Enforcing International Law: States, IOs, and Courts as Shaming Reference Groups

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Does international law (IL) impose meaningful constraints on state behaviour? Unabated drone strikes by the dominant superpower in foreign territories, an ineffective United Nations, and persistent disregard for international law obligations, as evidenced by states killing their own citizens, all suggest that the sceptics have won the debate about whether international law is law and whether it affects state behaviour.³ We argue that such a conclusion would be in error because it grossly underestimates the complex ways in which IL affects state behaviour. We argue that scholars who claim that the lack of coercive power in IL is fatal to it being 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.⁴ Incarceration is not the only type of coercion available for law enforcement. To be sure, depriving the offender of his liberty by 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 falls. We aim to do this by focusing on a relatively neglected kind of sanction in IL – shaming.⁵ We 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 behaviour in the same ways that traditional coercive sanctions do.

Shaming has received extensive examination as a sanction in other areas of law, most notably the criminal law.⁶ In contrast, IL scholars have largely passed over the concept although some have suggested that shaming may have a positive role in ensuring international

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law compliance. This is surprising since shaming is pervasive in IL and matches up well with the cost-benefit type prerequisites typically employed in the design of sanctions and incentives. Moreover, the impossibility of establishing a centralized system of traditional 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 paper, refers to a deliberate attempt to negatively impact a state or regime or leader’s reputation by publicizing and targeting violations of international law norms. The 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…” In experimental settings, shame was seen to be an intense, painful emotion involving feelings of “moral transgression”, responsibility and regret. In other words, shaming can be coercive.

IL actors have employed shaming to achieve coercive outcomes. These include labeling a state as an offender, creating a reputation as a bad actor and non-cooperator, marginalization or expulsion from international organizations, causing economic damage, shunning by other states, and mobilizing domestic public opinion against the offending regime or leader. Coercion is employed against 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.

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7 See, Louis Henkin, “Human Rights: Ideology and Aspiration, Reality and Prospect,” in Samantha Power and Graham Allison (eds), Realizing Human Rights: Moving from Inspiration to Impact (New York: St. Martin’s Press, 2000), 24: “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.”
8 Wexler, supra note 2, at 564, pointing out “one advantage of shaming penalties, as compared to incarceration, is their cheapness.”
9 See Chad Flanders, “Shame and the Meanings of Punishment”, (2006) 54 CLEV. ST. L. REV. 609, 610 (“most scholars agree that shaming punishments involve the deliberate public humiliation of the offender.”). 
11 Id.
Criminal law scholarship shows that shame sanctions are most effective in tightly-knit societies with shared norms.\textsuperscript{13} If the ideal condition – a normative framework which 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 both in terms of normative frameworks and enforcement models, suggesting that shaming is unlikely to be effective. But this facile conclusion ignores complex webs of networked linkages between states that cut against the heterogeneity and make shaming powerful. Nation states share epistemic, religious,\textsuperscript{14} ethnic, gender,\textsuperscript{15} economic, and language bonds that result in shared commitments to many IL norms despite deep divergences in domestic laws.\textsuperscript{16} For example, all participants in the international law system share, at a minimum, a publicly expressed condemnation of torture,\textsuperscript{17} slavery,\textsuperscript{18} piracy,\textsuperscript{19} genocide,\textsuperscript{20} prostitution,\textsuperscript{21} and narcotic drugs,\textsuperscript{22} as reflected by their ratification records and pronouncements on international law instruments in these areas. Extracting from ratification records for IL instruments, state practice and publicly articulated commitments, it is possible to constitute an international community with a shared normative framework.\textsuperscript{23} It has been claimed that this community is one of “civilized nations,” suggesting a moral element to the

\begin{thebibliography}{99}
\bibitem{13}David Skeel, Shaming in Corporate Law, 149 U. Penn. L.R. 1811 (2001).
\bibitem{15}The women’s movement transcends national boundaries in its campaigns for issues affecting women around the world. The UN Convention on the Elimination of all Forms of Discrimination Against Women is one manifestation of a legal framework for this community: http://www.un.org/womenwatch/daw/cedaw/; See generally, Valentine Moghadam, Globalizing Women (JHU Press, 2005), Jackie Smith et al (eds), Transnational Social Movements and Global Politics (Syracuse, 1997), Myra Ferree et al (eds), Global Feminism: Transnational Women’s Activism, Organizing, and Human Rights (New York, 2006).
\bibitem{16}Peter M. Haas, “Introduction: Epistemic Communities and International Policy Coordination”, (1992) 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”).
\bibitem{17}Convention Against Torture and other Cruel, Inhuman and or Degrading Treatment or Punishment, 1984.
\bibitem{18}Slavery Convention, 1926; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956; Universal Declaration of Human Rights; The UN Charter
\bibitem{19}Convention on the High Seas (Geneva), 1958.
\end{thebibliography}
impetus for cooperation. Even formalized manifestations of this community, such as the United Nations, support this idea.

Apart from communities of nation states, regimes and their leaders are also part of several networks, whether they are international organizations such as the United Nations, regional organizations such as the European Union, or clubs of allied regimes such as the OECD and NATO. When a State or leader is a member of a community or network characterised by interdependence, other members are able to direct evaluative opinions about them, which may be esteem enhancing or detracting. We call such a community a shaming reference group. As rational actors, states and their leaders will behave in ways calculated to maximise esteem and minimise shame. At a minimum, the reference group’s imposition of a shame sanction can make the commission of the act costly to the offender. Even if the state or regime is impervious to shame and not amenable to norm-conforming behaviour 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 constantly evolving.

Although states are the principal IL actors, shaming is also attractive at the individual level: leaders of nation states tend to belong to those sections of society most sensitive to reputational damage. If the state is a democracy, winning elections will be a priority for any leader and reputational damage is inimical to electoral success. 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. For all of these reasons, shame sanctions have constraining power for the leader of a nation state 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

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25 See, Dan Kahan, supra note 6 at 639. Prof. 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 behaviour to fit that asserted norm.
enforcers of the sanction, and the conditions for imposing them. We analyse several examples of states, regimes and individuals being shamed by international organizations and by domestic courts in the UK, US, Germany, and Canada. We further show that enforcement of IL norms affects state behaviour in ways similar to traditional coercive sanctions. In Part III, we develop the notion of a shaming reference group, advancing some examples of networks that meet the necessary conditions, including supranational organisations such as the European Union and networks of domestic courts. Part IV concludes.

Part I: Transplanting shaming into IL

Shame sanctions have been debated extensively by criminal law scholars. At the definitional level, shaming 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.”26 Scholars offer examples ranging from the publication of the names of patrons of prostitutes in newspapers27 to the special license plates required for people convicted of driving under the influence of alcohol or drugs.28 They also point out that courts sometimes shame offenders as part of the sentencing process.29 For criminal law scholars, shaming is the means by which negative emotions aroused by the offender are expressed.30 This is often done by an agent, presumptuously, enforcing the shaming sanction on behalf of the group.31 Deterrence is central to such

26 Kahan & Posner, supra note 6, at 368.
29 Some reported cases where shaming has been employed are United States v. Gementera, 379 F.3d 596, 599 (9th Cir. 2004) (requiring a convict to wear a signboard proclaiming his guilt); United States v. Coenen, 135 F.3d 938, 939 (5th Cir. 1998) (requiring the defendant to publish notice in the official journal of the parish); United States v. Schechter, 13 F.3d 1117, 1118 (7th Cir. 1994) (requiring the defendant to notify all future employers of the defendant’s past tax offenses); People v. Letterlough, 205 A.D.2d 803, 804, 613 N.Y.S.2d 687 (N.Y.App.Div.1994) (“CONVICTED DWI” sign on license plate); People v. McDowell, 59 Cal.App.3d 807, 812-13, 130 Cal.Rptr. 839 (Cal.App.1976) (tap shoes for purse thief who used tennis shoes to approach his victims quietly and flee swiftly); Goldschmitt v. Florida, 490 So.2d 123, 124 (Fla. Dist. Ct. App. 1986) (requiring a defendant to place a sticker: “CONVICTED D.U.I.—RESTRICTED LICENSE”); Ballenger v. Georgia, 436 S.E.2d 793, 794 (Ga. Ct. App. 1993) (imposing a condition requiring the offender to wear a fluorescent pink plastic bracelet imprinted with the words “D.U.I. CONVICT”). For contra, see, People v. Hackler, 16 Cal.Rptr.2d 681, 686-87 (1993), required a shoplifting offender to wear a t-shirt whenever he left the house reading: “My record plus two six-packs equals four years” on the front and “I am on felony probation for theft” on the back. This was struck down in appeal on the ground that the objective was to “public[ly] ridicule and humiliat[e]” and not “to foster rehabilitation.” Id. at 686-87; People v. Johnson, 174 Ill.App.3d 812, 124 Ill.Dec. 252, 528 N.E.2d 1360 (1988), required a DWI offender to publish a newspaper advertisement with apology and mug shot. This was struck down “possibly, adds public ridicule as a condition” and was contrary to the goal of rehabilitation. Id. at 1362
30 Skeel, supra note 13, at 1814-16.
31 Id.
shaming because it is calculated to show other members of the community that offending can be costly. Given the absence of a fair process or prior community consent, some enforcers might be overly aggressive in shaming offenders and thereby over-deter. Consequently, individuals might forsake otherwise valid conduct for fear of being targeted. For example, fear of religious fanatics might coerce women into wearing religious costume like the burka.

Proponents of shaming in the criminal law do not claim that shaming is purely deterrence-based. For them, it also serves the retributive function of punishment. Aside from meeting these objectives of punishment, shaming is cheaper because the burden is delegated to the community and funds for the establishment of an administrative structure are unnecessary. 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 he is used to enjoying. However, when the stigma added by shame at having incurred the fine is considered, such a sanction may have considerably more bite than is apparent at first glance.

Critics argue that shaming has debilitating negative effects. They claim that offenders might form sub-communities which explicitly embrace their wrongs and defy the majority’s norms. Criminal activity is celebrated in such sub-communities and shaming has no effect on behaviour. Gangs and terrorist organizations are examples of such sub-communities. Some scholars also claim that different offenders may be treated differently because of the intervention of extraneous factors. Kahan and Posner provide the example of a gifted stockbroker who may not suffer much from shaming for insider trading in the long run in

32 U.S. v. Gementera, 379 F.3d 596 (2004); E.B. v. Verniero, 119 F.3d 1077, 1120-21 (1997); “…notification 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.”
33 Flanders, supra note 9, at 612; see also Kahan, “Alternative Sanctions”, supra note 6, at 630.
34 Kahan, “Alternative Sanctions”, supra note 6, at 630-49.
35 Id. This problem persists in most areas where fines are the 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 – reputation.
37 Braithwaite writes that “[offenders] associate with others who are perceived in some limited or total way as also at odds with mainstream standards.” Id. at 67.
38 Kahan, “Alternative Sanctions” supra note 6, at 636.
comparison with a run-of-the-mill broker who may pay a heavier price. Likewise, 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. These two states had greater geo-political clout and were therefore not punished harshly for these actions, whereas states such as North Korea and Iran continue to be treated more harshly. 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 cost benefits of shaming are not as significant as its proponents make them out to be. They refer to the cost of establishing reputations and maintaining them and the dissipation of these expenditures when reputations are tarnished without visible gain. Further, shaming entails its own cost – the cost of engaging in the conduct embodying moral disapproval whether it is the forgoing of otherwise profitable interactions or the cost of conveying the disapproval in another manner. For example, if the United States and other nations desired to shame China for human rights violations (for e.g. the suppression of Falun Gong) and stopped importing cheap commodities from that country, consumers would have to pay higher prices, existing business relationships would be disrupted, rogue companies which choose to defy the sanctions would have to be policed, countries that do not participate in the shaming would engage in opportunistic behaviour, and so on, making the shaming costly to the enforcers.

As previously noted, shaming works best in tightly knit communities and some critics have argued that diverse communities do not offer conducive conditions because of the lack of social interdependence; social heterogeneity creates problems of definition pertaining to the kinds of offences that might engender a feeling of shame. Moreover, the scale of large communities necessitates a large volume of communications about shaming causing an “overload.” To be sure, the volume problem is an even larger one in IL due to the number of

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40 See, Kahan & Posner, supra note 6, at 372-373.
41 Uttara Choudhury, “Seven years after going nuclear, India and Pakistan thriving,” Agence France-Presse (2 June 2005). (“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.”)
42 Bill Nicholas, “Condemnation swift, but options are limited,” USA Today (9 October 2006).
43 Kahan & Posner, supra note 6, at 372.
45 Skeel, supra note 13.
46 Skeel gives a similar example in the corporate law context. See, supra note 13.
48 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.”)
49 Id. at 1930.
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 offences to be observable. In addition, and in contrast to the individual level interactions relevant for 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 cost. This price might, inter alia, take the form of lost developmental aid and grants,\textsuperscript{50} withdrawal of foreign direct investment,\textsuperscript{51} the flight of foreign institutional investors from the state’s stock markets causing security prices to fall,\textsuperscript{52} the collapse of a state’s currency,\textsuperscript{53} the embargoing of contracts with companies based in the offending state causing them to lose out on profitable transactions abroad,\textsuperscript{54} restrictions on the repatriation of capital to that state,\textsuperscript{55} restrictions on travel to and from that state,\textsuperscript{56} and the suspension and expulsion of that state from international and regional organizations.\textsuperscript{57} The heterogeneity objection has some teeth for a different reason - definition: there are differences between nation states about 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, means that the state has to experience some shame. A rational state might determine that such conduct has low utility and cease to engage in it. We give an example of such behaviour in Libya’s response to the Pan-Am dispute in Part II of this article.

\textsuperscript{50} Rich Nielsen, “Rewarding Human Rights? Selective Aid Sanctions against Repressive States,” (2012) Int’l Stud. Q. Nielsen’s study found that aid donors withdraw aid when repressive acts are publicised in the media.


\textsuperscript{54} “Judge blocks Fla. Cuba, Syria business ties” Charlotte Observer (26 June 2012), http://article.wn.com/view/2012/06/26/Judge_blocks_Fla_Cuba_Syria_business_ties_i/


Other scholars have developed critiques focusing on the lack of processual fairness in the deployment of shame sanctions.\footnote{Seth Kreimer, “Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law” (1991) 140 U. PS. L. REV. 1, 5-12.} Predicated on a well-developed strain of constitutional jurisprudence establishing basic fairness protections for offenders, these critics claim that shaming fails the test of fairness. Specifically, the enforcers are not neutral judges charged with legal obligations to ensure that the offender is innocent unless proven guilty; to afford the offender an opportunity to defend himself adequately; to protect against coercion; to take account of precedent or to ensure that punishment is proportionate to the wrong committed.

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 we acknowledge 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, 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.\footnote{James Whitman, “What is Wrong with Inflicting Shame Sanctions?” (1988) 107 YALE L.J. 1055, 1088.} 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.\footnote{The suicide of a prosecutor who allegedly solicited a person he believed to be 13 years of age following a Dateline NBC sting is a sobering reminder of the dangerous consequences. See, Tim Eaton, “Prosecutor Kills Himself in Texas Raid Over Child Sex” \textit{New York Times} (6 Nov. 2006), available at http://www.nytimes.com/2006/11/07/us/07pedophile.html?ex=1320555600&en=9a849fc4db0d28ce&e i=5088&partner=rssnyt&emc=rss.}

Part II: A framework for shaming in international law
We attempt 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 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

This principle is based on commonly understood notions of enterprise liability. As is the case with collectively organised forms of business, such as companies, liability is imposed on the collective body which bears responsibility for the actions of its agents. Enterprise liability externalizes the cost of monitoring when the conduct is at micro-level with attendant asymmetries of knowledge, resources, and information between enforcers and offenders. The prospect of liability creates incentives for the entity to invest in monitoring the conduct of its agents. When agents engage in bad conduct, they are disciplined by their superiors and the chain of responsibility for monitoring stops with shareholders in the case of large modern companies. 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 might 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, formalized institutional processes aimed at establishing the truth and identifying offenders, structural reforms, corrective legislation, punishment for offenders, reparations for victims, and

61 David Skeel, supra note 13.
62 Id.
66 Following an abuse scandal at Abu Ghraib prison in Iraq, several US military personnel serving at the prison were convicted on multiple charges by court martial and incarcerated, “Graner Gets 10 years for Abu Ghraib Abuse” NBC News/Associated Press (16 Jan. 2005), http://www.msnbc.msn.com/id/6795956/#.UNiWfneeu;
67 For example, Maher Arar, a Syrian-Canadian who was subjected to rendition in Jordan and Syria after Canadian officials falsely suspected him of terrorist activities, was awarded $10.5 million CDN in damages from the Canadian government following a public inquiry, “Barack Obama should apologize to Maher Arar, rights groups say” Toronto Star (22 May 2012).
In other circumstances, whether it is because a state does not have a strong sense of identity and national pride or because a state possessed of these attributes denies wrongdoing, shaming has largely external consequences. 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 promoting better conduct – e.g., by improving the training of police or military personnel or employing more lawyers in the defense hierarchy – or the monitoring function – e.g., anti-corruption staff, and human rights commissions – while in other cases it translates into greater resources for enforcement – e.g., more police, courts, and prisons. 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. At least that is the theory.

The evidence is less clear. Other things being equal, shaming sanctions appear to be imposed less frequently upon richer states than on poorer states. Authors who have studied shaming by the United Nations Human Rights Commission write that despite there being eleven attempts at censuring China between 1991 and 2001, none proved to be successful. 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. For example, the authors found that “regardless of their rights records, states

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69 Libya’s oil industry, for example, was hit hard by UN 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 $18 billion by the World Bank and $33 billion by Libyan government (Ray Takeyh, “The Rogue Who Came in from the Cold” (2001) Foreign Affairs 62, 64), while sanctions against the Ian Smith regime in Rhodesia succeeded in making the country wholly dependent on trade with apartheid-era South Africa. Once Western countries managed to disrupt that trading relationship, the Rhodesian economy was brought to its knees (Robert O. Metthres “From Rhodesia to Zimbabwe: Prerequisites of a Settlement” (1989-1990) 45 International Journal 292, 302 et seq and 327).

70 During the Cold War, a state with average capabilities was able to escape sanctions or to keep the charges against it confidential 44% of the time; a state with capabilities one standard deviation above the mean (e.g. Austria or Morocco) avoided more than confidential treatment 66% of the time. The effect is only slightly less pronounced in the post-Cold War period (the values are 25% and 42%, respectively), see James H. Lebovic & Erik Voeten, “The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR” (2006) 50(4) Intl’ Stud. Quarterly 861, 878.

71 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, ibid at 884.

72 In the Cold War period, a state with a perfect attendance record in the UNGA is less than half as likely to have a public resolution adopted against it as is a country that participates only 50 percent of the time … targeted states that faithfully vote in the UNGA escape without punishment or with confidential consideration an estimated 54% of the time, whereas a state that participates only half the time that it is eligible can make the same claim only 13% of the time, ibid. at 877-878
that failed to participate in peacekeeping missions in the prior year ran about twice the risk of being targeted by the commission as did participating states. [Similarly,] states that vote in the UN [General Assembly] only half the time are about twice as likely to be targeted than are states that vote all the time.” 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 – our claim is that IL affects state behaviour in ways that matter for law, not that all states are punished equally all of the time. In other words, it suffices for our 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 or otherwise of prosecution and degree of punishment imposed is a function of a number of factors not least of which is relative power and resources – no different from domestic law enforcement.

Shaming at the entity level is necessary because states are the primary actors in IL and make promise or contract type commitments to each other. While states might adhere to these commitments for any number of reasons including moral ones, 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 ICCPR: “[d]uring the Cold War, states that signed and ratified the ICCPR treaty were about twice as likely to be shamed by public resolution than were states that failed to do so.” It seems that when states ratify pieces of international law, they are creating a set of contract type expectations about their subsequent conduct.74 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 judgements about whether behaviour matches up with performance expectations.75

73 Ibid.
74 The study by Lebovic and Voeten revealed (at 882) 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, on a desire to hold states accountable for their commitments... countries that have signed and ratified the ICCPR treaty do not appear to share characteristics (e.g., human rights records) that could explain why the probability of a vote to punish a target rises precipitously when both the target and voter are parties to the ICCPR treaty. 75 Lebovic and Voeten at 885: “states do not appear to get favorable treatment from the commission merely by paying lip service to important principles. To the contrary, the acts of signing and ratifying treaties or achieving formal membership within IOs seem not to contribute directly toward reputation-building in the international community. If these agreements and memberships matter, it is in raising expectations when members of the community evaluate the conduct of other states. Simply put, states expect others to deliver on their promises.”
A complicating factor for shaming at the entity level is its politicization.\textsuperscript{76} 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, “political alignment with the US greatly increased the prospect that countries were subject to severe sanctions. Targeted states that consistently voted with the US were virtually assured (a probability of .93) of being sanctioned by a public resolution.”\textsuperscript{77} This declined following the end of the Cold War but “states were more likely to favour countries with similar alliances and to oppose countries with dissimilar alliances. This conclusion is further reinforced by the impact of a convergence in domestic ideology.”\textsuperscript{78}

While we 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 programme to influence the behaviour of other States. This extends to whether or not a recipient state’s votes in the UN GA conform 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\% per cent of the time in the UN GA. One standard deviation in voting behaviour, \textit{i.e.}, an increase to voting with France 73\% of the time resulted in a 96\% increase in foreign aid to that country. Similarly, a standard deviation in voting in favour of the US resulted in an increase of US aid by 78\% to the country voting in the “right” way, while one standard deviation in voting in favour of Japanese policies resulted in a staggering 345\% increase in Japanese foreign aid to that nation.\textsuperscript{79} Such beneficence has also been used to coerce other states into compliance with the favoured agenda of the donor. Japan is alleged to have dispatched a delegation to Geneva shortly before the 2004 WTO General Council meeting in an effort to coerce weaker states to conform to its platform. Asian countries in receipt of Japanese aid reportedly were told that if they contravened vital Japanese objectives at the Council meeting (these consisted in 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 endangered.\textsuperscript{80}

\textsuperscript{76} Id. “foreign policy positions, as measured by votes in the UNGA, has a significant and substantial affect on the decision by a state to withhold punishment of another (hence, the negative coefficients) in both the Cold War and post-Cold War periods.”
\textsuperscript{77} Lebovic and Voeten, at 876.
\textsuperscript{78} Id.
\textsuperscript{79} As compared to a 78\% increase in US aid for a standard deviation in voting with the US and a 96\% increase in French foreign aid for a standard deviation in voting in line with France, Alberto Alesina & David Dollar, “Who Gives Foreign Aid”, 5 J Econ Growth, 33 (2000).
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, Japan not only pays members of the IWC to vote in its interests, it also – via its Overseas Development Assistance program – pays nations to join the organisation.\(^{81}\) Chief recipients include St. Lucia, St. Vincent, St. Kitts and Nevis, Grenada, Dominica and Antigua and Barbuda, which vote with Japan on virtually every issue before the IWC.\(^{82}\) For each 10% increase in the number of votes a recipient state cast in favour of Japan at the IWC between 1999 and 2004, it received an increase of $2.1 per capita in aid.\(^{83}\) 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 behaviour it is punished by having aid withheld. Thus, far from using its clout to enforce compliance with IL, Japan punishes states which 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 behaviour which 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, 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 were 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.\(^{84}\) This did not hold true when there was a strong history of religious or ethnic conflict between states. As Lebovic and Voeten point out, “frequent resolutions [were] passed against Israel for abuses against Palestinians in the 1970s and 1980s and [there was] wholesale neglect of abuses by Arab countries against their own citizens (e.g., the violent crackdown on dissent in Syria in 1982).”\(^{85}\)

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\(^{81}\) Ofer Eldar, “Vote-trading in International Institutions” (2008) 19 EJIL 3, 35.

\(^{82}\) Id.


\(^{84}\) Id.

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 example of Libya in the Lockerbie incident. On 21 December 1988, a bomb was placed on Pan-Am flight 103, travelling from London to New York. The bomb exploded as the plane was flying over Lockerbie, Scotland, killing 259 people onboard and 11 people on the ground. Of the victims, 189 were American citizens, while 43 were British nationals. Although several organizations claimed responsibility for the bombing at the time (mainly armed Palestinian organizations), international suspicion gravitated towards Libya. After nearly two decades of low-level military attacks and counter-attacks between the US and Libya, the latter was not held in very high esteem in the Western world. After coming to power in 1970, Gaddafi had expelled American oil firms from Libya and prohibited American military vessels from operating in Libyan waters, leading to a sharp deterioration in relations with the US. The US embassy was later ransacked by mobs in Libya, which were acting in support of the Iranian Revolution, resulting in the termination of diplomatic relations in 1980. Finally, in 1986 a Berlin nightclub frequented by American soldiers was bombed (allegedly by Libya) and, in response, the US ordered air raids on Libya and froze Libyan assets in its banks. It was hardly surprising then that the bombing of an American civilian plane, which resulted in the death of over 200 passengers, provoked interest into the possible involvement of the Libyan government.

Following a prolonged investigation, on 13 Nov 1991 indictments for murder were issued by both the US and Scotland against Abdelbaset al-Megrahi and Lamin Khalifa Fhimah (both Libyan Airlines officials). The US and UK issued a joint statement on 27 November demanding that the suspects be extradited to their territory for trial, a request declined by Libya.

The Lockerbie case provides much 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. Assuming the suspects acted on their own volition, a breach of Art. 11 of the 1971 Convention would arise. The states affected by the bombings – the US, UK and France – were all permanent members of the UNSC. As such, they utilized their position to ensure that any ambiguities about whether a breach of IL had occurred were swept aside.

Working together, the US, UK and France were able to convince the Security Council to pass several resolutions. Res. 731 qualified the Lockerbie incident as an act of “international terrorism” which constituted a threat to international peace and security, and also referred to earlier resolutions 286 and 635 which placed obligations on states not to interfere with international civil aviation. SC Res. 748 added to this, with an interpretation of Art. 2 (4) UN Charter to the effect that, “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”. Res. 748 also specifically stated that Libya’s failure to cooperate (by refusing to extradite al-Megrahi and Fhirmah) constituted a threat to international peace and security. Res. 748, instituted under Chapter VII, demanded compliance with (non-binding) resolution 731, which had in turn, demanded that Libya comply with the US and UK requests for the suspects. Res. 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. These sanctions were later tightened via SC Res. 883.

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 SC Res. 748.

This in itself points to a desire of states 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 US, UK
and France was to alter the legal parameters of the incident is confirmed in the fact that they explicitly referred to this alteration as the only relevant law during later proceedings before the ICJ.\(^{97}\)

Libya also adopted a legalistic stance on the issue, turning to the ICJ\(^{98}\) and asking the court to declare that it had complied with all of its obligations under the Montreal Convention, and that the US and UK were obliged to desist from using force or the threat thereof against it, and to grant temporary relief.\(^{99}\) The court declined the plea for temporary relief,\(^{100}\) but eventually decided that it did have jurisdiction and that the case centered around differing interpretations of Art. 7 and 11 of the Montreal Convention.\(^{101}\) The court did not take SC Res. 748 and 883 into consideration when determining its jurisdiction as these had been passed after Libya filed the case.\(^{102}\)

The legal basis of the case against Libya was thus weaker than the US and UK had hoped it to be.\(^{103}\) 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, left bereft of a superpower patron after the collapse of the Soviet Union, and ignored while Western states rolled out the red carpet to revolutionary figures such as Yasser

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\(^{97}\) *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), (Preliminary Objections), [1998] IJC Rep, at para. 23 and para. 36.

\(^{98}\) *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America) (Provisional Measures), [1992] IJC Rep.*


\(^{100}\) *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America) (Provisional Measures), [1992] IJC Rep, at para. 46.

\(^{101}\) Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America) (Preliminary Objections) [1998] IJC Rep, paras. 28, 32 and 35.

\(^{102}\) *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America) (Preliminary Objections), [1998] IJC Rep, paras. 37 and 43.

\(^{103}\) *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America) (Preliminary Objections), [1998] IJC Rep at para. 38.*
Arafat and Nelson Mandela, both of whom had received considerable aid from Gaddafi at the lowest points in their struggles, and neither of whom were less violent in pursuing their goals.¹⁰⁴

To compound the issue, Libya continued to refuse to extradite the two suspects to the US or UK, claiming they would not receive a fair trial.¹⁰⁵ Libya did offer to extradite them to Malta (where the bomb was set in motion), an offer which met with rejection on the grounds that Malta’s geographic proximity to Libya would render it subject to improper influence.¹⁰⁶ In 1994, Libya offered to hand over al-Megrahi and Fhirmah for trial under Scottish law in the Netherlands – this too was initially rejected. However, as third nations began to voice objections to the UN sanctions against Libya¹⁰⁷ the US and UK thawed in their attitude.

Under these conditions, Gaddafi – ever the pragmatist – reached a compromise with the US and UK by which they would accept a trial under Scottish law in the Netherlands. UN monitors would be stationed in the Scottish prison, should the suspects be convicted and end up serving there, and – so it was rumoured – the prosecution would agree in advance not try to trace orders for a bombing to Gaddafi himself. Furthermore, the trial would be conducted by a judge, not jury. This deal was accepted and al-Megrahi and Fhirmah were duly handed over in 1999; the UN suspended sanctions against Libya via Res. 1192.¹⁰⁸ Al-Megrahi was convicted and Fhirmah was acquitted. Evidence in the case was not entirely convincing,¹⁰⁹ but the decision allowed all nations involved to move on as it was increasingly obvious that none of them were profiting from the stalemate.

While UN sanctions were suspended in 1999, Libya – which had suffered an estimated $18 billion in lost revenue as a result¹¹⁰ – wanted them cancelled. To achieve this, it agreed to pay $2.7 billion in compensation to the victims, to be released in several tranches.¹¹¹ The first tranche would come with the cancellation of UN sanctions, and these were duly lifted on 12

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¹⁰⁶ Id.
¹⁰⁷ Id.
¹⁰⁹ Id.
¹¹⁰ Ray Takeyh, “The Rogue Who Came in from the Cold” (2001) Foreign Affairs 62, 64
Sept. 2003.\textsuperscript{112} Libya never admitted guilt for the Lockerbie bombings but issued a letter to the UN in 2003, stating that it “accepted responsibility for the actions of its officials”.\textsuperscript{113} The US, UK and Libya also removed the pending ICJ decision from the court’s list through a joint statement in 2003.\textsuperscript{114} In 2005, American energy companies began investing in Libya and full diplomatic relations were restored in 2006.\textsuperscript{115}

The moral of the story seems to be that even absent convincing evidence that Libya was in fact responsible 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 might have succeeded in deterring other states contemplating similar terrorist actions by making the action extremely costly. If Libya was in fact responsible, this is a good example of shaming being effective to enforce IL rules following the correct identification of the offender through a law enforcement framework.

Sri Lanka offers another example. Following the conclusion of the military campaign against the LTTE which resulted in over 40,000 civilian deaths, thousands of Tamils continue to be housed in temporary camps.\textsuperscript{116} Camp conditions are horrific both in physical and human rights terms: many allegedly are being held incommunicado for suspected links with the LTTE. There are allegations that the media has been intimidated through killings, torture, disappearances and detentions.\textsuperscript{117}

The government’s vociferous denials of wrongdoing have been dented by video and other evidence of troops executing bound captives; a UN expert confirmed that a mobile phone video showing one such killing was genuine after three forensic experts viewed the footage.\textsuperscript{118}

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\textsuperscript{115} see “A History of Libya’s Ties with the US” BBC News (15 May 2006), http://news.bbc.co.uk/2/hi/africa/4774355.stm


\textsuperscript{117} Id. See also, Human Rights Watch report at http://www.hrw.org/news/2012/07/03/sri-lanka-halt-harassment-media.

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There is evidence that some of these gross abuses were authorised at the highest levels of command: General Fonseka who was Rajapaksa’s rival in the presidential elections claimed that execution orders had been issued by the defence secretary, who is the president’s brother.119

A US State Department report in 2009 documented that government forces shelled civilian areas and caused deaths before the expiry of a publicly announced ceasefire.120 Captives and combatants who sought to surrender were also allegedly slaughtered. The report also documents cases of disappearances and killings in custody.121 Similar reports have been issued by Amnesty International and Human Rights Watch.122

The international community has repeatedly called upon Rajapaksa to remedy human rights violations.123 After its pleas were ignored, the European Union suspended the Generalised System of Preferences Plus (GSP+) for Sri Lanka.124 These concessions are extremely important: goods from countries accorded GSP+ are offered reduced tariffs when entering the EU market. Sri Lanka’s suspension was based on a European Commission investigation concluding that Sri Lanka is in breach of the International Covenant on Civil and Political Rights, the Convention against Torture, and the Convention on the Rights of the Child.125

For once, the EU’s actions carry some punch: imports from Sri Lanka under GSP+ amounted to Eur. 1.24 billion in 2008, and the Sri Lankans depend heavily on the EU because it is their largest export market.126 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.127

The EU was not alone in shaming Sri Lanka. The UNHRC voted in March 2012 to ask Sri Lanka to implement the recommendations of its Lessons Learnt and Reconciliation Commission and to investigate human rights violations.128 This was in the face of a desperate campaign, both of persuasion and intimidation, launched by the Sri Lankans to stop the passage of the resolution.129 The government lobbied foreign states via telephone calls and meetings and tried to intimidate civil rights groups travelling to the meeting. Why would Sri Lanka engage in such acts if shaming is not powerful? This is not the only instance of such behaviour. In 2009, the EU sought to initiate a resolution against Sri Lanka at the UNHRC in May 2009 by calling a special session. Sri Lanka, in a smart procedural tactic, tabled its own resolution before the EU could propose one, ensuring that its resolution would be the basis for negotiation. It lobbied other states and defeated the EU’s amendments.130 These and other actions show that the Sri Lankan government is acutely aware of the coerciveness of shaming and acts aggressively resists 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 in domestic law, shaming entails similar, but non-fatal, objections: partisanship, sensitivity to economic and power influence, flaws in identification of actual offenders, and lack of proportionality.

B. Shaming the regime/government/ruler

Shaming the regime or government rather than the state at the entity level may be necessary when the latter is either not congruent with blame for the wrong or when shaming the entity is not effective. Several reasons 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

127 Even under the reformed GSP rules, available here: http://trade.ec.europa.eu/doclib/docs/2012/october/tradoc_150025.pdf, suspension of Sri Lanka remains well within the EU’s possibilities.
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 approved of in the first place. 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 within a domestic population for strong feelings of identity to exist. Even where such strong national identities exist, these may not always be assumed to inure to the benefit of a ruling group. For example, many Middle Eastern states do possess strong Islamic identities but there is a division between the regime and the population when it concerns issues involving international relations.\footnote{Cite literature on public support for militant Islamic organisations in Saudi Arabia, Kuwait etc despite the regime’s campaigns against those organisations in concert with the US.}

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 the entire government. For example, shaming the Iraqi government for its invasion of Kuwait in 1991 would punish people who had nothing to do with the invasion or 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, this is 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. A presidential form of government where executive power vests in one individual or a dictatorial regime would satisfy this condition. In an ideal scenario, shaming triggers both an internal and external response in the ruler; 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.\footnote{See Sandeep Gopalan, “Alternative Sanctions and Social Norms in International Law: The Case of Abu Ghraib”, (2007) Mich. St. L. Rev.} 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.\footnote{“Bahrain’s human-rights report” The Economist (26 Nov. 2011), http://www.economist.com/node/21540304} These externally
directed actions might be accompanied by denials of any wrongdoing. A rational ruler will factor in the cost of shaming before engaging in any conduct with international implications. If the benefits from the conduct exceed the potential cost from the shaming or the probability of detection or a combination of both, he 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 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.

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.

It is not clear that all rulers are equally responsive to shaming and some are more responsive than others. For example, rulers with strong claims to moral or ethical leadership, rulers whose grip on power is infirm, those who need good reputations to join regional associations or trade groups, those who need to attract international investment,

136 Religious leaders, in particular, such as the Pope or the Dalai Lama, could be susceptible to shaming in this sense. While Vatican officials initially reacted sluggishly to a stream of sexual abuse scandals, plummeting approval ratings and religious disenfranchisement not seem to have prompted more appropriate reactions (Cathy Lynn Grossman, “Sex abuse scandal drives down Pope Benedict’s U.S. approval ratings” USA TODAY (Mar 29, 2010); 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 denial as “a primitive coping mechanism” and announced that the Church would shortly be holding a four-day symposium on the matter. Scicluna also acknowledged the Church’s duty to co-operate with civil authorities in investigations (Philip Pullella “Denial no option in sexual abuse scandal: Vatican” Reuters (Feb 3, 2012), http://www.reuters.com/article/2012/02/03/us-vatican-abuse-idUSTRE8121F420120203.
137 For example, when Mohamed Nasheed was forced to reign as President of the Maldives on 7 Feb. 2012 prompting a “political crisis”, 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”. 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 (“Maldives Crisis: Commonwealth Urges Earlier Elections” BBC News (23 Feb. 2012); Peter Griffiths “Commonwealth Suspends Maldives from Rights Group, seeks elections” Reuters (23 Feb. 2012)). Once Waheed had somewhat consolidated his grip on power, he pushed elections back to July 2013, a date still several months ahead of his own original schedule (“Maldives President Waheed Hassan sets elections for 2013” BBC News (18 April 2012), http://www.bbc.co.uk/news/world-asia-17762963), possibly due to the fact that the Maldives is still experiencing episodes of civil unrest (Will Jordan “The Maldives: Mired in Presidental Intrigue” Al-Jazeera (4 Sept. 2012), http://www.aljazeera.com/indepth/features/2012/09/20129116544631378.html.
138 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-
those who need loans from multilateral lending agencies, and those who need support from allies are probably most responsive to shame sanctions. In contrast, rulers who resist external norms have established reputations for denouncing the dominant international actors, or are pursuing a different ideology which provides internal justifications for their based violence and other serious inequalities (Helena Smith, “Human Rights Record Haunts Turkey’s EU Ambitions” The Guardian (13 Dec. 2004), http://www.guardian.co.uk/world/2004/dec/13/eu.turkey1; Criminal Code Law Nr. 5237 (Passed 26 Sept. 2004, Published 12 Oct. 2004), Official Gazette No. 25611, available at http://legislationline.org/documents/action.popup/id/6872/preview). 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” Southeast European Times (24 December 2012).

Libya, for example, following a decades long shame campaign spearheaded by the US and UK, eventually agreed to extradite two suspects in the Pan-Am bombing and to pay compensation to the victim’s families. This action permitted Libya to normalize its aviation industry and to attract much needed foreign investment to fully exploit its oilfields (John H. Donboli & Farnaz Kashefi “Doing Business in the Middle East: A Primer for U.S. Companies” (2005) 38(2) Cornell International Law Journal 413, 451; Jad Mouawad, “Libya Tempts Executives With Big Oil Reserves” New York Times (2 January 2005)).


Israel, for example, while enjoying a human rights record that is far from spotless, generally takes care to remain clean enough so as not to endanger support from its key allies, the USA, Britain or Germany. Examples, include complex and rigorous rules regarding targeted assassination, meant to minimize civilian casualties (as outlined in Decision HCJ 769/02, Public Committee Against Torture in Israel v Government of Israel, 14 December 2006), making every effort to keep it nuclear weapons program low-key, and at least token efforts at compliance with provisions of the Geneva Conventions mandating civilian protection, such as its leaflet drops warning Gaza residents to keep away from Hamas buildings before air raids (Olga Kazan, Israeli Army Drops Warning Leaflets on Gaza” Washington Post (15 Nov. 2012), http://www.washingtonpost.com/blogs/worldviews/wp/2012/11/15/israeli-army-drops-warning-leaflets-on-gaza/).

In 2008, Robert Mugabe was stripped of an honorary British knighthood that had been bestowed 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 Mark of Revulsion,” The Scotsman (25 June 2008)). In close temporal proximity, Mugabe was stripped of several honorary degrees he had been awarded by Western universities in the 1980s, (Paul Kelbie, “Edinburgh University revokes Mugabe degree” The Observer (15 July 2007); “Michigan State Revokes Mugabe’s Honorary Degree” Associated Press (16 Sept. 2008). This does not seem to have had much impact on Mugabe, with his chief spokesperson George Charamba 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” Associated Press (25 April 2007)

Hugo Chavez is a good example of such a figure. At a press conference on 2 August 2012, Chavez denounced European nations for funding Syrian rebels/terrorists in the ongoing conflict in that country, available at: http://www.guardian.co.uk/world/video/2012/aug/02/venezuela-hugo-chavez-syria-video;
actions are unlikely to be responsive to shaming.\textsuperscript{144} These effects are exacerbated if the ruler is also from a powerful country with substantial bargaining power.\textsuperscript{145} Under such circumstances, a ruler is likely to be less responsive to shame sanctions because of the strategic or economic importance of his country.\textsuperscript{146} Even so, unless the ruler has egregiously criminal tendencies,\textsuperscript{147} 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,\textsuperscript{148} or if a dictator without any resistance, he will be weakly responsive at

see also: “Chavez, Ahmadinejad denounce West’s imperialist aggression in Libya, Syria” J\textsuperscript{a}gr\textsuperscript{n} Post (17 Aug. 2011), \url{http://post.jagran.com/chavez-ahmadinejad-denounce-wests-imperialist-aggression-in-libya-syria-1313592746}. In 2006, Chavez famously referred to then-US-President George Bush as “the devil” during a speech to the UN General Assembly, taking the opportunity in follow-up interviews to criticize the Second Iraq War and “Washington-back capitalist reforms in Latin America” (Tim Padgett, “Chavez: “Bush Has Called Me Worse Things”” \textit{TIME Magazine} (22 Sept. 2006), available at \url{http://www.time.com/time/world/article/0,8599,1538296,00.html#ixzz2G6BzUvhc})

\textsuperscript{144} For example, the Taliban destroyed the irreplaceable Bamiyan Buddhas in 2001, despite an international outcry, in which several countries, including Iran, offered to purchase the historical statues, due to a “religious obligation to destroy idols” (Alex Spillius “Taliban ignore all appeals to save Buddhas” \textit{The Telegraph} (5 Mar 2001))

\textsuperscript{145} China and Russia have both been able to use their permanent seats on the Security Council to avoid action on Tibet and Chechnya respectively. 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.

\textsuperscript{146} 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 US criticism on subjects ranging from China’s border disputes with its neighbours (Barbara Demick, “Clinton Draws Criticism from Chinese Ahead of Talks” \textit{LA Times} (4 Sept. 2012); Steven Lee Myers & Jane Perlez “Smiles and Barbs for Clinton in China” \textit{New York Times} (4 Sept 2012) to its support of Syria (“Clinton’s Criticism over Syria is Unacceptable” \textit{Xinhua News} (7 July 2012) \url{http://news.xinhuanet.com/english/china/2012-07/07/c_131701262.htm}).

\textsuperscript{147} 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 the man himself as “possessed of an animal magnetism” which he wielded with “sadistic skill”. Amin attributed God-like powers to himself, and exhibited such irrational behaviour that most foreign leaders who had contact with him came to the conclusion that he was, in fact, clinically insane. Amin was ruthless in dealing with real and imagined political opponents and his reign caused the deaths of an estimated 300 000 people (Patrick Keatley “Obituary: Idi Amin” \textit{The Guardian} (17 Aug. 2011), see also: “Chavez, Ahmadinejad denounce West’s imperialist aggression in Libya, Syria” J\textsuperscript{a}gr\textsuperscript{n} Post (17 Aug. 2011), \url{http://post.jagran.com/chavez-ahmadinejad-denounce-wests-imperialist-aggression-in-libya-syria-1313592746}).

\textsuperscript{148} For example, Robert Mugabe of Zimbabwe. Support for Mugabe’s chief opposition, the Movement for Democratic Change, fell from 38% in 2010 to only 20% in mid-2012 (Lydia Polgreen, “Less Support for Opposition in Zimbabwe, Study Shows”, \textit{New York Times} (22 Augut 2012). 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 Movement for Democratic Change” Institute for Security Studies (3 May 2004) \url{http://dspace.cigilibrary.org/jspui/bitstream/123456789/31353/1/ZIMMAY04.pdf?1}).
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.\textsuperscript{149} To the contrary, in such cases, shaming by international actors 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. The most recent example of this is Mr. Hugo Chavez, the president of Venezuela, who has made his reputation almost entirely on being anti-US. He seems to have profited from this reputation and his embracing of U.S. attempts at shaming has made the sanction impotent when applied to him. Another example is Mr. Ahmedinejad of Iran. This sort of impotency can have some 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 who 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 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.\textsuperscript{150}

Notwithstanding these features, shaming at the regime level offers insights. Burma offers a good case study. Until 1988, Burma was ruled under a one-party military-socialist system. In the wake of political upheaval that year, General Saw Muang seized power and formed a ruling council which implemented a capitalist society, albeit under military control.\textsuperscript{151} In 1990 Saw Muang held elections in which the National League for Democracy (NLD) took roughly 80% of all contested seats. Following this unexpected electoral outcome, the military refused

\textsuperscript{149} Slobodan Milosevic, for example, always positioned himself as the defender of the Serbian people against foreign aggression. In a 2001 BBC interview, following his extradition to face war crimes charges at The Hague, Milosevic’s wife Mira Markovic stated: “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.” 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” (“‘Wife hails Milosevic the ‘freedom fighter’,” \textit{BBC News} (7 Sept 2001) http://news.bbc.co.uk/2/hi/europe/1529200.stm ). Milosevic himself phoned Fox News from his cell to give a live interview stating, “I’m proud of everything I did in defending my country and my people” (Milosevic gives TV interview from cell,” \textit{BBC News} (24 August 2001), http://news.bbc.co.uk/2/hi/europe/1507660.stm)


\textsuperscript{151} It was around this time that the country was officially renamed “Myanmar”.

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to cede power and placed the NLD’s General-Secretary – Aung San Suu Kyi – under house arrest.\textsuperscript{152}

Over the next 20 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.”\textsuperscript{153}

From 1991, the UN General Assembly 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”, there are also examples of language that was clearly pejorative and expressive of a value judgement regarding the junta’s conduct, such as “condemning” or “deploring” their actions,\textsuperscript{154} for instance, UN GA resolution 56/231 adopted in 2001 “[\textit{d}eplo\textit{ring}] 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.”\textsuperscript{155}

Other international organizations also repeatedly condemned human rights abuses in Burma,\textsuperscript{156} with the ILO going so far as to “urge” its members to impose sanctions on

\begin{footnotesize}
\begin{enumerate}
\item The resolution also stated that the General Assembly … “\textit{Deplores} 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”.
\end{enumerate}
\end{footnotesize}
Myanmar unless it improved its forced labour track record in late 2000.\footnote{Thihan Myo Nyun, “Feeling Good or Doing Good: Inefficacy of the US Unilateral Sanctions Against the Military Government of Burma/Myanmar” Wash. U. Glo. Stud. L. Rev., 455 at 478, fn. 97 (2008).} This ultimatum yielded results: Myanmar allowed the ILO to open an office in its territory in 2002 and agreed a plan to end forced labour.\footnote{Id. at 478.} The World Bank also sought to put pressure on the junta by cutting off lending to Myanmar and tying any minor loans to a willingness to institute reforms.\footnote{Id. at note 166, at 156.}

Individual states also took action against the regime. The US began by suspending aid to combat drug trafficking, imposing an arms embargo and discontinuing Burma’s status as a preferred trading partner. These initial sanctions, which were put in place between 1988 and 1990, were explicitly linked to violations of internationally recognized workers rights’ and drug trafficking.\footnote{Ewing-Chow, supra at note 166, at 156.} Despite several attempts to formulate legislation imposing tougher sanctions (e.g., the failed 1995 Free Burma Act),\footnote{“Free Burma Act” introduced to the House of Representatives by Dana Rohrbacher on 25 January 2006, H.R.2892.IH, available at http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.2892.} 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 Myanmar, froze assets of top officials and prohibited granting them visas.\footnote{Sec. 3 of the Act [Ban against Trade that Supports the Military Regime of Burma]; Sec. 4 of the Act [Freezing Assets of the Burmese Regime in the United States]; Sec. 6 of the Act [Expansion of Visa Ban].} It also mandated that the US would block “soft loans” to Myanmar at the IMF and World Bank.\footnote{Sec.5 of the Act [Loans at International Financial Institutions]}

In contrast to other domestic US sanctions legislation, the provisions of the BFDA have never been waived and it was put in force indefinitely, stipulating that it cannot be repealed until substantial and measurable progress has been made on internationally recognized human rights violations, such as forced labour, the conscription of child soldiers and rape, and substantial progress has been made towards forming a democratic government, all political prisoners are released, and

\begin{flushleft}
\textbf{Rapporteur, Mr. Rajsoomer Lallah, submitted in accordance with Commission on Human Rights resolution” (1997/64, E/CN.4/1998/70).}
\end{flushleft}
freedom of speech, of the press, of association and religion are allowed. Further, the Burmese junta must reach a peaceful settlement with the NLD, other democratic forces and Burma’s ethnic minorities.

The EU worked in tandem with the US on the issue of Burma, imposing an arms embargo and refusing all aid, except for humanitarian assistance. In 1996, the EU adopted a Common Position on Myanmar, which also introduced a visa ban for senior Burmese officials, and in 1997, further strengthened the level of its sanctions by suspending Burma from the Generalized System of Preferences programme. In 2000, the EU imposed a freeze on assets held abroad by persons related to the Burmese government.

Shaming by the US and EU has come at severe economic cost to Burma: as a Least Developed Country (a status it has “enjoyed” since 1987), it would otherwise be entitled to (and, of course, in need of) significant financial assistance.

While the West took coercive steps, Burma’s neighbours, acting through ASEAN, preferred what they termed “constructive engagement”, a method of encouraging reform in Burma in a less confrontational manner. 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. In the Burmese face-based culture, this has massive shame implications.

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

164 Sec. 3(3)(A)(B) of the Act; see also, Ewing–Chow, supra at note 163 at 157 et seq.
167 Nyun, supra at note 168, at 478; Ewing-Chow, supra at note 163, at 158 et seq.
168 Ewing-Chow, supra at note 163, at154.
169 Lim, supra at note 162., at209.
170 Lim, supra at note 162, at 211.
Buddhist monks brought renewed attention and strong criticism from international figures: in 2008, Laura Bush, then First Lady of the US, called the violent crackdown on democracy protestors in Burma a “shameful response”, 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.

Significantly, ASEAN stopped its face-saving efforts with Burma and expressed in no uncertain terms “revulsion” at the repression of protests. This term “revulsion” would appear to be the strongest language ever officially used in relation to the situation in Burma.

While a Security Council Resolution calling on Myanmar’s government to stop military attacks against civilians in ethnic minority regions and transition to democracy was vetoed by China and Russia in 2007, likely due to internal concerns in Russia/China (Chechnya/Tibet), attention continued to focus on Burma throughout 2008 at the UN when Human Rights Council Res. 7/31 expressed “deep concern” at the violent repression of protests and deplored the ongoing systematic violation of human rights and fundamental freedoms in Myanmar. It also urged the government of Myanmar to receive a Special Rapporteur. The report of one of the Rapporteurs, issued a few months later, focussed on violations of the Universal

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173 Rice: Myanmar one of ‘worst regimes in the world,” USA Today (16 November 2005).


176 Lim, supra at note 162, at 216, who describes China as being “frustrated” by Burma’s military junta.

177 “Situation of Human Rights in Myanmar”, Human Rights Council Res. 7/31 (28 March 2008), Preamble: “Expressing its deep concern at the situation of human rights in Myanmar, including the violent repression of the peaceful demonstrations of September 2007” and para. 1 “Strongly deplores the ongoing systematic violations of human rights and fundamental freedoms of the people of Myanmar”.

Declaration of Human Rights, such as Art. 19 UDHR (freedom of expression).\textsuperscript{180} The report also considered Articles 9, 10, 11, 19, 20 and 21 of the Universal Declaration to be affected in the case of Aung San Suu Kyi and the excessive use of force to quell protests in September 2007, which according to the report led to 31 deaths, to contravene Art. 29(2) and (3) of the Universal Declaration.\textsuperscript{181} The report also estimated the number of political prisoners to be 1900.\textsuperscript{182}

The ruling junta was not impervious to shaming. It reacted periodically in predictable ways. On Oct. 24, 2007, the government issued a protest note the day after the UN humanitarian coordinator in Burma released a statement critical of the junta’s handling of the protests and expelled him from the country days later on Nov. 2, 2007. The protest note from the Ministry of Foreign Affairs stated that the United Nations statement was "unprecedented" and "very negative" and complained that Burmese officials were not notified in advance of its publication.\textsuperscript{183} In a letter on 5 Nov. 2007 to the UN 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 …. Human rights issues must be addressed with objectivity, respect for national sovereignty and territorial integrity and non-interference in the internal affairs of States. There should be no double standards or politicization of human rights issues.”\textsuperscript{184} The letter blamed the “relentless negative media campaign” for Myanmar becoming “an emotive issue” and attacked the veracity of claims about human rights violations.\textsuperscript{185} It outlined several areas of progress achieved by Myanmar in cooperation with the ILO, attempting to create a reputation as a co-operator state. In reaction to GA Res.

\textsuperscript{181} Id. at para. 27.
\textsuperscript{182} Id.
\textsuperscript{183} Thomas Fuller, “Myanmar Junta expels top UN Official,” \textit{New York Times} (2 November 2007). The letter stated: "The 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."
\textsuperscript{184} “Memorandum on the Situation of Human Rights in the Union of Myanmar: Letter dated 5 November 2007 from the Permanent Representative of Myanmar to the United Nations addressed to the Secretary-General”, available at \url{http://www.un.int/wcm/content/site/myanmar/cache/offonce/pid/2669#_msoanchor_1}
\textsuperscript{185} Id.
65/241, Myanmar “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.” Similarly, in response to GA Res. 60/233, Myanmar’s representative “categorically rejected the allegations and accusations.”

Burma’s leaders were, moreover, not merely subject to shaming directed from other states. The cause of the NLD had also long been a popular one in the public consciousness of many Western nations. As a result, the junta sporadically found itself targeted by shaming actions directed at it by private pressure groups. Realizing that the junta may not be responsive, these groups engaged in secondary shaming against Western companies for “doing business” with Burma.

In 2004, the Burma Campaign UK published the names of 37 companies transacting business with Burma, an action explicitly referred to in the press as “naming and shaming” with those on it reportedly belonging to “a dirty list”. Those named included several high-profile companies, such as Rolls Royce, Lloyds of London, and SWIFT, the financial messaging network partly owned by British firms. Tony Blair, then Prime Minister of the United Kingdom, 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. These tactics had some success, persuading at least 20 firms – most notably British American Tobacco – to exit Burma in 2004. 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

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188 UN GA Res 60/233 (23 March 2006) UN Doc A/RES/60/233.
191 Id.
192 Id.
co-operating with a norm violator, thus isolating the norm violator and discouraging third parties from engaging in similar behaviour.

Until recently, however, the effect of such sanctions remained uncertain. When UN Secretary-General Ban Ki-Moon visited Burma in mid-2009, the ruling council refused to allow a meeting with the opposition leader.\textsuperscript{194} Ki-Moon did, however, procure a pledge from Senior General Than Shwe that elections would be held in 2010 and that they would be free and fair. 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.” 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 UN’s requests. Several powerful States, such as the United Kingdom clearly sent a message that their impatience with Burma was increasing and that if reforms did not materialize “the international community must react firmly”, a sentiment echoed by France.\textsuperscript{195}

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: “\textit{Strongly condemns} the ongoing systematic violations of human rights and fundamental freedoms of the people of Myanmar.”\textsuperscript{196}

Whether owing to the international pressure or for other reasons, the junta decided to hold elections in 2010.\textsuperscript{197} President Thein Sein (a former military commander) was

\textsuperscript{194} Francis Wade “Should Ban Ki-Moon Visit Burma?” \textit{The Guardian} (2 July 2009), \url{www.guardian.co.uk}

\textsuperscript{195} “Secretary-General, briefing Security Council, calls Myanmar’s Refusal to Grant Meeting with Jailed Opposition Leader a Lost Opportunity” UN Press Release (13 July 2009) UN Doc. S/9704.

\textsuperscript{196} UNGA Res 64/238 (24 December 2009) UN Doc A/RES/64/238.

\textsuperscript{197} The crackdown on Burma’s protesting monks was a major source of contention between the junta’s two most powerful generals Than Shwe and Muang Aye, who have been locked in a power struggle for decades. It is possible that the increasingly geriatric Than Shwe (the more powerful of the two) is planning 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. Than Shwe has already suffered several strokes, while Muang Aye has prostate cancer and Prime Minister Thein Sein has a pacemaker. 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 have seemed 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. 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. It was, indeed, after Khin Nyunt
elected, and proceeded to usher in a period of political liberalization, freeing Aung San Suu Kyi, releasing a number of political prisoners, and relaxing censorship laws. As a reward for this behaviour, US Secretary of State Hilary Clinton visited the country in December 2011. Shortly after Clinton’s visit, approximately 600 political prisoners were released from Burma’s jails and a peace agreement was signed with the Karen ethnic group. In 2012 a by-election was held for 45 parliamentary seats, 43 of which were won by the NLD, including a seat for Suu Kyi who entered parliament on May 2 2012. Thereafter, the US loosened some of its restrictions on investment in Burma, while the EU instituted a temporary lift on sanctions.

The release of Aung Sang Suu Kyi and other political prisoners from arrest, as well as their ability to travel, had formed a major point of Western policy on Burma for over 20 years. In September 2012, Suu Kyi made a historic visit to Western Europe and the United States, collecting several important human rights prizes, which had been awarded to her in absentia. Concurrent to her visit, Burma announced the release of some 500 political prisoners on humanitarian grounds. These actions have prompted the EU to consider reinstating Burma’s preferential trading status.

was sacked that ASEAN became increasingly frustrated with the junta and refused to let Burma take its turn at heading the organization. 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. Cyclone Nargis which hit Burma in 2008 may have also contributed to the junta’s weakening grasp on the country, as relief efforts were perceived as ineffective and mismanaged (Win Min, “Looking Inside the Burmese Military” (2008) 48 Asian Survey 1018).


York in September. 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. The minister then went on to make a comparison between the post-Apartheid South Africa, with Suu Kyi in the role of Mandela, and the current Burmese government, in the role of the South African de Klerk government. Two days prior to these comments being made, the US had agreed to lift measures which blocked Burma’s president and members of the lower house of representatives from holding US assets. Relations appear to be improving further still as US President Obama visited Burma in November 2012. During Obama’s visit, Thein Sein showed a certain sensitivity to issues of national pride and shame, specifically speaking of the relationship between the US and Burma as being based on “based on mutual…respect” and stating that human rights in Burma would have to be “aligned with international standards”. 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. By making it apparent that compliance with international standards will not set off a further round of shame and condemnation, but that non-compliance will, the administration has succeeded in wielding shame as an enforcement measure to significant effect.

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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205 Id.
207 Id.
208 Id.
B: Enforcement of Shaming Sanctions

Critics who argue that IL is not law emphasise the lack of a 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 is no agency with authority to make determinations of responsibility that satisfies the requirements of authority, neutrality, and legitimacy. But that is not the whole 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 Organisations (IOs) are capable of performing the adjudicative function to a degree sufficient to meet the requirements of authority, neutrality, and fairness. The United Nations offers a complex example. The consequences for the UN employing shame sanctions are likely to be different depending on whether it is the Security Council or the General Assembly that is the enforcer. Given that the General Assembly is comprised of all the nations of the world with equal voting power which is usually deployed in a partisan manner, it is unlikely that there will be agreement on anything but the most egregious violations of international law. Given the presence of a large number of countries with dictatorships, it is also unlikely that many acts that would be regarded as shameful by liberal democracies will be so viewed by countries ruled by dictators. Even when such states participate in shaming, it might be paying lip-services to norms and hence a form of cheap talk, be muted, or worse, hypocritical. Despite these problems, the General Assembly does engage in shaming; 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 due to the veto power enjoyed by the permanent members. Recent examples such as the difficulty in imposing sanctions on Iran due to opposition from China and Russia suggest that the Security Council may
not be particularly well suited to imposing shame sanctions except for the most egregious violations.

Aside from the United Nations, states are members of a number of small and large international organisations. 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. There is a 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 bullies.”

Shaming by IOs follows similar contours. Their constitutional documents set out a mission and organisational goals, and 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. In some cases, a state that is targeted for sanctioning might relinquish membership rather than face expulsion to deflect shame. For example, in 2003, Zimbabwe quit its membership of the Commonwealth, after a decision to suspend its membership (initially taken in 2002) was maintained indefinitely as a response to the nation’s unfair elections.

Shaming at the IO level also includes adjudicative tribunals set up by treaty regimes. The proliferation of such tribunals, for instance, in the international investment law area, means that some of the process type objections advanced against shaming have much less bite. These tribunals have authority delegated by states via bilateral or multilateral treaties and are required to follow formal legal processes analogous to domestic tribunals. They have the ability to make the necessary findings of fact antecedent to shaming.

210 “Zimbabwe Quits Commonwealth” BBC News (8 Dec. 2003), http://news.bbc.co.uk/2/hi/afrika/3299277.stm, “Zimbabwe was suspended from the Commonwealth last year after an election widely seen as flawed...Mr Mugabe had earlier threatened to leave the 54-nation group if the country was not "treated as an equal".
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 matters. Not only does it matter to the two states, but it also matters to third states because it reinforces the norm and conveys information about the desirability of the offender state as a cooperation partner.

States make evaluative opinions about other states all the time. Some have the resources to make elaborate justifications and provide evidence for those opinions in a legal manner. One example is the United States State Department’s annual human rights reports. These have come in for harsh criticism as being partisan.\(^\text{212}\) As acknowledged by Prof. Kahan in a recantation from his earlier position, partisanship is a major problem for shaming.\(^\text{213}\) The US has also been accused of hypocrisy.\(^\text{214}\) Attacks based on the lack of neutrality and credibility to engage in shaming are severely debilitating, and do 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 US State Department’s reports, and it must ultimately fall to a process of democratic debate 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

\(^{212}\) See, George Gedda, “After Abu Ghraib: The U.S. Human Rights Agenda” (2004) For. Serv. J., noting that William Schulz, executive director of Amnesty International USA, remarked on the occasion of the 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.” Available at http://www.afsa.org/fsj/dec04/Gedda.pdf.

\(^{213}\) Kahan, supra note __ at 2076.

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 Prof. Kahan’s criticisms regarding partisanship may have some salience in the criminal law because of the existence of incarceration as a viable alternative, the absence of better alternatives in IL means that shaming has currency.

3. Domestic Enforcement of IL
   a. Domestic Courts
The gap in enforcement caused by the absence of a world court system with binding universal jurisdiction can be bridged by domestic courts. After all, while sovereign states can claim that they are not subservient to foreign courts, the same claim cannot be held about their own domestic courts. If, as is increasingly becoming more prevalent, domestic courts enforce IL norms against their governments, the criticism about IL lacking coercive enforcement withers away. More specifically for our argument about shaming being the coercive sanction for the enforcement of IL, the criticism about the absence of an adjudication agency to make a finding of responsibility loses sting. Critics might still argue that domestic courts are not sufficiently 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. 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 processual 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 in order to bring its government into behaviour compliant with those norms. We examine some examples below.
1. United States

In *Hamdi v Rumsfeld*, the highest court stated that “[w]e 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.” The court bolstered this view with reference to the Geneva and Hague Conventions, stating that: “[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities”, unless the prisoner is either being lawfully prosecuted or serving a sentence resulting from such a prosecution.

In *Boumediene v Bush*, the court made reference to the Geneva Convention and reiterated that “[t]he Nation’s basic charter cannot be contracted away …. 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 may switch the Constitution on or off at will… [would lead to a regime in which they], not this Court, say “what the law is.”

In both *Hamdan v Rumsfeld* and *Hamdi v Rumsfeld*, the US Supreme Court made extensive references to international treaties and mechanisms in its decisions. The latter case involved a habeas corpus action by a Yemeni national who had been captured in Afghanistan and transported to Guantanamo Bay. After several years in custody he was charged before a military tribunal. The Supreme Court found that the military tribunals, as they had been set up, violated both the UCMJ (Uniform Code of 215 542 US 507 (2004).
216 Citing Youngstown Sheet & Tube, 343 U. S., at 587.
217 553 U.S. 723 (2008). The case was brought by “enemy combatants” being held at Guantanamo Bay. All were non-citizens of the US who had filed a writ of habeas corpus. The US’s Detainee Treatment Act and Military Commissions Act had stated that those held at Guantanamo Bay were not entitled to habeas corpus. The question before the court was thus whether a constitutional guarantee of habeas corpus existed and extended to non-citizens. The court found that in cases where habeas corpus was denied an adequate alternative had to be provided.
219 126 S. Ct. 2749 (2006); this case involved a habeas corpus action by a Yemeni national who had been captured in Afghanistan and transported to Guantanamo Bay. After several years in custody he was charged before a military tribunal. The Supreme Court decided that the military tribunals, as they had been set up, violated both the US Uniform Military Code of Justice and the Geneva Conventions, at p. 567.
220 542 US 507 (2004), concerned an American citizen apprehended in Afghanistan. He was initially transferred to Guantanamo Bay, but later to the US when it was determined that he was an American citizen.
Military Justice of the USA) and the Geneva Conventions. While mainly referring to its own domestic law, the court did make extensive reference to international treaties and mechanisms in its decision. The US government previously argued in Hamdan that the Geneva Conventions did not apply to the case, because the conflict in question existed between the United States and Al-Qaïda rather than between the United States and Afghanistan. Since Al-Qaïda was not a contracting party to the Geneva Conventions, its members did not enjoy their protection. 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 “[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.”” The court considered the commentaries on the Geneva Conventions and a treatise of the Red Cross to determine whether a military tribunal was a “regularly constituted court” as used in Common Article 3.

In a similar vein, in Hamdi v Rumsfeld, the court also again made substantial references to IL in evaluating the conduct of its own government:

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221 Id at page 567. The court specifically stated, “…international sources confirm that the crime charged here is not a recognized violation of the law of war. …. none of the major treaties governing the law of war identifies conspiracy as a violation thereof. And the only “conspiracy” crimes that have been recognized by international war crimes tribunals (whose jurisdiction often extends beyond war crimes proper to crimes against humanity and crimes against the peace) are conspiracy to commit genocide and common plan to wage aggressive war, which is a crime against the peace and requires for its commission actual participation in a “concrete plan to wage war.” 1 Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945–1 October 1946, p. 225 (1947).” At page 610.

222 At page 628.

223 At page 629-630.


225 At page 630-632.


227 “It is a clearly established principle of the law of war that detention may last no longer than active hostilities. 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
“It is a clearly established principle of the law of war that detention may last no longer than active hostilities. 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, 32Stat. 1817 (as soon as possible after “conclusion of peace”); Hague Convention (IV), supra , Oct. 18, 1907, 36Stat. 2301 (“conclusion of peace” (Art. 20)); Geneva Convention, supra , July 27, 1929, 47Stat. 2055 (repatriation should be accomplished with the least possible delay after conclusion of peace (Art. 75)). The court using language that calls on moral norms: “…it 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.” The Court then included a similar quotation from United States v. Robel:228 “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.”

The court was unwilling to cede ground to the government because of the limits of the separation of powers doctrine: “we 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. 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. Youngstown Sheet & Tube, 343 U. S., at 587. … unless 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

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228 389 U. S. 258, 264 (1967).
governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions. … it 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 his detention by his government, simply because the Executive opposes making available such a challenge.” 229 These cases show the judiciary reaching for IL norms, not to enforce them in the normal way it would enforce a domestic law norm, but rather as an aspirational goal, the breach of which would entail shame.

If Hamdi asserted judicial power in keeping executive power in check, Munaf v Geren230 went in the opposite direction: the US 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. The court said, “the [US] 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.” This is a retrograde decision for the shaming argument because the court is restrained based upon a strict view of the separation of powers doctrine. Its deference is because “the other branches possess significant diplomatic tools and leverage the judiciary lacks,”231 and because it does not see itself as a member of the shaming reference group.

2. The United Kingdom

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230 553 US 674, 128 S. Ct. 2207 (June 12 2008).
231 479 F. 3d, at 20, n. 6 (dissenting opinion).
Case law from the UK has also seen this tension between the executive and the judiciary with the latter referring to foreign law and IL norms to hold the former in check. The war on terror, once again, posed the hard questions and the recent case of *Binyam Mohamed*\(^{232}\) saw the Supreme Court using shaming language against an executive that had some complicity in torture:

The common law has long set its face against torture, a practice which it has regarded for centuries with a particular abhorrence reiterated … in the House of Lords in *A v. Secretary of State for the Home Department (No. 2)*. When practised by a State as an instrument of State policy it is a particularly ugly phenomenon … the 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 has attained a particularly high status in the hierarchy of rules constituting international law. It 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. In this it resembles the prohibition on genocide, slavery and the acquisition of territory by force. This superior status has been recognised by international and domestic tribunals.

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 national 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.\(^{233}\)

In *Binyam*, the court relied on *R v Horseferry Road Magistrates Court ex p Bennett*\(^{234}\) 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

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\(^{232}\) The Queen on the Application of Binyan Mohamed v Secretary of State for Foreign and Commonwealth Affairs, [2008] EWHC 2048 (Admin), 2008 WL 381953. Binyam Mohamed was an Ethiopian citizen and UK resident who had been arrested in Pakistan on suspicion of involvement in terrorist activities. He alleged that following his arrest he was tortured in both Afghanistan and Morocco at the behest of the US military. British intelligence were alleged to have been complicit in Binyam Mohammed’s detention, encouraging him to co-operate with his jailers, and supplying them with questions for him to answer.


\(^{234}\) [1994] 1 AC 42 at 67F-H.
only been enabled to do so by participating in violations of international law and 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.\footnote{235}

The court is clearly making an evaluative judgement about norms that transcend its
own jurisdiction. It is then using that judgement 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
UK courts to use shaming language. In Regina (Bancoult) v Secretary of State for
Foreign and Commonwealth Affairs (No 2),\footnote{236} the House of Lords noted “[t]here 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 honour of the United
Kingdom, could be legitimated by executive fiat, is not something which I would find
acceptable.”\footnote{237} 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),\footnote{238} 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,\footnote{239} 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),\footnote{240} the Ninth Circuit Court of Appeals has described
the right to be free from torture as “fundamental and universal”\footnote{241} (Siderman de Blake
v Argentina 965 F 2d 699 (1992), 717) and the UN Special Rapporteur on Torture
(Mr Peter Kooijmans) has said that “If ever a phenomenon was outlawed unreservedly
and unequivocally it is torture” (Report of the Special Rapporteur on Torture,
\footnote{235}{[2008] EWHC 2048 (Admin), 2008 WL 381953, at para. 147.}
\footnote{236}{[2008] UKHL 61.}
\footnote{237}{[2008] UKHL 61, Lord Hoffman, at para. 35.}
\footnote{238}{[2004] EWCA Civ 1123.}
\footnote{239}{Demjanjuk v Petrovsky 612 F Supp 544 (1985), 566.}
\footnote{240}{Higgs v Minister of National Security [2000] 2 AC 228, 260.}
\footnote{241}{Siderman de Blake v Argentina 965 F 2d 699 (1992), 717.}
Lord Bingham also pronounced on the kind 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 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.

Lord Bingham seems to be saying that in order to determine if state behaviour is shameful, not all foreign judicial findings are alike. It is only findings made by a court in the shaming reference group, which 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,” 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.\textsuperscript{243}

The Mau Mau case currently before the British courts is also likely to offer key insights on shaming by domestic courts.\textsuperscript{244} 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.\textsuperscript{245} The British government took the stance that Kenya, and not Britain, was liable for the Mau Mau claims as the successor state to the colonial administration in Kenya. The Kenyan government strongly objected to this argument, stating that it: "does not accept liability for the torture of Kenyans by the British colonial regime. …the Kenyan Republic [cannot] 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…."\textsuperscript{246} The Kenyan position has been supported by activists who have deployed shaming language against the British defence: 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, stating: “…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.”\textsuperscript{247}

In the High Court, at the preliminary stage, Justice McCombe said, “… if the allegations are true (and no doubt has been cast upon them by any evidence before the

\textsuperscript{243} At para. 99.

\textsuperscript{244} The case has been subject to two preliminary judgments, the first concerning whether Kenya or the United Kingdom is the appropriate defendant, \textit{Mutua and Ors v FCO}, [2011] EWHC 1913 (QB), 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 longer possible, \textit{Mutua and Ors v FCO}, [2012] EWHC 2678 (QB).

\textsuperscript{245} \textit{Mutua and Ors v FCO}, [2011] EWHC 1913 (QB), at para. 1.

\textsuperscript{246} “Kenyan Government refutes Britain’s stance on colonial era torture”, (1 April 2010), available at http://www.leighday.co.uk/News/2010/April-2010

\textsuperscript{247} “Kenyan Government refutes Britain’s stance on colonial era torture”, (1 April 2010), available at http://www.leighday.co.uk/News/2010/April-2010
court), the treatment of these claimants was utterly appalling”.\textsuperscript{248} He found that “[t]he evidence shows that those new materials were removed from Kenya upon independence precisely because of their potential to embarrass the UK Government.”\textsuperscript{249} 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 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.”\textsuperscript{250} Further, “the rejection of torture by the common law has a special iconic importance as the touchstone of a humane and civilised legal system.”\textsuperscript{251}

Justice McCombe was unstinting in his employment of shaming in the case before him: “... it 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.”\textsuperscript{252}

Justice McCombe also recognized that the UK had a duty to refrain from torture under Art 14 of the UN Convention against Torture. While noting that this Convention had entered into force many years after the events had occurred, McCombe nonetheless

\textsuperscript{248} Mutua and Ors v FCO, [2011] EWHC 1913 (QB), at para. 1
\textsuperscript{249} Mutua and Others v FCO, [2011] EWHC 1913 (QB), at para. 130.
\textsuperscript{250} Lord Hoffman, in A v Secretary of State for the Home Department (No.2) [2005] UKHL 71, incorporated into Mutua and Others v FCO, [2011] EWHC 1913 (QB) at para. 153.
\textsuperscript{251} Lord Hoffman’s judgment in A v Secretary of State for the Home Department (No.2) [2005] UKHL 71, incorporated into Mutua and Others v FCO, [2011] EWHC 1913 (QB) at para. 153.
\textsuperscript{252} Mutua and Others v FCO, [2011] EWHC 1913 (QB) at para. 154.
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.\textsuperscript{253}

3. Canada

Shaming by domestic courts in reliance upon foreign and IL sources is not only an Anglo-American phenomenon. For e.g., the Canadian Supreme Court decision in \textit{Suresh v Canada} shows similar techniques being employed.\textsuperscript{254} Suresh was a fundraiser for the Tamil Tigers and had originally been granted refugee status in Canada. The court held that Suresh was entitled to a fair procedure:

… we 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”.\textsuperscript{255}

According to the court:

The 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”\textsuperscript{256}

The court was not willing to defer to the executive branch and allow it to transfer Suresh to a foreign state: “… the 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.”\textsuperscript{257}

\textsuperscript{253} \textit{Mutua and Others v FCO}, [2011] EWHC 1913 (QB) at para. 156.
\textsuperscript{254} \textit{Suresh v Canada (Minister for Citizenship and Immigration)} [2002] 1 S.C.R. 3, at para.6
\textsuperscript{255} [2002] 1 S.C.R. 3, at para. 46, quoting an earlier judgment, \textit{Burns}
\textsuperscript{256} [2002] 1 S.C.R. 3, at para.54
The court refused to accept the fig leaf of Canada’s involuntary participation in torture: “… we 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.”

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 principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself.”

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.” 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.

*Suresh* is particularly interesting for 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 to be given to promises made by public officials: “In 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 fulfil the assurances, particularly where there is doubt about the government’s ability to control its security forces.” This idea finds resonance in the case of *AS and DD (Libya) v Secretary of State for the Home*

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Department, where the court cited the ECHR’s insistence that diplomatic assurances be closely examined, ultimately finding that it was acceptable for the UK to reject such assurances offered by Libya on the grounds that Gaddafi and his government did not enjoy a track-record of reliability.

4. Germany

In German legal thought, the idea of shame is somewhat different than that held in the Anglo-Saxon common law tradition. For Germans, to break the law, by itself, is 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 a sense of at least mild 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.

A strong example of shaming is provided by the unlikely source of the German Federal Administrative Court (BVerwG) in its judgment of 21st June 2005. The decision of the US and UK to prosecute the Second Iraq War without a Security Council resolution, thus rendering such a war illegal under IL, was one that mystified many Germans. The court’s decision was reflective of this attitude. 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). 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 USA and other EU States, on multinational missions. The officer’s concerns arose, inter alia, from the fact that

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262 [2008] EWCA Civ. 289
263 [2008] EWCA Civ. 289, at paras. 68-82.
264 One of the authors was educated in Germany, but would also like to thank Prof. Dr. Georg Nolte and his staff at the Humboldt Universitats Berlin for their insights into this issue. The views expressed are, of course, only the authors’ own.
266 BVerwG, 2 WD 12.04, p. 15 et seq.
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. At the time of the officer’s refusal, the war on Iraq had just commenced. However, it was possible that the war would continue for many years and the completed IT project would make all of the aforementioned tasks easier. Throughout the process, the position of the German army was partially based on the stance that the officer’s legal opinion (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 anyway, although several other army personnel took a sympathetic view of the officer’s disruptive behavior, including both his refusal to work on the project, as well as showing up to work in civilian clothing and wearing a white rose affixed to his clothing. On this basis, the on-site legal advisor applied to the Ministry of Defence for an official opinion on the legality of the war, which was duly delivered. The ministry’s paper did not declare the war illegal, but stated that Germany “rejected” military action against Iraq and “regretted” that Iraq’s disarmament was not being pursued peacefully. 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. The officer could not reconcile his work in the army with his conscience and thus refused to obey until the German Constitutional Court decided on the matter. The soldier was eventually transferred to another project, but the army’s disciplinary lawyer began a military process against him. It should be noted that at this point even the official State prosecutors asked the military lawyers to set aside the process on the basis that due to the media attention the possible illegality of the war on Iraq had received, the soldier could not be faulted for having reached the conclusions that he did.

267 BVerwG, 2 WD 12.04, p.18 and 22; the white rose was the symbol of the society of the Scholl-Siblings, young dissidents executed by the Nazis for their pacifist views.
269 See an excerpt from the soldier’s letter to the German Chancellor on p. 21 of the judgment – the implication being that if the BVerfG decided that the war was legal, he would then be able to have a clear conscience about his actions.
270 BVerwG, 2 WD 12.04, p. 23 – meaning that the State prosecution either sympathized with the soldier’s views or preferred to avoid a conflict.
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 Art.4(1) of the German Basic Law and that he therefore had the right to be assigned work that did not require him to disobey his conscience. German soldiers are not required to obey orders that are contrary to international law and the court thus checked to see whether that was the case here.

The BVerwG decision covered 126 pages, 21 of which concerned exclusively with the legality of the Iraq War and Germany’s participation in it, a fairly high proportion, considering that a large part of the judgment was spent going over the facts of the case and dealing with the administrative issues at hand, and the fact that the court is an administrative court and not a court normally primarily seized of international or constitutional matters. In its treatment of the issue, the court managed to rake over numerous facts, which, while true, were potentially quite embarrassing to the US, *inter alia*, reiterating the ICJ interpretation of the prohibition on the use of force used in its *Nicaragua* decision (a decision which was found against the US) and entering into the failed attempts to secure a new resolution against Iraq at the Security Council before remarking somewhat condescendingly that what US representatives “thought” SC Res. 1441 allowed them to do was irrelevant, rather the content of the resolution depended upon what was included in the final text. The court also quoted an interview given by Paul Wolfowitz (a former President of the World Bank) in the magazine *Vanity Fair*, in which he said that the WMD case for war against Iraq had been invented for public consumption because it was a reason everyone could agree on and because it would allow the US administration to overcome “bureaucratic resistance” to the war, before recalling that UN General-Secretary at-the-time Kofi Annan had called the war “an illegal act”.

The court found that there were “serious misgivings under international law about the legality of the war”, described US and UK actions as “offensive, military battle

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271 BVerwG, 2 WD 12.04, p. 27.
272 BVerwG, 2 WD 12.04, p. 34.
273 BVerwG, 2 WD 12.04, p. 73.
274 BVerwG, 2 WD 12.04, p. 77.
275 BVerwG, 2 WD 12.04, p. 77.
276 BVerwG, 2 WD 12.04, p. 80.
actions”, stated that “any state that uses force contrary to the UN-Charter is breaking military law and committing an act of aggression”. It also pointed out that under the laws of neutrality, Germany possibly had the duty to intern US and British soldiers found on its territory in order to prevent them from participating in the war. To top things off, the court did not even check whether the IT project in question was actually contributing to the war in Iraq – they decided that it was enough that the soldier in question had understandable reasons for fearing that it might.

The court’s main quarry, as it were, was however, a domestic one. As its single greatest bullet to the German government, the court stated that when the soldier joined the army (approximately thirty years previously), 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, could ever decide to take supportive military action in favour of the United States and its allies, in a war that was questionable under IL.

The court also repeatedly referred to the fact that decisions of conscience, such as the one under examination before it, were oriented on the categories of “good and evil”. While this is an oft-repeated formula when examining such cases, the court did not exactly pull punches in its repeated referral to it. The latter part of the judgment veritably dripped praise for the soldier concerned, at one point extolling on his “courage” in explaining his reasons for disagreeing with the war to his subordinates, and at another praising the way he treated even the military lawyer with respect during the process against him (very nearly implying that a mere mortal would not have been able to treat his tormentor thus).

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

278 BVerwG, 2 WD 12.04, p. 72.
279 BVerwG, 2 WD 12.04, p. 73.
280 BVerwG, 2 WD 12.04, p. 84.
between justice/law and morality/custom exists or should exist, is at least understandable”.\textsuperscript{285}

Perhaps most surprisingly of all, this 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).\textsuperscript{286} However, generally speaking, the court 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.\textsuperscript{287} Instead of doing this, the court waded into the question as to whether the war on Iraq was illegal and this has been viewed by some as possibly being meant as “a warning” to the government “to prevent similar actions from happening in the future”.\textsuperscript{288} The authors agree with this assessment. The sympathetic treatment the soldier received from many (although it must be stressed, not all) of his superiors, the court’s gushing 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, in this case military matters), point to a German establishment deeply unhappy with the government’s supportive role in the war and willing to fire a shot across its bow, pointing out in the process, the shame experienced as a result of the war.

Any shaming of the US/UK was likely neither per se intended nor avoided, and, indeed, the court went so far as to make an oblique threat to inter their combatants found on German territory. The court’s attitude seems to have been largely that it was merely applying the law; it could hardly be faulted for reiterating facts that were completely true or pointing out obvious axioms of international law. Any state that does not want to be shamed, should simply refrain from such behavior in the first place.

\textsuperscript{285} BVerwG, 2 WD 12.04, p.100.
\textsuperscript{287} Ibid.
\textsuperscript{288} Ibid. at p. 41.
It should probably not be overlooked that the true “master shamer” in this particular process was the German soldier, who managed to bring the full light of the German court system to bear on the German government’s covert military support for the war, simply by refusing to work on a software project.

3. 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. 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 Canadian resident with both Syrian and Canadian citizenship. In 2002, on his way back to Canada from a vacation in Tunisia, Arar was stopped at JFK airport in New York and arrested by US officials, who had been informed by the Canadian federal police that he was a terrorist.\(^{289}\) Arar was transported to Syria, where he was held in custody for nearly a year. He was held in deplorable conditions and beaten for the first few weeks of his imprisonment.\(^{290}\) Unable to withstand this treatment, Arar made false confessions.\(^{291}\) Arar’s plight gained attention from influential Canadians even while he was still held in Syria.\(^{292}\) His eventual return to Canada was accompanied by a media outcry, and the Canadian government set up an inquiry headed by Judge Denis O’Connor.\(^{293}\) This inquiry concluded that “[t]he


\(^{292}\) \textit{Id.} at p. 40.

RCMP provided American authorities with information about Mr. Arar that was inaccurate, portrayed him in an unfairly negative fashion and overstated his importance. Further, “[s]ome Canadian officials did operate under the “working assumption” that Mr. Arar had been tortured. … all 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”. Judge O’Connor’s inquiry also resulted in a number of recommendations for government agencies involved in anti-terrorism work. Recommendation 12 is salient: “Where 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.” Recommendation 13 requires the Department of Foreign Affairs to provide country reports about human rights practices to the relevant agencies and Recommendation 14 requires the agencies to review their practices with regard to sharing information with countries with “questionable human rights records.” Specifically, directions are required for “eliminating any possible Canadian complicity in torture, avoiding the risk of other human rights abuses and ensuring accountability.” The inquiry also recommended that Canada register a formal objection with the US government over the treatment of Arar.

Following the publication of this report, the Canadian government issued a formal apology to Arar and awarded him $10.5 million CDN in compensation. 

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295 Id. at p. 33-34


297 Id. at p. 344 and 345 respectively.

298 Id.

299 Id. Recommendation 22.

US government’s refusal to acknowledge any wrongdoing, several members of the US Congress made individual apologies to him in 2007.\textsuperscript{301}

Part III: The Shaming Reference Group

The preceding discussion about the internal and external dimensions of shame and criticisms about processual 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.\textsuperscript{302} 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 courts – national\textsuperscript{303} and international – international and intergovernmental organisations, nation states and their leaders, international NGOs, and domestic constituencies of the relevant state. Our 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.”\textsuperscript{304} This means that a properly identified shaming reference group has potency for the enforcement of IL norms via shaming.

We offer some examples of shaming reference groups below.

1. The European Union

\textsuperscript{301} Urge the U.S. government to apologise to torture survivor Maher Arar; \url{http://www.amnesty.org/en/appeals-for-action/apologise-to-maher-arar}; “The Unfinished Case of Maher Arar”, \textit{New York Times}, 17 February 2009; “Barack Obama should apologize to Maher Arar, rights groups say”, \textit{Toronto Star}, 22 May 2012

\textsuperscript{302} Braithwaite writes that “sanctions imposed by relatives, friends or a personally relevant collectivity have more effect . . . than sanctions imposed by a remote legal authority . . . because repute in the eyes of . . . acquaintances matters more to people than the opinions or actions of criminal justice officials” at 55.

\textsuperscript{303} For e.g., \textit{R v Horseferry Road Magistrates Court ex p Bennett}, [1994] 1 AC 42 at 67F-H: “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.”

\textsuperscript{304} June Tangney & Rowan Miller, “Are Shame, Guilt, and Embarrassment Distinct Emotions?”, 70 J. Personality & Soc. Psy. 1256, 1261.
The EU serves as a shaming reference group for both structural and historical reasons. Structural, because EU treaties expressly create inter-linkages and transnational accountability institutions that require member states to be responsive to shaming.\footnote{305 Insert relevant treaty provisions about various institutions and relationship to states.} For example, the UK courts are much better able to resist executive pressure to deport terror suspects, because of the existence of the European Court of Human Rights.

Consider the case of \textit{Saadi v Italy}.\footnote{306 (2009) 49 E.H.R.R. 30.} Nassim Saadi was arrested in Italy in 2002, and placed in detention for several years while proceedings, in which he stood accused of several crimes including international terrorism, took place. The case under Italian law proved complex and after approximately four years of proceedings, he was released from detention. However, during the period of his detention, a Tunisian court had found him guilty of terrorism offences (logistical and financial support) \textit{in absentia} and sentenced him to 20 years imprisonment. As a result of this judgment, Italy wished to deport Saadi to Tunisia. Saadi contended that there was a real threat that he would be tortured if this course of action were to be implemented. The Italian courts issued a stay on Saadi’s deportation, but he also requested a stay from the Strasbourg court, which decided that deporting Saadi would be a breach of Art. 3 ECHR, citing its own previous cases \textit{Soering v UK}\footnote{307 161 Eur. Ct. H.R. (ser.A). (1989).} and \textit{Chahal v UK}\footnote{308 1996-V Eur. Ct. H.R. 1831.} which prohibited deportation when there was a real risk of torture or inhumane or degrading treatment to the deportee at their proposed destination.

The UK joined the proceedings in \textit{Saadi} as a third-party intervenor. Both the UK and Italy argued that the court should amend its doctrine on Art. 3 of the Convention – developed in \textit{Chahal} –\footnote{309 Chahal was a radical Sikh living in the UK who was charged with conspiring to murder the Prime Minister of India.} 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.\footnote{310 (2009) 49 E.H.R.R. 30, at paras. 113-116 and 122.} The court was not persuaded; it held that a person’s conduct is irrelevant to the absolute prohibition contained in Art. 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 which could be “balanced”. 311

The case is significant because the UK 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 UK 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. 312 The immediate aftermath of the Saadi opinion offers a classic illustration of how the shaming reference group works. The UK Court of Appeal endorsed the Saadi decision at the earliest opportunity in AS and DD (Libya) v Secretary of State for the Home Department, 313 citing the Eur. Ct. H.R.’s insistence on close scrutiny of diplomatic assurances. 314 The court found that it was reasonable to conclude that the assurances offered to the UK by Libya in AS and DD were inadequate as Gaddafi and his government did not enjoy a track-record of reliability. 315

Due to the European Court’s interpretation of Art. 3, unlike the courts in Canada and the US, 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. v. Secretary of State for the Home Department, 316 an appeal was brought by nine foreign nationals who were suspected of involvement in terrorism, but were not charged with any crime. The UK 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. This provision empowered the government to detain suspected international terrorists pending deportation, despite the fact that removal from the United Kingdom was

312 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”, (2009) 49 E.H.R.R. 30, at para. 148.
313 [2008] EWCA Civ. 289, at paras. 54-61
314 [2008] EWCA Civ. 289, para.68.-
315 [2008] EWCA Civ. 289, the Court entered into the precise evidence regarding the past and possible future unreliability of the Libyan government at paras. 68-82.
temporarily or indefinitely prevented, in derogation from art. 5 of the European Convention on Human Rights. The government claimed that this was necessary to combat the national security threat posed by Al-Qaeda terrorists. The House of Lords, by a majority of 8 to 1, accepted that Al-Qaeda terrorism represented a serious threat to the life of the nation, 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. These same judges also concluded that s. 23 was incompatible with art. 14 of the European Convention on Human Rights, because of the way it discriminated between nationals and non-nationals. The derogation permitting permanent detention of non-nationals treated them more harshly than nationals. Absent the possibility of deportation, it lost its character as an immigration provision, and hence constituted unlawful discrimination.

In *Binyam*, the court relied upon domestic norms and IL norms to shame both its own government and a key ally – the United States: “... the United States 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

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317 *Chahal*
319 The court said, “The common law has long set its face against torture, a practice which it has regarded for centuries with a particular abhorrence reiterated most recently in the speeches in the House of Lords in A v. Secretary of State for the Home Department (No. 2). When practised by a State as an instrument of State policy it is a particularly ugly phenomenon. As Lord Hoffmann explained in that case, at paragraph 82, the use of torture by a State is dishonourable, corrupting and degrading the State which uses it and the legal system which accepts it.” (at para. 142(i)).
320 Referred to the Convention Against Torture and stated that it was “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. In this it resembles the prohibition on genocide, slavery and the acquisition of territory by force.” (at para. 142(ii)). The court cited case law from international tribunals and the US (again at para. 142(ii)).
321 The Court referred to torture as being the subject of the “abhorrence” (at para. 143) and “revulsion” (at para. 147) of the entire legal system, and of cruel, inhumane or degrading treatment as being the subject of international “stigmatism” (at para. 143) and that when it is practiced as part of State policy that is “a particularly ugly phenomenon” (at para. 142(i); it referred to an American judgment, which called torturers “the enem[ies] of all mankind” (*Filartiga v. Pena-Irala*, (1980) 630 F 2d 876, cited at para. 142); it also cited a previous judgment of the Privy Council which referred to confession obtained by torture as having no place in any “civilised society” (*Wong Kam-ming v R*, Lord Hailsham [1980] 1 AC 247, cited at para. 147(v)); The court said, “the United Kingdom Government facilitated the interrogation of BM for part of that period in the knowledge of the reports of the interviews at Karachi which contained information relating to his detention and treatment and to which we have referred at paragraph 87. It is also significant that his detention incommunicado was unlawful under the law of Pakistan.” (at para. 147(vi)).
before the United States Military Commission and a pointer towards the very real
difficulties that BM's lawyers may face in obtaining information under the United
States Military Commissions procedures. … the provision of information as to the
whereabouts of a person in custody would cause no particular difficulty, given that it
is a basic and long established value in any democracy that the location of those in
custody is made known to the detainee's family and those representing him…. to
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 his account
and other essential assistance to his defence. To deny him this at this time would be
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.”

322 The language in these cases again
rises well beyond the application to legal rules to invocations of honour 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.

2. 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
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 the proceedings and decisions of foreign courts in applying IL norms. Third,
since 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 that they refer to

322 The court also said: “The unreasoned dismissal by the United States 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.”

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and follow no particular hierarchy in deciding which view is more persuasive when there is a division between different courts on the issue.\footnote{323} This has generated predictable criticism about activism and partisanship by judges. 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.\footnote{324} In the US, there are even efforts to pass legislation to take away the power of courts to refer to foreign law.\footnote{325}

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. US courts seem to largely reference international law rather than foreign law.\footnote{326} The courts of Canada often reference other courts, mainly from the UK, but on at least one occasion Israel, when debating non-refoulement in relation to suspected terrorists.\footnote{327} Even when these courts come to conclusions that are different from the foreign cases referred to, the discursive process has shaming implications.

For e.g., in recent terrorism cases, Canada and the US rely on Art. 3 of the 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 there other concerns, such as security, need to be taken into consideration when considering deportation to a state in which the deportee may be tortured. In addition, these courts consider whether or not their executives have been able to obtain “diplomatic assurances,” that

\footnote{323} Cite scholarship from US law reviews that criticizes US courts; also cite statements by US supreme court justices O’Connor, Kennedy, Scalia, etc., on referring to foreign law.\footnote{324} cite\footnote{325} cite\footnote{326} cite\footnote{327} In Suresh v Canada, the Canadian Supreme Court 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 government, the 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 combating terrorism and protecting national security: H.C. 6536/95, Hat’m Abu Zaydav. Israel General Security Service, 38 I.L.M. 1471 (1999); Rehman, supra, at para. 54, per Lord Hoffmann”, Suresh v Canada (Minister for Citizenship and Immigration) [2002] 1 S.C.R. 3, at para. 74.
the receiving state will not torture the deportee. These devices recast the issue as one of “balancing”. In the US, 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 (just like Canada) that it was for the executive to determine whether there was a risk of torture. They did not enter into IL in their findings and the issue of non-refoulement was given quite cursory treatment. At the same time, the Supreme Court has insisted fully on its jurisdiction regarding Guantanamo Bay and has made clear that it is its job to ensure that the US is living up to the standards it has set itself and to ensure compliance with obligations of international law in that respect.

In the Canadian Supreme Court case of Charkaoui, the court decided that it was not permissible to hold foreign nationals in detention for alleged terrorism-related activities based on confidential information. In doing so, the court also compared several Canadian anti-terrorism measures to the British Anti-Terrorism Act, doing so under the somewhat circuitous reasoning that the British Anti-Terrorism Act had itself been based on certain aspects of Canadian law and practice. The decision also cited a number of foreign court decisions such as Rasul v Bush and Silvenko v Latvia. It seems essential for the court to justify its conclusions with numerous references to American and English court decisions. It is also notable that it refers to the

329 Munaf v. Geren, 553 U.S. 674 (2008). At page 702, the Court states that “the Judiciary is not suited to second-guess such determinations” referring to determinations as to whether or not a deportee is likely to be tortured at their destination.
330 For example, in Hamdan v Rumsfeld, 126 S. Ct. 2749 (2006), 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 terror”, at pages 625-635.
331 Charkaoui v Canada (Minister for Citizenship and Immigration) [2007] 1 S.C.R. 350, 2007 SCC. 9, para. 80 et seq
332 para. 90
333 para. 90
334 Cite; For example, at para. 124 of its judgment, the Court states: “These 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.).” [2007] 1 S.C.R. 350, 2007 SCC. 9, at para.124.
European Convention by way of citing British decisions and indirectly measures itself by the convention’s standards.  

UK courts take a more eclectic approach to the reference of foreign legal authorities. For example, in Abbott v Secretary of State for Foreign and Commonwealth Affairs,336 the case concerned a British national who had been captured in Afghanistan and held in Guantanamo Bay. The litigants sought to obligate the UK government to take all possible steps to release Abbasi from the “legal blackhole” that was Guantanamo.337 The court mentioned the shared legal tradition of the US and UK 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 UK.338 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.339 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.

3. Other International Organisations

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 US to clarify the status of the inmates and to conduct investigations into accusations of treatment which may amount to torture or other inhumane and degrading treatment, on the grounds

335 The Court devoted several paragraphs of its decision to analysing the British decision A. v. Secretary of State for the Home Department, [2005] 3 All E.R. 169, [2004] UKHL 56 (“Re A”), in which several breaches of the ECHR were determined, before concluding, “[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 effective review process that meets the requirements of Canadian law].” [2007] 1 S.C.R. 350, 2007 SCC. 9., (at para. 125 et seq.).

336 United Kingdom (UK) Supreme Court of Judicature – Court of Appeal (Civil Division): Abbasi v Secretary of State for Foreign and Commonwealth Affairs, (2003) 42 ILM 2 358.


that the US is obligated to prevent such treatment. Throughout its report the Commission emphasized that US 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 US alone to decide. The US 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.

Part IV: Conclusion

States adhere to IL for a variety of reasons including the threat of being shamed. We have 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, we 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. We demonstrated that enforcement of IL norms affects state behaviour in ways similar to traditional coercive sanctions and that states invest considerable effort in avoiding shaming. Our analysis showed several examples of states, regimes and individuals being shamed by international organizations and by domestic courts in the UK, US, 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 behaviour. 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 organisations like the European Union and networks of domestic courts.

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341 (2006) 45 ILM 673, at page 673 et seq.