001).

13. See Jeff Haynes, *Transnational Religious Actors and International Politics*, 22 THIRD WORLD Q. 143, 143–58 (2001). Co-religionists have acted beyond national borders on numerous occasions:

Pope Benedict has condemned the violence against Christians in Orissa but also deplored the killing of the [Laxmananda]. On [August 28th], Italy's Foreign Ministry said it will summon India's ambassador to demand "incisive action" to prevent further attacks against Christians. A statement issued after a cabinet meeting also said Italy would ask France, the current EU president, to take up the issue at a future meeting of foreign ministers.

See, e.g., *PM Terms Orissa Violence a National Shame*, CNN-IBN (Sept. 2, 2008), <http://ibnlive.in.com/news/pm-terms-orissa-violence-a-national-shame/72406-3.html>.

14. The women's movement transcends national boundaries in its campaigns for issues affecting women around the world. The U.N. Convention on the Elimination of All Forms of Discrimination Against Women is one manifestation of a legal framework for this community. U.N. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13. See generally MYRA MARX FERREE ET AL., GLOBAL FEMINISM: TRANSNATIONAL WOMEN'S ACTIVISM, ORGANIZING, AND

bonds. Together, these forces result in shared commitments to many IL norms despite deep divergences in domestic laws.<sup>15</sup>

For example, all participants in the international law system support, at a minimum, the condemnation of torture,<sup>16</sup> slavery,<sup>17</sup> piracy,<sup>18</sup> genocide,<sup>19</sup> prostitution,<sup>20</sup> and narcotic drugs.<sup>21</sup> Extracting from ratification records for IL instruments, state

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HUMAN RIGHTS (2006) (demonstrating how feminism has increasingly used the transnational arena to articulate their demands); VALENTINE M. MOGHADAM, *GLOBALIZING WOMEN: TRANSNATIONAL FEMINIST NETWORKS* (2005) (arguing that “transnational feminist networks are the organizational expression of the transnational women’s movement and are guided by . . . global feminism”); *TRANSNATIONAL SOCIAL MOVEMENTS AND GLOBAL POLITICS: SOLIDARITY BEYOND THE STATE* (Jackie Smith et al. eds., 1997) (discussing how nations demonstrate their commitment to international law norms that may differ from domestic policy).

15. Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 *INT’L ORG.* 1, 3 (defining an epistemic community as a “network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area”).

16. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, 112 Stat. 2681, 1465 U.N.T.S. 85.

17. See Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *opened for signature* Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 4 (Dec. 10, 1948); U.N. Charter art. 55; Slavery Convention, *opened for signature* Sept. 25, 1926, 60 L.N.T.S. 254.

18. See U.N. Convention on the High Seas arts. 14–22, *opened for signature* Apr. 29, 1958, 2 U.S.T. 2312, 450 U.N.T.S. 11.

19. See U.N. Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 78 U.N.T.S. 277.

20. See U.N. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others arts. 1–4, *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 271.

21. See U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 2, *opened for signature* Dec. 20, 1988, 1582 U.N.T.S. 95; Protocol Amending the Single Convention on Narcotic Drugs, *opened for signature* Mar. 25, 1972, 976 U.N.T.S. 3; U.N. Convention on Psychotropic Substances, *opened for signature* Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175; U.N. Single Convention on Narcotic Drugs, *opened for signature* Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 151; Second International Opium Convention, Feb. 19, 1925, 81 L.N.T.S. 317; Agreement Concerning the Suppression of the Manufacture of, International Trade in, and Use of, Prepared Opium, Feb. 11, 1925, 51 L.N.T.S. 337; International Opium Convention, Jan. 23, 1912, 8 L.N.T.S. 187.

practice, and publicly articulated commitments, it is possible to compose a shared normative framework for the international community.<sup>22</sup> It has been claimed that this community is one of “civilized nations,” suggesting a moral element to the impetus for cooperation.<sup>23</sup> Even formalized manifestations of this community, such as the U.N., support this idea.<sup>24</sup>

Apart from communities of nation states, regimes and their leaders are also part of several networks, whether they are international organizations such as the U.N., regional organizations such as the European Union, or clubs of allied regimes such as the Organisation for Economic Co-operation and Development (“OECD”) and North Atlantic Treaty Organization (“NATO”). When a state or leader is a member of a community or network characterized by interdependence, other members are able to direct evaluative opinions about them, which may be esteem enhancing or detracting. Such communities will be referred to as shaming reference groups. As rational actors, states and their leaders will behave in ways calculated to maximize esteem and minimize shame with reference to the applicable normative framework by supporting norms, adhering to them, reacting against breaches, championing new norms, etc. Whether the actor accepts a norm or not, at a minimum the reference group’s imposition of a shame sanction can make the commission of the offending act costly to the actor. Even if the state or regime is impervious to shame and not amenable to norm-conforming behavior in the future, the very process of shaming has the effect of establishing and cementing the asserted norm for non-offenders—not a trivial function in IL because it is a discipline where norms are created in a dynamic non-linear structure and are constantly evolving.<sup>25</sup>

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22. See Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 535, 542 (1998).

23. See Statute of the International Court of Justice art. 38, para. 1(c), June 26, 1945, 33 U.N.T.S. 993.

24. See, e.g., Press Release, Kofi Annan, U.N. Sec'y Gen., *The Meaning of International Community*, U.N. Press Release UNIS/SG/2478 (Dec. 30, 1999).

25. Professor Kahan argues that shaming has the effect of shaping preferences. If individuals are shamed for contravening a particular asserted norm, other observers will modify their own behavior to fit that asserted norm. *Alternative Sanctions*, *supra* note 5, at 639.

Although states are the principal IL actors, shaming is also attractive at the level of individual actors who are mainly agents of states: leaders of nation states, the primary component of this category, tend to belong to those sections of society most sensitive to reputational damage. For example, if the state is a democracy, political leaders have to prioritize voter reactions to their behavior, and reputational damage at the international level might be leveraged by opponents in electoral contests. Even in non-democratic states, leaders have to balance various constituencies and power groups to retain their own power. Thus, shame external to the state has the potential to disrupt the balance of power in a non-democratic state and strengthen the non-democratic leader's internal opponents. Shaming also has functional consequences for a leader: his reputation affects his ability to enter into business transactions and attract foreign investment—essential measures of successful governance in the global economy. In addition, evidence suggests that leaders from democratic and non-democratic states are eager to join multilateral organizations and gain positions in them to buttress their domestic standing.<sup>26</sup> For all of these reasons, shame sanctions have constraining power for leaders of nation states at the individual level.

Part I of this Article shows how the conceptual work on shaming is applicable to IL. Part II develops a structure for shaming in IL by identifying the relevant targets for shaming, the enforcers of the sanction, and the conditions for imposing the sanction. Part II further analyzes several examples of states, regimes, and individuals being shamed by international organizations and by domestic courts in the United Kingdom (“U.K.”), the United States, Germany, and Canada. It further illustrates that enforcement of IL norms via shaming affects state behavior in ways similar to traditional coercive sanctions. Part III develops the notion of a shaming reference group, advancing some examples of networks that meet the necessary conditions, including supranational organizations such as the EU, and networks of domestic courts. The Article then concludes.

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26. See, e.g., Ingmar Oldberg, *Russia's Great Power Strategy under Putin and Medvedev*, 1 UI OCCASIONAL PAPER 1, 4–10 (2010); *WTO Entry for Beijing Is Priority: EU Pushes for Talks on China Trade Status*, N.Y. TIMES (Dec. 9, 1996), [http://www.nytimes.com/1996/12/09/business/worldbusiness/09iht-wto.t\\_6.html](http://www.nytimes.com/1996/12/09/business/worldbusiness/09iht-wto.t_6.html).



## I. TRANSPLANTING SHAMING INTO INTERNATIONAL LAW

Criminal law scholars have engaged in extensive analysis of shaming sanctions. At the definitional level, “[s]haming is the process by which citizens publicly and self-consciously draw attention to the bad dispositions or actions of an offender, as a way of punishing him for having those dispositions or engaging in those actions.”<sup>27</sup> Scholars offer examples ranging from the media releasing the names of men who solicit prostitutes,<sup>28</sup> to the special license plates required for people convicted of driving under the influence of alcohol.<sup>29</sup> In addition, courts occasionally shame offenders as part of the sentencing process.<sup>30</sup>

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27. Kahan & Posner, *supra* note 5, at 368.

28. Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 735 & n.12 (1998); Courtney Guyton Persons, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons*, 49 VAND. L. REV. 1525, 1536–37 (1998).

29. Donna DiGiovanni, Comment, *The Bumper Sticker: The Innovation That Failed*, 22 NEW ENG. L. REV. 643, 644 (1988) (citing *Goldschmitt v. State*, 490 So. 2d 123 (Fla. Dist. Ct. App. 1986)).

30. See, e.g., *United States v. Gementera*, 379 F.3d 596, 598, 607 (9th Cir. 2004) (holding that the requirement that a convict wear a signboard proclaiming his guilt was “reasonably related to the legitimate statutory objective of rehabilitation”); *United States v. Coenen*, 135 F.3d 938, 939, 946 (5th Cir. 1998) (requiring a person convicted of transmission of child pornography to publish notice in the official journal of the parish was within the district court’s broad discretion to protect); *United States v. Schechter*, 13 F.3d 1117, 1118–19 (7th Cir. 1994) (requiring the defendant to notify all future employers of the defendant’s past tax offenses was not an abuse of its broad discretion to protect the public); *People v. McDowell*, 130 Cal. Rptr 839, 842–43 (Cal. Ct. App. 1976) (requiring that purse thief who used tennis shoes to approach his victims quietly and flee swiftly wear tap shoes “should foster rehabilitation and promote the public safety”); *Goldschmitt v. Florida*, 490 So. 2d 123, 124–26 (Fla. Dist. Ct. App. 1986) (requiring a defendant to place a sticker that read “CONVICTED D.U.I.—RESTRICTED LICENSE” is not “sufficiently humiliating to trigger constitutional objections”); *Ballenger v. Georgia*, 436 S.E.2d 793, 794–95 (Ga. Ct. App. 1993) (court refused to interfere with trial court’s broad discretion in imposing a condition requiring the offender “to wear a fluorescent pink plastic bracelet imprinted with the words ‘D.U.I. CONVICT’”). *Contra* *People v. Hackler*, 16 Cal. Rptr. 2d 681, 686–87 (Cal. Ct. App. 1993) (striking down on appeal a requirement that a shoplifting offender wear a t-shirt whenever he left the house that read on the front, “My record plus two six-packs equals four years” and on the back, “I am on felony probation for theft,” on the ground that the objective was to “public[ly] ridicule and humiliat[e], rather than to foster rehabilitation”); *People v. Johnson*, 528 N.E.2d 1360, 1361–62 (Ill. App. Ct. 1988) (requiring a DWI of-

For criminal law scholars, shaming is the means by which negative emotions aroused by the offender are expressed.<sup>31</sup> This is often done by an agent acting presumptively to enforce the shaming sanction on behalf of a group.<sup>32</sup> Deterrence is central to such shaming because it is calculated to show other members of the community that offending can be costly.<sup>33</sup> Given the absence of a fair process or prior community consent, some enforcers might be overly aggressive in shaming offenders and thereby deter too much. Consequently, individuals might forsake otherwise valid conduct for fear of being targeted. For example, fear of religious fanatics who both assert the need for particular clothing as an article of religious belief and police those who do not comply might coerce women into wearing religious garments like the burka even in secular countries.

Proponents of shaming in criminal law do not claim that shaming is purely deterrence-based. For them, it also serves the retributive function of punishment.<sup>34</sup> Aside from meeting these objectives of punishment, shaming is more cost-effective because the burden is delegated to the community, making expenditures for the establishment of an administrative structure

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fender to publish a newspaper advertisement with an apology and his mug shot was struck down because the effect of the condition was to “possibly . . . add[] public ridicule as a condition” and could be contrary to the goal of rehabilitation); *People v. Letterlough*, 655 N.E.2d 146, 147, 151 (N.Y. 1995) (“CONVICTED DWI” sign on license plate not permitted because it could not “under any view be regarded as a rehabilitative measure”).

31. *See Skeel*, *supra* note 12, at 1814–16.

32. *See id.* (arguing that when judges administer shaming sanctions, they often reflect the emotions of the affected group).

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[N]otification results in shaming the offender, thereby effecting some amount of retribution. This suffering “serves as a threat of negative repercussions [thereby] discourag[ing] people from engaging in certain behavior.” It is, therefore, also a deterrent. There is no disputing this deterrent signal; the notification provisions are triggered by behavior that is already a crime, suggesting that those who consider engaging in such behavior should beware.

*E.B. v. Verniero*, 119 F.3d 1077, 1120–21 (3d Cir. 1997) (citing *Artway v. Attorney General*, 81 F.3d 1235, 1243 (3d Cir. 1996)). *See also Gementera*, 379 F.3d at 601–03 (2004).

34. *Flanders*, *supra* note 8, at 612. *See also Alternative Sanctions*, *supra* note 5, at 631, 637.

unnecessary.<sup>35</sup> Shaming also provides bite to other sanctions. For example, a fine alone may not be effective if the offender is able to pay it without suffering any material infringement of the lifestyle to which he is accustomed. However, when the stigma added by shame in addition to having incurred the fine is considered, such a sanction may be considerably more effective than is apparent at first glance.<sup>36</sup>

Critics argue that shaming has debilitating negative effects.<sup>37</sup> They claim that offenders might form subcommunities that explicitly embrace the offender's wrongs and defy the majority's norms.<sup>38</sup> Criminal activity is celebrated in such subcommunities and shaming has no effect on behavior.<sup>39</sup> Gangs and terrorist organizations are examples of such subcommunities.<sup>40</sup> Some scholars also claim that individual offenders may be treated differently because of the intervention of extraneous factors.

Similarly, states are sometimes treated differently for the violation of the same IL norm. For example, India and Pakistan were treated more charitably than North Korea after testing nuclear weapons.<sup>41</sup> These two states had greater geopolitical clout and were therefore not punished harshly for these ac-

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35. See *Alternative Sanctions*, *supra* note 5, at 641.

36. *Id.* at 630–49. This problem persists in most areas where fines are the standard punishment. For example, a fine would have been a rather weak sanction when applied to Martha Stewart because of her vast financial resources, whereas shaming can strike at a commodity that might not be so easily replaceable—her reputation.

37. See Garvey, *supra* note 28, at 746–62; Massaro, *Shame and Criminal Law*, *supra* note 5, at 1944; MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 337 (2004). See generally Toni M. Massaro, *The Meanings of Shame*, 3 PSYCHOL. PUB. POL'Y & L. 645 (1997) (arguing that the use of shaming in the wrong context can be ruinous).

38. Braithwaite writes that a possible result of extending shaming is that “[offenders may] associate with others who are perceived in some limited or total way as also at odds with mainstream standards.” JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 67 (1989).

39. *Alternative Sanctions*, *supra* note 5.

40. See BRAITHWAITE, *supra* note 38, at 65–66 (discussing the prevalence of criminal gangs, motorcycle gangs, “and other groups which transmit criminal subcultures”).

41. See Uttara Choudhury, *Seven Years after Going Nuclear, India and Pakistan Thriving*, DEFENCE TALK (June 2, 2005), <http://www.defencetalk.com/seven-years-after-going-nuclear-india-and-pakistan-thriving-3001/> (“Based on the experiences of India and Pakistan since they tested nuclear weapons in 1998, North Korea could be forgiven for thinking the price of carrying out an atomic test is worth paying.”).

tions, whereas states such as North Korea and Iran continue to be treated harshly.<sup>42</sup> Inequality and disproportionality are problems that bedevil even traditional sanctions and therefore are not fatal objections to shaming.

Other critics of shame sanctions claim that the purported costs and benefits of shaming are not as significant as proponents make them out to be.<sup>43</sup> These critics refer to the cost of establishing reputations and maintaining them, as well as the dissipation of these expenditures when reputations are tarnished without visible gain.<sup>44</sup> Further, shaming entails its own cost—the cost of engaging in the conduct embodying moral disapproval, whether it is the foregoing of otherwise profitable interactions, or the cost of conveying the disapproval in another manner.<sup>45</sup> For example, if the United States and other nations desired to shame China for human rights violations (e.g. the suppression of Falun Gong)<sup>46</sup> and chose to stop importing cheap commodities from that country, consumers would have to pay higher prices, existing business relationships would be disrupted, rogue companies that chose to defy the sanctions would have to be policed, countries that had not participated in the shaming would engage in opportunistic behavior, and so on, making the shaming costly to the enforcers.<sup>47</sup>

As previously noted, shaming works best in tight-knit communities and some critics have thus argued that diverse communities do not offer conditions conducive to effective shaming because of the lack of social interdependence;<sup>48</sup> social heterogeneity creates problems of definition pertaining to the kinds of offenses that might engender a feeling of shame.<sup>49</sup> Moreover, the scale of large communities necessarily results in a large

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42. See Bill Nicholas, *Condemnation Swift, but Options Are Limited*, USA TODAY (Oct. 9, 2006), [http://usatoday30.usatoday.com/news/world/2006-10-09-nuke-test-reaction\\_x.htm](http://usatoday30.usatoday.com/news/world/2006-10-09-nuke-test-reaction_x.htm).

43. Kahan & Posner, *supra* note 5, at 372.

44. See Massaro, *Shame and Criminal Law*, *supra* note 5, at 1938.

45. See Skeel, *supra* note 12, at 1814–20.

46. For relevant background information, see THOMAS LUM, CONG. RESEARCH SERV., RL 33437, CHINA AND FALUN GONG (2006).

47. See *generally* Skeel, *supra* note 12 (providing a similar example in the corporate law context).

48. See Massaro, *Shame and Criminal Law*, *supra* note 5, at 1916.

49. *Id.* at 1923. Thus, even if a particular community could theoretically impose shame on an offender, a given judge's particular method of accomplishing that goal may still be off the mark.

volume of communications about shaming, creating an “overload.”<sup>50</sup> The volume problem is an even larger one in IL due to the number of actors and their potential interactions, but this need not be overstated if the relevant community is the shaming reference group. This group would be discrete enough for communication costs to be sufficiently low and for offenses to be observable.

In addition, and in contrast to the individual level interactions relevant in domestic criminal law, nation states are extremely interdependent. Commercial and trade linkages are so strong that no state can afford to ignore other states without a cost. This price might take the form of, inter alia, lost developmental aid and grants,<sup>51</sup> withdrawal of foreign direct investment,<sup>52</sup> the flight of foreign institutional investors from the state’s stock markets (causing security prices to fall),<sup>53</sup> the decline and possible collapse of a state’s currency,<sup>54</sup> the embargo of contracts with companies based in the offending state (causing the companies to lose out on profitable transactions abroad),<sup>55</sup> restrictions on the repatriation of capital to that state,<sup>56</sup> restrictions on travel to and from that state,<sup>57</sup> and the

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50. *Id.* at 1930.

51. See Rich Nielsen, *Rewarding Human Rights? Selective Aid Sanctions Against Repressive States*, INT’L. STUD. Q. (forthcoming 2013) (manuscript at 2–3). Nielsen’s study found that aid donors withdraw aid when repressive acts are publicized in the media. *Id.* at 9.

52. See Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INTL. ORG. 593, 609–14 (2005).

53. See *Not Open for Business: Despite Elections, Investor Risk Remains High in Burma*, CONFLICT RISK NETWORK 5 n.22 (Apr. 2012), <http://endgenocide.org/images/uploads/downloads/burma-not-open-for-business.pdf>.

54. See *Iran Arrests 50 over Currency Decline*, YAHOO! NEWS (Oct. 24, 2012), available at <http://news.yahoo.com/iran-arrests-50-over-currency-decline-122538312—finance.html>.

55. See Curt Anderson, *Judge Blocks Fla. Cuba, Syria Business Ties Law*, ASSOCIATED PRESS, June 25, 2012, <http://bigstory.ap.org/article/judge-blocks-fla-cuba-syria-business-ties-law>.

56. *U.S. Government Eases Sanctions Against Burma*, SIDLEY AUSTIN LLP (July 12, 2012), <http://www.sidley.com/US-Government-Eases-Sanctions-Against-Burma-07-12-2012/>. See Council Decision 2012/635/CFSP, art. 4, 2012 O.J. (L 282/58).

57. See, e.g., Press Release, Council of the European Union, Human Rights Violations: Council Tightens Sanctions Against Iran (Mar. 23, 2012),

suspension and expulsion of that state from international and regional organizations.<sup>58</sup>

The heterogeneity objection has some teeth for a different reason—in a heterogeneous society it is difficult to define what behaviors attract shame sanctions. There are differences between nation states in regards to conduct that can be the subject of shame due to variations in national legal systems, normative structures, cultures, and moral ideas. The effect of these variations may be somewhat mitigated because, notwithstanding differences between domestic audiences about whether a state's conduct is shameful, as long as the state has to engage with another state where it is so viewed, shaming will have a constraining effect. Thus, even though the citizens of the offending state and its leader do not regard the conduct as shameful, the very process of interaction with others who do, and express blame for such conduct, means that the state must experience some shame. A rational state might determine that such conduct has low utility and cease to engage in it. An example of such behavior is Libya's response to the Pan-Am dispute found in Part II of this Article.

Other scholars have developed critiques focusing on the lack of procedural fairness in the deployment of shame sanctions.<sup>59</sup> Predicated on a well-developed strain of constitutional jurisprudence establishing basic fairness protections for offenders,<sup>60</sup> these critics claim that shaming fails the test of fairness. The critics' argument falls into four parts: the enforcers are not neutral judges charged with legal obligations to ensure that the offender is considered innocent until proven guilty, the offender is not afforded an opportunity to defend himself adequately, there is no protection against coercion, and there is no guaran-

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[http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/129215.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/129215.pdf).

58. See Tom Baird, *The Positive and Punitive Power of CMAG*, COMMONWEALTH Q. (Mar. 7, 2008), [http://secretariat.thecommonwealth.org/EZInformation/176155/060308cmag; Organization of Islamic Cooperation Suspends Syria's Membership](http://secretariat.thecommonwealth.org/EZInformation/176155/060308cmag;Organization%20of%20Islamic%20Cooperation%20Suspends%20Syria's%20Membership), AL ARABIYA (Aug. 13, 2012), <http://english.alarabiya.net/articles/2012/08/13/232088.html>.

59. Seth Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 5–12 (1991).

60. See, e.g., *id.* at 93 & n.251.

tee that precedent is considered or that punishment is proportionate to the wrong committed.<sup>61</sup>

For these critics, fairness requires the adjudicative process to adhere to a system of rule-based protections for the accused and for the ensuing punishment to be restrained by well-defined boundaries. The first part of the objection—fairness in adjudication—need not be fatal for shaming sanctions. While it is acknowledged that the lack of a tribunal can lead to a politicization of shaming as an enforcement mechanism, this cannot lead to the conclusion that it is always politicized or useless. Indeed, shaming becomes particularly useful when a given state refuses to submit itself to the adjudication of any tribunal, thereby attempting to place itself above the law. Moreover, the shaming reference group is capable of achieving acceptable levels of adjudicative neutrality, thus giving an opportunity for the accused state to defend itself, protecting against illegal coercion and taking account of precedent.

The second objection—lack of proportionality in punishment—is more difficult because of at least two different problems: delegation and dispersion. Punishment is delegated to other actors who do not always have a legal obligation to enforce it, meaning that the sanction can be empty in some instances. Dispersion refers to the multiplicity of actors in the enforcer group, resulting in different actors enforcing the punishment to varying degrees, potentially over-punishing some offenders and under-punishing others, and creating incentives for free-riding.<sup>62</sup> Even worse, unpredictable enforcement of the primary sanction and uncontrollable secondary effects might have disproportionate consequences for some accused even without a finding of guilt.<sup>63</sup>

## II. A FRAMEWORK FOR SHAMING IN INTERNATIONAL LAW

This Article attempts to develop a structure for the application of shaming in IL that accommodates the objections advanced in the domestic context and satisfies the demands of

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61. *Cf. id.*

62. *See* Whitman, *supra* note 5, at 1088.

63. The suicide of a prosecutor who allegedly solicited a person he believed to be thirteen years of age following a Dateline NBC sting operation is a sobering reminder of the dangerous consequences. *See* Tim Eaton, *Prosecutor Kills Himself in Texas Raid over Child Sex*, N.Y. TIMES (Nov. 6, 2006), <http://www.nytimes.com/2006/11/07/us/07pedophile.html>.

theoretical coherence. The first challenge in the IL context pertains to the target of the shaming sanction. Who is to be shamed? Is it the state, its citizens, the regime, or a combination of all three?

#### *A. Shaming the State*

The principle of shaming the state is based on commonly understood notions of enterprise liability.<sup>64</sup> As is the case with collectively organized forms of business, such as corporations, liability is imposed on the collective body that bears responsibility for the actions of its agents. Enterprise liability externalizes the cost of monitoring when the conduct is at the micro-level, with attendant asymmetries of knowledge, resources, and information between enforcers and offenders.<sup>65</sup> The prospect of liability creates incentives for the entity to invest in monitoring the conduct of its agents.<sup>66</sup> In the case of large modern companies, when agents engage in bad conduct, they are disciplined by their superiors and the chain of responsibility for monitoring stops with shareholders.

Transposing this idea at the level of the state, when public officials act in breach of their legal obligations, shame is imposed on the state, negatively affecting its self-image. There may be internal and external aspects to this shame depending upon the depth of a state's sense of identity. Under ideal conditions, for a state with a strong sense of identity and attendant conceptions of national pride, the imposition of a shame sanction triggers internal consequences. These might be manifested by exercises in self-reflection,<sup>67</sup> formalized institutional processes aimed at establishing the truth and identifying offenders,<sup>68</sup>

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64. See Skeel, *supra* note 12, at 1816.

65. See generally Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984).

66. See Skeel, *supra* note 12, at 1829–32.

67. See E. Dresler-Hawke & J.H. Liu, *Collective Shame and the Positioning of German National Identity*, 32 PSICOLOGÍA POLÍTICA 131–34 (2006) (Spain); Michael Johns et al., *Ashamed to Be an American? The Role of Identification in Predicting Vicarious Shame for Anti-Arab Prejudice after 9-11*, 4 SELF & IDENTITY 332–33 (2005).

68. See Nicholas Cecil & Paul Cheston, *Day of Shame for British Army: Shocking Brutality Uncovered by Inquiry*, LONDON EVENING STANDARD (Sept. 8, 2011), <http://www.standard.co.uk/news/day-of-shame-for-british-army-shocking-brutality-uncovered-by-inquiry-6441146.html>.



structural reforms,<sup>69</sup> corrective legislation, punishment for offenders,<sup>70</sup> reparations for victims,<sup>71</sup> and apologies.<sup>72</sup> In other circumstances, whether it is because a state does not have a strong sense of identity and national pride, or because a state that possesses these attributes denies wrongdoing, shaming has largely external consequences.<sup>73</sup>

Under either scenario, shaming at the entity level creates incentives for better monitoring and law abidance. In some cases, such incentives might result in greater investment in the promotion of good conduct (e.g., improving the training of police or military personnel, or employing more lawyers in the defense hierarchy to ensure that operational decisions are undertaken with reference to IL) or in the monitoring function (e.g., recording equipment for custodial interrogations, anti-corruption

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69. See Ryan Goodman & Derek Jinks, *International Law and State Socialization: Conceptual, Empirical, and Normative Challenges*, 54 DUKE L.J. 983, 991–96 (2005).

70. See Liz Beavers, *England back in Mineral County*, CUMBERLAND TIMES (Mar. 25, 2007), <http://times-news.com/archive/x1540389540>; *Graner Gets 10 Years for Abu Ghraib Abuse*, NBC NEWS (Jan. 16, 2005), <http://www.msnbc.msn.com/id/6795956.UNiWfnfee5> (following an abuse scandal at Abu Ghraib prison in Iraq, several U.S. military personnel serving at the prison were convicted on multiple charges by court martial and incarcerated).

71. For example, Maher Arar, a Syrian-Canadian who was subjected to rendition in Syria after Canadian officials suspected him of terrorist activities, was awarded CDN\$10.5 million in damages from the Canadian government following a public inquiry. Josh Tapper, *Barack Obama Should Apologize to Maher Arar, Rights Groups Say*, TORONTO STAR (May 22, 2012), [http://www.thestar.com/news/canada/2012/05/22/barack\\_obama\\_should\\_apologize\\_to\\_maher\\_arar\\_rights\\_groups\\_say.html](http://www.thestar.com/news/canada/2012/05/22/barack_obama_should_apologize_to_maher_arar_rights_groups_say.html).

72. See, e.g., Kevin Rudd, Prime Minister of Austl., *Apology to the Stolen Generations*, Address before the 42nd Parliament of Australia (Feb. 13, 2008), available at [http://www.dfat.gov.au/indigenous/apology-to-stolen-generations/national\\_apology.html](http://www.dfat.gov.au/indigenous/apology-to-stolen-generations/national_apology.html).

73. Libya's oil industry, for example, was hit hard by U.N. sanctions imposed after the bombing of two commercial airplanes in the late 1980s. By 2001, the total cost of these sanctions to the Libyan economy was estimated to be US\$18 billion by the World Bank and US\$33 billion by the Libyan government. Ray Takeyh, *The Rogue Who Came in from the Cold*, 80 FOREIGN AFF. 62, 64 (2001). Sanctions against the Ian Smith regime in Rhodesia succeeded in making the country wholly dependent on trade with apartheid-era South Africa. Robert O. Matthews, *From Rhodesia to Zimbabwe: Prerequisites of a Settlement*, 45 INT'L J. 292, 301 (1990). Once Western countries managed to disrupt that trading relationship, the Rhodesian economy was brought to its knees. *Id.* at 327.

staff, and human rights commissions), while in other cases it translates into greater resources for enforcement (e.g., more police, courts, and prisons). In theory, the net result from the operation of these incentives is that a state acts rationally to minimize the probability of being punished because it cares about the negative consequences of shaming.

The evidence is less clear. Other things being equal, shaming sanctions appear to be imposed less frequently on stronger states than weaker states.<sup>74</sup> Authors who have studied shaming by the United Nations Human Rights Commission (“UNHRC”) write that despite numerous attempts to censure China between 1991 and 2001, none proved to be successful.<sup>75</sup> The study examined other variables that predicted when a state would become a target for shaming at the UNHRC. States seen to be more cooperative than others or those that made a greater contribution to common objectives were unsurprisingly less likely to be targeted by other states.<sup>76</sup>

Extrapolating from the evidence, the difficulty of punishing the powerful relative to the weak is not necessarily a problem as long as punishment is attempted. The authors claim that IL affects state behavior in ways that matter for law, not that all states consistently receive equal punishment. In other words, it suffices for the authors’ model that states are targeted when violations are observed, because it is then clear that norms are being validly asserted and evaluative opinions about the offender’s conduct are being made by the shaming reference group. The ultimate success of prosecution and the degree of

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74. See James H. Lebovic & Erik Voeten, *The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR*, 50 INT’L STUD. Q. 861, 879 (2006). During the Cold War, “a state with average capabilities was able to escape sanctions or to keep the charges against it confidential [43]% of the time; a state with capabilities one standard deviation above the mean (equivalent to Austria or Morocco) avoided more than confidential treatment [63]% of the time.” *Id.* at 878. The effect is only slightly less pronounced in the post-Cold War period where the values are 25% and 42%, respectively. *Id.*

75. See *id.* at 866. As the ability of Saudi Arabia and China to escape condemnation indicates, there is still good reason to be suspicious of the impartiality of the UNHCR’s public shaming process. See *id.* at 884.

76. During the Cold War period, a state with a perfect attendance record in the U.N. General Assembly (“UNGA”) was nearly half as likely as a country that participated only 50% of the time to have a public resolution adopted against it. *Id.* at 878.

punishment imposed is a function of a number of factors, not the least of which are the availability of convincing proof and the power and resources possessed by the defendant—no different from domestic law enforcement.

Shaming at the entity level is necessary because states are the primary actors in IL and regularly make promises or other contractual commitments to each other. While states might adhere to these commitments for any number of reasons, coercive enforcement is necessary if these commitments are to be regarded as legally binding. Therefore, a key test of these commitments is whether there is enforcement in practice. Lebovic and Voeten's study examined the consequences for states that ratified the International Covenant on Civil and Political Rights ("ICCPR") and found that "[d]uring the Cold War, targeted states that ratified the ICCPR treaty were more than twice as likely (a mean predicted probability of 0.79 vs. 0.33) to be shamed by public resolution than were other states."<sup>77</sup> It seems that when states ratify pieces of international law, they create a set of contractual expectations about their subsequent conduct.<sup>78</sup> The architecture of a particular international legal instrument sets the contours for the legal obligations assumed by the ratifying state and provides criteria for other states to make evaluative judgments about whether behavior matches up with performance expectations.<sup>79</sup>

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77. *Id.* at 878. "[C]ommitting publicly to uphold a set of human rights norms does carry political consequences: states that have made a formal promise are held to a higher standard than states that have not done so." *Id.*

78. The study by Lebovic and Voeten revealed that members that signed and ratified the ICCPR treaty judge target states that also committed to the treaty more harshly than states that did not and conclude that shaming practices in the UNHRC are based, in part,

by a desire to hold states accountable for their commitments. . . . [C]ountries that ratified the ICCPR treaty do not appear to share characteristics, e.g., human rights records, that explain the precipitous rise in the probability of a vote to punish a target when the target and voter are both parties to the ICCPR treaty.

*Id.* at 882.

79. "[S]tates did not get favorable treatment from the commission merely by paying lip service to important principles." *Id.* at 885. To the contrary, the acts of signing and ratifying a treaty or achieving formal membership within IOs seem to contribute directly toward reputation-building in the international community. *See id.* If these agreements and memberships matter, it is in "raisi[ng] expectations when members of the community evaluate[] the

A complicating factor for shaming at the entity level is its politicization.<sup>80</sup> This is particularly problematic at the multilateral organization level when there is capture by partisan interests. One study of practice at the UNHRC found that during the Cold War, alignment with the United States greatly increased the prospect that countries would be subject to severe sanctions.<sup>81</sup> This likelihood declined after the Cold War, but states were more likely to favor countries with similar alliances and to oppose countries with dissimilar alliances.<sup>82</sup> This conclusion is further reinforced by the impact of a convergence in domestic ideology.<sup>83</sup>

While the authors acknowledge that politicization is problematic for shaming in IL, it is fairly endemic in all international relations and need not be a fatal objection. Japan's foreign aid policy is a good example of politicization. Japan has been particularly transparent about using its foreign economic aid program to influence the behavior of other states. This extends to whether or not a recipient state votes in the U.N. General Assembly ("UNGA") in conformity with Japanese foreign policy objectives. France is another example: one study found that the average developing country voted in the same direction as France 64% of the time in the UNGA.<sup>84</sup> One standard deviation in voting behaviour, an increase to voting with France 73% of the time, resulted in a 96% increase in foreign aid to that country.<sup>85</sup> Similarly, a standard deviation in voting in favor of the United States resulted in an increase of U.S. aid by 78% to the country voting the "right" way, while one standard deviation in voting in favor of Japanese policies resulted in a staggering 345% increase in Japanese foreign aid to that nation.<sup>86</sup>

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conduct of other states." *Id.* Simply put, states expect others to deliver on their promises. *See id.*

80. "[F]oreign policy positions, as measured by [votes] in the UNGA, has a significant and strong influence over whether a state voted *not* to punish other (hence, the negative coefficients) in both the Cold War and post-Cold War periods." *Id.* at 883.

81. *Id.* at 878.

82. *Id.* at 883.

83. *Id.* at 882.

84. Alberto Alesina & David Dollar, *Who Gives Foreign Aid to Whom*, 5 J. ECON. GROWTH 33, 46 (2000).

85. *Id.*

86. *Id.*

Such beneficence has also been used to coerce other states into compliance with the favored agenda of the donor. Japan is alleged to have dispatched a delegation to Geneva shortly before the 2004 World Trade Organization (“WTO”) General Council meeting in an effort to coerce weaker states to conform to its platform. Asian countries in receipt of Japanese aid were reportedly told that if they contravened vital Japanese objectives at the Council meeting—having the so-called three Singapore issues (investment, competition, and transparency in government procedure) dropped from the agenda—Japan’s support for the development of their infrastructure could be at risk.<sup>87</sup>

Most notoriously of all, Japan uses its clout to punish and reward weak states for their stance vis-à-vis the whaling industry. At the International Whaling Commission (“IWC”), Japan not only pays members of the IWC to vote in its interests, it also pays nations to join the organization via its Overseas Development Assistance program.<sup>88</sup> For each 10% increase in the number of votes a recipient state cast in favor of Japan at the IWC between 1999 and 2004, it received an increase of US\$2.10 per capita in aid.<sup>89</sup> When a nation votes in Japan’s interests at the IWC, it receives an economic reward in the form of development aid; when a nation fails to conform to this behavior, it is punished by having aid withheld. Thus, far from using its clout to enforce compliance with IL, Japan punishes states that comply more fully with what many would regard as positive developments in international environmental law, namely the protection of endangered species.

It is thus necessary to employ caution in sifting between behavior that seeks to move states into compliance with a third state’s foreign policy objectives, and that which seeks to move them into compliance with IL norms. The former will often simply deprive the recalcitrant state of a covetable good,

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87. Aileen Kwa, *WTO: A Game of Serious Arm Twisting*, 441 NEW AFR. J. 46, 46 (2005).

88. Ofer Eldar, *Vote-Trading in International Institutions*, 19 EUR. J. INT’L L. 3, 35 (2008). Chief recipients include “St. Lucia, St. Vincent, St. Kitts and Nevis, Grenada, Dominica and Antigua, and Barbuda,” all of which vote with Japan on virtually every issue before the IWC. *Id.*

89. Andrew Miller & Nives Dolsak, *Issue Linkages in International Environmental Policy: The International Whaling Commission and Japanese Development Aid*, 7 GLOBAL ENVTL. POL. 69, 86 (2007).

whereas the latter will usually explicitly link economic harm or reputational damage to a violation of IL. Shaming is more likely to do the latter.

Despite the above examples of politicization in international relations, states are not as hypocritical as might have been expected in imposing shame sanctions on other states. At least one study found that states with good domestic records were more liable to shame other states at the UNHRC than states with poor records for human rights protections at the domestic level.<sup>90</sup> This did not hold true when there was a strong history of religious or ethnic conflict between states.

### *B. Shaming at Work: Libya and Sri Lanka*

Shaming at the entity level has an additional problem: unsatisfactory determination of responsibility for wrongdoing and punishment without identifying the actual offenders. This is illustrated by the treatment of Libya following the Lockerbie incident. On September 21, 1988, a bomb was placed on Pan Am flight 103, travelling from London to New York.<sup>91</sup> The bomb exploded as the plane flew over Lockerbie, Scotland, “killing all 259 people on board and eleven on the ground.”<sup>92</sup> The victims were mainly American and British nationals.<sup>93</sup> After nearly two decades of low-level military attacks and counter-attacks between the United States and Libya,<sup>94</sup> the latter was not held in high esteem in the Western world and international suspicion gravitated towards it.<sup>95</sup>

Following a prolonged investigation, indictments for murder were issued by both the United States and Scotland against Abdelbaset al-Megrahi and Lamin Khalifa Fhimah (both Liby-

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90. Lebovic & Voeten, *supra* note 74, at 861.

91. Bernd Martenczuk, *The Security Council, the International Court, and Judicial Review: What Lessons from Lockerbie?*, 10 EUR. J. INT'L L. 517, 520 (1999).

92. *Id.*

93. See *Victims*, VICTIMS OF PAN AM FLIGHT 103, INC. (Aug. 22, 2009), <http://www.victimsofpanamflight103.org/victims>.

94. See *A History of Libya's Ties with the US*, BBC NEWS (May 15, 2006), <http://news.bbc.co.uk/2/hi/africa/4774355.stm>.

95. See *Key Facts: Libya Sanctions*, CNN (Feb. 10, 2004), [http://articles.cnn.com/2004-02-10/world/libya.sanctions.facts\\_1\\_libya-sanctions-al-amin-khalifa-fahima-libyan-government?\\_s=PM:WORLD](http://articles.cnn.com/2004-02-10/world/libya.sanctions.facts_1_libya-sanctions-al-amin-khalifa-fahima-libyan-government?_s=PM:WORLD). Libya was also blamed for the 1989 bombing of a French airliner (UTA Flight 772) over the Niger desert that killed 170 people. *Id.*

an Airlines officials) on November 14, 1991.<sup>96</sup> The United States and U.K. issued a joint statement on November 27th demanding that the suspects be extradited to their territory for trial,<sup>97</sup> a request declined by Libya.<sup>98</sup>

The Lockerbie case provides useful material for the study of IL enforcement, as the resulting shaming directed at Libya was very much cast in terms of IL violations. If al-Megrahi and Fhirmah were responsible for the bombings and if they were acting under orders from the Libyan State, there was a breach of the 1971 Montreal Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation.<sup>99</sup> Assuming the suspects acted on their own volition, a breach of Article 11 of the 1971 Convention would arise. The states affected by the bombings—the United States, U.K., and France—are all permanent members of the U.N. Security Council (“S.C.”). As such, they utilized their position to ensure that any ambiguities about whether a breach of IL had occurred were addressed.

Working together, the United States, U.K, and France were able to convince the S.C. to pass several resolutions. S.C. Res. 731 qualified the Lockerbie incident as an act of “international terrorism” that constituted a threat to international peace and security, and also referred to earlier Resolutions 286 and 635, which obligated states to refrain from interfering with international civil aviation.<sup>100</sup> S.C. Res. 748 added to this with an interpretation of Article 2(4) of the U.N. Charter to the effect that

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96. See Foreign Secretary Douglas Hurd, Statement in the House of Commons (Nov. 14, 1991).

97. See Permanent Rep. of the U.S., Letter dated 30 December 1991 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. A/46/827 (Dec. 31, 1991); Permanent Rep. of the U.K. of Gr. Brit. and N. Ir., Letter dated 20 December 1991 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General, U.N. Doc. A/46/826 (Dec. 31, 1991).

98. Martenczuk, *supra* note 91, at 520.

99. See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art. 10, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 178.

100. S.C. Res. 731, pmbl., U.N. Doc. S/RES/731 (Jan. 21, 1992) (the preamble starts by stating that “[d]eeply disturbed by the world-wide persistence of acts of international terrorism in all its forms. . .”). Paragraph 2 rebukes the Libyan government for failing to “cooperate fully in establishing responsibility for the terrorist acts referred to above against Pan-Am flight 103.” *Id.* ¶ 2. Finally, Paragraph 3 provides that the Libyan government act in such a way “so as to contribute to the elimination of international terrorism.” *Id.* ¶ 3.

“every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force.”<sup>101</sup> Resolution 748 also specifically stated that Libya’s failure to cooperate (by refusing to extradite al-Megrahi and Fhirmah) “constitute[d] a threat to international peace and security.”<sup>102</sup> Resolution 748, instituted under Chapter VII, demanded compliance with (non-binding) Resolution 731,<sup>103</sup> which had in turn demanded that Libya comply with the United States’ and U.K.’s requests for the suspects’ extradition.<sup>104</sup>

Resolution 748 also imposed sanctions on Libya, which were to last until compliance was achieved. These included denying overflight rights to aircraft flying to or from Libya, denying Libya any aircraft or parts thereof, denying arms or arms training, and curtailing diplomatic activity.<sup>105</sup> These sanctions were later tightened via S.C. Resolution 883.<sup>106</sup> Whether or not Libya was in violation of the 1971 Montreal Convention, it was now certainly in violation of international law in the form of S.C. Resolution 748.

This in itself points to a state’s desire to be seen not as unilaterally imposing what they view as “right” via methods such as shame, but as agents of law enforcement within a legal framework. Shame is thus very much a tool of IL enforcement. That the goal of the United States, the U.K., and France in passing S.C. resolutions on the topic was to alter the legal parameters of the incident is confirmed by the fact that they explicitly referred to this alteration as the only relevant law during later proceedings before the International Court of Justice (“ICJ”).<sup>107</sup>

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101. S.C. Res. 748, pmb., U.N. Doc. S/RES/748 (Mar. 31, 1992).

102. *Id.*

103. *Id.*

104. *See* S.C. Res. 731, *supra* note 100, ¶ 3.

105. S.C. Res. 748, *supra* note 101, ¶¶ 4–6(a).

106. *See generally* S.C. Res. 883, U.N. Doc. S/RES/883 (Nov. 11, 1993) (“Re-affirming its resolutions 731 (1992) of 21 January 1992 and 748 (1992) of 31 March 1992.”).

107. *See* Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Preliminary Objections, 1998 I.C.J. 115, ¶¶ 23, 36 (Feb. 27).



Libya also adopted a legalistic stance on the issue, turning to the ICJ<sup>108</sup> and asking the court to declare that it had complied with all of its obligations under the Montreal Convention, affirm that the United States and U.K. were obliged to desist from using force or the threat thereof against it, and grant temporary relief.<sup>109</sup> The court declined the plea for temporary relief,<sup>110</sup> but eventually determined that it had jurisdiction and that the case centered on differing interpretations of Articles 7 and 11 of the Montreal Convention.<sup>111</sup> The court did not take S.C. Resolutions 748 and 883 into consideration when determining its jurisdiction, as these resolutions had been passed after Libya filed the case.<sup>112</sup>

The legal basis of the case against Libya was thus weaker than the United States and U.K. had hoped it would be.<sup>113</sup> This, however, was at best a Pyrrhic victory for Libya, as it had already very much been “tried in the press” and its international reputation was in tatters. Firmly cast in the role of “rogue State,” Libya was increasingly isolated by erstwhile trading partners, such as Germany and Italy, and left bereft of a superpower patron after the collapse of the Soviet Union,<sup>114</sup> while Western states rolled out the red carpet to revolutionary figures such as Yasser Arafat and Nelson Mandela—both of whom had received considerable aid from Gaddafi at the lowest

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108. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Provisional Measures, 1992 I.C.J. 114, pmbl. (Apr. 14).

109. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Application Instituting Proceedings, 5–6 (Mar. 3, 1992), available at <http://www.icj-cij.org/docket/files/89/7209.pdf>. See also Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Request for the Indication of Provisional Measures of Protection Submitted by the Government of the Socialist People's Libyan Arab Jamahiriya, ¶ 7 (Mar. 3, 1992), available at <http://www.icj-cij.org/docket/files/89/13253.pdf>.

110. See *Libya v. United States*, Provisional Measures, 1992 I.C.J. at 127.

111. *Aerial Incident at Lockerbie*, Preliminary Objections, 1998 I.C.J. ¶¶ 28, 32, 35.

112. *Id.* ¶¶ 37, 43, 44.

113. See *id.* ¶ 38.

114. Takeyh, *supra* note 73, at 63, 64.

points of their struggles,<sup>115</sup> and neither of whom were less violent in pursuing their goals.<sup>116</sup>

To compound the issue, Libya continued to refuse to extradite the two suspects to the United States or U.K., claiming the suspects would not receive a fair trial.<sup>117</sup> Libya did offer to extradite them to Malta (where the bomb was set in motion), an offer that was rejected on the grounds that Malta's geographic proximity to Libya would render it subject to improper influence.<sup>118</sup> In 1994, Libya offered to hand over al-Megrahi and Fhirmah for trial under Scottish law in the Netherlands; this too was initially rejected.<sup>119</sup> However, as third nations began to voice objections to the U.N. sanctions against Libya, the United States and U.K. thawed in their attitudes.<sup>120</sup>

Under these conditions, Gaddafi reached a compromise with the United States and U.K. by which they would accept a trial under Scottish law in the Netherlands.<sup>121</sup> U.N. monitors would be stationed in the Scottish prison should the suspects be convicted and subsequently serve their sentences there,<sup>122</sup> and it was rumored that the prosecution would agree in advance not to attempt to trace orders for a bombing to Gaddafi himself.<sup>123</sup> Furthermore, the trial would be conducted by a judge, not jury.<sup>124</sup> This deal was accepted and al-Megrahi and Fhirmah were duly handed over in 1999, while the U.N. suspended sanctions against Libya via S.C. Resolution 1192.<sup>125</sup> Al-Megrahi was convicted and Fhirmah was acquitted.<sup>126</sup> Evidence in the case

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115. *Id.* at 64.

116. See Palash Ghosh, *If Nelson Mandela Is a Hero, What about Yasser Arafat*, INT'L BUS. TIMES (July 1, 2013), <http://www.ibtimes.com/if-nelson-mandela-hero-what-about-yasser-arafat-1330165>.

117. See Michael P. Scharf, *A Preview of the Lockerbie Case*, AM. SOC'Y INT'L L. INSIGHTS (Jan. 10, 2007), available at <http://dspace.cigilibrary.org/jspui/bitstream/123456789/13788/1/A%20Preview%20of%20the%20Lockerbie%20Case.pdf?1>.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Key Facts: Libya Sanctions*, *supra* note 95.

126. *Lockerbie Bombing—Timeline*, GUARDIAN (May 20, 2012), <http://www.theguardian.com/uk/2012/may/20/time-line-lockerbie-bombing-megrahi>.

was not entirely convincing, and the judgment itself was heavily criticized,<sup>127</sup> but the decision allowed all nations involved to move on from the incident.

Although U.N. sanctions were suspended in 1999, Libya—which had suffered an estimated US\$18 billion in lost revenue while they were in place—<sup>128</sup>wanted them cancelled. To achieve this, it agreed to pay US\$2.7 billion in compensation to the victims' families, to be released in several tranches.<sup>129</sup> The first tranche would come with the cancellation of U.N. sanctions, and these were duly lifted on September 12, 2003.<sup>130</sup> Libya never admitted guilt for the Lockerbie bombings, but issued a letter to the U.N. in 2003 stating that it “accept[ed] responsibility for the actions of its officials.”<sup>131</sup> The United States, U.K., and Libya also removed the pending ICJ decision from the

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127. See Robert D. McFadden, *Megrahi, Convicted in 1988 Lockerbie Bombing, Dies at 60*, N.Y. TIMES (May 20, 2012), <http://www.nytimes.com/2012/05/21/world/africa/abdel-basset-ali-al-megrahi-lockerbie-bomber-dies-at-60.html?ref=panamflight103> (detailing many of the flaws in the evidence presented, as well as a statement from Hans Köchler, a United Nations observer, calling the trial “a spectacular miscarriage of justice”); *Open Letter Slams Lockerbie Bomber’s Conviction as ‘Perverse Judgment,’* STV NEWS (May 22, 2012), <http://news.stv.tv/politics/102761-open-letter-slams-lockerbie-bombers-conviction-as-perverse-judgment/> (reporting on several public figures, including surviving relatives’, demands for an inquiry into the conviction); *Architect of Lockerbie Trial Vows to Fight for an Appeal*, SCOTSMAN (Nov. 1, 2005), <http://www.scotsman.com/news/scotland/top-stories/architect-of-lockerbie-trial-vows-to-fight-for-an-appeal-1-1102638> (describing how the man widely credited as “the architect” of the Lockerbie trials, Professor Robert Black QC, called the conviction “the most disgraceful miscarriage of justice in Scotland for 100 years”). For further analysis on the topic from Professor Black, see Robert Black, *The Lockerbie Verdict*, 5 EDINBURGH L. REV. 221 (2001); Robert Black, *Lockerbie: A Satisfactory Process but a Flawed Result*, 36 CASE W. RES. J. INT’L L. 443 (2004) (describing the case as “a very weak circumstantial one” and continuing to critique the court’s lack of satisfactory explanation for accepting several of the prosecution’s arguments relating to evidence).

128. Takeyh, *supra* note 73, at 64.

129. *Key Facts: Libya Sanctions*, *supra* note 95.

130. *UN Lifts Sanctions Against Libya*, GUARDIAN (Sept. 12, 2003), <http://www.theguardian.com/uk/2003/sep/12/lockerbie.libya>.

131. Chargé d’affaires a.i. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations, Letter dated Aug. 15, 2003 from the Chargé d’affaires a.i. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/818 (Aug. 15, 2003).

court's docket through a joint statement in 2003.<sup>132</sup> In 2005, American energy companies began investing in Libya and full diplomatic relations were restored in 2006.<sup>133</sup>

The result seems to be that even absent convincing evidence about Libya's responsibility for the Lockerbie bombing, the state experienced the full external consequences of a shame sanction. This is a powerful example of the coercive power of shaming, all the more so if Libya was in fact innocent. Not only was Libya coerced by shaming, the enforcer states may have succeeded in deterring other states contemplating similar terrorist actions by making the action extremely costly. If Libya was in fact responsible, the case provides a good example of shaming as an effective tool to enforce IL rules following the correct identification of the offender through a law enforcement framework.

Sri Lanka offers another example of IL enforcement vis-à-vis shaming. Following the conclusion of the military campaign commenced under the leadership of President Mahinda Rajapaksa against the Liberation Tigers of Tamil Eelam ("LTTE"), which resulted in over 40,000 civilian deaths,<sup>134</sup> thousands of Tamils continue to be housed in temporary camps.<sup>135</sup> Camp conditions are horrific both in physical and human rights terms; many are allegedly being held incommunicado for suspected links with the LTTE.<sup>136</sup> In addition, there are allegations that the media has been intimidated through killings, torture, disappearances and detentions.<sup>137</sup>

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132. Press Release, ICJ, Cases Removed from the Court's List at the Joint Request of the Parties, Press Release 2003/29 (Sept. 10, 2003), available at <http://www.icj-cij.org/docket/index.php?pr=168&code=lus&p1=3&p2=3&p3=6&case=89&k=82>.

133. *A History of Libya's Ties with the US*, *supra* note 94.

134. Colum Lynch, *U.N.: Sri Lanka's Crushing of Tamil Tigers May Have Killed 40,000 Civilians*, WASH. POST (Apr. 21, 2011), [http://articles.washingtonpost.com/2011-04-21/world/35262099\\_1\\_ethnic-tamil-civilians-tamil-tigers-vanni-region](http://articles.washingtonpost.com/2011-04-21/world/35262099_1_ethnic-tamil-civilians-tamil-tigers-vanni-region).

135. Lydia Polgreen, *Tamils Now Languish in Sri Lanka Camps*, N.Y. TIMES, July 12, 2009, at A1.

136. *Id.*

137. *Id.*; see also *Sri Lanka: Halt Harassment of Media*, HUMAN RIGHTS WATCH (July 3, 2012), <http://www.hrw.org/news/2012/07/03/sri-lanka-halt-harassment-media>.

The government's vociferous denials of wrongdoing have been dented by video and other evidence of troops executing bound captives;<sup>138</sup> a U.N. expert confirmed that a mobile phone video showing one such killing was genuine after three forensic experts viewed the footage.<sup>139</sup> There is evidence that some of these gross abuses were authorized at the highest levels of command: Amnesty International Asia Program Director Sam Zarifi claimed that execution orders had been issued by the defense secretary, who is also the president's brother.<sup>140</sup> A 2009 U.S. State Department report documented that Sri Lankan government forces shelled civilian areas and caused deaths before the expiry of a publicly announced ceasefire.<sup>141</sup> Captives and combatants who sought to surrender were allegedly slaughtered.<sup>142</sup> The report also documented cases of disappearances and killings in custody.<sup>143</sup> A similar report has been issued by Amnesty International.<sup>144</sup>

The international community has repeatedly called upon Rajapaksa to remedy human rights violations.<sup>145</sup> After its pleas were ignored, the EU suspended the Generalised System of

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138. *Killing Fields Video Evidence 'Builds Case for War Crimes,'* CHANNEL 4 NEWS (June 15, 2011), <http://www.channel4.com/news/killing-fields-video-evidence-builds-case-for-war-crimes>.

139. *Sri Lanka Execution Video Authentic—UN Envoy,* BBC NEWS (Jan. 7, 2010), [http://news.bbc.co.uk/2/hi/south\\_asia/8446849.stm](http://news.bbc.co.uk/2/hi/south_asia/8446849.stm).

140. Claudia Joseph, *Boy, 12, Was 'Executed by Sri Lankan Government Soldiers During Civil War by Tamil Tigers,'* DAILY MAIL (Mar. 11, 2012), <http://www.dailymail.co.uk/news/article-2113459/Sri-Lankan-government-executed-civilians-war-Tamil-Tigers.html#ixzz2EIJFPOm>.

141. U.S. DEPT OF STATE, REPORT TO CONGRESS ON INCIDENTS DURING THE RECENT CONFLICT IN SRI LANKA 35 (2009), available at [www.state.gov/documents/organization/131025.pdf](http://www.state.gov/documents/organization/131025.pdf).

142. *Id.* at 45.

143. *Id.* at 47.

144. *Amnesty Accuses Sri Lanka of 'Post War Abuses,'* BBC NEWS (Mar. 13, 2012), <http://www.bbc.co.uk/news/world-asia-17353223>.

145. See, e.g., REPORT OF THE SECRETARY-GENERAL'S PANEL OF EXPERTS ON ACCOUNTABILITY IN SRI LANKA 120–22 (Mar. 31, 2011), available at [http://www.un.org/News/dh/infocus/Sri\\_Lanka/POE\\_Report\\_Full.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf) (detailing human rights violations and the action to be taken by the Sri Lankan government to rectify them); Ashish Kumar Sen, *Clinton Urges Sri Lanka to Prosecute War Criminals,* WASH. TIMES (May 18, 2012), <http://www.washingtontimes.com/news/2012/may/18/clinton-urges-sri-lanka-prosecute-war-criminals/> (discussing U.S. Secretary of State Hillary Clinton's demands for the trial of war criminals).

Preferences Plus (“GSP+”) for Sri Lanka.<sup>146</sup> The GSP+ concessions are extremely important as goods from countries accorded GSP+ are offered reduced tariffs when entering the EU market.<sup>147</sup> Sri Lanka’s suspension was based on a European Commission investigation concluding that Sri Lanka was in breach of the International Covenant on Civil and Political Rights, the Convention against Torture, and the Convention on the Rights of the Child.<sup>148</sup> The EU’s actions in this instance carried some punch: imports from Sri Lanka under GSP+ amounted to €1.24 billion in 2008 and the Sri Lankans depend heavily on the EU because it is their largest export market.<sup>149</sup> This is not the only tool in the EU’s box; it could suspend Sri Lanka from GSP+ treatment altogether despite there being no human rights requirements under that scheme.<sup>150</sup>

The EU was not alone in shaming Sri Lanka. The UNHRC voted in March 2012 to urge Sri Lanka to investigate human rights violations.<sup>151</sup> This was in response to a desperate campaign, both of persuasion and intimidation, launched by the Sri Lankans to stop the passage of the resolution. The resolution also encouraged “the [Sri Lankan] government to implement the recommendations of its own Lessons Learnt and Reconciliation Commission.”<sup>152</sup> The Sri Lankan government lobbied foreign states via telephone calls and meetings and tried to intimidate civil rights groups travelling to the meeting.<sup>153</sup> Why would Sri Lanka engage in such acts if shaming is not powerful?

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146. Press Release, Eur. Comm’n, EU Temporarily Withdraws GSP+ Trade Benefits from Sri Lanka (Feb. 15, 2010), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=515>.

147. *Generalised Scheme of Preferences (GSP)*, EUR. COMM’N, [ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/index\\_en.htm](http://ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/index_en.htm) (last updated Sept. 2, 2013).

148. Council Regulation 143/2010, ¶ 7, 2010 O.J. (L 45) 2.

149. EU Temporarily Withdraws GSP+ Trade Benefits from Sri Lanka, *supra* note 146.

150. Even under the reformed GSP rules, suspension of Sri Lanka remains well within the EU’s possibilities. See Council Regulation 978/2012, art. 8, 2012 O.J. (L 303) 6.

151. *UN Adopts Resolution on Sri Lanka War Crimes Probe*, BBC NEWS (Mar. 22, 2012), <http://www.bbc.co.uk/news/world-asia-17471300>.

152. *Stricter Standards*, ECONOMIST (May 23, 2012), <http://www.economist.com/blogs/banyan/2012/03/sri-lanka-and-un>.

153. *Id.*

This is not the only instance of such behavior. In May 2009, the EU sought to initiate a resolution against Sri Lanka at the UNHRC by calling a special session.<sup>154</sup> Sri Lanka, in a smart procedural tactic, tabled its own resolution before the EU could make its proposal, ensuring that Sri Lanka's resolution would be the basis for negotiation.<sup>155</sup> It lobbied other states and defeated the EU's amendments.<sup>156</sup> These and other actions show that the Sri Lankan government is acutely aware of the coerciveness of shaming and acts aggressively to resist the imposition of shame sanctions just as it might resist traditional sanctions.

In sum, shaming the state comports with familiar notions of attributive liability. As is the case with the traditional punishments imposed on entities under domestic law, shaming entails similar but nonfatal objections: partisanship, sensitivity to economic and power influence, flaws in identification of actual offenders, and lack of proportionality.

### *C. Shaming the Regime, Government, or Ruler*

Shaming the regime or government, rather than the state at the entity level, may be necessary when the latter is either incongruent with blame for the wrong or when shaming the entity is ineffective. Several reasons for this divergence exist. First, the relationship between the offending public officials and the citizens of the state is likely to be quite attenuated. Under such circumstances, imposing shame on the state is both unfair and ineffective: unfair because the sanction punishes innocent people and ineffective because there is no congruence between the offender and the citizenry. In other words, the average citizen is unlikely to experience shame due to the actions of a small number of public officials over whom he has little direct control and whose actions he may not have initially approved. This is exacerbated in states where the regime is in power without popular support. Second, the heterogeneity in many modern states makes it difficult to find sufficient congruity of interests

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154. THEODOR RATHGEBER, PERFORMANCE AND CHALLENGES OF THE UN HUMAN RIGHTS COUNCIL: AN NGO'S VIEW 13 (2013), available at <http://library.fes.de/pdf-files/iez/global/09680.pdf>.

155. *Id.*

156. Karen Smith, *The European Union and the Politics of Legitimization at the United Nations*, 18 EUR. FOREIGN AFF. REV. 63, 75–76 (2013).

within a domestic population for strong feelings of identity to exist. Even where such strong national identities exist, these may not always inure to the benefit of a ruling group. For example, many Middle Eastern states possess strong Islamic identities, but there is a division between the regime and the population where issues involving international relations are concerned.

Some of the conceptual difficulties to shaming the state as an entity can be resolved by shaming the responsible regime instead. Even so, fairness requires that shame should be restricted to the individual offenders rather than extended to the entire government. For example, shaming the Iraqi government for its invasion of Kuwait in 1991 would punish people who either had nothing to do with the invasion or who had objected to it. Given that dissent and resignation from the government were not realistic options for individuals in the government for fear of Saddam Hussein, shaming the Iraqi government as a whole would be particularly cruel.

One response might be to limit shaming to the ruler when the decision is made by him or at his behest. This has the virtue of protecting innocent actors from undeserved punishment. However, for such shaming to be effective, the state has to be ruled by an individual with real decision-making authority and power over subordinates. In an ideal scenario, shaming triggers both an internal and external response by the ruler. The response is internal in the sense that the ruler experiences moral shame and undertakes corrective action to punish wrongdoers, compensate victims, and prevent future occurrences because he genuinely believes that the conduct is wrongful.<sup>157</sup> In less ideal conditions, the response might be purely external: faced with the shame sanction, the ruler takes some action to assuage external actors while continuing to covertly condone or ignore the wrong. These externally directed actions might be accompanied by denials of any wrongdoing.<sup>158</sup>

Shaming the ruler comes with its own set of incentive effects. A rational ruler will factor in the cost of shaming before engaging in any conduct with international implications. If the bene-

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157. See Sandeep Gopalan, *Alternative Sanctions and Social Norms in International Law: The Case of Abu Ghraib*, 2007 MICH. ST. L. REV. 785, 805 (2007).

158. *Id.*



fits of the conduct exceed the potential cost from the shaming, the probability of detection, or a combination of both, the rational ruler might engage in that action. If the cost exceeds the benefits, a rational ruler will forego the action. A rational ruler might also attempt to hide misconduct by lower level functionaries,<sup>159</sup> because it is only when the misconduct receives widespread public scrutiny that responsibility shifts from lower level officials to the ruler with the prospect of shaming.<sup>160</sup> Thus, one of the unintended consequences of shaming the ruler might be to create incentives for suppressing information about wrongs committed by lower level officials.

The coercive power of shaming at the individual level is variable. For example, rulers with strong claims to moral or ethical leadership,<sup>161</sup> whose grip on power is infirm,<sup>162</sup> who need good

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159. See, e.g., Lydia White, *Access to Information in Mexico: Migration and National Security*, FREEDOMINFO.ORG (June 28, 2012), <http://www.freedominfo.org/2012/06/access-to-information-in-mexico-migration-and-national-security>.

160. See, e.g., Cathy Lynn Grossman, *Sex Abuse Scandal Drives down Pope Benedict's U.S. Approval Ratings*, USA TODAY (Mar. 29, 2010), <http://content.usatoday.com/communities/Religion/post/2010/03/pope-benedict-sex-abuse-survey-ratings-fall/1#.UjIoTxZeVUQ>.

161. Religious leaders in particular, such as the Pope or Dalai Lama, could be susceptible to shaming in this sense. While Vatican officials initially reacted sluggishly to a stream of sex abuse scandals, plummeting approval ratings and religious disenfranchisement seem to have prompted more appropriate reactions. See *id.* In a recent interview, the Vatican's top official on the issue, Monsignor Charles Scicluna, admitted that the Catholic Church had been in denial over the issue of clerical sexual abuse, characterized the denial as "a primitive coping mechanism," and announced that the Church would be holding a four-day symposium on the matter in the near future. Philip Pulletta, *Denial No Option in Sexual Abuse Scandal: Vatican*, REUTERS (Feb. 3, 2012), <http://www.reuters.com/article/2012/02/03/us-vatican-abuse-idUSTRE8121F420120203>. Scicluna also acknowledged the Church's duty to cooperate with civil authorities in investigations. *Id.*

162. For example, when Mohamed Nasheed was forced to resign as President of the Maldives on February 7, 2012 and a "political crisis" resulted, the Commonwealth supported Nasheed's call for early elections to clarify the situation and suspended the country from the Commonwealth Ministerial Action Group (the organization's human rights observatory) on the grounds that the country was itself currently "under scrutiny by the Group itself." *Maldives Crisis: Commonwealth Urges Earlier Elections*, BBC NEWS (Feb. 23, 2012), <http://www.bbc.co.uk/news/world-asia-17135582>. In the initial days following the bloodless coup, when relative power positions were still unclear, the new President, Mohamed Waheed, seemed responsive to the Commonwealth's criticism. See Peter Griffiths, *Commonwealth Suspends Maldives*

reputations to join regional associations or trade groups,<sup>163</sup> who need to attract international investment,<sup>164</sup> who need loans from multilateral lending agencies,<sup>165</sup> and who need support

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from *Rights Group, Seeks Elections*, REUTERS (Feb. 23, 2012), <http://in.reuters.com/article/2012/02/22/maldives-commonwealth-idINDEE81L0JO20120222>; *Maldives Crisis, supra*. Once Waheed had somewhat consolidated his grip on power, he pushed elections back from late 2012 to July 2013, a date still several months ahead of his own original schedule. *Maldives President Waheed Hassan Sets Elections for 2013*, BBC NEWS (Apr. 18, 2012), <http://www.bbc.co.uk/news/world-asia-17762963>. This may have been due to the fact that the Maldives continued to experience episodes of civil unrest. See Will Jordan, *The Maldives: Mired in Presidential Intrigue*, AL-JAZEERA (Sept. 4, 2012), <http://www.aljazeera.com/indepth/features/2012/09/20129116544631378.html>.

163. In this context, one could consider Turkey's long-running efforts to join the EU, which have required it to undertake a number of human rights-related reforms, such as abolishing the death penalty, increasing linguistic rights for minorities, and passing a new penal code aimed at curtailing gender-based violence and other serious inequalities. Helena Smith, *Human Rights Record Haunts Turkey's EU Ambitions*, GUARDIAN (Dec. 13, 2004), <http://www.guardian.co.uk/world/2004/dec/13/eu.turkey1>. See CODE CRIMINAL [C. CRIM.], arts. 3(2), 46, 102, 122 (Turk.). According to the Turkish Minister for European Affairs, Egeman Bagis, "[s]ince 2011, Turkey has adopted 320 laws and 1,555 secondary regulations to harmonise its national legislation with the EU acquis," while "[t]he Turkish government maintains that the new constitution being drafted by a parliamentary committee will comply with EU standards." Menekse Tokyay, *Turkey's EU Bid Faces Opportunities and Challenges in 2013*, SETIMES.COM (Dec. 24, 2012), [http://setimes.com/cocoon/setimes/mobile/en\\_GB/features/setimes/articles/2012/12/24/reportage-01](http://setimes.com/cocoon/setimes/mobile/en_GB/features/setimes/articles/2012/12/24/reportage-01).

164. Libya, for example, eventually agreed to extradite two suspects in the Pan-Am bombing and to pay compensation to the victims' families following a decades-long shame campaign spearheaded by the United States and the U.K. *Key Facts: Libya Sanctions, supra* note 95. The removal of sanctions that followed permitted Libya to normalize its aviation industry and to attract much needed foreign investment to fully exploit its oilfields. See John H. Donboli & Farnaz Kashefi, *Doing Business in the Middle East: A Primer for U.S. Companies*, 38 CORNELL INT'L L.J. 413, 450–51 (2005); Jad Mouawad, *Libya Tempts Executives with Big Oil Reserves*, N.Y. TIMES (Jan. 2, 2005), <http://www.nytimes.com/2005/01/02/business/02libya.html>.

165. In 1994, the World Bank obligated Burkina Faso to "incorporate a pledge in its policy framework paper to curb female genital mutilation." Canan Gunduz, *Human Rights and Development: The World Bank's Need for a Consistent Approach* 19 (London Sch. of Econ., Dev. Studies Inst. Working Paper Series, Paper No. 04-49, 2004), available at <http://www.lse.ac.uk/internationalDevelopment/pdf/WP/WP49.pdf>. Two years later, Burkina Faso criminalized female genital mutilation and formed "a national committee to combat the practice." See Heidi Jones et al., *Female*

from allies<sup>166</sup> are probably most responsive to shame sanctions. In contrast, rulers who resist external norms,<sup>167</sup> have established reputations for denouncing the dominant international actors,<sup>168</sup> or are pursuing a different ideology that provides in-

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*Genital Cutting Practices in Burkina Faso and Mali and Their Negative Health Outcomes*, 30 *STUD. FAM. PLAN.* 219, 220 (1999).

166. Israel, for example, enjoys a human rights record that is far from spotless, but also takes care not to endanger support from its key allies: the United States, the U.K., and Germany. Examples include complex and rigorous rules regarding targeted assassinations (intended to minimize civilian casualties), see generally HCJ 769/02 *Pub. Comm. Against Torture in Isr. v. State of Isr.* 46 I.L.M. 375 [2005] (Isr.), efforts to keep its nuclear weapons program low-key, and efforts to comply with provisions of the Geneva Conventions mandating civilian protection, such as leaflet drops warning Gaza residents to keep away from Hamas buildings before air raids. See Olga Kazan, *Israeli Army Drops Warning Leaflets on Gaza*, *WASH. POST BLOG* (Nov. 15, 2012, 8:50 AM), <http://www.washingtonpost.com/blogs/worldviews/wp/2012/11/15/israeli-army-drops-warning-leaflets-on-gaza/>.

167. In 2008, Robert Mugabe was stripped of his honorary British knighthood that had been bestowed upon him in 1994 “as a mark of revulsion at the abuse of human rights and abject disregard for the democratic process in Zimbabwe over which President Mugabe has presided.” *Mugabe Is Stripped of Knighthood as ‘a Mark of Revulsion,’* *SCOTSMAN* (June 25, 2008), <http://www.scotsman.com/news/uk/mugabe-is-stripped-of-knighthood-as-a-mark-of-revulsion-1-1077561>. In close temporal proximity, Mugabe was stripped of several honorary degrees he had been awarded by Western universities in the 1980s and 1990s. See, e.g., Paul Kelbie, *Edinburgh University Revokes Mugabe Degree*, *GUARDIAN* (July 14, 2007), <http://www.theguardian.com/uk/2007/jul/15/highereducation.internationaleducationnews>; *Michigan State Revokes Mugabe’s Honorary Degree*, *DIVERSE* (Sept. 16, 2008), <http://diverseeducation.com/article/11685>. This does not seem to have had much impact on Mugabe, as his chief spokesperson George Charamba is quoted as saying “[Mugabe] does not lose sleep over threats. . . . Honorary degrees are exactly that, an unsolicited honor from the giver. If anything, those Western universities improved their international profile by associating themselves with the president.” Angus Shaw, *Mugabe Not Bothered by Moves to Strip Honorary Degrees*, *BOSTON.COM* (Apr. 25, 2007), [http://www.boston.com/news/education/higher/articles/2007/04/25/mugabe\\_not\\_bothered\\_by\\_moves\\_to\\_strip\\_honorary\\_degrees/](http://www.boston.com/news/education/higher/articles/2007/04/25/mugabe_not_bothered_by_moves_to_strip_honorary_degrees/).

168. Hugo Chavez was a good example of such a figure. Chavez is perhaps most infamous for “leading the ‘Bolivarian revolution’ against the ‘empire’ (i.e., the United States).” *Hugo Chávez’s Rotten Legacy*, *ECONOMIST* (Mar. 9, 2013), <http://www.economist.com/news/leaders/21573106-appeal-populist-autocracy-has-been-weakened-not-extinguished-hugo-ch%C3%A1vezs-rotten>. At a press conference on August 2, 2012, Chavez denounced European nations for funding Syrian rebels/terrorists in the ongoing conflict in that country. *Venezuela’s President Hugo Chavez Criticizes West over Syria*, *GUARDIAN* (Aug. 2, 2012), <http://www.guardian.co.uk/world/video/2012/aug/02/venezuela->

ternal justifications for their actions<sup>169</sup> are unlikely to be responsive to shaming. These effects are exacerbated if the ruler is also from a powerful country with substantial bargaining power.<sup>170</sup> Under such circumstances, a ruler is likely to be less responsive to shame sanctions because of the strategic or economic importance of his country.<sup>171</sup>

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hugo-chavez-syria-video. *See also Chavez, Ahmadinejad Denounce West's Imperialist Aggression in Libya, Syria*, JAGRAN POST (Aug. 17, 2011), <http://post.jagran.com/chavez-ahmadinejad-denounce-wests-imperialist-aggression-in-libya-syria-1313592746>. In 2006, Chavez famously referred to then-U.S. President George Bush as “the devil” during a speech to the UNGA, taking the opportunity in follow-up interviews to criticize the second Iraq War and “Washington-backed capitalist reforms in Latin America.” Tim Padgett, *Chavez: “Bush Has Called Me Worse Things,”* TIME (Sept. 22, 2006), <http://content.time.com/time/world/article/0,8599,1538296,00.html#ixzz2G6BzUvhc>.

169. For example, the Taliban destroyed the irreplaceable Bamiyan Buddhas in 2001 due to “a religious obligation to destroy idols,” despite an international outcry that included several countries, including Iran, offering to purchase the historical statues. Alex Spillius, *Taliban Ignore All Appeals to Save Buddhas*, TELEGRAPH (Mar. 5, 2001), <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/1325119/Taliban-ignore-all-appeals-to-save-Buddhas.html>.

170. China and Russia have both been able to use their permanent seats on the Security Council to avoid action on Tibet and Chechnya, respectively. *See Abdul Rahman Al-Rashed, With Chechnya and Tibet in Mind*, AL ARABIYA (Oct. 3, 2012), <http://www.alarabiya.net/views/2012/10/03/241553.html>. Despite the personal popularity for the Dalai Lama and the Tibetan cause in many Western States, China’s rising importance has ensured that the issue has slipped off the international agenda. *See Kim Arora, ‘Dalai Lama’s Popularity Is Key to Tibet Cause,’* TIMES OF INDIA (Mar. 12, 2011), [http://articles.timesofindia.indiatimes.com/2011-03-12/india/28683445\\_1\\_kalon-tripa-karmapa-lama-tibetans](http://articles.timesofindia.indiatimes.com/2011-03-12/india/28683445_1_kalon-tripa-karmapa-lama-tibetans).

171. Once sensitive to criticism over Tiananmen Square, which threatened to disrupt its bid to join the WTO, China is now dismissive and even contemptuous of U.S. criticism on subjects ranging from China’s border disputes with its neighbors to its support of Syria. *See, e.g., Barbara Demick, Clinton Draws Criticism from Chinese Ahead of Talks*, L.A. TIMES BLOG (Sept. 4, 2012, 11:00 AM), [http://latimesblogs.latimes.com/world\\_now/2012/09/clinton-draws-criticism-from-chinese-ahead-of-talks.html](http://latimesblogs.latimes.com/world_now/2012/09/clinton-draws-criticism-from-chinese-ahead-of-talks.html); Steven Lee Myers & Jane Perlez, *Smiles and Barbs for Clinton in China*, N.Y. TIMES (Sept. 4, 2012), <http://www.nytimes.com/2012/09/05/world/asia/a-harsh-reception-for-clinton-in-chinas-state-media.html>; *Clinton’s Criticism over Syria Is Unacceptable*, XINHUANET (July 7, 2012), [http://news.xinhuanet.com/english/china/2012-07/07/c\\_131701262.htm](http://news.xinhuanet.com/english/china/2012-07/07/c_131701262.htm).

Even so, unless the ruler has egregious criminal tendencies,<sup>172</sup> he will be responsive to shaming on a scale that varies from weakly responsive to strongly responsive. If the ruler enjoys widespread domestic support and has a weak opposition,<sup>173</sup> or is a dictator without any resistance, he will be weakly responsive to shaming at best. Similarly, if the ruler thrives on challenging the dominant international structure or is leading a revolutionary government fighting against claimed injustices perpetrated by foreign actors, shame has little chance of succeeding unless members of that state's shaming reference

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172. Examples of this type of ruler include Idi Amin of Uganda and Pol Pot of Cambodia. Idi Amin's rule has been described as "a synonym for barbarity," and Amin himself as "possess[ing] a kind of animal magnetism," which he wielded "with sadistic skill." Patrick Keatley, *Obituary: Idi Amin*, *GUARDIAN* (Aug. 17, 2003), <http://www.theguardian.com/news/2003/aug/18/guardianobituaries/print>. Amin attributed God-like powers to himself and exhibited such irrational behavior that some foreign leaders who had contact with him came to conclude that he was "a dangerous, unbalanced man." *Id.* Amin was ruthless in dealing with real and imagined political opposition, and his reign caused the deaths of an estimated 300,000 people, *id.*, for often erratic reasons and via sadistic methods such as beating them to death with sledge hammers. *See Death of a Buffoon and Killer*, *SCOTSMAN* (Aug. 17, 2003), <http://www.scotsman.com/news/international/death-of-a-despot-buffoon-and-killer-1-1292740>. Pol Pot, who ruled Cambodia from 1975–1979 as leader of the Khmer Rouge, went so far in his effort to force Cambodia into his idea of a Communist country as to kill all intellectuals, a term so widely interpreted at times as to include anyone who wore glasses or spoke a foreign language. *Pol Pot: Life of a Tyrant*, *BBC NEWS* (Apr. 14, 2000), <http://news.bbc.co.uk/2/hi/asia-pacific/78988.stm>. His many ill-conceived policies, which included emptying all urban areas and forcing Cambodians to continually use the pronoun "we" instead of "I," resulted in the deaths of up to 25% of the population. *Pol Pot's Cambodia: A Dark Century's Blackest Cloud*, *ECONOMIST* (Nov. 4, 2004), <http://www.economist.com/node/3352737>.

173. Robert Mugabe of Zimbabwe provides a helpful example. Support for Mugabe's chief opposition, the Movement for Democratic Change ("MDC"), fell from 38% in 2010 to only 20% in mid-2012. Lydia Polgreen, *Less Support for Opposition in Zimbabwe, Study Shows*, *N.Y. TIMES*, Aug. 22, 2012, at A10. The MDC has faced many challenges, including attempting to pacify a diverse supporting base of its own and a leadership weakened by treason accusations and Mugabe's populist policies, such as accelerated land redistribution. CHRIS MAROLENG, *SITUATION REPORT: ZIMBABWE'S MOVEMENT FOR DEMOCRATIC CHANGE: BRIEFING NOTES 2–4* (2004), *available at* <http://dspace.cigilibrary.org/jspui/bitstream/123456789/31353/1/ZIMMAY04.pdf>.

group participate.<sup>174</sup> To the contrary, shaming by dominant international actors in such cases serves to establish that ruler's reputation for fearlessness and in some cases can be effectively utilized to buttress his or her position amongst his domestic constituency.<sup>175</sup>

This sort of impotency can have disturbing consequences. Perversely, the international community's attempts at punishing those who violate international norms might bring to power the very sorts of rulers who have the greatest tendency to violate those norms. A state's population might elect individuals they perceive to be most hostile to a dominant power that is a proponent of such IL norms in an attempt to signal resistance, and shaming in such circumstances becomes counterproductive. One example of this is the case of former Chancellor Schroeder of Germany, who was trailing in opinion polls before masterfully employing his opposition to U.S. policies in Iraq to stage a stunning victory.<sup>176</sup>

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174. Slobodan Milosevic, for example, always positioned himself as the defender of the Serbian people against foreign aggression. *See Wife Hails Milosevic the 'Freedom Fighter,'* BBC NEWS (Sept. 7, 2001), <http://news.bbc.co.uk/2/hi/europe/1529200.stm>. In a 2001 BBC interview following his extradition to face war crimes charges at The Hague, Milosevic's wife Mira Markovic proclaimed, "I don't feel any shame. On the contrary, I'm proud of my people and I am sure that throughout its history it pursued—as far as wars are concerned—a defence policy." *Id.* Mrs. Markovic blamed Western powers for the bloodshed in the former Yugoslavia and claimed that Mr. Milosevic was an inspiration to "many poor, small and humiliated nations throughout the world." *Id.* Milosevic himself phoned Fox News from his cell to give a live interview where he stated, "I'm proud for everything I did in defending my country and my people." *Milosevic Gives TV Interview from Cell,* BBC NEWS (Aug. 24, 2001), <http://news.bbc.co.uk/2/hi/europe/1507660.stm>.

175. The most recent example of this is Mr. Hugo Chavez, the former president of Venezuela, who made his global reputation almost entirely on being anti-United States. He seems to have profited from this reputation, and U.S. attempts at shaming were impotent when applied to him. Another example is Mr. Ahmedinejad of Iran. *See generally* sources cited and accompanying text *supra* note 168.

176. Dan Collins, *Schroeder Claims Narrow Victory*, CBS (Feb. 11, 2009), [http://www.cbsnews.com/2100-202\\_162-522699.html](http://www.cbsnews.com/2100-202_162-522699.html); John F. Dickerson, *Why Bush Is Giving Schroeder the Cold Shoulder*, TIME (Sept. 30, 2002), <http://content.time.com/time/nation/article/0,8599,356168,00.html>; Steven Komarow, *Schroeder Sticks to Opposing War with Iraq*, USA TODAY (Sept. 23, 2002), [http://usatoday30.usatoday.com/news/world/2002-09-23-germany\\_x.htm#](http://usatoday30.usatoday.com/news/world/2002-09-23-germany_x.htm#).

Notwithstanding these features, shaming at the regime level offers valuable insights. Burma offers a helpful case study. Until 1988, Burma was ruled under a one-party military-socialist system.<sup>177</sup> In the wake of political upheaval that year, General Saw Maung seized power and formed a ruling council that implemented a capitalist society, albeit under military control.<sup>178</sup> In 1990, Saw Maung held elections in which the National League for Democracy (“NLD”) took roughly 80% of all contested seats.<sup>179</sup> Following this unexpected electoral outcome, the military refused to cede power<sup>180</sup> and placed the NLD’s General-Secretary, Aung San Su Kyii, under house arrest.<sup>181</sup> Over the next twenty years, the ruling military junta was accused of a host “of grave violations of basic human rights including forced labor, the use of child soldiers, forced relocation, summary executions, torture and the rape of women and girls, particularly of members of ethnic minorities.”<sup>182</sup>

From 1991, the UNGA passed a steady stream of resolutions on Burma, mainly focused on addressing democratization, human rights, and the release of political prisoners. Although these resolutions often employed “soft” diplomatic terms, such as the expression “of grave concern,”<sup>183</sup> there were also examples of language that was clearly pejorative and expressive of a

177. C.L. Lim, *From Constructive Engagement to Collective Revulsion: The Myanmar Precedent of 2007*, 26 SING. L. REV. 204, 206–07 (2008).

178. *Id.* at 208. It was around this time that the country was officially renamed “Myanmar.” *Burma Takes Another Name: Now, the Union of Myanmar*, N.Y. TIMES (June 20, 1989), <http://www.nytimes.com/1989/06/20/world/burma-takes-another-name-now-the-union-of-myanmar.html>.

179. Lim, *supra* note 177, at 208.

180. *Id.* at 208–09.

181. *Aung San Suu Kyi*, BIOGRAPHY.COM, <http://www.biography.com/people/aung-san-suu-kyi-9192617> (last visited Nov. 4, 2013).

182. Michael Ewing-Chow, *First Do No Harm: Myanmar Trade Sanctions and Human Rights*, 5 NW. J. INT'L HUM. RTS. 153, 155 (2007).

183. *See, e.g.*, G.A. Res. 66/230, ¶¶ 1, 9, 21 U.N. Doc. A/RES/66/230 (Dec. 24, 2011); G.A. Res. 61/232, ¶ 2, U.N. Doc. A/RES/61/232 (Dec. 22, 2006); G.A. Res. 60/233, ¶ 2, U.N. Doc. A/RES/60/233 (Dec. 23, 2005); G.A. Res. 59/263, ¶ 2, U.N. Doc. A/RES/59/263 (Dec. 23, 2004); G.A. Res. 58/247, ¶¶ 2, 3, U.N. Doc. A/RES/58/247 (Dec. 23, 2003); G.A. Res. 57/231, ¶ 3, U.N. Doc. A/RES/57/231 (Dec. 18, 2002); G.A. Res. 47/144, U.N. Doc. A/RES/47/144 (Dec. 18, 1992); G.A. Res. 46/132, ¶ 2, U.N. Doc. A/RES/46/132 (Dec. 17, 1991).

value judgment regarding the junta's conduct, such as "condemning" or "deploring" their actions.<sup>184</sup> For instance, UNGA Resolution 56/231, adopted in 2001, "[d]eplor[ing] the continued violations of human rights in Myanmar, including extrajudicial, summary or arbitrary executions, enforced disappearances, rape, torture, inhuman treatment, forced labour, including the use of children, forced relocation and denial of freedom of assembly, association, expression, religion and movement."<sup>185</sup>

Other international organizations also repeatedly condemned human rights abuses in Burma,<sup>186</sup> with the International Labour Organization ("ILO") going so far as to "urge" its members in late 2000 to impose sanctions on Burma unless it improved its track record on forced labor.<sup>187</sup> This ultimatum, yielded results: Burma "allowed the ILO to open an office in [its territory] in 2002" and agreed on a plan of action to end forced la-

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184. See, e.g., G.A. Res. 65/241, ¶ 1, U.N. Doc. A/RES/65/241 (Dec. 24, 2010); G.A. Res. 64/238, ¶ 1, U.N. Doc. A/RES/64/238 (Dec. 24, 2009); G.A. Res. 63/245, ¶ 1, U.N. Doc. A/RES/63/245 (Dec. 24, 2008); G.A. Res. 62/222, ¶ 1, U.N. Doc. A/RES/62/222 (Dec. 22, 2007); G.A. Res. 56/231, ¶¶ 4, 18, 20, 22, U.N. Doc. A/RES/56/231 (Dec. 24, 2001); G.A. Res. 55/112, ¶¶ 4, 14, 16, 18, U.N. Doc. A/RES/55/112 (Dec. 4, 2000); G.A. Res. 54/186, ¶¶ 5, 13, 14, U.N. Doc. A/RES/54/186 (Dec. 17, 1999); G.A. Res. 53/162, ¶ 4, U.N. Doc. A/RES/53/162 (Dec. 9, 1998); G.A. Res. 52/137, ¶ 3, U.N. Doc. A/RES/52/137 (Dec. 12, 1997); G.A. Res. 51/117, ¶ 3, U.N. Doc. A/RES/51/117 (Dec. 12, 1996); G.A. Res. 50/194, ¶ 3, U.N. Doc. A/RES/50/194 (Dec. 22, 1995); G.A. Res. 49/197, ¶ 3, U.N. Doc. A/RES/49/197 (Dec. 23, 1994); G.A. Res. 48/150, ¶ 2, U.N. Doc. A/RES/48/150 (Dec. 20, 1993).

185. G.A. Res. 56/231, *supra* note 184, ¶ 4. The resolution also stated that the UNGA "[d]eplores the continued violations of human rights, in particular those directed against persons belonging to ethnic and religious minorities, including summary executions, rape, torture, forced labour, forced portage, forced relocations, use of anti-personnel landmines, destruction of crops and fields and dispossession of land and property." *Id.* ¶ 18.

186. See, e.g., E.S.C. Dec. 1998/261, U.N. Doc. E/DEC/1998/98 (July 30, 1998); U.N. Comm'n on Human Rights, Human Rights Res. 1997/64, ¶ 2, U.N. Doc. E/CN.4/RES/1997/64 (Apr. 16, 1997); E.S.C. Dec. 1994/269, U.N. Doc. E/DEC/1994/94 (July 25, 1994); U.N. Comm'n on Human Rights, Human Rights Res. 1994/85, U.N. Doc. E/CN.4/RES/1994/84 (Mar. 9, 1994); U.N. Comm'n on Human Rights, Human Rights Res. 1992/58, ¶ 2, U.N. Doc. E/CN.4/RES/1992/58 (Mar. 3, 1992); see generally Special Rapporteur on the Situation of Human Rights in Myanmar, *Situation of Human Rights in Myanmar*, Comm'n on Human Rights, U.N. Doc. E/CN.4/1998/70 (Jan. 15, 1998) (by Rajsomer Lallah).

187. Thihan Myo Nyun, *Feeling Good or Doing Good: Inefficacy of the U.S. Unilateral Sanctions Against the Military Government of Burma/Myanmar*, 7 WASH. U. GLOBAL STUD. L. REV. 455, 478 n.97 (2008).



bor.<sup>188</sup> The World Bank also sought to put pressure on the junta by cutting off lending to Burma and tying any minor loans to a willingness to institute reforms.<sup>189</sup>

Individual states also took action against the regime. The initial sanctions, which were put in place between 1988 and 1990, were explicitly linked to violations of internationally recognized workers' rights and drug trafficking laws.<sup>190</sup> Despite several attempts to formulate legislation imposing tougher sanctions (e.g., the failed 1995 Free Burma Act),<sup>191</sup> comprehensive legislation on this point was only passed in 2003 in the form of the Burmese Freedom and Democracy Act, 2003 ("BFDA"), which banned imports from Burma/Myanmar,<sup>192</sup> froze assets of top officials,<sup>193</sup> and prohibited granting them visas.<sup>194</sup> It also mandated that the United States block "soft loans" to Burma at the IMF and World Bank.<sup>195</sup>

In contrast to other U.S. domestic sanction legislation, the provisions of the BFDA have never been waived. The legislation was put in force indefinitely and cannot be repealed until "measurable and substantial progress" has been made on preventing internationally recognized human rights violations (such as forced labor, the conscription of child soldiers, and rape), forming a democratic government, releasing all political prisoners, and improving the protection of freedom of speech, freedom of the press, freedom of association, and freedom of religion.<sup>196</sup> Further, the Burmese junta must reach a peaceful settlement with the NLD, other democratic forces, and Burma's ethnic minorities.<sup>197</sup>

The EU worked in tandem with the United States on the issue of Burma, imposing an arms embargo and refusing all aid

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188. *Id.*

189. *Id.* at 477–78.

190. *Id.*

191. See H.R. 2892, 104th Cong. (1996).

192. Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61, § 3, 117 Stat. 864, 865–66 (2003) (codified as amended at 50 U.S.C. § 1701 (2000)).

193. § 4, 117 Stat. at 867.

194. § 6, 117 Stat. at 867.

195. § 5, 117 Stat. at 867.

196. § 3(A)–(B), 117 Stat. at 866. See also Ewing-Chow, *supra* note 182, at 157–58.

197. § 3(B)(v), 117 Stat. at 866.

except for humanitarian assistance.<sup>198</sup> In 1996, the EU adopted a Common Position on Myanmar, which also introduced a visa ban for senior Burmese officials,<sup>199</sup> and in 1997, further strengthened its sanctions by suspending Burma from the GSP program.<sup>200</sup> In 2000, the EU imposed a freeze on assets held abroad by persons related to the Burmese government.<sup>201</sup> Shaming by the United States and EU has come at severe economic cost to Burma: as a Least Developed Country (a status it has “enjoyed” since 1987), Burma would otherwise be entitled to (and, of course, in need of) significant financial assistance.<sup>202</sup>

While the West took coercive steps, Burma’s neighbors, acting through the Association of Southeast Asian Nations (“ASEAN”), preferred what they termed “constructive engagement”—a method of encouraging reform in Burma in a less confrontational manner.<sup>203</sup> However there was an element of shame even here: in 2006, the year that Myanmar would have been entitled to chair ASEAN, the other members convinced the junta to waive that right.<sup>204</sup> In the Burmese face-based culture, this has massive shame implications.<sup>205</sup>

The evidence seems to support the view that shaming was not especially effective until 2007, when the junta’s repressive crackdowns on the “Saffron Revolution” led by Buddhist monks brought renewed attention<sup>206</sup> and strong criticism from inter-

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198. Council Common Position (EC) No. 96/635 of 28 Oct. 1996, art. 5(a)(ii), 1996 O.J. (L 287) 1, 2 (these measures were reaffirmed to as they were “already adopted”).

199. *Id.* art. 2(b)(i).

200. *EU/Burma: Council Suspends Industrial and Agricultural GSP Benefits*, EUROPOLITICS (Mar. 26, 1997), <http://www.europolitics.info/eu-burma-council-suspends-industrial-and-agricultural-gsp-benefits-artr166176-75.html>.

201. Ewing-Chow, *supra* note 182, at 159.

202. *See id.* at 154.

203. Lim, *supra* note 177, at 209.

204. *Id.* at 211.

205. *See generally* David Yau-Fi Ho, *On the Concept of Face*, 81 AM. J. SOC. 867 (1998) (discussing the concept of face in general); Joo Yup Kim & Sang Hoon Nam, *The Concept and Dynamics of Face: Implications for Organizational Behavior in Asia*, 9 ORG. SCI. 522, 523 (1998) (discussing how the concept of face explains behavior in many Asian cultures).

206. The immediate result was widespread news coverage. *See, e.g.*, Andrew Buncombe & Peter Popham, *Burma: Inside the Saffron Revolution*, INDEPENDENT (Sept. 27, 2007), <http://www.independent.co.uk/news/world/asia/burma-inside-the-saffron->

national figures. In 2008, Laura Bush, then First Lady of the United States, called the violent crackdown on democracy protesters in Burma a “shameful response,”<sup>207</sup> while Secretary of State Condoleezza Rice condemned the military junta as “one of the worst regimes in the world’ for its record on human rights and free speech.”<sup>208</sup> Significantly, ASEAN stopped its face-saving efforts with Burma and expressed in no uncertain terms “revulsion” at the repression of protests.<sup>209</sup> This term “revulsion” appears to be the strongest language ever officially used in relation to the situation in Burma.

While a Security Council Resolution calling on Burma’s government to stop military attacks against civilians in ethnic minority regions and transition to democracy was vetoed by China and Russia in 2007,<sup>210</sup> attention continued to focus on Burma throughout 2008 at the U.N. when Human Rights Council Resolution 7/31 expressed “deep concern” at the violent repres-

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revolution-403645.html; Marc Huger et al., *Cracking Down on the Saffron Revolution: Junta Takes Back Control in Burma*, SPIEGEL ONLINE (Oct. 1, 2007), <http://www.spiegel.de/international/world/cracking-down-on-the-saffron-revolution-junta-takes-back-control-in-burma-a-508874.html>; *Revolution in Myanmar: The Saffron Revolution*, ECONOMIST (Sept. 27, 2007), <http://www.economist.com/node/9867036>. An article from then-U.K. Shadow Foreign Secretary David Miliband revived the movement three years later. David Miliband, *Keep Making Noise about Burma*, GUARDIAN (Aug. 13, 2010), <http://www.theguardian.com/commentisfree/libertycentral/2010/aug/13/burma-a-human-rights-pressure>.

207. *Speaking out on Behalf of the People of Burma: Mrs. Bush Supports Burmese People’s Efforts to Free Themselves from Regime’s Tyranny*, WHITE HOUSE, <http://georgewbush-whitehouse.archives.gov/firstlady/burma.html> (last visited Nov. 4, 2013).

208. *Rice: Myanmar One of ‘Worst Regimes in the World,’* USA TODAY (Nov. 16, 2005), [http://usatoday30.usatoday.com/news/world/2005-11-16-rice-myanmar\\_x.htm](http://usatoday30.usatoday.com/news/world/2005-11-16-rice-myanmar_x.htm).

209. Paul Eckert, *ASEAN Voices ‘Revulsion’ at Myanmar Violence*, REUTERS (Sept. 27, 2007), <http://www.reuters.com/article/2007/09/27/idUSN27379289>.

210. Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Myanmar, Owing to Negative Votes by China, Russian Federation, U.N. Press Release SC/8939 (Jan. 12, 2007), [www.un.org/News/Press/docs/2007/sc8939.doc.htm](http://www.un.org/News/Press/docs/2007/sc8939.doc.htm). This can likely be attributed to internal concerns in Russia and China in regards to Chechnya and Tibet. See Abdul Rahman Al-Rashed, *With Chechnya and Tibet in Mind*, AL ARABIYA (Oct. 3, 2012), <http://www.alarabiya.net/views/2012/10/03/241553.html>. See also Lim, *supra* note 177, at 216 (describing China as “frustrated” by Burma’s military junta).

sion of protests<sup>211</sup> and “[s]trongly deplore[d] the ongoing systematic violations of human rights and fundamental freedoms of the people of Myanmar.”<sup>212</sup> It also urged the government of Burma to receive a Special Rapporteur.<sup>213</sup> The report of one of the Rapporteurs, issued a few months later, focused on violations of the Universal Declaration of Human Rights, such as Article 19 (freedom of expression).<sup>214</sup> The report also considered Articles 9, 10, 11, 19, 20, and 21 of the Universal Declaration to be implicated in the case of Aung San Suu Kyi,<sup>215</sup> and found that the excessive use of force to quell protests in September 2007 (which, according to the report, led to thirty-one deaths) contravened Article 29(2) and (3) of the Universal Declaration.<sup>216</sup> The report also estimated the number of political prisoners to be 1,900.<sup>217</sup>

The ruling junta was not impervious to shaming. It reacted periodically in predictable ways. On October 24, 2007, the day after the U.N. humanitarian coordinator in Burma, Charles Petrie, released a statement critical of the junta’s handling of the protests, the Burmese Ministry of Foreign Affairs issued a protest note.<sup>218</sup> The note stated that “the United Nations statement was ‘unprecedented’ and ‘very negative’ and complained that Myanmar officials were not notified in advance of its publication.”<sup>219</sup> Shortly thereafter, on November 2, the junta ordered Petrie’s expulsion from the country.<sup>220</sup> In a letter dated

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211. Human Rights Council Res. 7/31, pmb., Rep. of the Human Rights Council, Situation of Human Rights in Myanmar, 7th Sess., Mar. 3–28, Apr. 1, 2008, U.N. GAOR, 63rd Sess., Supp. No. 53, A/63/53, at 164–65 (Mar. 28, 2008).

212. *Id.* ¶ 1.

213. *Id.* ¶ 2.

214. Special Rapporteur on the Situation of Human Rights in Myanmar, *Human Rights Situations That Require the Council’s Attention*, ¶ 20, U.N. Doc. A/HRC/8/12 (June 3, 2008) (by Tomás Ojea Quintana).

215. *Id.* ¶ 29.

216. *Id.* ¶ 45.

217. *Id.* ¶ 27.

218. Thomas Fuller, *Myanmar Junta Expels Top UN Official*, N.Y. TIMES (Nov. 2, 2007), <http://www.nytimes.com/2007/11/02/world/asia/02iht-03myanmar.8161667>.

219. *Id.* The letter added, “[t]he government of the Union of Myanmar does not want Petrie to continue to serve in Myanmar, especially at this time when the cooperation between Myanmar and the United Nations is crucial.” *Id.*

220. *Id.*

November 5, 2007 and addressed to the U.N. Secretary-General, the government attacked the shamers:

countries that initiated the draft resolution . . . did so only to channel the domestic political process in the direction of their choosing and not to promote human rights per se . . . There should be no double standards or politicization of human rights issues.<sup>221</sup>

The letter blamed the “relentless negative media campaign” for Burma becoming “an emotive issue” and attacked the veracity of claims concerning human rights violations.<sup>222</sup> It outlined several areas of progress achieved by Burma in cooperation with the ILO, attempting to create a reputation as a cooperator state.<sup>223</sup> In reaction to UNGA Resolution 65/241,<sup>224</sup> Burma “appreciated those that had voted against the text despite the serious pressure and threats imposed by some States. Still, the ‘heavy-handed approach’ used by some countries had made it difficult for many delegations to vote against the ill-thought-out resolution.”<sup>225</sup> Similarly, in response to UNGA Resolution 60/233,<sup>226</sup> Burma’s representative “categorically reject[ed] the allegations and accusations.”<sup>227</sup>

Burma’s leaders were, moreover, not merely subject to shaming directed from other states. The cause of the NLD had long been a popular one in the public consciousness of many Western nations.<sup>228</sup> As a result, the junta occasionally found itself

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221. Memorandum, Permanent Representative of Myanmar to the U.N. Secretary General, Memorandum on the Situation of Human Rights in the Union of Myanmar, ¶¶ 5, 29, A/C.3/62/7 (Nov. 5, 2007).

222. *Id.* ¶¶ 15, 33.

223. *See generally id.*

224. G.A. Res. 65/241, *supra* note 184.

225. Press Release, General Assembly, As General Assembly Concludes Main Part of Sixty-Fifth Session, President Hails ‘Constructive and Cooperative Spirit’: Delegates Pass Text on Memorial to Legacy of Slavery, Transatlantic Slave Trade, U.N. Press Release GA/11043 (Dec. 23, 2010), *available at* <http://www.un.org/News/Press/docs/2010/ga11043.doc.htm>.

226. *See generally* G.A. Res. 60/233, *supra* note 183.

227. U.N. GAOR, 60th Sess., 69th plen. mtg. at 19, U.N. Doc. A/60/PV.69 (Dec. 23, 2005).

228. *See* Peter Beaumont, *Aung Sang Suu Kyi Arrives in Oslo to Collect Nobel Prize*, GUARDIAN (June 15, 2012), <http://www.theguardian.com/world/2012/jun/16/aung-san-suu-kyi-oslo-nobel>.

targeted by shaming actions from private pressure groups.<sup>229</sup> Realizing that the junta may not be responsive, these groups engaged in secondary shaming against Western companies for “doing business” with Burma.<sup>230</sup>

In 2004, the Burma Campaign UK published the names of thirty-seven companies transacting business with Burma in an action referred to in the press as “naming and shaming,” with those on it reportedly belonging to “a dirty list.”<sup>231</sup> Those named included several high-profile companies,

includ[ing] Rolls Royce, . . . Lloyds of London, . . . and SWIFT, the financial messaging network partly owned by British firms. . . . Tony Blair [then-Prime Minister of the U.K.] . . . urged British companies to boycott Burma voluntarily, pointing to the suppression of democracy, human rights abuses, the use of forced labour and the oppression of minorities.<sup>232</sup>

These tactics had some success, persuading “at least twenty firms—most notably British American Tobacco—to exit Burma” in 2004.<sup>233</sup> The military junta was thus not only subjected to direct shaming actions, but was also susceptible to others refusing to have dealings with them because of shame directed at those third parties. This is an example of effective secondary shaming, in which high social and economic costs deter third parties from cooperating with a norm violator, thus isolating the norm violator and discouraging third parties from engaging in similar behavior.

Until recently, however, the effect of such sanctions remained uncertain. When U.N. Secretary-General Ban Ki-Moon visited Burma in mid-2009, the ruling council refused to allow a meeting with the opposition leader.<sup>234</sup> Ki-Moon did, however, procure a pledge from Senior General Than Shwe that elections

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229. See, e.g., Anton La Guardia, *Companies ‘Shamed’ for Trade with Burma*, TELEGRAPH (Aug. 25, 2004), <http://www.telegraph.co.uk/news/worldnews/asia/burmamyanmar/1470181/Companies-shamed-for-trade-with-Burma.html>.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. Press Release, Secretary-General, Briefing Security Council, Calls Myanmar’s Refusal to Grant Meeting with Jailed Opposition Leader a Lost Opportunity, U.N. Press Release SC/9704 (July 13, 2009), available at <http://www.un.org/News/Press/docs/2009/sc9704.doc.htm>.

would be held in 2010 and that they would be “free and fair.”<sup>235</sup> According to Ki-Moon’s report, “[t]he Government intended to implement all appropriate recommendations proposed by the Secretary-General, including on such matters as amnesty for prisoners and technical assistance for the elections.”<sup>236</sup> Reaction to this report within the Security Council was mixed, although the vast majority of statements reflected a strong feeling that Burma should comply with the U.N.’s requests.<sup>237</sup> Several powerful states, including the U.K. and France, sent a clear message that their impatience with Burma was increasing and that if reforms did not materialize “the international community must react firmly.”<sup>238</sup> Resolution 64/238, which followed about five months after Ki-Moon’s visit, was even more critical in its language than previous resolutions had been: “*The General Assembly . . . strongly condemns* the ongoing systematic violations of human rights and fundamental freedoms of the people of Myanmar.”<sup>239</sup>

Whether owing to the international pressure, or for other reasons, the junta decided to hold elections in 2010.<sup>240</sup> Presi-

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235. *Id.*

236. *See id.*

237. *Id.*

238. *Id.*

239. G.A. Res. 64/238, *supra* note 184.

240. Several contributing factors need to be taken into consideration in order to appreciate the situation in its full context. The crackdown on Burma’s protesting monks was a major source of contention between the junta’s two most powerful generals, Than Shwe and Maung Aye, who have been locked in a power struggle for decades. Win Min, *Looking Inside the Burmese Military*, 48 ASIAN SURV. 1018, 1032 (2008). It is possible that the increasingly geriatric Than Shwe (the more powerful of the two) plans to use the elections (which contain built-in military privileges) to retain influential positions for himself and his cronies for the remainder of his life. *Id.* at 1035–36. Than Shwe has already suffered two mild strokes, while Maung Aye has had prostate cancer and Prime Minister Thein Sein already has a pacemaker. *Id.* at 1034. It is unlikely that they could continue to retain effective military control for much longer and may feel vulnerable to a putsch or other radical takeover. A gradual transition to democracy may be the safest course for the elderly junta members.

Another possible contributing factor to Burma opening up could be the purging of Khin Nyunt (the junta’s No. 3 General) in 2004. *Id.* at 1028. Khin Nyunt was the junta’s “diplomat,” both masterminding and executing working relationships with ASEAN, the NLD, China, international organizations, and Burma’s various armed ethnic groups. *See id.* at 1029–32. Indeed, it was only after Khin Nyunt was sacked that ASEAN became increasingly frustrat-

dent Thein Sein (a former military commander) was elected and proceeded to usher in a period of political liberalization, freeing Aung San Suu Kyi,<sup>241</sup> releasing a number of political prisoners,<sup>242</sup> and relaxing censorship laws.<sup>243</sup> As a reward for this behavior, U.S. Secretary of State Hilary Clinton visited the country in December 2011.<sup>244</sup> Shortly after Clinton's visit, approximately 600 political prisoners were released from Burmese jails and a peace agreement was signed with the Karen ethnic group.<sup>245</sup> In 2012, a by-election was held for forty-five parliamentary seats, forty-three of which were won by the NLD, including a seat for Suu Kyi, who entered parliament on May 2, 2012.<sup>246</sup> Simultaneously, the United States loosened some of its restrictions on investment in Burma,<sup>247</sup> while the EU instituted a temporary lift on sanctions.<sup>248</sup>

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ed with the junta and refused to let Burma take its turn at heading the organization. *Id.* at 1031. Purging Khin Nyunt may have had the inadvertent consequence of effectively killing the junta's public relations work, leading to increased frustration from the international community and thus ultimately shaking their grasp on power. *See id.* at 1031–32. Another possible contributing event to the junta's weakening grasp was a cyclone that hit Burma in 2008, as relief efforts were perceived as ineffective and mismanaged. *Id.* at 1035.

241. Jack Davies & David Batty, *Burma Frees Aung San Suu Kyi*, *GUARDIAN* (Nov. 13, 2010), <http://www.theguardian.com/world/2010/nov/13/burma-frees-aung-san-suu-kyi>.

242. Lizzy Davies, *Burmese Dissidents: Handful Freed 'Suggests Stalled Political Reform'*, *GUARDIAN* (Oct. 12, 2011), <http://www.theguardian.com/world/2011/oct/12/burmese-dissidents-freedom-few-slowdown>; *Obama Declines to Lift US Sanctions on Myanmar*, *NDTV* (May 17, 2012), <http://www.ndtv.com/article/world/obama-declines-to-lift-us-sanctions-on-myanmar-212364>.

243. *See, e.g.*, Kate Hodal, *EU Lifts Burma Sanctions for One Year*, *GUARDIAN* (Apr. 23, 2012), <http://www.theguardian.com/world/2012/apr/23/eu-lifts-burma-sanctions>.

244. *Obama Declines to Lift US Sanctions on Myanmar*, *supra* note 242.

245. Jason Burke, *Burma Releases Political Prisoners*, *GUARDIAN* (Jan. 13, 2012), <http://www.theguardian.com/world/2012/jan/13/burma-prisoner-release-begins>.

246. Daniel Ten Kate, *Myanmar's Suu Kyi Enters Parliament after Detention*, *BLOOMBERG* (May 1, 2012), <http://www.bloomberg.com/news/2012-05-02/myanmar-s-suu-kyi-enters-parliament-after-years-in-detention.html>.

247. Anne Gearan & Matthew Pennington, *US Eases Economic Sanctions to Reward Myanmar*, *ASSOCIATED PRESS*, May 17, 2012, available at <http://bigstory.ap.org/content/us-eases-economic-sanctions-reward-myanmar>.

248. Hodal, *supra* note 243.



The release of Aung San Suu Kyi and other political prisoners from arrest, as well as their ability to travel, significantly influenced a major point of Western policy on Burma for over twenty years. In September 2012, Suu Kyi made a historic visit to Western Europe and the United States, collecting several important human rights prizes that had been awarded to her in absentia.<sup>249</sup> Concurrent to her visit, Burma announced the release of some 500 political prisoners on humanitarian grounds.<sup>250</sup> These actions prompted the EU to consider reinstating Burma's preferential trading status.<sup>251</sup> Suu Kyi's visit to the United States coincided with President Thein Sein's visit to the U.N. Headquarters in New York in September 2012.<sup>252</sup> Asked whether the government was afraid of being upstaged by Suu Kyi, Minister Aung Min reportedly replied that the government was not worried about the attention devoted to Suu Kyi and that they were "very proud" of her work.<sup>253</sup> The minister then compared Burma to post-apartheid South Africa, with Suu Kyi playing the role of Mandela and the current Burmese government playing the role of the South African de Klerk government.<sup>254</sup> Two days prior to these comments, the United States had agreed to lift measures that blocked Burma's president and the speaker of its lower house of parliament from holding U.S. assets.<sup>255</sup>

Relations appeared to be improving further still as U.S. President Obama visited Burma in November 2012.<sup>256</sup> During Obama's visit, President Thein Sein showed certain sensitivity to issues of national pride and shame, specifically speaking of

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249. See, e.g., Beaumont, *supra* note 228.

250. James Hookway, *Myanmar Releases Prisoners as Suu Kyi Visits U.S.*, WALL ST. J. (Sept. 17, 2012), <http://online.wsj.com/article/SB10000872396390443720204578002014078538942.html>.

251. *Id.*

252. Michelle Nichols, *Myanmar Says Not Worried Suu Kyi Upstaging President on U.S. Visit*, REUTERS, Sept. 21, 2012, available at <http://www.reuters.com/article/2012/09/21/us-myanmar-un-idUSBRE88K1BN20120921>.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Barack Obama Makes Historic Burma Visit*, RTE NEWS (Nov. 19, 2012), <http://www.rte.ie/news/2012/1119/praise-and-pressure-as-obama-begins-burma-visit.html>.

the relationship between the United States and Burma as being “based on mutual . . . respect” and stating that human rights in Burma would have “to be aligned with international standards.”<sup>257</sup> The Obama administration showed considerable recognition of the cultural importance attached to saving face during the president’s visit, and decided to “soften the blow” on the junta’s pride by undertaking such actions of demonstrative respect as visiting important Burmese cultural and religious sites.<sup>258</sup> This stance has been reinforced by other actors within the U.S. political decision-making process, which indicate that these actors also recognize the importance of shaming/non-shaming behavior in encouraging IL compliance. Then House Minority Leader and previous sponsor of sanctions on Burma, Mitch McConnell, announced in May 2013 that he would not seek the renewal of sanctions on Burma as it “would be *a slap in the face* to Burmese reformers.”<sup>259</sup>

By making it apparent that compliance with international standards will not set off a further round of shame and condemnation but that non-compliance would, the administration has succeeded in wielding shame as an enforcement measure to significant effect. As a result, positive steps continue to be taken in relation to Burma’s compliance with international human rights standards, including Thein Sein’s visit to the U.K. in July 2013, during which he met with Prime Minister David Cameron and pledged that “by the end of this year, there will be no prisoners of conscience in Myanmar.”<sup>260</sup>

Thus, while far from ideal, the situation in Burma has undergone a dramatic change in the past four years and the goals that were set by the shaming sanctions (release of political prisoners, elections, peace with ethnic rebels) have largely borne fruit. What is more, it can be observed that these changes have been brought about in a carefully calibrated lockstep with the easing of sanctions against the nation.

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257. *Id.*

258. *See id.*

259. James Rowley & Daniel Ten Kate, *Myanmar Sanctions Won't Be Extended, McConnell Says*, BLOOMBERG (May 22, 2013), <http://www.bloomberg.com/news/2013-05-21/myanmar-sanctions-won-t-be-extended-mcconnell-says.html> (emphasis added).

260. Andrew Woodcock, *No More Political Prisoners: Myanmar*, AUSTRALIAN (July 16, 2013), <http://www.theaustralian.com.au/news/latest-news/no-more-political-prisoners-myanmar/story-fn3dxix6-1226679907770>.

*D. Enforcement of Shaming Sanctions*

Critics who argue that IL is not real law emphasize the lack of centralized machinery for its enforcement. They set out IL in marked contrast to domestic law, where the legal system provides policemen, courts, and prisons to enforce the law and mete out punishment. The enforcement machinery problem does not disappear merely because we are dealing with shaming rather than other types of coercive sanctions. Even in domestic criminal law, shaming is closely aligned to the court system and is imposed after a judicial finding of responsibility for the wrong. When transposed into the IL context, the absence of a court with universal jurisdiction creates difficulties because there are no agencies with authority to make determinations of responsibility that satisfy the requirements of authority, neutrality, and legitimacy. But this fails to tell the entire story.

### 1. International Organizations

The absence of a world court system with binding adjudicative power does not mean that there is no adequate enforcement mechanism for shaming. International Organizations (“IOs”) are capable of performing the adjudicative function to a degree sufficient to meet the requirements of authority, neutrality, and fairness. The U.N. offers a complex example.

The consequences of the U.N. employing shame sanctions are likely to be different, depending on whether the enforcer is the Security Council or the UNGA. Given that the UNGA is comprised of all the nations of the world with equal voting power, which is usually deployed in a partisan manner,<sup>261</sup> it is unlikely that there will be agreement on anything but the most egregious violations of international law. In addition, the presence of a significant number of countries with unelected leaders also makes it unlikely that many acts that would be regarded as shameful by liberal democracies will be so viewed by countries ruled by such individuals. Even when such states participate in shaming, it might be disingenuous or even hypocritical, and a means to uphold the appearance of conforming to international norms.

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261. See Axel Dreher & Jan-Egbert Sturm, *Do the IMF and the World Bank Influence Voting in the UN General Assembly?*, 151 PUB. CHOICE 363, 364–65 (2012).

Despite these problems, the UNGA does engage in shaming, although this might only provide a weak constraint on states. If the Security Council engages in shaming, the net effect is unlikely to be much better because of the veto power enjoyed by the permanent members.<sup>262</sup> Recent examples, such as the difficulty in imposing sanctions on Iran due to opposition from China and Russia,<sup>263</sup> suggest that the Security Council may not be particularly well suited to impose shame sanctions except for the most egregious violations involving states bereft of super-power support.

Aside from the U.N., states have membership in a number of other small and large international organizations. Membership in these IOs commits states to engage in cooperative activities within a defined legal framework, which is typically provided by the constitution of the IO.<sup>264</sup> There is well-developed scholarship showing the cooperative benefits of membership that is of salience for shaming. For example, Robert Axelrod writes that, “[i]f the players can observe each other interacting with others, they can develop reputations; and the existence of reputations can lead to a world characterized by efforts to deter bul- lies.”<sup>265</sup>

Shaming by IOs follows similar contours. Their constitutional documents set out a mission and organizational goals,<sup>266</sup> and

262. See U.N. Charter art. 23, para. 1.

263. Louis Charbonneau, *Russia, China Block U.N. Condemnation of Iran Missile Tests*, CHI. TRIB. (July 15, 2013), [http://articles.chicagotribune.com/2013-07-15/news/sns-rt-us-iran-sanctions-un-20130715\\_1\\_iran-missile-tests-u-n-security-council-iran-panel](http://articles.chicagotribune.com/2013-07-15/news/sns-rt-us-iran-sanctions-un-20130715_1_iran-missile-tests-u-n-security-council-iran-panel).

264. See, e.g., Constitutive Act of the African Union, *entered into force* May 26, 2001, 2158 U.N.T.S. 3.

265. ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 167–68 (1984).

266. For example, the Constitutive Act of the African Union lists the following objectives:

- (a) Achieve greater unity and solidarity between the African countries and the peoples of Africa;
- (b) Defend the sovereignty, territorial integrity and independence of its Member States;
- (c) Accelerate the political and socio-economic integration of the continent;
- (d) Promote and defend African common positions on issues of interest to the continent and its peoples;
- (e) Encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;

repeated interactions between member states enable the creation of reputations about whether states meet those goals. If a state acquires a reputation as an offender, other states and the IO's executive machinery can impose shame sanctions in increments ranging from cautionary warnings to expulsion from membership.<sup>267</sup> In some cases, a state that is targeted for sanctions might relinquish membership rather than face expulsion to deflect shame. In 2003, for example, Zimbabwe quit its membership of the Commonwealth after a decision to suspend its membership (initially made in 2002) was maintained indefinitely as a response to the nation's unfair elections.<sup>268</sup>

Shaming at the IO level also includes adjudicative tribunals set up by treaty regimes. The proliferation of such tribunals, such as those in the international investment law area, means that some of the process-type objections advanced against

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- (f)** Promote peace, security, and stability on the continent;
  - (g)** Promote democratic principles and institutions, popular participation and good governance;
  - (h)** Promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments;
  - (i)** Establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations;
  - (j)** Promote sustainable development at the economic, social and cultural levels as well as the integration of African economies;
  - (k)** Promote co-operation in all fields of human activity to raise the living standards of African peoples;
  - (l)** Coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union;
  - (m)** Advance the development of the continent by promoting research in all fields, in particular in science and technology;
  - (n)** Work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.

Constitutive Act of the African Union, *supra* note 264, art. 3.

267. See, e.g., Aaron Maasho, *African Union Suspends Egypt*, REUTERS, July 5, 2013, <http://www.reuters.com/article/2013/07/05/us-egypt-protests-africa-idUSBRE9640EP20130705>.

268. *Zimbabwe Quits Commonwealth*, BBC NEWS (Dec. 8, 2003), <http://news.bbc.co.uk/2/hi/africa/3299277.stm>. "Mr. Mugabe had earlier threatened to leave the 54-nation group if the country was not 'treated as an equal.'"

shaming have much less bite.<sup>269</sup> These tribunals have authority delegated by states via bilateral or multilateral treaties and are required to follow formal legal processes analogous to domestic tribunals.<sup>270</sup> They have the ability to make the necessary findings of fact antecedent to shaming.

## 2. States

States are likely to be the principal enforcers of shame sanctions. Given the opportunities for repeated interactions in an interdependent world, evaluative opinions by a state about another state's derogation from IL norms is important. Not only does it matter to the two states, but it also matters to third-party states because it reinforces the norm and conveys information about the desirability of the offender state as a cooperative partner.

States regularly make evaluative opinions about other states. Some have the resources to make elaborate justifications and provide evidence for those opinions in a legal manner. One example is the U.S. State Department's annual human rights reports. These reports have received harsh criticism as being partisan.<sup>271</sup> As acknowledged by Professor Kahan in a recantation from his earlier position, partisanship is a major problem for shaming.<sup>272</sup> The United States has also been accused of hypocrisy.<sup>273</sup> Attacks based on the lack of neutrality and credibility to

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269. See Jason Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L.J. 391, 392 (2012).

270. See, e.g., *The Tribunal*, INT'L TRIBUNAL ON THE LAW OF THE SEA, <http://www.itlos.org/index.php?id=15&L=0> (last visited Nov. 8, 2013).

271. See George Gedda, *After Abu Ghraib: The U.S. Human Rights Agenda*, 81 FOREIGN SERVICE J. 48 (2004). Gedda noted that William Schulz, executive director of Amnesty International USA, remarked on

the occasion of the February release of the State Department's annual human rights report . . . : "The content of this report has little correspondence with the administration's foreign policy; indeed, the U.S. is increasingly guilty of a 'sincerity gap,' overlooking abuses by allies and justifying action against foes by post-facto references to human rights. In response, many foreign governments will choose to blunt criticism of their abuses by increasing cooperation with the U.S. war on terror rather than by improving human rights."

*Id.*

272. *Alternative Sanctions*, *supra* note 5, at 2076.

273. The Los Angeles Times wrote in conjunction with a diplomatic offensive by the Bush administration in Argentina:

engage in shaming are severely debilitating and suggest that neutrality, or a perception thereof, is important if shaming sanctions are to work.

This is not to say that shaming by individual states should be ignored altogether. Some states will be persuaded by the U.S. State Department's reports, and it must ultimately fall to a process of reinforcement by validation to determine if the state being shamed is indeed deserving of punishment. There is nothing stopping Iran and Venezuela from issuing shaming reports of their own. If members of the international community believe these reports are the products of serious investigation and research, they will be credible. On the other hand, if they are merely propaganda, they are likely to be ignored. While Kahan's criticisms regarding partisanship may have some salience in the criminal law due to the existence of incarceration as a viable alternative, the absence of better alternatives in IL means that shaming has currency despite these difficulties.

### 3. Domestic Enforcement of IL

#### *a. Domestic Courts*

The gap in enforcement caused by the absence of a world court system with binding jurisdiction can be bridged by domestic courts. While sovereign states can claim that they are not subservient to foreign courts, the same claim cannot be held about the state's own domestic courts. If, as a growing body of case law shows, domestic courts enforce IL norms against their governments, the criticism about IL lacking coercive enforcement recedes.

With regards to shaming being the coercive sanction for the enforcement of IL, the criticism about the absence of an adjudicative agency to make a finding of responsibility loses sting. Critics might still argue that domestic courts are not sufficient-

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Critics were quick to assail Washington's human rights record, citing abuses at the Abu Ghraib prison in Iraq and at the U.S. detention center in Guantanamo Bay, Cuba, and the U.S.-led invasion of Iraq. All have fanned anti-U.S. sentiment in a region where Washington's previous interventions and alliances with military dictatorships remain fresh in the collective memory.

Patrick J. McDonnell, *Latin America Wary of New U.S. Attention*, L.A. TIMES (Feb. 12, 2007), <http://articles.latimes.com/2007/feb/12/world/fg-soamerica12>.

ly neutral adjudicators against their own governments because they are but organs of the same government. This objection is objectively refutable. Because the adjudication is public and observable, and follows the processes typical of judicial dispute resolution, neutrality can be assessed in the same way as is standard for purely domestic adjudication where the government is frequently a litigant. Moreover, judges and lawyers are obligated to follow the same rules in cases involving the application of IL rules against the home state as they are required to do in domestic cases. If these checks are sufficient for domestic adjudication to satisfy the test of neutrality and procedural fairness in order to be legitimate and credible, surely the same principle applies when the case involves the application of IL rules.

The domestic enforcement of IL rules shows that shaming is effective—not by judges intervening in foreign policy decisions or by compelling the state to act against its self-interest, but by enforcing IL norms on a domestic level and employing “shaming”-idealistic language when referencing such IL norms. This serves to bring the government behavior into compliance with those norms. Some examples are presented below.

### 1. United States

Despite political opposition and criticism from many quarters, U.S. courts have referenced IL norms in a number of recent cases. In *Hamdi v. Rumsfeld*,<sup>274</sup> the highest court in the United States stated, “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”<sup>275</sup> The U.S. Supreme Court bolstered this view with reference to the Geneva and Hague Conventions, stating, “It is a clearly established principle of the law of war that detention may last no longer than active hostilities,”<sup>276</sup> unless the prisoner is either being

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274. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

275. *Id.* at 536 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)).

276. “See Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities”). See also Article 20 of the Hague Convention (II) on Laws and Customs of War on Land, July 29, 1899, 32 Stat 1817 (as soon as possible after “conclusion of peace”); Hague Convention (IV),



lawfully prosecuted or serving a sentence resulting from such a prosecution.<sup>277</sup>

The Court also used language that calls on moral norms:

[I]t is . . . vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.<sup>278</sup>

The Court then included a similar quotation from *United States v. Robel*:<sup>279</sup> "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."<sup>280</sup> The Court was unwilling to cede ground to the government because of the limits of the separation of powers doctrine:

[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government. . . . [U]nless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions. . . . [I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for

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*supra*, Oct. 18, 1907, 36 Stat 2301 ("conclusion of peace" (Art. 20)); Geneva Convention, *supra*, July 27, 1929, 47 Stat 2055 (repatriation should be accomplished with the least possible delay after conclusion of peace (Art. 75))." *Hamdi*, 542 U.S. at 520.

277. *Id.* at 520–21 (citing Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 510–11 (2003)).

278. *Id.* at 532.

279. *United States v. Robel*, 389 U.S. 258 (1967).

280. *Hamdi*, 542 U.S. at 532 (citing *Robel*, 389 U.S. at 264).

his detention by his government, simply because the Executive opposes making available such a challenge.<sup>281</sup>

In *Boumediene v. Bush*,<sup>282</sup> the Court reiterated that

[the Nation's] basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. . . . To hold that the political branches have the power to switch the Constitution on or off at will . . . [would lead to a regime in which they], not this Court, say "what the law is."<sup>283</sup>

In *Hamdan v. Rumsfeld*,<sup>284</sup> the U.S. Supreme Court made further extensive references to international treaties and mechanisms in its decision.<sup>285</sup> The U.S. government argued that the Geneva Conventions did not apply to the case because the conflict in question existed between the United States and al-Qaeda, rather than between the United States and Afghanistan.<sup>286</sup> Since al-Qaeda was not a contracting party to the Geneva Conventions, its members did not enjoy their protection.<sup>287</sup> The Court did not feel compelled to pronounce on this question because

there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories. Article 3 . . . provides that in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum," certain provisions protecting

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281. *Hamdi*, 542 U.S. at 535–37.

282. *Boumediene v. Bush*, 553 U.S. 723 (2008). The case was brought by "enemy combatants" being held at Guantanamo Bay. *Id.* at 732. All were non-citizens of the United States who had filed a writ of habeas corpus. The United States' Detainee Treatment Act and Military Commissions Act had stated that those held at Guantanamo Bay were not entitled to habeas corpus. *Id.* at 734. The question before the Court was thus whether a constitutional guarantee of habeas corpus existed and extended to noncitizens. *Id.* at 732. The Court found that in cases where habeas corpus was denied an adequate alternative had to be provided. *Id.* at 732–33.

283. *Id.* at 765 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

284. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). This case concerned a Yemeni national captured in Afghanistan and held at Guantanamo Bay. *Id.* at 566.

285. *See id.* at 628.

286. *Id.* at 629.

287. *Id.*

“[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by . . . detention.” . . . [It] prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>288</sup>

The Court considered the commentaries on the Geneva Conventions and a treatise of the Red Cross<sup>289</sup> to determine whether a military tribunal was a “regularly constituted court” as used in Common Article 3.<sup>290</sup>

If *Hamdi* asserted judicial power in keeping executive power in check, *Munaf v. Geren*<sup>291</sup> went in the opposite direction: the U.S. Supreme Court decided that whether or not individuals (in this case American citizens) could be transferred into Iraqi custody was a matter for the executive to decide.<sup>292</sup> According to the Court,

the [United States] explains that, although it remains concerned about torture among some sectors of the Iraqi Government, the State Department has determined that the Justice Ministry—the department that would have authority over Munaf and Omar—as well as its prison and detention facilities have “generally met internationally accepted standards for basic prisoner needs.” The Solicitor General explains that such determinations are based on “the Executive’s assessment of the foreign country’s legal system and . . . the Executive[’s] . . . ability to obtain foreign assurances it considers reliable.” The Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government’s ability to speak with one voice in this area.<sup>293</sup>

This is a retrograde decision for the shaming argument because the Court is restrained based upon a strict view of the separa-

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288. *Id.* at 629–30 (quoting Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135).

289. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES (rev. ed. 2009).

290. *Hamdan*, 548 U.S. at 631–32.

291. *Munaf v. Geren*, 553 U.S. 674 (2008).

292. *Id.* at 704–05.

293. *Id.* at 702 (citing Brief for Federal Parties at 47, *Munaf*, 553 U.S. 674 (No. 06-1666); Reply Brief for Federal Parties at 23, *Munaf*, 553 U.S. 674 (No. 06-1666)).

tion of powers doctrine. It defers because “the other branches possess significant diplomatic tools and leverage the judiciary lacks,”<sup>294</sup> and because it does not see itself as a member of the shaming reference group.

These cases together show the judiciary reaching for IL norms, not to enforce them in the way it would typically enforce a domestic law norm, but rather as an aspirational goal, the breach of which would entail shame and therefore mixed results. On balance, the U.S. courts have not embraced IL norms as readily as might have been expected by external audiences and thereby not gained the status as norm entrepreneurs that U.S. courts have enjoyed in constitutional law adjudication.

## 2. The United Kingdom

Case law from the U.K. also exhibits this tension between the executive and the judiciary, with the latter referring to foreign law and IL norms to hold the former in check. Once again, in the context of the war on terror, the recent case of *Binyam Mohamed*<sup>295</sup> saw the Supreme Court using shaming language against an executive that had some complicity in torture:

[T]he use of torture by a state is dishonourable, corrupting and degrading the State which uses it and the legal system which accepts it. . . .

The prohibition on state torture under this Convention and in customary international law . . . is now established as a peremptory norm or a rule of jus cogens, from which derogation by states through treaties or rules of customary law not possessing the same status is not permitted. . . .

Although there may be a debate as to the use of information obtained through torture or cruel, inhuman and degrading treatment in averting serious and imminent threats to na-

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294. *Munaf*, 553 U.S. at 702 (quoting *Omar v. Harvey*, 479 F.3d 1, 20 & n.6 (2007) (dissent)).

295. *R (Mohamed) v. Sec’y of State for Foreign and Commonwealth Affairs*, [2008] EWHC (Admin) 2048, [2009] 1 W.L.R. 2579 (Eng.). Binyam (or Binyan) Mohamed was an Ethiopian citizen and U.K. resident who had been arrested in Pakistan on suspicion of involvement in terrorist activities. *Id.* ¶¶ 7–14. He alleged that following his arrest, he was tortured in both Afghanistan and Morocco at the behest of the U.S. military. *Id.* ¶¶ 26–37. British intelligence officers were alleged to have been complicit in Mohammed’s detention, encouraging him to co-operate with his jailers and supplying them with questions for him to answer. *Id.* ¶ 87.

tional security, it is a principle at the heart of our systems of justice that evidence of involuntary confessions obtained by such means are inadmissible at a trial.<sup>296</sup>

In *Binyam*, the court relied on *R v. Horseferry Road Magistrates Court ex p Bennett*<sup>297</sup> to declare the international character of certain basic tenets of the rule of law:

Whatever differences there may be between the legal systems of South Africa, the United States, New Zealand and this country, many of the basic principles to which they seek to give effect stem from common roots. There is . . . no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court . . . respect for the rule of law demands that the court take cognisance of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is . . . an insular and unacceptable view.<sup>298</sup>

The court is clearly making an evaluative judgment about norms that transcend its own jurisdiction. It is then using that judgment to make a finding about the conduct of its own government. The language used is highly shame-based as shown by the use of words like “abhorrence.”

Other recent cases involving rendition have also required U.K. courts to use shaming language. In *Regina (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No. 2)*,<sup>299</sup> the House of Lords noted:

There are allegations, which the US authorities have denied, that Diego Garcia or a ship in the waters around it have been used as a prison in which suspects have been tortured. The idea that such conduct on British territory, touching the hon-

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296. *Id.* at [142], [147].

297. *R v. Horseferry Road Magistrates Court, Ex parte Bennett*, [1994] 1 A.C. 42 (H.L.) (Eng.).

298. *R (Mohamed)*, [2008] EWHC (Admin) at [147], [2009] 1 W.L.R. at 2637 (quoting *Horseferry Road Magistrates Court*, [1994] 1 A.C. at [68]).

299. *R (Bancoult) v. Sec’y of State for Foreign and Commonwealth Affairs*, [2008] UKHL 61, [2009] 1 A.C. 453.

our of the United Kingdom, could be legitimated by executive fiat, is not something which I would find acceptable.<sup>300</sup>

Lord Bingham consulted foreign case law and IL norms in *A (FC) and Others (FC) v. Secretary of State for the Home Department, A and Others, (FC) and Others v. Secretary of State for the Home Department* (Conjoined Appeals),<sup>301</sup> opining that

[t]here can be few issues on which international legal opinion is more clear than on the condemnation of torture. Offenders have been recognised as the “common enemies of mankind” (*Demjanjuk v. Petrovsky* 612 F. Supp. 544 (1985), 566, Lord Cooke of Thorndon has described the right not to be subjected to inhuman treatment as a “right inherent in the concept of civilisation” (*Higgs v. Minister of National Security* [2000] 2 AC 228, 260), the Ninth Circuit Court of Appeals has described the right to be free from torture as “fundamental and universal” (*Siderman de Blake v. Argentina* 965 F. 2d 699 (1992), 717) and the UN Special Rapporteur on Torture (Mr Peter Koojimans) has said that “If ever a phenomenon was outlawed unreservedly and unequivocally it is torture” (Report of the Special Rapporteur on Torture, E/CN.4/1986/15, para 3).<sup>302</sup>

Lord Bingham also detailed the type of legal authority that might be persuasive—implicitly supporting the idea of a shaming reference group comprised of a network of courts applying similar processes and norms:

The authorities relied on by . . . Lord Hope . . . and Lord Rodger . . . to support their conclusion are of questionable value at most. In *El Motassadeq*, a decision of the Higher Regional Court of Hamburg of 14 June 2005, the United States Department of Justice supplied the German court, for purposes of a terrorist trial proceeding in Germany with reference to the events of 11 September 2001, with summaries of statements made by three Arab men. There was material suggesting that the statements had been obtained by torture, and the

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300. *Id.* at [35].

301. *A v. Sec’y of State for the Home Dep’t*, [2005] UKHL 71, [2006] 2 A.C. 221.

302. *Id.* at [33]. The Special Rapporteur also cited Article 41 of the International Law Commission’s draft articles on Responsibility of States for Internationally Wrongful Acts (November 2001) and the advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. *Id.* at [34].

German court sought information on the whereabouts of the witnesses and the circumstances of their examination. The whereabouts of two of the witnesses had been kept secret for several years, but it was believed the American authorities had access to them. The American authorities supplied no information, and said they were not in a position to give any indications as to the circumstances of the examination of these persons. Two American witnesses who attended to give evidence took the same position. One might have supposed that the summaries would, without more, have been excluded. But the German court, although noting that it was the United States, whose agents were accused of torture, which was denying information to the court, proceeded to examine the summaries and found it possible to infer from internal evidence that torture had not been used. This is not a precedent which I would wish to follow.<sup>303</sup>

Lord Bingham seems to be saying that in order to determine if state behavior is shameful, not all foreign judicial findings are alike. It is only findings made by a court in the shaming reference group that follows similar norms that are persuasive. In his opinion, Lord Hoffman, who agreed with Lord Bingham, said this case was of “great importance . . . for the reputation of English law,”<sup>304</sup> again establishing the notion of a network of domestic courts as a shaming reference group by implying that English courts and English law would only enjoy a good reputation if IL norms were properly applied.

A recent case brought by surviving Mau Mau fighters against the British Government is also likely to offer key insights on shaming by domestic courts.<sup>305</sup> The case stems from allegations that torture and severe forms of physical and sexual abuse were systematically perpetrated against Mau Mau rebels and their supporters in the 1950s.<sup>306</sup> The British government initially took the stance that Kenya, and not Britain, was liable

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303. *Id.* at [60].

304. *Id.* at [99].

305. The case has been subject to two preliminary judgments: the first concerning whether Kenya or the United Kingdom is the appropriate defendant, *Mutua v. Foreign & Commonwealth Office*, [2011] EWHC 1913, [2], and the second concerning whether or not the case should be time-barred on the grounds that, due to the significant time lapse between perpetration of the crimes and the present proceedings, a fair trial is no longer possible. *Mutua v. Foreign & Commonwealth Office*, [2012] EWHC 2678, [2].

306. *Mutua*, [2011] EWHC 1913 at [1].

for the Mau Mau claims as the successor state to the colonial administration in Kenya.<sup>307</sup> The Kenyan government strongly objected to this argument, stating that it

[did] not accept liability for the torture of Kenyans by the British colonial regime. In no way can the Kenyan Republic inherit the criminal acts and excesses of the British colony and then the British Government. . . . Kenya fully supports this case . . . [and] calls on the British Government to lessen the costs of litigation by simply admitting liability.<sup>308</sup>

The Kenyan position has been supported by activists who have deployed shaming language against the British defense:

Archbishop Desmond Tutu and Sir Nigel Rodley, the British member of the UN Human Rights Committee . . . sent an open letter to the British Foreign Secretary, David Miliband in which they state[d that] . . . this [attempt to pass liability to Kenya] represents an intolerable abdication of responsibility. Britain's insistence that international human rights standards should be respected by governments around the world will sound increasingly hollow if the door is shut in the face of these known victims of British torture.<sup>309</sup>

In the High Court, at the preliminary stage, Justice McCombe said, “[I]f the allegations are true (and no doubt has been cast upon them by any evidence before the court), the treatment of these claimants was utterly appalling.”<sup>310</sup> He found that “[t]he evidence shows that those new materials [referring to British documents revealing practices of torture] were removed from Kenya upon independence precisely because of their potential to embarrass the UK Government.”<sup>311</sup> The court also quoted from a preceding judgment:

That word honour, the deep note which Blackstone strikes twice in one sentence, is what underlies the legal technicalities of this appeal. The use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it. When judicial torture was routine all

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307. *Kenyan Government Refutes Britain's Stance on Colonial Era Torture*, LEIGH DAY (Apr. 1, 2010), <http://www.leighday.co.uk/News/2010/April-2010/Kenyan-Government-refutes-Britains-stance-on-colo>.

308. *Id.*

309. *Id.*

310. *Mutua*, [2011] EWHC 1913 at [1].

311. *Id.* at [130].



over Europe, its rejection by the common law was a source of national pride and the admiration of enlightened foreign writers such as Voltaire and Beccaria. In our own century, many people in the *United States, heirs to that common law tradition, have felt their country dishonoured by its use of torture outside the jurisdiction and its practice of extra-legal "rendition" of subjects to countries where they would be tortured.*<sup>312</sup>

Further, "the rejection of torture by the common law has a special iconic importance as the touchstone of a humane and civilised legal system."<sup>313</sup>

Justice McCombe was unstinting in his employment of shaming in the case before him:

[I]t may well be thought strange, or perhaps even "dishonourable", that a legal system which will not in any circumstances admit into its proceedings evidence obtained by torture should yet refuse to entertain a claim against the Government in its own jurisdiction for that government's allegedly negligent failure to prevent torture which it had the means to prevent, on the basis of a supposed absence of a duty of care.<sup>314</sup>

Justice McCombe also recognized that the U.K. had a duty to refrain from torture under Article 14 of the U.N. Convention against Torture. While noting that this convention had entered into force many years after the events in question had occurred, McCombe nonetheless considered it "an echo of principles" long recognized under IL, particularly those in the European Convention on Human Rights, which was in force from 1950.<sup>315</sup>

In this case, the British Government eventually responded positively to these shaming efforts. Instead of appealing Justice McCombe's second decision in the matter (in which he had rejected the U.K.'s argument that the passage of time precluded the feasibility of a full trial)<sup>316</sup> as it initially declared its plans

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312. *Id.* at [153] (quoting *A v. Sec'y of State for the Home Dep't*, [2005] UKHL 71, [82] [2006] 2 A.C. 221) (emphasis added).

313. *Id.*

314. *Id.* at [154].

315. *Id.*

316. *See Mutua v. Foreign & Commonwealth Office*, [2012] EWHC 2678, [91].

to be,<sup>317</sup> the government agreed to pay £19.9 million in compensation to 5,228 surviving victims and pledged to support the construction of a memorial in Nairobi to the victims.<sup>318</sup> Moreover, while sidestepping a direct apology, the government has itself adopted shaming language to describe the incidents which took place. Foreign Secretary William Hague stated that “[t]he British government sincerely regrets that these abuses took place and that they marred Kenya’s progress towards independence. Torture and ill-treatment are abhorrent violations of human dignity that we unreservedly condemn.”<sup>319</sup> The Mau Mau Veterans Association welcomed this statement as “a beginning of reconciliation.”<sup>320</sup>

### 3. Canada

Shaming by domestic courts in reliance upon foreign and IL sources is not only an Anglo-American phenomenon. The Canadian Supreme Court decision in *Suresh v. Canada*<sup>321</sup> shows similar techniques being employed. Suresh was a fundraiser for the Tamil Tigers and had originally been granted refugee status in Canada.<sup>322</sup> The court held that Suresh was entitled to a fair procedure: “[W]e find that . . . Suresh made a *prima facie* case showing a substantial risk of torture if deported to Sri Lanka, and that his hearing did not provide the procedural safeguards required to protect his right not to be expelled to a risk of torture or death.”<sup>323</sup> According to the court,

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317. Ian Johnston, *Court: Kenyans Tortured by Colonial Regime Can Sue UK Despite Passage of Time*, NBC NEWS (Oct. 5, 2012), [http://worldnews.nbcnews.com/\\_news/2012/10/05/14240256-court-kenyans-tortured-by-colonial-regime-can-sue-uk-despite-passage-of-time](http://worldnews.nbcnews.com/_news/2012/10/05/14240256-court-kenyans-tortured-by-colonial-regime-can-sue-uk-despite-passage-of-time).

318. Greg Sheridan, *Britons Compensate Kenyans for Mau Mau Torture*, AUSTRALIA (June 7, 2013), <http://www.theaustralian.com.au/news/world/britons-compensate-kenyans-for-mau-mau-torture/story-e6frg6so-1226659001324>.

319. *Id.*

320. Ian Johnston, *50 Years on, UK Agrees to Compensate Kenyans Tortured During Colonial Rule*, NBC NEWS (June 6, 2013), [http://worldnews.nbcnews.com/\\_news/2013/06/06/18800690-50-years-on-uk-agrees-to-compensate-kenyans-tortured-during-colonial-rule](http://worldnews.nbcnews.com/_news/2013/06/06/18800690-50-years-on-uk-agrees-to-compensate-kenyans-tortured-during-colonial-rule).

321. *Suresh v. Canada* (Minister for Citizenship and Immigration), [2002] S.C.R. 3 (Can.).

322. *Id.* para. 1.

323. *Id.* para. 6.

[t]he inquiry into the principles of fundamental justice is informed not only by Canadian experience and jurisprudence, but also by international law, including *jus cogens*. This takes into account Canada's international obligations and values as expressed in "[t]he various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, [and] customary norms."<sup>324</sup>

The court was not willing to defer to the executive branch and allow it to transfer Suresh to a foreign state:

[T]he guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected. We reaffirm that principle here. At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand.<sup>325</sup>

The court refused to accept the fig leaf of Canada's involuntary participation in torture:

[W]e cannot pretend that Canada is merely a passive participant. That is not to say, of course, that any action by Canada that results in a person being tortured or put to death would violate s. 7. There is always the question . . . of whether there is a sufficient connection between Canada's action and the deprivation of life, liberty, or security.<sup>326</sup>

In *Suresh*, the Canadian Supreme Court employed a familiar device to bring IL norms home:

International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. However, in seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada's international obligations *qua* obligations; rather, our concern is with the

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324. *Id.* para. 46 (quoting *United States v. Burns*, [2001] 1 S.C.R. 7, paras. 79–81 (Can.)).

325. *Id.* para. 54.

326. *Id.* para. 55.

principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself.<sup>327</sup>

The court concluded that “international law rejects deportation to torture, even where national security interests are at stake” and that this norm “best informs the content of the principles of fundamental justice under s. 7 of the *Charter*.”<sup>328</sup> In reaching this conclusion it drew upon treaty instruments and the complete lack of support for torture at the international level as evidenced in the absence of administrative procedures sanctioning torture, statements by states, and scholarly work.<sup>329</sup>

*Suresh* is a particularly interesting example of shaming because the court implicitly recognizes the notion of a shaming reference group by making distinctions between states based on their human rights records and the relative weight that should be given to promises made by public officials:

[i]n evaluating assurances by a foreign government, the Minister may also wish to take into account the human rights record of the government giving the assurances, the government’s record in complying with its assurances, and the capacity of the government to fulfill the assurances, particularly where there is doubt about the government’s ability to control its security forces.<sup>330</sup>

This idea finds resonance in the case of *AS and DD (Libya) v. Secretary of State for the Home Department*,<sup>331</sup> where the court cited the European Court of Human Rights (“ECtHR”) insistence that diplomatic assurances be closely examined, ultimately finding that it was acceptable for the U.K. to reject such assurances offered by Libya on the grounds that Gaddafi and his government did not enjoy a track record of reliability.<sup>332</sup>

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327. *Id.* para. 60.

328. *Id.* para. 75.

329. *See id.* paras. 61–75.

330. *Id.* para. 125.

331. *AS & DD (Libya) v. Sec’y of State for the Home Dep’t*, [2008] EWCA (Civ) 289.

332. *Id.* at [68–82].

4. Germany<sup>333</sup>

In German legal thought, the idea of shame is somewhat different than that held in the Anglo-Saxon common law tradition. In Germany, it is often thought that to break the law is in itself tantamount to having acted shamefully. To accuse someone of breaking the law, to find them guilty of breaking the law, or to remind them of an occasion where they broke the law would in many instances be equivalent to causing that person to experience some level of shame (depending on the severity of the breach). There is thus virtually no need to characterize unlawful behavior as shameful—it is already shameful by virtue of being unlawful.

Nonetheless, a strong example of what could be considered “additional” shaming is provided by the unlikely source of the German Federal Administrative Court (“BVerwG”) in its judgment of June 21, 2005.<sup>334</sup> The decision of the United States and U.K. to proceed with the second Iraq War without a Security Council resolution, thus rendering such a war illegal under IL, was one that mystified and offended many Germans.<sup>335</sup> The court’s decision was reflective of this attitude.

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333. One of the authors was educated in Germany, but would also like to thank Professor Dr. Georg Nolte and his staff at the Humboldt-Universität zu Berlin for their insights into this issue. The views expressed are, of course, only the authors’ own.

334. See Bundesverwaltungsgerichts [BVerwG] [Federal Administrative Court] Jun. 21, 2005, ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVerwGE] 1 (Ger.), available at <http://www.bverwg.de/entscheidungen/entscheidung.php?ent=210605U2WD12.04.0>.

335. To glean a flavor of this reaction, see generally Sebastian Fischer, *Iraq Anniversary: 10 Lessons from America’s “Dumb War”*, SPIEGEL Online (Mar. 20, 2013), <http://www.spiegel.de/international/world/ten-lessons-america-learned-from-the-2003-iraq-war-a-890066.html> (discussing damage to the international reputation of the United States: “For this war, America has broken international law, defamed allies and made the United Nations an object of derision.”); Kathrin Klöpfer, *Ziviler Ungehorsam: Aufstehen und sich Niedersetzen*, SPIEGEL ONLINE (Apr. 10, 2013), <http://www.spiegel.de/panorama/ziviler-ungehorsam-aufstehen-und-sich-niedersetzen-a-244021.html> (discussing the sit-in war protests that took place on United States military bases in Germany in reaction to the Iraq war); *Gauweiler gegen Bush: USA soll vor Internationalen Gerichtshof*, SPIEGEL ONLINE (Apr. 7, 2004), <http://www.spiegel.de/politik/deutschland/gauweiler-gegen-bush-usa-sollen-vor-internationalen-gerichtshof-a-243692.html> (news article about a German

The case concerned a German military officer who refused to work on an IT project in the army on the grounds that completing the project would further military operations in Iraq, something that would have conflicted with his conscience as the war was, in his opinion, an illegal act of aggression (*Angriffskrieg*).<sup>336</sup> The IT project in question involved an overhaul of the German army's software systems in order to allow for better integration within NATO, and to facilitate better inter-operational capabilities with the armed forces of other nations, specifically the United States and other EU states, on multinational missions.<sup>337</sup> The officer's concerns arose, inter alia, from the fact that Germany permitted American and British planes overflight rights during the second Iraq War, allowed them to use facilities within Germany (including substantial foreign-operated army bases), and dispatched German warplanes to monitor Turkish airspace.<sup>338</sup>

At the time of the officer's refusal, the war in Iraq had just commenced.<sup>339</sup> However, it was foreseeable that the war could continue for many years and the completed IT project would make all of the aforementioned tasks easier.<sup>340</sup> Throughout the process, the position of the German army was based partly on the stance that the officer's assessment of the legal situation

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politician calling for the United States to be tried in the International Court of Justice for the Iraq War); *Kritik an Friedenskultur: Die Alten sagen "Dresden", die Jungen sagen "Öl"*, SPIEGEL ONLINE (Mar. 29, 2003), <http://www.spiegel.de/kultur/gesellschaft/kritik-an-friedenskultur-die-alten-sagen-dresden-die-jungen-sagen-oel-a-242484.html> ("Wie selten zuvor in Deutschland sind sich Regierung, Intellektuelle und das Volk einig: Amerikas Krieg gegen den Irak ist falsch, ja verheerend."); *Der Kanzler bläst zur Attacke*, DER STERN (Aug. 13, 2005), <http://www.stern.de/politik/deutschland/wahlkampf-der-kanzler-blaest-zur-attacke-544283.html> ("Schröder hatte im Bundestagswahlkampf 2002 die Beteiligung Deutschlands an einem Irakkrieg ausgeschlossen. Dies war laut Analysen ein wichtiger Faktor für den SPD-Sieg.").

336. Bundesverwaltungsgerichts [BVerwG] [Federal Administrative Court] Jun. 21, 2005, ENTSCHIEDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVERWGE] 1 (5) (Ger.), available at <http://www.bverwg.de/entscheidungen/entscheidung.php?ent=210605U2WD12.04.0>.

337. BVerwGE 1 (15).

338. BVERWGE 1 (17–8).

339. He began his action on March, 20 2003, the same day that the invasion of Iraq began. BVERWGE 1 (17).

340. *See id.* at 16.

that the war in Iraq was an illegal act of aggression was incorrect, and/or that the work he had been assigned would not directly or indirectly aid the war.<sup>341</sup> It is noteworthy that, even in this phase, several other army personnel took a sympathetic view of the officer's disruptive behavior,<sup>342</sup> including both his refusal to work on the project<sup>343</sup> and appearing at his workplace dressed as a civilian with a white rose affixed to his clothing.<sup>344</sup>

Eventually, the on-site legal advisor applied to the Ministry of Defense for an official opinion on the legality of the war, which was duly delivered.<sup>345</sup> The ministry's paper did not explicitly state that the war was illegal, but stated that Germany "rejected" military action against Iraq and "regretted" that Iraq's disarmament was not being pursued peacefully.<sup>346</sup> The paper further stated that Germany would not participate in the war, but that it would maintain its duties under NATO, which included those actions which the officer complained of.<sup>347</sup> Under these circumstances, the officer could not reconcile his work in the army with his conscience and thus refused to obey his orders concerning the IT integration until the German Constitutional Court decided on the matter.<sup>348</sup> The soldier was then transferred to another project while the army's disciplinary lawyer commenced proceedings against him.<sup>349</sup> Again, a certain leniency toward the soldier in question would seem apparent in that the official state prosecutors asked the military lawyers to set aside the case on the grounds that due to the media attention the possible illegality of the war in Iraq had received, the

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341. *Id.* at 19.

342. *Id.* at 17–20.

343. *Id.*

344. *Id.* at 17, 22. The white rose was the symbol of the society of the Scholl-Siblings, young dissidents executed by the Nazis for their pacifist views. BVERWGE 1 (21).

345. *Id.* at 80.

346. *Id.* at 19.

347. *Id.* at 19.

348. *Id.* at 21 (an excerpt from the soldier's letter to the German Chancellor, the implication being that if the Bundesverfassungsgericht [Federal Constitutional Court] decided that the war was legal, he would then be able to have a clear conscience about his actions).

349. BVERWGE 1 (23).

soldier could not be faulted for having reached the conclusions that he did.<sup>350</sup> This plea, however, was unsuccessful.<sup>351</sup>

In the ensuing disciplinary process, the soldier appealed to the BVerwG on the grounds that he was obeying his conscience, which is constitutionally protected by Article 4(1) of the German Basic Law, and that he had the right to be assigned work that did not require him to disobey his conscience.<sup>352</sup> Despite the fact that it is an administrative court, not normally seized of constitutional or international matters, the BVerwG showed itself not only willing to entertain the soldier's conscience argument, but also showed an intense interest in the question of whether the war in Iraq was illegal, as German soldiers are not required to obey orders that are contrary to international law.<sup>353</sup>

Of the BVerwG's 126-page decision, twenty-one pages dealt exclusively with the legality of the Iraq War and Germany's participation in it. In its treatment of the issue, the court managed to rake over numerous facts, which were potentially embarrassing to the United States. Inter alia, the court reiterated the ICJ interpretation of the prohibition on the use of force used in its *Nicaragua* decision (a decision which went against the United States)<sup>354</sup> and discussed the failed attempts to secure a new resolution against Iraq at the Security Council,<sup>355</sup> before remarking that the content of the resolution depended on what was included in the final text. This implied that whatever the United States representatives "thought" S.C. Resolution 1441 allowed them to do was irrelevant.<sup>356</sup> The court also quoted an interview given by Paul Wolfowitz, former President of the World Bank, in the magazine *Vanity Fair*. In the interview, Wolfowitz said that the weapons of mass destruction ("WMD") case for war against Iraq had been invented for public consumption (as all sectors of the population recognized taking control of these WMD as a legitimate military objective) and because it would allow the U.S. administration to overcome "bureaucratic resistance" to the war, before recalling that U.N.

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350. *Id.* at 23.

351. *Id.*

352. *Id.* at 25.

353. *Id.* at 34.

354. *Id.* at 72.

355. *Id.* at 77.

356. *Id.*



General-Secretary Kofi Annan had labeled the war “an illegal act.”<sup>357</sup>

The court found that there were “serious misgivings under international law about the legality of the war,”<sup>358</sup> described U.S. and U.K. actions as “offensive, military battle actions,”<sup>359</sup> and stated that “any state that uses force contrary to the U.N.-Charter is breaking military law and committing an act of aggression.”<sup>360</sup> The court added a considerable edge to its criticism by pointing out that under the laws of neutrality, Germany may have had the affirmative duty to intern United States and British soldiers found on its territory in order to prevent them from participating in the war.<sup>361</sup> Despite its extensive research into the legality of the war, the court did not check whether the IT project in question was contributing to the war efforts; they decided that it was sufficient that the soldier in question had understandable reasons for fearing that it might.<sup>362</sup>

Having thoroughly delegitimized U.S. and U.K. actions, the court proceeded to criticize German complicity. In its strongest critique of the German government, the court stated that when the soldier joined the army (approximately thirty years prior), he could not have been expected to prepare himself for the possibility that a German government, constitutionally bound to observe the principles of law and justice, would ever decide to take supportive military action in favor of the United States and its allies in a war that was questionable under IL.<sup>363</sup> The statement clearly implies that a serious deterioration in ethical and legal standards had occurred.

The court also made repeated references to the fact that decisions of conscience, such as the one under examination, were oriented on the categories of “good and evil.”<sup>364</sup> While this is an oft-repeated formula when examining cases involving freedom of conscience, the court was unflinching in the use of this language, which made clear that “good” and “evil” were at stake.

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357. *Id.* at 79–80.

358. *Id.* at 71.

359. *Id.* at 72.

360. *Id.* at 73.

361. *Id.* at 84.

362. *Id.* at 96.

363. *Id.* at 98–99.

364. *Id.* at 99.

The court's strong language in condemning the actions in Iraq was matched only by its congratulatory words for the soldier concerned. The latter part of the judgment dripped praise for the soldier, at one point extolling his "courage" in explaining his disagreement with the war to his colleagues,<sup>365</sup> and at others praising his serious and thoughtful conduct throughout the investigation.<sup>366</sup>

Perhaps most interestingly of all, the court specifically admitted that the fact that the soldier was influenced by religious as well as legal considerations did not harm his case, because the idea "in a democratic rule of law State, that a necessary connection between law and morality exists or should exist, is at least understandable."<sup>367</sup>

Despite the use of strong shaming language, the judgment was seen by some as an exercise in judicial restraint, attributable to the court not wanting to open up unintended consequences with regards to the constitutionality of German supportive actions or the potential criminal liability of government officials from what had started as such a limited question (freedom of conscience).<sup>368</sup> However, the court technically only needed to determine whether there was enough legal uncertainty that an officer could be placed into a state of needing to exercise his own conscience on the matter.<sup>369</sup> That the court also considered whether the war on Iraq was illegal has been viewed by some as a possible warning to the German government "to prevent similar actions from happening in the future."<sup>370</sup>

The authors agree with this assessment. The sympathetic treatment the soldier received from many (although not all) of his superiors, the court's unstinting praise, as well as the fact that the court was composed of three judges and two military officers acting as volunteer judges (a mechanism often used in Germany when the question at hand demands particular expertise in an area), all point to a German establishment deeply

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365. *Id.* at 101–02.

366. *Id.* at 101–02.

367. *Id.* at 102.

368. Nikolaus Schultz, *Was the War on Iraq Illegal?—The German Federal Administrative Court's Judgement of 21st June 2005*, 7 GERM. L.J. 25, 38 (2006).

369. *Id.* at 38–39.

370. *Id.* at 41.

unhappy with the government's supportive role in the war and willing to make a strong statement, demonstrating in the process the shame experienced as a result of the nation's complicity in the war.

Any shaming of the United States and U.K. was likely neither per se intended nor avoided. The court's attitude primarily seems to have been that it was merely applying the law; it could hardly be faulted for reiterating facts that were entirely true or for reiterating basic axioms of international law, regardless of the embarrassment caused. While the Court engaged in considerable use of shame-oriented reasoning, the true "master shamer" in this particular process was the German soldier who managed to bring the full light of the court system to bear on the German government's covert military support for a war that contravened IL, simply by refusing to work on a software project.

#### *B. Other Domestic Adjudication*

Agencies other than courts may also enforce IL rules at the domestic level, and may employ shaming as a component of this enforcement. Commissions of inquiry are commonly used in this context. Consider the example of the Arar Inquiry. This inquiry arose out of the arrest of Maher Arar, a Syrian-born Canadian.<sup>371</sup> In 2002, on his way back to Canada from a vacation in Tunisia, Arar was stopped at JFK airport in New York City and arrested by U.S. officials who had been informed by the Canadian federal police that he was a terrorist.<sup>372</sup> Arar was transported to Syria, where he was held in custody for nearly a year.<sup>373</sup> He was held in deplorable conditions and beaten for the

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371. COMM'N OF INQUIRY INTO ACTIONS OF CAN. OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS 9 (2006) [hereinafter COMM'N OF INQUIRY REPORT], available at [http://www.pch.gc.ca/cs-kc/arar/Arar\\_e.pdf](http://www.pch.gc.ca/cs-kc/arar/Arar_e.pdf).

372. *Id.* at 13–15; Jonathon Gatehouse, *Maher Arar's Mind Cannot Forget*, MACLEAN'S (Sept. 8, 2011), <http://www2.macleans.ca/2011/09/08/the-mind-cannot-forget>; *RCMP Chief Apologizes to Arar for 'Terrible Injustices'*, CBC NEWS (Sept. 28, 2006), <http://www.cbc.ca/news/canada/story/2006/09/28/zaccardelli-appearance.html>; *The Unfinished Case of Maher Arar*, N.Y. TIMES, Feb. 17, 2009, at A26.

373. COMM'N OF INQUIRY REPORT, *supra* note 371, at 9.

first few weeks of his imprisonment.<sup>374</sup> Unable to withstand this treatment, Arar made false confessions.<sup>375</sup>

Arar's plight gained attention from influential Canadians even before his release.<sup>376</sup> As a result, his eventual return to Canada was accompanied by a media outcry and the Canadian government set up an inquiry headed by Judge Dennis O'Connor.<sup>377</sup> This inquiry concluded that "[t]he RCMP provided American authorities with information about Mr. Arar that was inaccurate, portrayed him in an unfairly negative fashion and overstated his importance."<sup>378</sup> Further,

[s]ome Canadian officials did operate under the 'working assumption' that Mr. Arar had been tortured. . . . [A]ll Canadian officials dealing with Mr. Arar . . . should have proceeded on the assumption that he had been tortured during the initial stages of his imprisonment and . . . that the "statement" he had made to the SMI had been the product of that torture.<sup>379</sup>

Judge O'Connor's inquiry also resulted in a number of recommendations for government agencies involved in anti-terrorism work. Recommendation 12 is salient: "[w]here Canadian agencies become aware that foreign agencies have made improper use of information provided by a Canadian agency, a formal objection should be made to the foreign agency and the foreign minister of the recipient country."<sup>380</sup> Recommendation 13 further requires the Department of Foreign Affairs to provide country reports about human rights practices to the relevant agencies,<sup>381</sup> and Recommendation 14 requires the agencies to review their practices with regard to sharing information with countries "with questionable human rights records."<sup>382</sup>

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374. See COMM'N OF INQUIRY REPORT, *supra* note 371, at 54–57; Gatehouse, *supra* note 372; Mehdi Hasan, *Syria Has Made a Curious Transition from US Ally to Violator of Human Rights*, GUARDIAN (Feb. 19, 2012), <http://www.theguardian.com/commentisfree/2012/feb/19/syria-us-ally-human-rights>.

375. See COMM'N OF INQUIRY REPORT, *supra* note 371, at 57.

376. See *id.* at 40.

377. *Id.* at 1–2; RCMP Chief Apologizes to Arar for 'Terrible injustices,' *supra* note 372.

378. COMM'N OF INQUIRY REPORT, *supra* note 371, at 57, 13.

379. *Id.* at 33–34.

380. *Id.* at 344.

381. *Id.* at 344–45.

382. *Id.* at 345.

Specifically, directions are required for “eliminating any possible Canadian complicity in torture, avoiding the risk of other human rights abuses and ensuring accountability.”<sup>383</sup> The inquiry also recommended that Canada “register a formal objection with the governments of the United States and Syria concerning their treatment of Mr. Arar.”<sup>384</sup>

Following the publication of this report, the Canadian government issued a formal apology to Arar and awarded him CDN\$10.5 million in compensation.<sup>385</sup> Arar’s case was taken up by Amnesty International with a major campaign<sup>386</sup> and, despite the U.S. government’s refusal to acknowledge any wrongdoing,<sup>387</sup> several members of the U.S. Congress made individual apologies to Mr. Arar in 2007.<sup>388</sup>

### III. THE SHAMING REFERENCE GROUP

The preceding discussion about the internal and external dimensions of shame and criticisms about procedural fairness and partisanship all point to the importance of actors with whom the offender feels a sense of community as a necessary condition for the effectiveness of shaming.<sup>389</sup> We call this the shaming reference group. An offender is only likely to experience shame if it suffers a loss of reputation relative to its standing within its shaming reference group. This group need not be static: it could include national<sup>390</sup> and international

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383. *Id.* at 345.

384. *Id.* at 361.

385. Mike Blanchfield, *Syrian Envoy: Arar a ‘Terrorist,’* CHRONICLE HERALD (Feb. 18, 2012), <http://thechronicleherald.ca/canada/64372-syrian-envoy-arar-terrorist>; Hasan, *supra* note 374.

386. Tapper, *supra* note 71; *Urge the U.S. Government to Apologise to Torture Survivor Maher Arar*, AMNESTY INT’L (June 25, 2012), <http://www.amnesty.org/en/appeals-for-action/apologise-to-maher-arar>.

387. *Id.*; *The Unfinished Case of Maher Arar*, *supra* note 372.

388. Matthew Jaffe, *Congress Hears Testimony in Arar Case: The U.S. Deported a Syrian-born Canadian Citizen to Syria, Where He Was Tortured*, ABC NEWS (Oct. 18, 2007), <http://abcnews.go.com/Politics/story?id=3746371&page=1&singlePage=true>.

389. “[S]anctions imposed by relatives, friends or a personally relevant collectivity have more effect on criminal behavior than sanctions imposed by a remote legal authority . . . because repute in the eyes of close acquaintances matters more to people than the opinions or actions of criminal justice officials.” BRAITHWAITE, *supra* note 38, at 69.

390. *See, e.g., R v. Horseferry Road Magistrates Court, Ex parte Bennett*, [1994] 1 A.C. 42 (H.L.) at [67] (Eng.).

courts, international and intergovernmental organizations, nation states and their leaders, international NGOs, and domestic constituencies of the relevant state.

The authors' notion of the shaming reference group is built upon insights from the psychology scholarship about the importance of "affective connection" with external actors who might observe the event. As Tangney and Miller note, "although shame is no more 'public' than guilt in terms of the actual structure of the eliciting situation, when feeling shame, people's awareness of others' reactions may be somewhat heightened."<sup>391</sup> This means that a properly identified shaming reference group has potency for the enforcement of IL norms via shaming. Some examples of shaming reference groups are provided below.

#### A. *The European Union*

The EU serves as a shaming reference group for both structural and historical reasons. Structurally, EU treaties expressly create inter-linkages and transnational accountability institutions that require member states to be responsive to shaming.<sup>392</sup> For example, U.K. courts are better able to resist executive pressure to deport terror suspects because of the existence of the ECHR.

Consider the case of *Saadi v. Italy*.<sup>393</sup> In 2002, Nassim Saadi was arrested in Italy and placed in detention for several years while proceedings, in which he stood accused of several crimes including international terrorism, took place.<sup>394</sup> The case under Italian law proved complex and after approximately four years of proceedings, Saadi was released from detention.<sup>395</sup> However,

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Whatever differences there may be between the legal systems of South Africa, the United States, New Zealand and this country, many of the basic principles to which they seek to give effect stem from common roots. There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself.

*Id.*

391. Tangney et al., *supra* note 9, at 1261.

392. See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 5 (Nov. 4, 1950).

393. *Saadi v. Italy*, App. No. 37201/06, 49 Eur. H.R. Rep. 30 (2008).

394. *Id.* ¶¶ 11–17.

395. *Id.* ¶ 31.

during the period of his detention, a Tunisian court had found him guilty of terrorism offenses (membership in a terrorist organization and incitement to terrorism) in absentia and sentenced him to twenty years imprisonment.<sup>396</sup>

Following Saadi's release, Italy desired to deport him to Tunisia.<sup>397</sup> Saadi contended that there was a real threat that he would be tortured if this course of action were to be implemented.<sup>398</sup> Although the Italian courts issued a stay on his deportation,<sup>399</sup> Saadi also requested a stay from the Strasbourg court.<sup>400</sup> The Strasbourg court decided that deporting Saadi would breach Article 3 of the European Convention of Human Rights, citing its own previous cases, *Soering v. UK*<sup>401</sup> and *Chahal v. UK*,<sup>402</sup> which prohibited deportation when there was a real risk of torture or inhumane or degrading treatment to the deportee at the proposed destination.<sup>403</sup>

The U.K. joined the proceedings in *Saadi* as a third-party intervener.<sup>404</sup> Both the U.K. and Italy argued that the court should amend its doctrine on Article 3 of the convention—developed in *Chahal*—to allow deporting states to consider the danger the potential deportee posed to the public in balancing their own security against their duty to prevent torture under the convention.<sup>405</sup> The court was not persuaded; it held that a person's conduct is irrelevant to the absolute prohibition contained in Article 3 and that "balancing" security with the likelihood of a deportee being tortured was "misconceived"—declaring these to be two different goods or values which do not stand in any relationship to each other that could be "balanced."<sup>406</sup>

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396. *Id.* ¶ 29.

397. *Id.* ¶ 32.

398. *Id.* ¶ 35.

399. *Id.* ¶¶ 41–43.

400. *Id.* ¶¶ 51–52.

401. *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H.R. Rep. 439 (1989).

402. *Chahal v. United Kingdom*, 22 Eur. Ct. H.R. 1831 (1996). Chahal was a radical Sikh living in the U.K. who was charged with conspiring to murder the Prime Minister of India. *Id.* ¶¶ 19, 23.

403. *See Saadi*, 49 Eur. H.R. Rep. ¶¶ 124–49.

404. *Id.* ¶ 7.

405. *See id.* ¶¶ 113–16, 122.

406. *Id.* ¶ 139.

The case is significant because the U.K. pushed hard to have the court acknowledge the existence of a post-9/11 world in which it was necessary to drastically re-interpret the convention's prohibition on torture. The court also refused to endorse the U.K. and Italy's view that mere diplomatic assurances that a suspect would not be tortured sufficed to allow a convention state to deport a suspect in good faith.<sup>407</sup> The immediate aftermath of the *Saadi* opinion offers a classic illustration of how the shaming reference group works. The U.K. Court of Appeal endorsed the *Saadi* decision at the earliest opportunity in *AS and DD (Libya) v. Secretary of State for the Home Department*, citing the ECHR's insistence on close scrutiny of diplomatic assurances.<sup>408</sup> The court found that it was reasonable to conclude that the assurances offered to the U.K. by Libya in *AS and DD* were inadequate as Gaddafi and his government did not enjoy a track-record of reliability.<sup>409</sup> Due to the ECHR's interpretation of Article 3, unlike the courts in Canada and the United States, British courts cannot submit to pressure from the executive to perform a balancing act between security needs and the prohibition on torture.

The shaming reference group can also serve both as a source of norms and as a source of monitoring, interpretation, and enforcement. For example, in *A & Others v. Secretary of State for the Home Department*,<sup>410</sup> an appeal was brought by nine foreign nationals who were suspected of involvement in terrorism but were not charged with any crime.<sup>411</sup> The U.K. had detained these individuals at Belmarsh Prison under s. 23 of the *Anti-terrorism, Crime and Security Act 2001* because they could not be deported.<sup>412</sup> This provision empowered the government to

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407. *See id.* ¶ 148. The Court specifically stated that such assurances “would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention.” *Id.*

408. *AS & DD (Libya) v. Sec’y of State for the Home Dep’t*, [2008] EWCA (Civ) 289, [68].

409. *See id.* at [73]. The Court also discussed the precise evidence regarding the past and possible future unreliability of the Libyan government. *Id.* at [68]–[82].

410. *A v. Sec’y of State for the Home Dep’t*, [2004] UKHL 56, [2005] 2 A.C. 169 (Eng.).

411. *Id.* at [1]–[3].

412. *Id.* at [2].



detain suspected international terrorists pending deportation, despite the fact that removal from the U.K. was temporarily or indefinitely prevented in derogation of Article 5 of the European Convention on Human Rights.<sup>413</sup> The government claimed that this was necessary to combat the national security threat posed by al-Qaeda terrorists.<sup>414</sup>

The House of Lords, by a majority of eight to one, accepted that al-Qaeda terrorism represented a serious threat to the life of the nation,<sup>415</sup> but seven of the eight law lords who accepted this premise nevertheless concluded that s. 23 was not strictly required by the exigencies of the situation.<sup>416</sup> These same judges also concluded that s. 23 was incompatible with Article 14 of the European Convention on Human Rights because of the way it discriminated between nationals and non-nationals.<sup>417</sup> The derogation permitting permanent detention of non-nationals treated them more harshly than nationals.<sup>418</sup> Absent the possibility of deportation, it lost its character as an immigration provision and hence constituted unlawful discrimination.<sup>419</sup>

In *Binyam*, the court relied upon domestic norms<sup>420</sup> and IL norms<sup>421</sup> to shame both its own government<sup>422</sup> and a key ally—the United States:

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413. See *Chahal v. United Kingdom*, 22 Eur. Ct. H.R. 1831, ¶ 10. (1996).

414. *A v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, [25].

415. *Id.* at [54].

416. *Id.* at [44].

417. *Id.* at [68].

418. *Id.*

419. See *id.* at 159.

420. See *supra* text accompanying note 296.

421. *Id.*

422. The Court referred to torture as being the subject of the “abhorrence,” *id.* at [143], and “revulsion,” *id.* at [147(v)], of the entire legal system, and of “cruel, inhumane or degrading treatment” as being “the subject of international . . . stigmatism,” *id.* at [143]. In addition, the Court stated that when it is practiced as part “of state policy it is a particularly ugly phenomenon,” *id.* at [142(i)]. The court also referred to an American judgment, which called torturers “the enem[ies] of all mankind,” *id.* at [142(ii)] (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)), as well as a previous judgment of the Privy Council which referred to confessions obtained by torture as having no place in any “civilised society.” *Id.* at [147(v)] (quoting *Wong Kam-ming v. R*, Lord Hailsham [1980] 1 A.C. 247, 261 (P.C.)). The court added that

the UK Government facilitated the interrogation of BM for part of the period . . . in the knowledge of the reports of the interviews at Karachi which contained information relating to his detention and

[T]he U.S. Government has refused to provide any information as to BM's location during the period between May 2002 and May 2004. The fact that no explanation has been provided to date (despite the disclosure in the earlier proceedings) is a matter of serious concern in relation to the practical operation of the disclosure procedures before the US military commissions . . . .

[T]o leave the issue of disclosure to the processes of the military commission . . . would be to deny to BM a real chance of providing some support to a limited part of his account and other essential assistance to his defence. To deny him this at this time would be to deny him the opportunity of timely justice in respect of the charges against him, a principle dating back to at least the time of Magna Carta and which is so basic a part of our common law and of democratic values.<sup>423</sup>

The language in these cases again rises well beyond the application of legal rules to invocations of honor and shame. When other courts or institutions in the EU refer to such decisions in their own judgments, the shaming reference group gets solidified by an iterative process where norms are refined and applied.

### *B. Network of Domestic Courts*

Courts, particularly those that share common legal families or legal traditions—whether those are the byproduct of colonialism, treaty regimes, or membership in international organizations—are part of epistemological networks. They reference and cite each other's opinions, thereby transplanting foreign law and IL norms into their respective domestic legal systems. When litigation involves the conduct of a state or regime, these courts act as a shaming reference group in several ways. First, they observe the application of norms by other courts and note this record in their own judgments. Second, and ancillary to this recording function, they make evaluative judgments about

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treatment and to which we have referred at para 87. It is also significant that his detention incommunicado was unlawful under the law of Pakistan.

*Id.* at [147(vi)].

423. *Id.* at [147(xi–xii)]. The court also said “the unreasoned dismissal by the US Government of BM's allegations as ‘not credible’ as recorded in the letter of 22 July 2008 is, in our view, untenable, as it was made after consideration of almost all the material provided to us.” *Id.* at [147(x)].

the proceedings and decisions of foreign courts in applying IL norms. Third, because they are conscious of being subjected to similar treatment by other foreign courts, they are likely to be constrained by a desire to apply IL norms correctly or, at a minimum, explain derogations from such norms in the form of plausible legal arguments.

To be sure, courts are idiosyncratic in selecting the courts to which they refer and follow no particular hierarchy in deciding which decision is more persuasive when there is a division between different courts on the issue. This has generated predictable criticism about activism and partisanship by judges.<sup>424</sup> Critics have called for domestic courts to ignore foreign law in resolving domestic disputes, arguing that doing so is an undemocratic transplantation of foreign values outside of the legislative process.<sup>425</sup> In the United States, there have even been efforts to pass legislation in order to take away the power of courts to refer to foreign law.<sup>426</sup> Whether they expressly refer to foreign cases in their judgments or not, it is clear that the networks and epistemological communities that lawyers and judges share satisfy the conditions necessary for them to constitute a shaming reference group.

The practice of domestic courts on the reference to foreign law varies. U.S. courts seem to largely reference international law rather than foreign law.<sup>427</sup> The courts of Canada often reference other courts, mainly from the U.K.,<sup>428</sup> but on at least one occasion it referenced Israel when debating non-refoulement in relation to suspected terrorists.<sup>429</sup> Even when these courts

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424. See Kelley Vlahos, *Judge Bork: Judicial Activism Is Going Global*, FOX NEWS (Sept. 11, 2013), <http://www.foxnews.com/story/2003/09/11/judge-bork-judicial-activism-is-going-global/>.

425. See generally John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U.L. REV. 303 (2006).

426. Kimberly Railey, *More States Move to Ban Foreign Law in Courts*, USA TODAY (Aug. 4, 2013), <http://www.usatoday.com/story/news/nation/2013/08/04/states-ban-foreign-law/2602511/>.

427. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

428. See, e.g., *Charkaoui v. Canada (Minister for Citizenship and Immigration)*, [2007] 1 S.C.R. 350 (Can.).

429. In *Suresh*, in contemplating the deportation of a member of the Liberation Tamil Tigers of Eelam to Sri Lanka (where he claimed he would, as a member of an armed opposition group, face torture at the hands of the gov-

come to conclusions that are different from the foreign cases referred to, the discursive process has shaming implications.

For example, in recent terrorism cases, Canada and the United States rely on Article 3 of the Convention against Torture (“CAT”), which they seek to interpret in a manner that is not conducive to achieving the CAT’s goals. These courts have whittled down the CAT’s main purpose by finding that only a “risk” of torture is not sufficient to prevent deportation, or that other concerns, such as security, need to be taken into consideration when considering deportation to a state in which the deportee may be tortured.<sup>430</sup> In addition, these courts consider whether or not their executives have been able to obtain “diplomatic assurances” that the receiving state will not torture the deportee.<sup>431</sup> These devices recast the issue as one of “balancing.”

In the United States, the issue of non-refoulement was sidestepped by the Supreme Court, which pointed out that there was no likelihood (only a possibility) that the suspects would be tortured in the receiving country, but also (similar to Canada) that it was for the executive to determine whether there was a risk of torture.<sup>432</sup> There was no discussion of IL in their findings and the issue of non-refoulement was given quite cursory treatment.<sup>433</sup> At the same time, the Supreme Court has insisted fully on its jurisdiction regarding Guantanamo Bay, and has also made clear that it is its responsibility to ensure that the United States is living up to the standards it has set for itself

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ernment), the Canadian Supreme Court noted that “the Supreme Court of Israel sitting as the High Court of Justice and the House of Lords have rejected torture as a legitimate tool to use in combatting terrorism and protecting national security.” *Suresh v. Canada (Minister for Citizenship and Immigration)*, [2002] S.C.R. 3, para. 74 (Can.) (citing H.C. 6536/95; *Hat’m Abu Zayda v. Israel General Security Service*, 38 I.L.M. 1471 (1999)); *Sec’y of State for the Home Dep’t v. Rehman*, [2001] 3 W.L.R. 877, para. 54.

430. HUMAN RIGHTS WATCH, *CASES INVOLVING DIPLOMATIC ASSURANCES AGAINST TORTURE: DEVELOPMENTS SINCE MAY 2005* 3–10, 17–22 (2007), <http://www.hrw.org/sites/default/files/reports/eu0107.pdf>.

431. *Id.*

432. *Munaf v. Geren*, 553 U.S. 674, 700–02 (2008).

433. *See id.* at 702 (stating that “[t]he Judiciary is not suited to second-guess such determinations” in reference to whether or not a deportee is likely to be tortured at their destination).

and to ensure compliance with obligations of international law in that respect.<sup>434</sup>

In the Canadian Supreme Court case of *Charkaoui*,<sup>435</sup> the court decided that it was not permissible to detain foreign nationals for alleged terrorism-related activities based on non-disclosed information.<sup>436</sup> In doing so, the court also compared several Canadian anti-terrorism measures to the British Anti-Terrorism Act, employing the somewhat circuitous reasoning that the British Anti-Terrorism Act had itself been based on certain aspects of Canadian law and practice.<sup>437</sup> The decision also cited a number of foreign court decisions, including *Rasul v. Bush* and *Silvenko v. Latvia*.<sup>438</sup> It seems essential for the court to justify its conclusions with numerous references to American and English court decisions.<sup>439</sup> It is also notable that it refers to the European Convention by way of citing British decisions and indirectly measures itself by the convention's standards.<sup>440</sup>

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434. For example, in *Hamdan*, the Court examined international law in great detail, explicitly refusing to accept the government's argument that the Geneva Conventions did not apply to the "war on terrorism." See *Hamdan v. Rumsfeld*, 548 U.S. 557, 625–35 (2006).

435. *Charkaoui v. Canada* (Minister for Citizenship and Immigration), [2007] 1 S.C.R. 350 (Can.).

436. *Id.* para. 139.

437. *Id.* paras. 80–87.

438. *Id.* para. 90.

439. For example, at paragraph 124 of its judgment, the Court states

[t]hese conclusions are consistent with English and American authority. Canada, it goes without saying, is not alone in facing the problem of detention in the immigration context in situations where deportation is difficult or impossible. Courts in the United Kingdom and the United States have suggested that detention in this context can be used only during the period where it is reasonably necessary for deportation purposes: *R v. Governor of Durham Prison, ex parte Singh*, [1984] 1 All E.R. 983 (Q.B.).

*Id.* para. 124.

440. The Court devoted several paragraphs of its decision to analyzing the British decision *A v. Secretary of State for the Home Department*, in which several breaches of the ECHR were determined before the Court concluded,

[t]he finding in *Re A* of breach of the detention norms under the European Convention on Human Rights was predicated on the U.K. Act's authorization of permanent detention. The *IRPA*, unlike the U.K. legislation under consideration in *Re A*, does not authorize indefinite detention and, interpreted as suggested above, provides an

U.K. courts take a more eclectic approach to the reference of foreign legal authorities. For example, in *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*,<sup>441</sup> the case concerned a British national who had been captured in Afghanistan and held in Guantanamo Bay.<sup>442</sup> The litigants sought to compel the British government to take all possible steps to release Abbasi from the “legal blackhole” that was Guantanamo.<sup>443</sup> The court mentioned the shared legal tradition of the United States and U.K. and made numerous references to the decisions of the European courts, ultimately concluding that Abbasi had no rights under the ECHR or international law to diplomatic assistance from the U.K.<sup>444</sup> It also stressed that Abbasi’s case had been taken up by the Inter-American Commission and that the Foreign and Commonwealth Office would likely be unable to help the matter further than the Commission would.<sup>445</sup> The decision demonstrated a willingness of the court to rely on both foreign courts and international bodies to ensure that a degree of protection commensurate with its own standards would be implemented.

### *C. Other International Organizations*

As previously noted, IOs serve as shaming enforcers. They also serve as a shaming reference group. One example is the Inter-American Commission on Human Rights. In the context of Guantanamo Bay, the Commission has urged the United States to clarify the status of the inmates and to conduct investigations into accusations of treatment that may amount to torture or other inhumane and degrading treatment, on the grounds that the United States is obligated to prevent such treatment.<sup>446</sup> Throughout its report, the Commission empha-

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effective review process that meets the requirements of Canadian law.

*Id.* paras. 125–27.

441. *Abbasi v. Sec’y of State for Foreign & Commonwealth Affairs*, [2002] EWCA (Civ) 1598, [2003] 42 I.L.M. 358.

442. *Id.* para. 1.

443. *Id.* paras. 22, 23(vi).

444. *Id.* paras. 59–67.

445. *Id.* para. 107(i).

446. Inter-Am. Comm’n Hum. Rts. (“IACHR”), *Detainees At Guantanamo Bay, Cuba*, Precautionary Measure No. 259-02 (2005), 45 I.L.M. 673, 673 (2006).

sized that U.S. action did not suffice to comply on any of the contentious points and left no doubt that the fate of the Guantanamo detainees was in no way up to the United States alone to decide. The United States categorically denied the allegations of torture, but felt the need to justify this denial by substantiating its own safeguards in this respect, including numerous ongoing judicial proceedings.<sup>447</sup>

#### CONCLUSION

States adhere to IL for a variety of reasons, including the threat of being shamed. This Article has demonstrated that the conceptual work on shaming is applicable to IL and that understanding the precise architecture for the application of shaming enriches our conception of IL. Further, the authors proposed a structure for shaming in IL by identifying the relevant targets for shaming, the enforcers of the sanction, and the conditions for imposing them. It has been demonstrated that enforcement of IL norms affects state behavior in ways similar to traditional coercive sanctions and that states invest considerable effort to avoid shaming.

The analysis showed several examples of states, regimes, and individuals being shamed by international organizations and by domestic courts in the U.K., United States, Germany, and Canada. These courts did not enforce IL as they would normally enforce domestic law, but rather called upon the state's sense of shame to get the regime to modify its behavior. While the record of the courts is patchy and idiosyncratic, recent case law indicates a growing willingness to reference IL norms and more systematic study is necessary in order to fully understand the role of national courts in enforcing IL. In the final part of the paper, we developed the notion of a shaming reference group, advancing some examples of networks that meet the necessary conditions, including supranational organizations like the European Union and networks of domestic courts. It is hoped that the framework offered will inspire other scholars to study shame sanctions in IL in a more exhaustive manner, expanding on our case studies and developing on the acknowledged limitations of partisanship, definition, delegation, and dispersion to propose models that advance the understanding of how IL is enforced with non-traditional legal sanctions.

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447. *Id.* at 673–74.