

SHAME IN THE SECURITY COUNCIL

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ABSTRACT

The decision of the U.N. Security Council to authorize military intervention in Libya in 2011 was greeted as a triumph of the power of shame in international law. At last, it seemed, the usually clashing members of the Council came together, recognizing the embarrassment they would suffer if they stood by in the face of an imminent slaughter of civilians, and atoning for their sins of inaction in Rwanda, Bosnia, and Darfur. The accuracy of this redemption narrative, however, is open to question. Shaming—an expression of moral criticism intended to induce a change in some state practice—is assumed by scholars and practitioners to be a powerful force in international law generally and in the context of humanitarian intervention specifically. In the first study of the operation of shame in humanitarian intervention, this Article tests that assumption.

Grounded both in the promise of sociological approaches to international law and in the reality that states cling dearly to the power to use military force, this Article offers insights on Security Council members' responses to the dire situations that most demand their action. After providing a definition of shame as it applies in international law, a crucial piece of analysis that has been missing from this area of undertheorized assertions and unexplored assumptions, this Article argues that shaming efforts vary according to four dynamics: the influence of the agent of shame, the subject of the shame, the attention of audiences other

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than the agent of shame, and the repeated interactions of the Council's members. Based on this analysis, the Article suggests how states, international organizations, and civil society groups can best deploy the unexpectedly fragile tool of shame in the context of humanitarian intervention. In place of blind reliance on shaming sanctions, efforts should focus on generating the conditions that foster more effective use of shame as one of the vanishingly few—and thus critically important—means of encouraging effective responses to humanitarian crises.

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INTRODUCTION

In the last two decades, humanitarian intervention—the use of military force for the purpose of protecting nationals of a foreign state from large-scale human rights abuses—has become one of the greatest sources of both hope and skepticism in international law. The optimists argue that states are internalizing norms of responsibility and the universality of human rights such that it is now widely agreed that no government will be allowed to violently oppress its own people.¹ The skeptics take the position that even if states agree that mass atrocity is a bad thing, convincing them to act on that belief when they have no direct interest in doing so is another matter.² At the heart of these debates is a puzzle: how can otherwise-uninterested states be convinced to take notice and take action in the face of massive human rights abuses?

The puzzle is further complicated by the legal regime governing humanitarian intervention. The U.N. Charter and customary international law provide that a state may not use armed force against another state, except in cases of self-defense or when authorized by the U.N. Security Council.³ The decisions of the Council, in turn, vary according to the policies and interests of the five permanent members—China, France, Russia, the United Kingdom, and the United States—each with the power

1. See, e.g., GARETH EVANS, *THE RESPONSIBILITY TO PROTECT: ENDING ATROCITY CRIMES ONCE AND FOR ALL* 3 (2008) (“[T]he world has at last started to . . . take the steps necessary to ensure that we will never again have to say ‘never again.’”); EDWARD C. LUCK, *UN SECURITY COUNCIL: PRACTICE AND PROMISE* 85 (2006) (contending that the “humanitarian imperative . . . is much more widely accepted now than . . . in the late 1990s”); Mónica Serrano, *The Responsibility to Protect and its Critics: Explaining the Consensus*, 3 *GLOBAL RESP. TO PROTECT* 425 (2011).

2. See, e.g., Brad R. Roth, *The Enduring Significance of State Sovereignty*, 56 *FLA. L. REV.* 1017, 1044 (2004) (questioning whether foreign policy can be guided by moral priorities); Michael J. Smith, *Humanitarian Intervention: An Overview of the Ethical Issues*, 12 *ETHICS & INT’L AFF.* 63, 70 (describing realist approaches to humanitarian intervention); Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 *AM. J. INT’L L.* 99, 102 (characterizing responsibility to protect as a “political catchword”); Thomas G. Weiss, *The UN’s Prevention Pipe-Dream*, 14 *BERKELEY J. INT’L L.* 423, 432–37 (1996) (discussing political realities of intervention). Beyond these debates, there is great disagreement about whether intervention—military or otherwise—is good policy, either generally or in particular cases. See *infra* Part II.D.

3. See U.N. Charter art. 2, para. 4; *id.* arts. 42, 51 (preserving member states’ “inherent right” of self-defense in the event of an armed attack).

to veto any substantive decision by the Council.⁴ Because of this legal context, the question that persistently troubles thinkers in this area is how to convince the five permanent members of the Security Council that they have a responsibility to stop carnage in far-off places.⁵

In a system of few coercive, formal means of enforcing international law, scholars and practitioners alike have turned to the informal tool of shaming—the expression of moral criticism intended to induce a change in some state practice.⁶ Shaming efforts seek to convince permanent members that they should support humanitarian intervention because of the embarrassment that they will suffer if they idly stand by or block action by willing states. This emphasis on shaming has formed part of a larger movement by constructivist scholars to understand states as social entities, and to investigate how states’ interactions with other actors—whether states, domestic publics, or nongovernmental organizations (“NGOs”)—affect compliance with international norms and the formation and modification of state preferences, among other things.⁷

For those who advocate reliance on shaming, the power of embarrassment in impelling humanitarian intervention has become something of an article of faith. This Article unsettles these assumptions about shaming by undertaking the first investigation of the dynamics of shame in humanitarian intervention. Examining efforts to influence the Security Council and the consequences thereof, I argue that shaming efforts affect the intervention policies of permanent members only in limited circumstances. By probing the contexts in which shaming successfully influences those policies, I offer an examination of four factors that affect the success of shaming—an analysis that ultimately can

4. See U.N. Charter art. 27, para. 3.

5. See, e.g., INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 72–73 (2001) [hereinafter RESPONSIBILITY TO PROTECT] (discussing ways to affect Security Council decisionmaking); Ariela Blätter & Paul D. Williams, *The Responsibility Not to Veto*, 3 GLOBAL RESP. TO PROTECT 301 (2011).

6. See, e.g., David Bosco, *Can Shame Defeat the Veto?*, FOREIGN POL’Y (Feb. 2, 2012), http://bosco.foreignpolicy.com/posts/2012/02/02/can_shame_defeat_the_veto; see also *infra* Part II (discussing attempts to pressure Council members through shaming).

7. See, e.g., Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 641, 699 (2004); Alexander Wendt, *Constructing International Politics*, 20 INT’L SECURITY 71, 71–72 (1995) (“[T]he fundamental structures of international politics are social rather than strictly material . . . and . . . these structures shape actors’ identities and interests.”); see also ALASTAIR IAIN JOHNSTON, *SOCIAL STATES: CHINA IN INTERNATIONAL INSTITUTIONS, 1980–2000* (2008); Alexander Wendt, *Anarchy Is What States Make of It*, 46 INT’L ORG. 391 (1992). In my examination, I do not dispute the work of those scholars who have produced groundbreaking theories of the socialization processes of states. Instead, I seek to contribute to that work by developing a thick account of the circumstances in which shaming is successful and the circumstances in which it is not.

lead to a more realistic, and more effective, approach to influencing Council members to take action in the face of massive humanitarian crises.

The thrust of the problem addressed in this Article can be understood by situating it within the history of intervention over the last two decades. Consider the first battles of the Libyan revolution. Loyalist forces were advancing on the city of Benghazi, and Colonel Muammar el-Qaddafi avowed that they would show “no mercy or compassion” to the opposition.⁸ Policymakers warned that without outside intervention to stop the impending assault, Benghazi would face a massacre, and the world would have the blood of Libya on its hands—the stain of another Rwanda, another Srebrenica.⁹ The U.N. Security Council acted quickly to authorize the use of military action to enforce a no-fly zone in Libya.¹⁰ China and Russia, widely perceived as opponents of humanitarian intervention, did not exercise or even threaten a veto to force the United States and others into the awkward—and illegal—position of acting without Council authorization.¹¹ Instead, Russia and China chose to abstain on the resolution, voicing some reservations about the decision but not blocking it altogether.¹²

Compare this to the events in the Security Council in 1999, when Serb security forces were escalating a campaign of violence against ethnic Albanians in the Kosovo region of the Federal Republic of Yugoslavia. The Council imposed an arms embargo against the ruling Milosevic regime and demanded an end to the violence,¹³ but beyond these preliminary measures, the permanent members were deadlocked. The United States, United Kingdom, and France pushed for the Security Council to authorize military action; Russia and China, however, refused to yield to their pressure and threatened to veto any resolution approving

8. David D. Kirkpatrick & Kareem Fahim, *Qaddafi Warns of Assault on Benghazi as U.N. Vote Nears*, N.Y. TIMES (Mar. 17, 2011), <http://www.nytimes.com/2011/03/18/world/africa/18libya.html?pagewanted=all> (internal quotation marks omitted).

9. See President Barack Obama, Remarks by the President in Address to the Nation on Libya at National Defense University (Mar. 28, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya>; Roland Paris, *Flawed, Perhaps, but Better Than Inaction*, GLOBE AND MAIL (Toronto), Mar. 28, 2011, at A13 (recounting warning by White House officials that Benghazi could be “Srebrenica on steroids” with a death toll of 100,000).

10. See S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

11. See U.N. SCOR, 66th Sess., 6498th mtg. at 3, U.N. Doc. S/PV.6498 (Mar. 17, 2011) [hereinafter Security Council 6498th Meeting].

12. See *id.*; see also Michael Ignatieff, *The Duty to Rescue*, NEW REPUBLIC, Sept. 24, 2008, at 41–43 (predicting that Russian and Chinese power “makes it unlikely that the Security Council will authorize humanitarian interventions again”).

13. See S.C. Res. 1160, ¶ 8, U.N. Doc. S/RES/1160 (Mar. 31, 1998); S.C. Res. 1199, ¶ 4(a), U.N. Doc. S/RES/1199 (Sept. 23, 1998).

the use of armed force.¹⁴ As a result, NATO sidestepped the Council and launched a seventy-eight-day bombing campaign on its own.¹⁵ Two days into the operation, Russia tabled a resolution condemning and demanding an end to the bombing, but the measure failed to gather enough votes to pass, even despite the illegality of the NATO action.¹⁶

Or consider the Security Council's conduct five years before that: over the course of one hundred days, some 800,000 Tutsis and politically moderate Hutus in Rwanda were slaughtered by militiamen, soldiers, shopkeepers, teachers, and farmers wielding guns, machetes, garden tools, and kitchen knives.¹⁷ Soon after the massacre began, the Council voted to slash the U.N. peacekeeping force stationed in Rwanda from 2,558 troops to a meager 270.¹⁸ For the next several weeks, while thousands of people were being killed, raped, and mutilated each day, the members of the Security Council debated from the other side of the world whether to restore the U.N. presence in Rwanda. Even as they watched the events unfold, nearly two months passed and an estimated 500,000 people died¹⁹ before the Council finally voted to authorize the deployment of a weak French military force.²⁰

What changed in the years between the crises in Rwanda, Kosovo, and Libya? It seems clear that Russia and China had not embraced a commitment to humanitarian intervention, which appears by the time of

14. See NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* 261 (2000).

15. See Francis X. Clines, *Missiles Rock Kosovo Capital, Belgrade and Other Sites*, N.Y. TIMES, Mar. 25, 1999, at A1; Craig R. Whitney, *Bombing Ends as Serbs Begin Pullout*, N.Y. TIMES, June 11, 1999, at A1.

16. See Susan L. Woodward, *The Security Council and the Wars in the Former Yugoslavia*, in *THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945*, at 406, 438 (Vaughan Lowe et al. eds., 2008) [hereinafter *SECURITY COUNCIL AND WAR*] (describing defeat of Russian resolution, with only three votes in favor and twelve opposed); see also John C. Yoo, *The Dogs that Didn't Bark: Why Were International Legal Scholars MIA on Kosovo?*, 1 CHI. J. INT'L L. 149, 153–54 (2000) (noting that “[d]espite Kosovo’s . . . legal difficulties, international legal scholars remained noticeably, even remarkably, silent”).

17. See generally PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES* (1998); JEAN HATZFELD, *MACHETE SEASON: THE KILLERS IN RWANDA SPEAK* (Linda Coverdale trans., Farrar, Straus and Giroux 2005).

18. RAMESH THAKUR, *THE UNITED NATIONS, PEACE AND SECURITY* 293 (2006); see also S.C. Res. 912, ¶ 8, U.N. Doc. S/RES/912 (Apr. 21, 1994); Colin Keating, *Rwanda: An Insider's Account*, in *THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* 500, 507–08 (David M. Malone ed., 2004) (describing negotiations leading to resolution).

19. See SEAN D. MURPHY, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER* 244 (1996).

20. See S.C. Res. 929, ¶ 1, U.N. Doc. S/RES/929 (June 22, 1994); see also S.C. Res. 918, ¶¶ 3, 5, U.N. Doc. S/RES/918 (May 17, 1994); Ibrahim A. Gambari, *Rwanda: An African Perspective*, in *THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY*, *supra* note 18, at 512, 517–18 (noting that three months passed before for the first UNAMIR II troops arrived).

the violence in Libya to have become more accepted in the United States—at least in some circumstances.²¹ Nonetheless, some argued that the response to the Libyan revolution showed an understanding by Russia and China that in the face of such unjustifiable violence, to block a Security Council resolution authorizing military intervention would be an embarrassment, a shocking exposure of callous disregard for human rights, for human dignity, for human life.²² Perhaps they did recognize this—though their persistent refusal in subsequent months to authorize sanctions against a murderous regime in Syria suggests otherwise.²³ In order to understand not merely what happened then, but how governments can be influenced in the future, a deeper inquiry into the choices of states with regard to humanitarian intervention is needed. Opening up an area of undertheorized assertions and unexplored assumptions, this Article offers a novel understanding of the role of shaming in humanitarian intervention and a way forward in generating more productive thinking about this crucial field of international law and politics.

This Article proceeds in three Parts. Part I provides a definition of shaming in international law. The term “shaming” is often used to describe how various actors seek to influence the behavior of states, but beyond a few cursory definitions, there has been little exploration of its meaning in international law. Based on a comprehensive study of the literature in international law, international relations, and human rights, this Part provides a definition of shaming, singling out the elements that distinguish shaming as it is understood in international law both from mere criticism of state behavior and from affective processes intended to influence the emotions of individual state actors.

21. Some, however, dispute whether the United States was motivated by humanitarian impulses. See, e.g., Andrew Leonard, *Libya. Oil. War. Is It That Simple?*, SALON (Mar. 21, 2011), http://www.salon.com/2011/03/21/the_libyan_oil_war_connection/.

22. See, e.g., Konstantin Kosachev, *Russia's Choice*, ROSSIISKAYA GAZETA (Moscow), Mar. 25, 2011, at 8; Yun Sun, *China's Acquiescence on UNSCR 1973: No Big Deal*, PACNET (Center for Strategic and Int'l Stud. Pac. F., Honolulu, Haw.), Mar. 31, 2011, at 1, available at <http://csis.org/files/publication/pac1120.pdf>.

23. See Neil MacFarquhar, *At U.N., Pressure Is on Russia for Refusal to Condemn Syria*, N.Y. TIMES, Feb. 1, 2012, at A1; see also U.N. SCOR, 67th Sess., 6711th mtg. at 2, U.N. Doc. S/PV.6711 (Feb. 4, 2012); U.N. SCOR, 66th Sess., 6627th mtg. at 2, U.N. Doc. S/PV.6627 (Oct. 4, 2011) [hereinafter Security Council 6627th Meeting]. Alternative explanations for the surrender on Libya include theories that the United States offered to decrease arms sales to Taiwan and to advocate for Russia's admission to the World Trade Organization in exchange for an abstention, see Ted Galen Carpenter, *The Security Council Vote on Libya: U.S. Concessions to Russia and China?*, NAT'L INT. (Mar. 22, 2011), <http://nationalinterest.org/blog/the-skeptics/the-security-council-vote-libya-us-concessions-russia-china-5057>, or that—like much of the world, it seemed—Russia and China, too, had enough animosity toward Qaddafi to overcome their usual dedication to nonintervention, see Sun, *supra* note 22, at 1.

Part II explains why and how shaming has formed the core of efforts to influence Security Council members in the context of humanitarian crises. After a brief discussion of the limits of legal requirements on the voting behavior of the Council's permanent members, this Part begins by examining early Security Council records that reveal efforts to shame permanent members into responsibly responding to the world's crises during the first days of the Council's operation. It then turns to three recent proposals—open meetings, indicative voting, and the responsibility to protect—that demonstrate a commitment to shaming strategies in efforts to change behavior in the Security Council.

Part III argues that shaming efforts impact permanent members' approaches to humanitarian intervention in only limited circumstances. Examining post-Cold War humanitarian crises, this Part identifies four key factors that impact the success or failure of shaming efforts: (1) the influence of the party that seeks to mobilize shame, referred to here as the "agent of shame"; (2) the subject of the shame; (3) the attention of audiences other than the agent of shame; and (4) the repeated interactions of the Council. This Part concludes that in light of the limits of shaming in motivating humanitarian intervention, proponents of intervention should set their sights on generating conditions for successful shaming rather than blindly seeking to criticize states for their opposition to intervention. It further contends that the dynamics of shame in the Council expose the breaking point of the power of humanitarianism, suggesting that advocates of intervention should take seriously alternatives to military force, which may engender greater support and less resistance on the part of the states with the power to realize such interventions.

The ability and willingness of states to turn their backs on massive human suffering is a concern that defines our humanity. Still, this Article proceeds modestly. It accepts the reality of the permanent-member veto; it recognizes the likelihood of states' limited interest in far-off bloodshed; and it urges a prudent view of the potential of military intervention to cure human rights problems. Some might say that this approach is too modest in light of the enormity of the problem this Article tackles; I take the position that I have chosen a modest approach because of it. Grand gestures of shaming have had little impact. Accordingly, the approach pursued here—one based both in the promise of sociological approaches to international law and in the reality that the use of military force is the power states cling to most dearly—has the potential to transform what is expected of the Council's members in the dire situations that most demand their action.

I. SHAMING IN INTERNATIONAL LAW

How to influence state behavior represents one of the core questions of international law. Although some formal enforcement mechanisms exist, they are at best limited, and most are weak.²⁴ Because no supranational government consistently punishes or threatens to punish states or their leaders for illegal conduct, and because no reliable mechanism can ensure that states consistently compensate one another for harms they inflict, actors in the international system rely heavily on the diverse array of noncoercive mechanisms that may influence state behavior.²⁵

This informal system includes as one of its primary tools the “mobilization of shame.”²⁶ Shaming has a widespread presence in the theory and practice of international affairs. The term “shaming” is used to categorize activities ranging from an NGO’s documentation and exposure of torture and enslavement by the Myanmar military²⁷ to the adoption of a U.N. Human Rights Council resolution condemning those same abuses in Myanmar that already are widely known.²⁸ The human rights movement is said to thrive on the practice of shaming. Ken Roth, the Executive Director of Human Rights Watch, describes it as “the core of our methodology.”²⁹ While advocates attempt to determine how to deploy shame effectively, political scientists theorize the processes by which shaming and other means of influence operate, seeking to understand how outside actors succeed in affecting state preferences and identities.³⁰

24. THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 111 (2002); OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 184 (1991).

25. See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 21 (1990); Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L.J.* 252, 258, 305–08 (2011). See generally ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

26. See generally ROBERT F. DRINAN, *THE MOBILIZATION OF SHAME: A WORLD VIEW OF HUMAN RIGHTS* (2001).

27. See Matthew F. Smith & Naing Htoo, *Energy Security: Security for Whom?*, 11 *YALE HUM. RTS. & DEV. L.J.* 217, 224 (2008).

28. See, e.g., Patrizia Scannella & Peter Splinter, *The United Nations Human Rights Council: A Promise to Be Fulfilled*, 7 *HUM. RTS. L. REV.* 41, 45 n.17 (2007); see also James H. Lebovic & Erik Voeten, *The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR*, 50 *INT’L STUD. Q.* 861 (2006) (studying shaming decisions in the Council’s predecessor, the Commission on Human Rights).

29. Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 *HUM. RTS. Q.* 63, 67 (2004).

30. See, e.g., MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in *THE*

Despite the attention that is paid to shaming and the abundant examples of practices identified as shaming, there exists little analysis of precisely what constitutes the “mobilization of shame.”³¹ Indeed, use of the term has become so prevalent that authors and advocates seem to believe that the term is axiomatic and that its definition is unnecessary. Those definitions of shame that do exist refer vaguely to a process whereby “behavior of target actors is held up to the light of international scrutiny”;³² or, more simply, shame is identified as the “exposure of . . . noncompliance.”³³ But what is shame? To characterize conduct as shaming suggests that it is distinct from some other kind of pressure or criticism, but the unique parameters of shaming have yet to be explored. This Part fills these gaps, and in doing so provides an analytical framework applicable even beyond the specific case of humanitarian intervention. I surveyed the literature in international law, international relations, and human rights for indications about what constitutes shaming in the views of scholars and practitioners. Based on that evaluation, this Part synthesizes a comprehensive explanation of shaming in international law. It then turns to the impact of shaming and examines why shaming has been relied upon despite its questionable effectiveness.

A. *Defining Shame*

For the purposes of this Article, “shaming” refers to an expression of moral criticism intended to induce a change in some state behavior without reliance on formal, legal processes. This Section explains the mechanism of shame, first focusing on the actors that shame and those that are targeted by shame, and then turning to how shame is expected to change state behavior.

POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 1, 15 (Thomas Risse et al. eds., 1999).

31. Even Robert Drinan’s *The Mobilization of Shame*, a work often cited as the background reading on shame in international law, see, e.g., Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT’L L. 462, 511 n.322 (2004); Vicki C. Jackson, *World Habeas Corpus*, 91 CORNELL L. REV. 303, 313 n.46 (2006), provides no definition of shame. See DRINAN, *supra* note 26; see also Elazar Barkan, *Human Rights Leader or Reluctant Supporter?*, 4 INT’L STUD. REV. 199, 200 (2002) (“Drinan presents no comprehensive discussion of shame.”).

32. KECK & SIKKINK, *supra* note 30, at 23.

33. Ole Kristian Fauchald & Jo Stigen, *Corporate Responsibility Before International Institutions*, 40 GEO. WASH. INT’L L. REV. 1025, 1098 (2009).

1. *The Agents and Targets of Shame*

Literature on shaming primarily identifies the main users of shaming tactics—the agents of shame—as nonstate actors or institutions that have no power to make binding law or to enforce the law.³⁴ These actors have few tools at their disposal; unlike states, they cannot impose sanctions, they cannot withhold foreign aid, and they cannot initiate criminal prosecutions. Because of these limits, discussions of the mobilization of shame tend to focus on the use of this tool by NGOs, civil society groups, and institutions like the U.N. Human Rights Council or the Committee Against Torture, the decisions of which have no binding authority.³⁵ Nonetheless, governments and intergovernmental organizations with law-making power also rely heavily on shaming to influence state behavior.³⁶ For example, the U.N. Security Council has the power to issue decisions that are binding on all U.N. member states, but it often uses its resolutions instead to express condemnation of a state's wrongdoing.³⁷ Similarly, along with the many coercive tools it uses, the U.S. government relies on its annual Human Rights Reports to change state behavior by exposing violations.³⁸ Although coercive means of enforcement, such as economic sanctions or prosecutions, are available to these actors, in many contexts they are difficult or costly to employ. Shaming, in contrast, requires no centralized authority, and the sanction can be effective as soon as it is carried out, with no subsequent monitoring requirements. Shaming thus

34. See, e.g., Roth, *supra* note 29, at 67; Bill Steigerwald, *Human Rights and Wrongs*, PITT. TRIB. REV. (Mar. 29, 2003), triblive.com/x/pittsburghtrib/opinion/columnists/qa/s_126235.html (interviewing Amnesty International director William Schulz).

35. See, e.g., JULIE A. MERTUS, BAIT AND SWITCH: HUMAN RIGHTS AND U.S. FOREIGN POLICY 148–50 (2004); Sarah Joseph & Joanna Kyriakakis, *The United Nations and Human Rights*, in RESEARCH HANDBOOK ON INTERNATIONAL HUMAN RIGHTS LAW 1, 26 (Sarah Joseph & Adam McBeth eds., 2010).

36. See Leonard S. Rubenstein, *How International Human Rights Organizations Can Advance Economic, Social, and Cultural Rights: A Response to Kenneth Roth*, 26 HUM. RTS. Q. 845, 848 (2004); see also THE EFFECTIVENESS OF INTERNATIONAL DECISIONS: PAPERS OF A CONFERENCE OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW, AND THE PROCEEDINGS OF THE CONFERENCE 447–56 (Stephen M. Schwebel ed., 1971) (discussing differences between shame by states against other states and shaming by nonstate actors within a country against that government).

37. See, e.g., S.C. Res. 2014, ¶ 2, U.N. Doc. S/RES/2014 (Oct. 21, 2011) (condemning human rights violations by Yemeni authorities). This may be an example of incrementally building the community that ultimately will support coercive action. While the Council might not expect that the condemnation will change the behavior of the target state, the condemnation may still serve to convince other states to pay attention to the violations by the target state and to support more severe sanctions in the future.

38. See DRINAN, *supra* note 26, at 84–94 (arguing that U.S. State Department Human Rights Reports are successful in changing human rights practices in other countries).

provides an opportunity for influence even by actors with alternative means for seeking changes in behavior.

As the term is used in international law, shaming targets the behavior of states. The focus on states presents a crucial distinction from other types of shaming such as shame in criminal law, which emphasizes the impact of shaming on the emotions of individuals.³⁹ As states are ultimately constituted of the people who run them, shame in international law of course seeks to affect the decisions of the individuals who make state policies. The process, however, is understood to center on those individuals' positions as representatives of the state. Accordingly, with only a few exceptions, writers on shame in international law generally give no consideration to the individual government leader's own need to protect her personal reputation for fairness, harshness, morality, or shrewdness. Similarly, in defining shame, no consideration generally is given to any impact that should be had on the individual's personal feelings of pain, isolation, or humiliation. This limited focus on states may be detrimental to our understanding of shame in international law and international relations. When Bill Clinton, for example, apologized in Rwanda for the failures of the international community,⁴⁰ this may have been the product of shame he felt as an individual, as opposed to his absorption of the criticism of the state. Still, despite the limits of this approach, the target of the shame—as the term is understood in this context—is seen to be the state itself, and it is only in the reality that individuals make up a state that the persons who run the state or make state decisions are thought to be a part of the shaming process.⁴¹

39. For a sampling of this innovative work, see MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* (2004); John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 *CRIME & JUST.* 1 (1999); Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 *U. CHI. L. REV.* 733 (1998); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 *U. CHI. L. REV.* 591 (1996); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 *VAND. L. REV.* 2157 (2001); Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 *PSYCHOL. PUB. POL'Y & L.* 645 (1997); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 *MICH. L. REV.* 1880 (1991).

40. See *infra* note 261 and accompanying text.

41. See Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 *J. CONFLICT RESOL.* 3, 26–27 (“[I]nternational legal discussions about ‘mobilization of shame’ can be understood not in the moral sense of creating guilt among states but in an instrumental sense of enhancing reputational and other incentives to abide by commitments.”); cf. Oran R. Young, *The Effectiveness of International Institutions: Hard Cases and Critical Variables*, in *GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS* 160, 177 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992) (discussing sensitivity of individual policymakers “to the social opprobrium that accompanies violations of widely accepted behavioral prescriptions” and their

2. *The Mechanism of Shame*

Shaming seeks to change state behavior through expressions of criticism. The content of this expression, however, has been subject to only limited examination. In their groundbreaking research on interstate socialization and acculturation in human rights law, Ryan Goodman and Derek Jinks situate shaming among the crucial mechanisms of acculturation that are “highly effective and important” in changing state behavior.⁴² While their theory of how acculturation generally affects states includes shaming among such processes, they do not single it out for particular examination. The same is true of the work of Kathryn Sikkink and Margaret Keck, whose “boomerang” theory of transnational advocacy networks considers shaming but does not isolate a definition of what shaming is.⁴³ Oona Hathaway and Scott Shapiro have illuminated through detailed analysis and fine illustrations the concept of “outcasting,” which in part covers the concept of shaming but is broader.⁴⁴ Other literature has attempted to examine the process of shaming in international law through the lens of criminal law, despite significant differences in the meaning and operation of shaming in the two contexts.⁴⁵ I offer here three points in an effort to provide greater clarity on the elements of shaming as it applies in international law.

First, shame relies on moral opprobrium. The tool does not consist merely of an expression of criticism in the sense of dislike or dissatisfaction with a state’s policies. Instead, shaming entails the expression of moral condemnation, an effort to isolate the target of the shame as morally inferior and worthy of censure.⁴⁶ Identifying a state as

“motiv[at]ion] . . . to avoid the sense of shame or social disgrace that commonly befalls those who break widely accepted rules”).

42. Goodman & Jinks, *supra* note 7, at 641, 699; *see also* Ryan Goodman & Derek Jinks, *International Law and State Socialization: Conceptual, Empirical, and Normative Challenges*, 54 DUKE L.J. 983, 992 (2005) (discussing how acculturation can result in “public conformity without private acceptance”).

43. *See generally* KECK & SIKKINK, *supra* note 30.

44. *See* Hathaway & Shapiro, *supra* note 25, at 309.

45. *See, e.g.*, Sandeep Gopalan, *Alternative Sanctions and Social Norms in International Law: The Case of Abu Ghraib*, 2007 MICH. ST. L. REV. 785, 798–800; Lesley Wexler, *The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty*, 20 ARIZ. J. INT’L & COMP. L. 561, 563–65 (2003); *see also supra* Part I.A.1 (discussing differences between shaming as it is understood in the criminal law and in international law).

46. *See* DRINAN, *supra* note 26, at 94; *see also* Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, with Special Reference to Sanctions*, 19 INT’L REV. L. & ECON. 369, 371 (1999) (defining shaming as a sanction for “violations of the moral code”).

diverging from the practices or preferences of another does not necessarily constitute moral condemnation; it might simply identify a difference that the wielder of criticism points out for the purpose of impelling the target to change its practices to align with the wielder's preferences. Similarly, a failure to adhere to some practice because of lack of capacity typically does not invite shaming. For example, Eric Rosand asserts that in order to shame states that do not comply with the Security Council's antiterrorism sanctions regime, the agent of shame would need to show that those states are in violation, not because they have insufficient resources to properly police assets freezes or travel bans, but instead because of a lack of will to do so.⁴⁷ In this observation, he implicitly gestures to the willfulness and moral failure understood to merit shaming tactics in response.⁴⁸ Accordingly, although shaming is recognized as playing a role in a diverse range of areas in international law, including trade⁴⁹ and the environment,⁵⁰ the moral dimension of shame explains the particular salience of shaming in human rights law, and especially in situations of violent conflict or atrocity, in light of the understanding of the norms governing these situations as moral obligations as much as legal ones.⁵¹

This observation aligns with the theory of Ken Roth, who is responsible for perhaps the most famous work on shaming in international law.⁵² Urging human rights organizations to focus their activities on certain types of rights, Roth argued that there must be "relative clarity about the nature of the violation, violator, and remedy" in order for shame to be an effective mobilizer of change in governments.⁵³ Roth asserted that this clarity is necessary because an attempt to stimulate reform will be more difficult when, for example, a government can fairly claim that it lacks adequate resources to prevent a purported violation of a right, as opposed to a situation when it can be shown that the violation results from

47. See Eric Rosand, *The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions*, 98 AM. J. INT'L L. 745, 763 (2004).

48. See *id.*

49. See, e.g., CHRISTINE JOJARTH, CRIME, WAR, AND GLOBAL TRAFFICKING: DESIGNING INTERNATIONAL COOPERATION 39 (2009) (discussing use of shaming in the Kimberly Process to eliminate trade in conflict diamonds).

50. See, e.g., Olav Schram Stokke, *Boolean Analysis, Mechanisms, and the Study of Regime Effectiveness*, in REGIME CONSEQUENCES: METHODOLOGICAL CHALLENGES AND RESEARCH STRATEGIES 87, 97–98 (Arild Underdal & Oran R. Young eds., 2004) (discussing use of shaming in fisheries dispute between Soviet Union and Norway).

51. See James C. Franklin, *Shame on You: The Impact of Human Rights Criticism on Political Repression in Latin America*, 52 INT'L STUD. Q. 187, 187 (2008) (describing shaming as "[t]he most commonly used weapon in the arsenal of human rights proponents").

52. See generally Roth, *supra* note 29.

53. *Id.* at 72.

malfeasance.⁵⁴ The claim of inadequate resources, however, is significant not only because it makes the shaming ultimately less effective, as Roth explains, but also because an assertion that a state is simply unable to meet the needs of its people, absent some other claim of wrongdoing, is not understood to warrant moral condemnation.

Second, shaming identifies a state as diverging from a communal norm, rather than an individual one.⁵⁵ Shaming sanctions are used when norms or practices are shared by a community of which the target of the shame seeks to become or to remain a part. The community dimension explains the relative lack of reliance on shaming for isolationist states such as North Korea. Indeed, perhaps the most sustained discussion of shaming North Korea in recent years arose out of the country's participation in the 2010 World Cup, a communal event that seemed to offer a unique opportunity to express the world's condemnation of that government's practices.⁵⁶ The community dimension might also explain the loss of influence by the U.N. Commission on Human Rights, a body that relied primarily on shaming efforts but that offered membership to notorious abusers of human rights, such as Sudan, Syria, and Zimbabwe. Because the states targeted by the Commission had little interest in being a part of the society of states within the organization, its attempts to shame were meaningless.⁵⁷

Third, there are two distinct ways by which shaming of a government can compel that government to change its practices.⁵⁸ Under one mechanism, the process of shaming operates by mobilizing the threat of some consequential sanction either by the agent of shame or by a third party that has the power to influence the conduct of the offending government.⁵⁹ This could be a local public, which can vote officials out of office or stage protests to challenge the authority of the offending regime. Alternatively, this could be another state or an international organization,

54. *See id.* at 69–72.

55. *See* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996) (defining norms as “social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done”).

56. *See* Paul B. Stares, *A World Cup Shaming*, L.A. TIMES, May 30, 2010, at 40 (“[T]he World Cup offers an unparalleled stage for shaming and further isolating North Korea.”).

57. *See* WALTER KÄLIN & JÖRG KÜNZLI, *THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION* 241 (2009).

58. I focus here on pressure aimed at a particular government in order to change that government's practices, but shaming could also be a mechanism of general deterrence, impelling parties other than the target of the shaming from undertaking the condemned activities.

59. *See* Roth, *supra* note 29, at 67–68; *see also* ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* 286 (1999) (describing the “self-interest” theory of norm compliance).

which would respond to the disclosure or publicity of violations by withholding trade benefits or imposing economic sanctions.⁶⁰ In order to avoid these sanctions, the offending government changes its practices in response to the initial shaming, not because the government recognizes that its practices are wrong or inappropriate, but rather because it wishes to avoid third-party responses.⁶¹ Shaming thus results in “public conformity” with a particular norm “without private acceptance” of it.⁶²

In contrast to the externally focused sanctions mechanism, shaming could also operate based on its internal impact, free of any threat of additional sanction. Under this mechanism, the exposure of immoral or condemnable practices by a state reveals the hypocrisy of the offending government, or the inconsistency of the repressive behavior with the identity that the government seeks to convey to the outside world.⁶³ Calling attention to abuses compels the target state to seek, on its own, to rectify its practices so that they align with the state’s public image. No direct additional pressure from outside is necessary.⁶⁴ At the same time, as discussed above, the personal experience of individual statespersons is not understood to be the target of the shaming,⁶⁵ so any individual disconnect between the projected identity and the exposed identity appears not to be of concern to writers in this area, even though that disconnect may be crucial to effective shaming.⁶⁶ Instead, it is the dissonance between the state’s exposed identity and the identity it wishes to project that leads it to change practices to conform to that outside image.

Because shaming is seen as operating through both mechanisms, effective shaming could produce two types of changes in behavior. Specifically, a shaming campaign could be successful if it convinces a state to stop condemned practices because it accepts that governments have a legal or moral duty not to engage in them. Alternatively, shaming could be successful if it changes a state’s practices because that state fears

60. See *infra* Part III.B.1 (discussing influence of the agent of shame).

61. See Roth, *supra* note 29, at 67–68.

62. Goodman & Jinks, *supra* note 42, at 992. Goodman and Jinks argue, however, that public conformity can provide a first step toward deeper internalization of the norm. See *id.* at 995–96.

63. See Risse & Sikkink, *supra* note 30, at 15; WENDT, *supra* note 59, at 286 (describing “legitimacy” theory of norm compliance).

64. See ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 71–117 (2008) (discussing reputation for compliance and other types of reputation); Rachel Brewster, *Unpacking the State’s Reputation*, 50 HARV. INT’L L.J. 231, 241 (2009) (distinguishing reputation from global standing); see also *infra* Part III.B.2 (discussing impact of shaming regarding norms that form the basis of states’ identity).

65. See *supra* Part I.A.1 (discussing understanding of the target of shaming in international law as states, not individuals).

66. See *supra* text accompanying note 41.

that exposure of its behavior will cause it to experience some loss, even though it does not adhere to any belief in a legal or moral obligation to stop that conduct.

From this discussion, we can conclude that shaming in international law is a strategy adopted by an intergovernmental organization, NGO, or government, whereby moral condemnation is directed at a state for its failure to adhere to some shared norm of conduct. This criticism seeks to change that state's behavior by revealing or calling attention to its failure to adhere to a shared norm and perhaps threatening some sanction to be imposed either by peer governments or by domestic or foreign constituencies. Shaming is finger-pointing; the agent of shame must identify the target as engaging in some conduct that should be stopped.

B. The Effectiveness and Ascendance of Shame

1. Mixed Results

Little scholarly work has examined the mechanism of shaming in practice. Those scholars who have studied the impact of shaming on state behavior have found mixed results. In the first global statistical analysis of the issue, Emilie Hafner-Burton examined whether greater protection of human rights resulted from exposure of political terror and political rights violations in 145 countries between 1975 and 2000.⁶⁷ The regression analysis, which focused on shaming by NGOs, news media, and the United Nations, produced results indicating that the consequences of shaming were varied: "Governments put in the global spotlight for violations often adopt better protections for political rights afterward, but they rarely stop or appear to lessen acts of terror."⁶⁸ Hafner-Burton provides two explanations for this pattern. First, governments have greater capacity to enact and implement legislation protecting political rights, whereas political terror might be more decentralized and thus difficult to control. Second, government leaders may adjust their abuses in response to shaming, such that they escalate political terror to offset loosening of restrictions on political freedoms.⁶⁹

67. See Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT'L ORG. 689, 696 (2008). "Political terror" is defined as "government murder, torture, forced disappearance, political imprisonment, and other acts of political terror," and violations of political rights include restrictions on voting rights and political participation. *Id.*

68. *Id.* at 707.

69. *Id.* at 707–10.

In another quantitative study, James Franklin examined shaming of seven Latin American states by NGOs, intergovernmental organizations, and foreign governments between 1981 and 1995. Franklin found that governments with close economic ties to other countries curbed repression, at least in the short term, after being shamed.⁷⁰ He emphasized, however, the difficulty of assessing any causal connection between shaming and subsequent changes in government policy, in light of the various domestic and international factors that could be at work.⁷¹

Finally, case study research on shaming suggests that public exposure of human rights violations can lead governments to undertake further abuses in order to crack down against domestic opposition, which often escalates activity in the wake of the shaming. Writing about the increased scrutiny of China's human rights practices prior to the 2008 Olympics, Simon Long explained this cycle: "The world spotlight will invite those with grievances to try to air them. The government will do its utmost to stop them," and "[t]he impact of the games on human rights is likely to be on balance negative."⁷² Moreover, even if shaming does not increase repression, it may reinforce government resistance to changing practices. South Korean Foreign Minister Han Sung-joo warned in response to human rights pressure on China that "a simplistic and self-righteous approach to the issue of human rights could be counterproductive by provoking another powerful human sentiment, namely, nationalism."⁷³

2. *Heavy Reliance*

These few studies of shaming have contributed to a preliminary understanding of how state behavior may be influenced in the absence of direct, effective coercive mechanisms. They are not hearty endorsements of shaming; each recognizes the limitations on the tool's effectiveness. Nonetheless, the findings offer a limited conclusion that in some circumstances, shaming may affect states' practices. These studies thus provide an appealing basis for reliance on shaming by actors seeking to change state behavior in arenas in which direct coercion is not available.

70. See Franklin, *supra* note 51, at 206–07.

71. See *id.* at 192.

72. Simon Long, *China's Great Game*, ECONOMIST (Nov. 15, 2007), <http://www.economist.com/node/10125763>.

73. Statement by Han Sung-joo, Minister of Foreign Affairs of the Republic of South Korea, Vienna, June 15, 1993, in HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA-PACIFIC REGION 220 (James T. H. Tang ed., 1995), quoted in Alan M. Wachman, *Does the Diplomacy of Shame Promote Human Rights in China?*, 22 THIRD WORLD Q. 257, 276 (2001).

The Security Council is one such arena. Because of the veto power, permanent members have the capacity to control what the Security Council does or does not do. Actors interested in using or restraining the Council seek to influence the behavior of Security Council permanent members, especially in the context of their decisions on whether to support or oppose the use of coercive mechanisms to address humanitarian crises, but there are no direct legal mechanisms to impact the permanent members. Accordingly, it should be no surprise that proposals for how to influence Security Council members would embrace the tool of shaming.

II. EFFORTS TO SHAME WITHIN THE SECURITY COUNCIL

This Part argues that shaming has formed the core strategy guiding attempts to change behavior in the voting practices of permanent members of the Security Council. The story of efforts to impact the decisions of Security Council members has been told many times, in histories of the institution,⁷⁴ critical analyses of the prospects for reform,⁷⁵ and studies of the dynamics of international organizations.⁷⁶ This Part approaches the Security Council in a different way, tracing in reform efforts a focus on shaming as the primary instrument for changing permanent members' behavior. Section A provides a background for this discussion, explaining the decisions of the drafters of the U.N. Charter to vest control over the use of military force in the Security Council and to grant the permanent members a veto power. Section B then examines three developments in the Security Council's practices to demonstrate this reliance on shaming. First, uncovering original records that have been absent from the volumes of scholarship on Security Council reform, I bring to light attempts to curb permanent members' use of the veto through shaming in the early days of the Council. Second, I interpret post-Cold War efforts to introduce indicative voting and open meetings as efforts to enable shaming of permanent members in the context of humanitarian intervention, such that permanent members would be convinced to avoid using the veto in human rights crises for self-interested reasons. Finally, I explain the "responsibility to protect" principle as a shaming effort.

74. See, e.g., Bardo Fassbender, *Pressure for Security Council Reform*, in *THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY*, *supra* note 18, at 341, 351–52.

75. See, e.g., DIMITRIS BOURANTONIS, *THE HISTORY AND POLITICS OF UN SECURITY COUNCIL REFORM* (2005).

76. See, e.g., JAN WOUTERS & TOM RUYS, *SECURITY COUNCIL REFORM: A NEW VETO FOR A NEW CENTURY?* 19–35 (2005).

A. *The Origins and Implications of the Permanent-Member Veto*

The Security Council was born in the wake of the Second World War both as a necessity and as a compromise. The horrors of the war demonstrated to the Allies the need for an international security mechanism of far greater effectiveness than the interwar League of Nations, which proved to be a dismal failure in collective security and dispute settlement.⁷⁷ The planners of the new United Nations viewed the League's inability to secure the support of the major economic, military, and political powers of the time as one of its main sources of weakness.⁷⁸ To ensure the cooperation of the most powerful states this time around, it was clear that they would have to be given some control over the new organization's activities.⁷⁹ Accordingly, the planners of the United Nations vested responsibility for matters of international peace and security in the Security Council, a smaller organ of the United Nations consisting of five permanent members and a rotating set of non-permanent members.⁸⁰

This responsibility for international peace and security was manifested in the U.N. Charter in two primary ways. First, the Charter empowered the Council to order coercive measures to address threats to the peace, breaches of the peace, and acts of aggression. The power to order coercive measures entailed both the use of armed force and actions not involving the use of armed force, such as economic sanctions or the severance of diplomatic relations.⁸¹ Reinforcing the Security Council's power to order coercive measures was Article 25 of the Charter, which bound member states to comply with all decisions of the Security Council.⁸² Second, Article 2(4) of the Charter prohibited all U.N. member states from resorting to military force without Security Council authorization, except for force used in self-defense.⁸³ The Council thus enjoyed near complete control over the use of armed force by member states. Giving the five

77. See LUCK, *supra* note 1, at 9.

78. See JAMES S. SUTTERLIN, *THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL SECURITY: A CHALLENGE TO BE MET* 3–4 (2d ed. 2003).

79. See LUCK, *supra* note 1, at 10; Lauri Mälksoo, *Great Powers Then and Now: Security Council Reform and Responses to Threats to Peace and Security*, in *UNITED NATIONS REFORM AND THE NEW COLLECTIVE SECURITY* 94, 97–98 (Peter G. Danchin & Horst Fischer eds., 2010).

80. See U.N. Charter art. 23, para. 1. In 1963, the General Assembly voted to expand the number of non-permanent members in the Security Council from six to ten and to increase the required majority from seven to nine votes. See G.A. Res. 1991 (XVIII), ¶ 1, U.N. Doc. A/RES/1991 (Dec. 17, 1963).

81. See U.N. Charter arts. 39, 41–42.

82. *Id.* art. 25.

83. See *id.* art. 2, para. 4; see also *id.* art. 51.

permanent members a veto power over substantive decisions of the Council further ensured that they could preserve their national interests, and thus locked in their support for the new organization.⁸⁴ During negotiations of the Charter, several states attempted to eliminate the veto or to limit its scope, but the position of the soon-to-be permanent members was clear: without a veto, there would be no United Nations.⁸⁵ As a result, despite significant opposition, the permanent-member veto was accepted.⁸⁶

Although the structure of the Security Council was largely accepted as progress from the last failed attempt at international organization,⁸⁷ the reservations about the veto that had concerned delegates during the Charter negotiations persisted, and even heightened, after the organization began to function.⁸⁸ Many questioned the power disparity that they saw as solidified by the veto, and small states in particular worried that the Council would fail to come to their aid because of indecision or disagreement among the permanent members.⁸⁹ Accordingly, although the member states of the United Nations accepted the veto power as the price to be paid for the participation of the “big five,” they almost immediately began to clamor for change.⁹⁰

The urgent interest of U.N. member states in curbing the veto power makes sense in light of its considerable impact, especially in the context of the use of force. In other contexts, a veto or threat of veto could complicate or obstruct concerted action by the international community but would not prevent it altogether. For example, when a veto blocks a resolution that expresses condemnation of a particular state, or when the threat of a veto convinces the sponsors of a resolution to withdraw it from the Council to avoid a negative vote, that veto or threat of veto prevents the Council from expressing some position as one that enjoys the support of the international community. Nonetheless, individual states or groups of states may still declare that position on their own. Even when a permanent member vetoes or threatens to veto a resolution imposing economic sanctions by all U.N. member states against a particular government, those

84. See DAVID L. BOSCO, *FIVE TO RULE THEM ALL: THE UN SECURITY COUNCIL AND THE MAKING OF THE MODERN WORLD* 22–24 (2009).

85. See ANDREI GROMYKO, *MEMOIRS* 116 (1990); HARRY S. TRUMAN, *MEMOIRS: YEAR OF DECISIONS* 273, 313 (1955).

86. See WOUTERS & RUYSS, *supra* note 76, at 5.

87. See BOSCO, *supra* note 84, at 30–31.

88. See *infra* Part II.B.

89. BOSCO, *supra* note 84, at 37; RUTH B. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940–1945*, at 716 (1958).

90. See *infra* Part II.B.

sanctions still could be independently and lawfully instituted by individual states or groups of states.⁹¹ Although a sanctions regime imposed by a group of states may ultimately be less effective than one imposed by the entire U.N. membership,⁹² the legal authority of states to institute those sanctions even in the absence of a Security Council order is clear.⁹³

By contrast, only the Security Council has the legal authority to adopt resolutions authorizing the use of military force.⁹⁴ Other states might ultimately choose to use armed force, as NATO states did in the 1999 Kosovo intervention. But by most accounts, undertaking non-defensive military action—including humanitarian intervention—without the authorization of the Security Council constitutes a violation of international law.⁹⁵ Some commentators have taken the position that the Charter's prohibition on the use of force is a dead letter,⁹⁶ but past practice indicates that even if states are willing to violate the prohibition, they prefer not to do so. In the months leading to NATO's air strikes in the former Yugoslavia, for example, the United States and United Kingdom attempted to secure a resolution authorizing the use of military force in the Council.⁹⁷ Had they not seen some value in Council authorization, they would not have engaged in this process.⁹⁸ Even in the case of the U.S.-led war in Iraq, though not a humanitarian intervention, the United States signaled its preference to undertake the operation with Security Council

91. During the Kosovo crisis, for example, the six-nation Contact Group (Britain, France, Germany, Italy, Russia and the United States) imposed its own sanctions against the Federal Republic of Yugoslavia. *Contact Group Agrees to Sanctions*, BBC NEWS (Apr. 29, 1998), http://news.bbc.co.uk/2/hi/special_report/1998/kosovo/85808.stm.

92. See U.N. Charter art. 25 (requiring U.N. member states to carry out decisions of the Security Council).

93. *But see* NIGEL D. WHITE, *THE LAW OF INTERNATIONAL ORGANISATIONS* 49–50 (2d ed. 2005) (discussing law of countermeasures).

94. See *supra* text accompanying notes 81–83 (discussing prohibition on unauthorized use of force under the U.N. Charter).

95. See, e.g., SCHACHTER, *supra* note 24, at 128; Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 6 (1999).

96. See, e.g., Michael J. Glennon, *Law, Legitimacy, and Military Intervention*, in *JUSTIFYING WAR? FROM HUMANITARIAN INTERVENTION TO COUNTERTERRORISM* 153, 154–55 (Gilles Andréani & Pierre Hassner eds., 2008) (discussing views on the demise of Article 2(4)).

97. See Adam Roberts, *The Use of Force*, in *THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY*, *supra* note 18, at 133, 149–50; see also Paul Heinbecker, *Kosovo*, in *THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY*, *supra* note 18, at 537, 539–40.

98. See Erik Voeten, *The Political Origins of the UN Security Council's Ability to Legitimize the Use of Force*, 59 INT'L ORG. 527, 528 (2005) (examining the “costly” nature of unsuccessful attempts to secure Security Council authorization for the use of force).

authorization, even though ultimately it was willing to invade without the Council's blessing.⁹⁹

The veto power is therefore especially obstructive when it is used to block authorizations of military force professedly sought in support of collective ends.¹⁰⁰ This explains why much of the concern around the veto has centered on situations involving the use of force. The shifting attention of the Security Council from interstate wars to internal conflicts and mass atrocity in the wake of the Cold War, in turn, explains why concerns about influencing the behavior of the Security Council have focused on permanent members' positions on humanitarian intervention. But why has shaming been the chosen method of influence? The election of this strategy owes itself largely to the absence of clear legal limits on Security Council members' conduct in the Council.¹⁰¹ The Charter prescribes only a few general guidelines for the Council's conduct. The Council is required to "act in accordance with the Purposes and Principles of the United Nations,"¹⁰² and it is widely agreed that member states acting through the Council must not violate those *jus cogens* norms of international law that merit special deference.¹⁰³ These requirements, however, say little about how Council members must or may vote on a particular motion or otherwise conduct themselves in the Council.¹⁰⁴

99. See *id.* at 537 (discussing U.S. efforts to obtain Security Council authorization for the 2003 Iraq war); see also President George W. Bush, National Press Conference on Iraq (Mar. 6, 2003), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030306-8.html> (asserting that the United States would call for a vote on the proposed resolution authorizing force in Iraq, "[n]o matter what the whip count is").

100. It is important to note, however, that the veto power may be not only obstructive, but also crucial in safeguarding against pretext. The founders of the United Nations did aim to make a resort to military force difficult. While we generally think of the veto as being used in obstruction of collective ends, it is also a tool that prevents coercive powers from being used *unless* they are being used collectively.

101. See Rosalyn Higgins, *The Place of International Law in the Settlement of Disputes by the Security Council*, 64 AM. J. INT'L L. 1, 1 (1970); Edward C. Luck, *The Council for All Seasons: The Creation of the Security Council and Its Relevance Today*, in SECURITY COUNCIL AND WAR, *supra* note 16, at 61, 62–63; see also Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 28–30 (Int'l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995).

102. U.N. Charter art. 24, para. 2.

103. ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 190 (2004).

104. For discussion of judicial review of Security Council decisions, see Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), Preliminary Objections, 1998 I.C.J. 9, ¶¶ 40–45; Ian Brownlie, *The Decisions of Political Organs of the United Nations and the Rule of Law*, in ESSAYS IN HONOUR OF WANG TREYA 91 (Ronald St. John MacDonald ed., 1994); Tom J. Farer, *Human Rights in Law's Empire: The Jurisprudence War*, 85 AM. J. INT'L L. 117 (1991).

Moreover, the U.N. Charter confers on the Security Council “primary responsibility for the maintenance of international peace and security,”¹⁰⁵ but it does not obligate the Council to act in any particular way under any particular circumstance.¹⁰⁶ Members are not required to convene meetings on a matter simply because there is an ongoing crisis;¹⁰⁷ they are not required to issue resolutions at any particular time or on any particular matter;¹⁰⁸ they are not required to bring resolutions to a vote once they are tabled;¹⁰⁹ and, most important, they are not required to impose sanctions or authorize the use of force.¹¹⁰ Indeed, the Security Council often takes advantage of its discretion not to undertake any of these activities. Despite the Charter’s rendering of the Security Council as the world’s first responder to threats against international peace and security, some, if not all, Council members are often content to remain on the sidelines of global crises. Thus, because the legal requirements on the Security Council to act in particular ways—or to act at all—are so minimal, informal mechanisms are called on to shape behavior. Shaming has emerged as the mechanism of choice for influencing the Council.

B. Exposure and Censure in the Council’s Early Years

Efforts to influence Security Council permanent members’ voting behavior began within months of the Security Council’s first meeting. To convey the message that the veto ought to be used sparingly, opponents of the veto sought to instill in the permanent members a sense that exercise of

105. U.N. Charter art. 24, para. 1.

106. BOSCO, *supra* note 84, at 22. For sources taking the position that the United Nations has a legal duty in some cases to intervene, see MURPHY, *supra* note 19, at 294 n.25.

107. For example, the Council did not hold a meeting until April 2004 on the genocide in Darfur, which had begun in February 2003. See U.N. S.C., Rep. of the Security Council, Aug. 1, 2003–July 31, 2004, at 6–7, U.N. Doc. A/59/2; GAOR, 59th Sess., Supp. No. 2 (2004) (describing Council’s initial work on Darfur).

108. The first resolution the Council issued on the Darfur genocide came only in July 2004, when it voted to impose an arms embargo against the Janjaweed and other nongovernmental entities. S.C. Res. 1556, U.N. Doc. S/RES/1556 (July 30, 2004).

109. The (in)famous “18th resolution” on Iraq was introduced by the United States, United Kingdom, and Spain. See Spain, United Kingdom of Great Britain and Northern Ireland and United States of America: Draft Resolution, U.N. Doc. S/2003/215 (Feb. 24, 2003). They chose not to bring the resolution to a vote after France declared its intention to veto. See Elaine Sciolino, *France to Veto Resolution on Iraq War*, *Chirac Says*, N.Y. TIMES, Mar. 11, 2003, at A10.

110. The requirement of mutual defense was another root of the failure of the League of Nations. The United States could not commit to Article 10 of the League Covenant, which required members to come to one another’s defense, because it would have taken away the Congressional power to declare war. Accordingly, during the negotiations of the U.N. Charter, it was clear that any true collective security arrangement would result in losing U.S. participation. See Leo Gross, *The Charter of the United Nations and the Lodge Reservations*, 41 AM. J. INT’L L. 531, 546–50 (1947).

the veto power was a profound act of disruption that had a moral dimension, a choice that could expose a state to significant costs. Well before the “mobilization of shame” had taken hold as the watchword of the human rights movement, the Security Council was gripped by an effort at shaming.¹¹¹

The first move toward change came through an effort to publicize information about voting. The initial meeting records of the Security Council included statements made by delegates, along with the results of votes, but they did not list the states that voted for or against a motion or that abstained from voting. Instead, they noted only the vote count, usually listing the number of states voting in favor and at times also including the number of votes against and the number of abstentions.¹¹² After six months of operations, however—at which point the Soviet Union already had used its veto power twice, to great surprise¹¹³—the Australian delegate to the Security Council, Herbert Evatt, sought to make the proceedings more public. When a draft resolution calling on member states to sever diplomatic relations with Spain’s Franco regime failed to gather enough votes to pass, Evatt asked that the President of the Security Council count not only the number of votes in favor, but also those against, because “in the interests of the record of the Security Council . . . there should be a record of votes for, votes against and abstentions.”¹¹⁴ Since that time, the meeting records of the Security Council have listed the names of states in the voting minutes rather than merely tallying the final count.¹¹⁵

Evatt staunchly opposed the permanent-member veto.¹¹⁶ During the drafting of the Charter, he had been one of the veto’s most vocal challengers, rallying other delegates to join his campaign, proposing legal

111. See *supra* Part I.A (defining shaming).

112. See, e.g., U.N. SCOR, 1st Sess., 47th mtg. at 378–79, U.N. Doc. S/PV.47 (June 18, 1946) [hereinafter Security Council 47th Meeting] (recording number of abstentions and votes in favor of and against proposals, but not recording which states cast which votes).

113. See U.N. SCOR, 1st Sess., 23d mtg. at 367–68, U.N. Doc. S/PV.23 (Feb. 16, 1946); Security Council 47th Meeting, *supra* note 112, at 378. The Soviets exercised their first veto on a draft resolution on the withdrawal of British and French forces from Syria and Lebanon. Although the veto was ultimately meaningless—the British and French delegates agreed on their own to undertake the actions recommended in the resolution, see INIS L. CLAUDE, JR., *SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION* 155 (2d ed. 1959)—the resort to a veto “astounded” other delegates and Council-watchers, who had expected that vetoes would be reserved for rare cases in which a permanent member deemed a negative vote necessary to defend its national interests, James B. Reston, *Russian Vetoes U.S. Levant Plan; Council Closes*, N.Y. TIMES, Feb. 17, 1946, at 1.

114. U.N. SCOR, 1st Sess., 48th mtg. at 388, U.N. Doc. S/PV.48 (June 24, 1946).

115. See, e.g., *id.* (recording for the first time the names of states and voting positions).

116. See BOSCO, *supra* note 84, at 36.

restrictions on its use, and calling frequent press conferences to inform journalists about the status of negotiations.¹¹⁷ Even after he lost that battle, he continued to challenge the veto by seeking to convince the permanent five of the gravity of their power. During the meeting preceding the one in which he secured the change to Security Council recordkeeping, Evatt stated before the Council that the veto “puts a special responsibility upon those members of the Council whose single vote may veto the action of the rest,” and he implored the permanent members to give “very serious consideration” before they chose to exercise their veto power.¹¹⁸ Evatt urged that delegates should not abandon a resolution in the face of a threatened veto, because the wielder of the veto should have to “take the responsibility of doing it, not of threatening to do it.”¹¹⁹ In light of Evatt’s position on the veto, his proposal to register the voting positions of states may be seen as more than a mere effort to augment the details contained in Security Council records for the sake of proper recordkeeping. Evatt was seeking to challenge any understanding of the veto as a morally neutral act; he aimed to present it instead as a destructive power that imposed on its holder a responsibility to the rest of the world. He conceived of a decision to exercise the veto not simply as one to be guided by the neutral policy preferences of self-interested states, but instead as a choice that could be “unjust.”¹²⁰ To Evatt, the exercise of the veto constituted a moral act that should require deliberation and should risk consequences. Forcing the vetoing state to bear the harsh light of publicity was part of his campaign against it.

This perception of the veto as a public act of weighty responsibility reemerged when North Korean forces invaded South Korea in June 1950. The Soviet delegate had left the Security Council five months earlier, in protest against the continued occupation of the Chinese U.N. seat by the Nationalist government of the Republic of China, which by that time had

117. *See id.*; John K. Jessup, *Evatt: Australian Is Conference Hero*, LIFE, July 23, 1945, at 72, 74, 76.

118. Security Council 47th Meeting, *supra* note 112, at 375; *see also* U.N. SCOR, 1st Sess., 46th mtg. at 356, U.N. Doc. S/PV.46 (June 17, 1946) (statement of Australian representative) (noting that “those on the Council who have been given a very special right called the right of veto . . . should exercise it only in the rarest type of case, and they should defer to the democratic majority of this Council, if there is such a majority”).

119. U.N. SCOR, 1st Sess., 49th mtg. at 438, U.N. Doc. S/PV.48 (June 26, 1946). Concern over the impact of threatened vetoes has continued today, and the Council may be influenced more by threatened vetoes than by exercised vetoes. *See infra* note 139.

120. Cth. Parliamentary Debates, House of Representatives, 30 Aug. 1945, 5037 (Herbert Vere Evatt, Attorney-General and Minister of External Affairs) (Austl.) (discussing ways to curb “capricious or unjust exercise of the veto privilege”).

departed for Taiwan.¹²¹ Meanwhile, the Communist government had established the People's Republic of China on the mainland but remained unrepresented in the United Nations.¹²² In the Soviet Union's absence, the Security Council was able to pass a resolution that condemned the North Korean invasion as a breach of the peace and called on member states to refrain from assisting North Korean authorities.¹²³ It also adopted a resolution recommending that U.N. member states "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area."¹²⁴

The Soviet Union quickly challenged the validity of the resolutions on the grounds that for any decision "on an important matter," the U.N. Charter explicitly required the concurring vote of all permanent members, and the Soviet Union had not cast a concurring vote in either resolution.¹²⁵ The Soviet Union thus put forward the position that a permanent member's absence from the Council was equivalent to a vote in opposition and had the effect of a veto.

This argument ultimately failed, and both abstentions and absences by permanent members have been interpreted as concurrences throughout the existence of the United Nations.¹²⁶ For the purpose of this Article, however, more significant than the outcome of the debate are the arguments deployed to evaluate the Soviet Union's position. At the time, the Security Council had on several occasions accepted votes on non-procedural matters as successful despite the abstention of a permanent member.¹²⁷ Even if the text of the Charter did not wholly support this interpretation, abstention as a matter of practice was equivalent to concurrence.¹²⁸ The new question raised by the Soviet challenge was whether an absence should have the same effect as an abstention or whether the two were distinct. Professor Leo Gross argued that

121. William Stueck, *The United Nations, the Security Council, and the Korean War*, in *SECURITY COUNCIL AND WAR*, *supra* note 16, at 265, 266.

122. *Id.*

123. See S.C. Res. 82, pmb., U.N. Doc. S/1501 (June 25, 1950); *id.* ¶ 3.

124. S.C. Res. 83, at 1, U.N. Doc. S/1511 (June 27, 1950).

125. Cablegram Dated 29 June 1950 From the Deputy Minister of Foreign Affairs of the Union of Soviet Socialist Republics to the Secretary-General Concerning the Security Council Resolution of 27 June 1950 (S/1511), U.N. Doc. S/1517 (June 29, 1950). In defense of its position, the Soviets pointed to the text of Article 27 of the Charter, which states that votes on non-procedural matters require the "concurring votes of the permanent members." See U.N. Charter art. 27, para. 3.

126. BARDO FASSBENDER, *UN SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE* 178–83 (1998).

127. See *id.* at 178.

128. Leo Gross, *Voting in the Security Council: Abstention from Voting and Absence from Meetings*, 60 *YALE L.J.* 209, 224 (1951).

abstention—a decision to be present in the Security Council chamber during a vote, but to not vote either in favor or in opposition to a measure—signaled agreement, “even if it be no more than tacit agreement to the action.”¹²⁹ In contrast, absence—a decision to not be physically present in the chamber for the vote—did not demonstrate such acquiescence, according to Gross. Instead, he argued, absence indicated a refusal to recognize the legitimacy of the Council’s actions, which necessarily implied opposition to any measure passed during that absence.¹³⁰

In their response to Gross, Professors Myres McDougal and Richard Gardner focused on the necessity of physical presence in the Security Council to a state’s capacity to block Council action. Echoing the views of the U.S. Department of State,¹³¹ they argued that in order to veto a resolution, a state must “risk the censure of world opinion.”¹³² A permanent member, they contended, should not be allowed to obstruct global action simply by hiding; the power to defeat an effort at international cooperation should “be exercised in a formal, open manner, for all the world to see and hear.”¹³³ Implicit in their argument was the notion that vetoing a measure should not be too easy, too casual, lest a permanent member too freely use its power in violation of the will of the rest of the world.

Just as Herbert Evatt had sought to impose upon the wielder of the veto a sense of gravity and responsibility, McDougal and Gardner saw in the use of the veto a responsibility that ought to be borne by a permanent member who wished to enjoy such unfettered power.¹³⁴ McDougal and Gardner, however, went one step beyond Evatt. In addition to articulating a sense of responsibility, they expressly asserted that a permanent member should be given the right of veto only if it was subject to the possibility of condemnation for exercising that right.¹³⁵ Quite simply, if a state was going to veto a resolution, it should have to pay a price.

129. *Id.* at 226; *see also id.* at 256 (describing abstention as “tacit consent”).

130. *See id.* at 247–48, 253.

131. *See* Philip C. Jessup, *The United Nations and Korea*, 23 DEP’T ST. BULL. 84, 86 (1950) (opining that the Soviet Union could exercise its power to veto only “by taking . . . responsibility before the world,” not by simply failing to attend the meeting), *quoted in* Myres S. McDougal & Richard N. Gardner, *The Veto and the Charter: An Interpretation for Survival*, 60 YALE L.J. 258, 286 (1951).

132. McDougal & Gardner, *supra* note 131, at 286.

133. *Id.*

134. *See id.* (arguing that in order to impose its will upon the Council, a permanent member must take “responsibility” for exercising the veto).

135. *Id.*

These two incidents in the first years of the Security Council may not be significant when looked at as isolated events. Indeed, these calls to recognize the moral gravity and potential for censure in the veto have been neglected in histories and analyses of Security Council reform. Nonetheless, they serve to demonstrate the early roots of the notion that using the veto is a decision that bears on morality, and that moral condemnation can and should impact the use of the veto.¹³⁶ Over the coming years, however, the exposure and sense of responsibility that Evatt, McDougal, and Gardner sought to instill in the permanent members did not prevent frequent use of the veto. From 1946 to 1989, permanent members exercised their veto power to block Security Council action 193 times.¹³⁷ These vetoes were not limited to matters of vital national interest. Instead, permanent members were quite comfortable exercising their veto power on matters that were not of grave importance to them, and Security Council votes appeared to be yet another forum in which Cold War rivalries could be played out.¹³⁸ Accordingly, when the frequency of vetoes drastically declined after 1990,¹³⁹ cooperation in the Council began to seem possible, and advocates of Security Council reform pushed with new vigor to propose mechanisms to improve the functioning of the

136. See *infra* Part II.C–D (discussing reliance on shaming strategies in veto reform efforts).

137. David M. Malone, *Introduction*, in *THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY*, *supra* note 18, at 1, 7; see also ANJALI V. PATIL, *THE UN VETO IN WORLD AFFAIRS 1946–1990*, at 59–400 (1992) (providing background on vetoes regarding political issues). This count does not include votes on Secretary-General candidates.

138. See David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 *AM. J. INT'L L.* 552, 568 (1993) (“[T]he veto quickly proved to be much more of a problem than even the more pessimistic of the delegations at the San Francisco Conference had probably foreseen.”).

139. See Malone, *supra* note 137, at 7. Between January 1990 and February 2012, permanent members used the veto twenty-five times. See Rep. of the Open-Ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council at 13, U.N. Doc. A/58/47 (2004) (listing vetoes cast until April 2004); Changing Patterns in the Use of the Veto in the Security Council, Global Pol’y Forum, <http://www.globalpolicy.org/component/content/article/102/32810.html#1> (last visited Jan. 24, 2013) (listing vetoes cast through 2008); Meetings Conducted / Actions Taken by the Security Council in 2012, <http://www.un.org/Depts/dhl/resguide/scact2012.htm> (last visited Jan. 24, 2013); Meetings Conducted / Actions Taken by the Security Council in 2011, <http://www.un.org/Depts/dhl/resguide/scact2011.htm> (last visited Jan. 24, 2013); Meetings Conducted / Actions Taken by the Security Council in 2010, <http://www.un.org/Depts/dhl/resguide/scact2010.htm> (last visited Jan. 24, 2013); Meetings Conducted / Actions Taken by the Security Council in 2009, <http://www.un.org/Depts/dhl/resguide/scact2009.htm> (last visited Jan. 24, 2013). This number, however, does not reflect the occasions on which permanent members have threatened a veto, resulting in withdrawal of a resolution. See Susan C. Hulton, *Council Working Methods and Procedure*, in *THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY*, *supra* note 18, at 237, 239 (“[T]he threat . . . of a veto may well be more significant than its actual use.”).

Council.¹⁴⁰ Ideas on the potential for censure to change behavior gained prominence, as advocates of Security Council reform began a sustained effort to stop the veto's reign of terror over the Security Council.

C. Transparency and Accountability in Security Council Reform

1. Informal Consultations

The first efforts to improve the Council in the wake of the Cold War focused on opening it to greater scrutiny from outsiders. Exposure of Security Council decisionmaking was a natural target for reform. The Security Council is a secretive institution, and its processes have long been opaque. Especially after the enlargement of the Council in the 1960s,¹⁴¹ Council members began to rely less on public meetings to reach decisions, and instead turned to private, off-the-record, informal discussions to negotiate positions and compromises.¹⁴² During these "informals," Council members debated measures without any public agenda of their meeting and without any record of their discussions or even the topics discussed. After the informal consultations, they arrived at the formal, public meetings with positions already decided. The formal meetings were public performances of the scripts written during the informals.¹⁴³

By the 1990s, open public meetings took place less frequently than informal consultations.¹⁴⁴ As a result of Council members reaching decisions outside of formal meetings, informal consultations "obviate[d] the need for the veto or for voting altogether."¹⁴⁵ That is, if Council members reached a consensus position during the informal consultations, they could adopt that position without much or even any discussion during the formal meeting. If members were unable to reach an agreement during informal consultations, then the moving party would more likely drop the

140. Security Council reform received widespread attention in the 1990s, but in fact it had been on the General Assembly's agenda since 1979. BOURANTONIS, *supra* note 75, at 32.

141. *See supra* note 80 (describing enlargement of the Council from six to ten non-permanent members).

142. BOURANTONIS, *supra* note 75, at 29–30.

143. *Id.* at 52 (noting that Security Council meetings "were typically convened simply to endorse what had been agreed upon in private"); *see also* DAVIDSON NICOL, *THE UNITED NATIONS SECURITY COUNCIL: TOWARDS GREATER EFFECTIVENESS* (1982).

144. BOURANTONIS, *supra* note 75, at 52.

145. Juergen Dedring, *The Security Council*, in *THE UNITED NATIONS AT THE MILLENNIUM: THE PRINCIPAL ORGANS* 75 (Paul Taylor & A.J.R. Groom eds., 2000).

matter from the Council's agenda before it reached a public, formal meeting.¹⁴⁶

The exclusivity of the Security Council, and frustration that its composition reflected outdated power dynamics, drove states to call for reforms such as participation by non-members in the informal meetings, briefings by the President of the Security Council to non-members after informal consultations, and announcements of upcoming informal meetings in the *U.N. Journal*, the daily digest of meetings taking place and documents being discussed.¹⁴⁷ These efforts aimed to give outsiders a voice in the activities of the Security Council and were ultimately successful in instituting some changes, including briefings by the President to non-members and publication of a provisional agenda in the *Journal*.¹⁴⁸ These changes are typically understood as a way to compensate for the absence of progress on making the Security Council a more representative body, the major focus of reform efforts.¹⁴⁹ But there is more to them than that. Opposition to the Security Council's private meetings originated not only in frustration with the exclusivity of the Council, but also in the concern that the real process of debate was off the record, so outsiders had a view only of the prepared statements and already-determined positions that members presented during formal Council meetings. Because the real, substantive discussions happened behind the scenes, permanent members could not be called on to explain their preferences and were thus insulated from criticism.¹⁵⁰ This lessened the

146. *Id.*

147. Movement of Non-Aligned Countries, Recommended Measures to Enhance the Effective and Efficient Functioning of the Security Council, U.N. Doc. A/AC.247/5(i) (Feb. 13, 1995), reprinted in U.N. Doc. A/49/965 at 94, 97–100 (Sept. 18, 1995); see also Letter Dated 22 December 1997 Signed by Ten Elected Members of the Security Council: Chile, Costa Rica, Egypt, Guinea-Bissau, Japan, Kenya, Poland, Portugal, Republic of Korea and Sweden, reprinted in *Report of the Open-Ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council* at 57–58, U.N. Doc. A/53/47 (Aug. 5, 1999) (calling for greater regulation of the work undertaken in informal consultations); Position Paper on Working Methods of the Security Council, reprinted in *Report of the Open-Ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council* at 59–60, U.N. Doc. A/53/47 (Aug. 5, 1999) (same).

148. See BOURANTONIS, *supra* note 75, at 53–54.

149. See, e.g., AMRITA NARLIKAR, DEADLOCKS IN MULTILATERAL NEGOTIATIONS: CAUSES AND SOLUTIONS 202–03 (2010) (describing attempts to change informal consultation system as compensation for the absence of real reform in the Council); see also Hulton, *supra* note 139, at 245 (noting that prevalence of informal consultations prevented non-members from exerting influence on Security Council members).

150. See JOCHEN PRANTL, THE UN SECURITY COUNCIL AND INFORMAL GROUPS OF STATES: COMPLEMENTING OR COMPETING FOR GOVERNANCE 16 (2006).

power of actors outside of those private consultations to influence the behavior of the permanent members. Greater inclusion of outsiders in these meetings could succeed in bringing the weight of their opinion to bear on the Council.

2. *Indicative Voting*

Following the push for greater opening of Security Council meetings to outsiders, a next focus of reform was on increasing the transparency of the decisionmaking process—and especially of the permanent members' decision to exercise a veto—during those meetings. The strongest push for reform of the veto from within the United Nations came in 2004, with the Report of the Secretary-General's High-Level Panel on Threats, Challenges, and Change.¹⁵¹ The High-Level Panel, convened to address how the United Nations should confront “the world's new and evolving security threats,” focused special attention on the Security Council's failures in the face of genocide and other mass atrocities.¹⁵² The Report took the position that permanent members should not be free to use the veto painlessly, as the veto demands responsibility. It emphasized that “[i]n exchange” for the right of veto, the permanent members “were expected to use their power for the common good”¹⁵³ and “to shoulder an extra burden in promoting global security.”¹⁵⁴

Having established this foundational understanding of the moral dimensions of veto use, the Report proposed “a system of ‘indicative voting,’” through which Security Council members could demand a public explanation of all member states' positions on a proposed resolution prior to a vote.¹⁵⁵ The panel recommended the system as a method to “increase the accountability of the veto function” by exposing vetoing members to criticism, which, ultimately, would limit resort to the veto.¹⁵⁶ As Yehuda Blum describes, the indicative voting system was intended to “shame” the

151. Secretary-General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter High-Level Panel Report].

152. Press Release, Secretary-General, Secretary-General Welcomes Recommendations on More Secure World, Strengthened United Nations, U.N. Press Release SG/2094 (Dec. 2, 2004).

153. High-Level Panel Report, *supra* note 151, at 13.

154. *Id.* ¶ 244.

155. *Id.* ¶ 257. The Panel endorsed the indicative voting system as an alternative to a commitment not to veto in certain situations. See ALEX J. BELLAMY, *GLOBAL POLITICS AND THE RESPONSIBILITY TO PROTECT: FROM WORDS TO DEEDS* 21 (Alex J. Bellamy et al. eds., 2011).

156. High-Level Panel Report, *supra* note 151, ¶ 257; see also THOMAS J. SCHOENBAUM, *INTERNATIONAL RELATIONS: THE PATH NOT TAKEN* 109 (2006) (explaining that indicative voting was intended to “expose a state's position to public scrutiny (and criticism)”).

permanent member on the verge of vetoing a resolution.¹⁵⁷ This proposal has been echoed by states suggesting a requirement that any permanent member exercising a veto must explain its reason for doing so at the time of the vote.¹⁵⁸ Nonetheless, while non-permanent Security Council members and observers continue to push for indicative voting, the proposal has yet to make any progress.

3. *Security Council Reform and the Facilitation of Shaming*

These two proposals exemplify a reliance on shaming tools to influence the behavior of permanent members. In opening meetings to greater scrutiny, reform advocates seek to establish the conditions that may enable shaming—exposure of abuses considered to be a departure from shared moral standards for the purpose of changing that behavior. Indicative voting, meanwhile, seeks to enable other parties to criticize an anticipated veto before it is issued. Instead of being framed explicitly as proposals to enhance the capacity of actors to shame permanent members, however, they are justified as being rooted in “transparency” and “accountability,”¹⁵⁹ concepts that have been prevalent in recent discussions of Security Council reform.¹⁶⁰ Transparency, of course, describes the goal of greater exposure of decisionmaking processes, and more openness to outsiders. The meaning of accountability, however, is more complex, and indicates an insistence that voting decisions of permanent members are matters of responsibility and not of mere interest.

Definitions of accountability vary, but most “emphasize both information and sanctions.”¹⁶¹ That is, accountability consists of both a

157. Yehuda Z. Blum, *Proposals for UN Security Council Reform*, 99 AM. J. INT’L L. 632, 644 (2005); see also Kemal Dervis, *Thoughts on the Report of the High-Level Panel on Threats, Challenges, and Change*, in REFORMING THE UNITED NATIONS FOR PEACE AND SECURITY: PROCEEDINGS OF A WORKSHOP TO ANALYZE THE REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES, AND CHANGE 48, 50–51 (Rachel Weaving ed., 2005).

158. See Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland: Draft Resolution, Improving the Working Methods of the Security Council, Annex ¶ 13, U.N. Doc. A/60/L.49 (Mar. 17, 2006) [hereinafter 2006 Draft Resolution]; Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland: Draft Resolution, Improving the Working Methods of the Security Council, Annex ¶ 18 (Apr. 14, 2011).

159. See 2006 Draft Resolution, *supra* note 158, ¶ 1.

160. See High-Level Panel Report, *supra* note 151, ¶ 258; Robert O. Keohane, *The Concept of Accountability in World Politics and the Use of Force*, 24 MICH. J. INT’L L. 1121, 1139 (2003) (proposing that improving Council transparency “would enhance the potential for public reputational accountability” and “enhance the prospects for publicizing inaction before it is too late”).

161. Keohane, *supra* note 160, at 1124; see also Vaughan Lowe et al., *Introduction to SECURITY COUNCIL AND WAR*, *supra* note 16, at 1, 39 (discussing concept of accountability).

“duty to give account for one’s actions to some other person or body”¹⁶² and a possibility of being held to account for those actions.¹⁶³ In discussions of veto reform, it is assumed that transparency—opening meetings and requiring permanent members to explain their votes in advance—will lead to accountability, but how this process takes place is left unsaid. To the extent that accountability signifies a duty to give account, transparency efforts such as more open meetings and required explanations of vote surely impose such a requirement. But proponents of greater transparency in the Security Council are not so limited in their vision of accountability. Beyond a mere reporting function, they see in these reforms a possibility of Security Council permanent members being held to account for their choice to exercise the veto.

In this regard, veto reform advocates envision some transformative potential in enhancing transparency in the Council. Opening up the Security Council would do more than simply provide information about the members’ decisionmaking processes.¹⁶⁴ It could lead permanent members to change their positions because of threats of censure or criticism.¹⁶⁵ The German delegate to the General Assembly provided a concise explanation of this view: To allow a permanent member to veto without explanation “makes it easier for States to veto a draft resolution unilaterally for national rather than international interests.”¹⁶⁶ Requiring an explanation, in contrast, “would make it more difficult to [veto] and thus bring about substantial progress towards using the right of veto more responsibly.”¹⁶⁷ That is, if a state has to explain itself when it casts a veto, the potential for censure in that public process might sufficiently concern that state so as to deter it from ultimately casting the negative vote. Alternatively, the prospect of censure might convince the state to abandon

162. Colin Scott, *Accountability in the Regulatory State*, 27 J.L. & Soc’y 38, 40 (2000).

163. See Keohane, *supra* note 160, at 1124 (“To be accountable means to have to answer for one’s action or inaction, and depending on the answer, to be exposed to potential sanctions . . .”) (quoting RONALD J. OAKERSON, *Governance Structures for Enhancing Accountability and Responsiveness*, in HANDBOOK OF PUBLIC ADMINISTRATION 114 (James L. Perry ed., 1989)).

164. Even this consequence is questionable. The proposals for indicative voting or explanations of a veto do not ask for any level of detail. See High-Level Panel Report, *supra* note 151, ¶ 257. It is difficult to see how these explanations would be any different from the statements already given before or after a vote during Security Council meetings.

165. See Ian Johnstone, *Discursive Power in the UN Security Council*, 2 J. INT’L L. & INT’L REL. 73, 90 (2005) (“[G]overnments who are required to announce their positions . . . will be less likely to cast a veto if the reasons for it are unlikely to pass muster in the court of international public opinion.”).

166. U.N. GAOR, 54th Sess., 8th plen. mtg. at 12, U.N. Doc. A/54/PV.8 (Sept. 22, 1999).

167. *Id.*

plans to veto even before the indicative round of voting.¹⁶⁸ Advocates of greater transparency in Security Council proceedings thus imagine that enabling other acts to highlight or expose the moral failings of a state choosing to exercise its veto will lead to greater reluctance to use the veto and, ultimately, less use of the veto.

D. Responsibility and Criticism in Humanitarian Intervention

Shaming also forms the basis for one component of the “responsibility to protect” principle, a set of expectations meant to guide decisionmaking about when states and, especially, the Security Council, should respond to humanitarian crises. The notion of a responsibility to protect was developed by the International Commission on Intervention and State Sovereignty (ICISS), an independent body formed in response to the challenges—and failures—of the Security Council’s responses to atrocities in Kosovo, Rwanda, Bosnia, and Somalia.¹⁶⁹ Aiming to shift the terms of the debate from questioning a “right to intervene” to asserting a “responsibility to protect,”¹⁷⁰ the doctrine stands for the proposition that states have a responsibility to protect their own populations, and that if they fail that responsibility, the international community, through the Security Council, has a duty to step in to discharge the responsibility to protect.¹⁷¹ In addition to setting out this dual responsibility, the ICISS sought to establish the conditions under which the Security Council should act to prevent or stop a humanitarian crisis. This framework, mirroring the requirements of just war theory,¹⁷² would require just cause for intervention and a proper intention by the intervenor; military intervention could be pursued only as a last resort; proportional means should be

168. See Blum, *supra* note 157, at 643–44 (discussing purpose of indicative voting proposal). These arguments must be distinguished from theories, like those in the fascinating work of Ian Johnstone, that the processes of deliberation and argumentation are constitutive of state preferences and behavior. See generally IAN JOHNSTONE, *THE POWER OF DELIBERATION: INTERNATIONAL LAW, POLITICS AND ORGANIZATIONS* (2011). Rather than identifying a process of deliberation and argumentation, advocates of indicative voting and other similar proposals simply ask that members explain their positions, which is usually already done in Security Council meetings, either before or after the vote. See SYDNEY D. BAILEY & SAM DAWS, *THE PROCEDURE OF THE UN SECURITY COUNCIL* 218–20 (3d ed. 2005).

169. RESPONSIBILITY TO PROTECT, *supra* note 5, at 2. For a discussion of the origins and development of the responsibility to protect, see Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 *STAN. J. INT’L L.* 319 (2012).

170. RESPONSIBILITY TO PROTECT, *supra* note 5, at 11, 16–18 (explaining rationale for shifting the terms of the debate).

171. See *id.* at 17; see also EVANS, *supra* note 1, at 71–74.

172. See generally CHARLES GUTHRIE & MICHAEL QUINLAN, *JUST WAR: THE JUST WAR TRADITION* (2007).

employed to secure the military objective; there must be a reasonable prospect of success; and the intervention should be undertaken with proper authority—namely, authorization by the Security Council.¹⁷³ The Commission sketched these guidelines in vague terms: The Council should intervene in the event of “large scale” loss of life, for example, but this criterion remained undefined.¹⁷⁴ The Council should use military force only if there are “reasonable prospects” of success,¹⁷⁵ but what constitutes success, and how to forecast those chances, was left to the states to debate.¹⁷⁶

The guidelines proposed by the Commission are not legally binding (though some hope that they could crystallize into a rule of customary international law),¹⁷⁷ but instead are meant to influence permanent members even absent formal rules governing intervention. While the drafters of *The Responsibility to Protect* hoped that states would internalize these norms of intervention, they also anticipated a reliance on shaming: criticism by influential actors could identify Security Council members as deviating from a shared standard of conduct, leading states to change their approach to intervention in response to or out of fear of criticism.¹⁷⁸ Supporters of this “prescriptive” component of the responsibility to protect intend the criteria to provide a useful standard by which outsiders or states within the Council can judge decisions to authorize or veto intervention and decisively condemn any states that are not adhering to the guidelines.¹⁷⁹ Arguing in the General Assembly that the responsibility to protect would compel states to support intervention, Canadian Prime Minister Paul Martin described the doctrine as “an international guarantor of political accountability.”¹⁸⁰

173. See RESPONSIBILITY TO PROTECT, *supra* note 5, at xii.

174. *Id.* at 32–33.

175. *Id.* at 35.

176. See BELLAMY, *supra* note 155, at 85–86 (discussing indeterminacy of the responsibility to protect criteria).

177. See, e.g., Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT'L L. 513, 524 (2009).

178. See Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, 20 ETHICS & INT'L AFF. 143, 149–50 (2006); Aidan Hehir, *The Responsibility to Protect and International Law*, in CRITICAL PERSPECTIVES ON THE RESPONSIBILITY TO PROTECT: INTERROGATING THEORY AND PRACTICE 84, 97 (Philip Cunliffe ed., 2011).

179. Bellamy, *supra* note 178, at 149.

180. U.N. GAOR, 59th Sess., 5th plen. mtg. at 31, U.N. Doc. A/59/PV.5 (Sept. 22, 2004).

E. The Unique Nature of Shame in the Security Council

Efforts to convince permanent members to support intervention in situations of mass atrocity have relied extensively on an expectation, or a hope, that governments can be persuaded to act by the force of international and domestic condemnation.¹⁸¹ At their core, these efforts in the Security Council represent typical examples of shaming—methods of exposing or calling attention to practices that warrant moral condemnation in an effort to end those practices. Shaming is distinct in the context of humanitarian intervention, however, because of the existence of another even more blameworthy perpetrator. When the Council fails to act in Syria or Darfur or Kosovo, it may well be viewed as abdicating a responsibility and thereby exposing permanent members' deviation from the expectations of a community; but such sins are exceeded, or at least paralleled, by those of the genocidaires, the conflict entrepreneurs, the direct perpetrators.¹⁸² Accordingly, even as the deployment of shaming strategies in the context of humanitarian intervention might seem obvious or inevitable in light of the prevalence of this approach in human rights enforcement, the choices of states and advocates to rely on shaming is noteworthy, as it signals an extension of shaming efforts from first-order shaming—condemnation of direct perpetrators of human rights abuses—to second-order shaming—condemnation of the actors that are not direct perpetrators but that have the power to intervene to prevent or stop the abuses undertaken by the direct perpetrators. The following Part considers the outcomes of this novel extension of shaming.

III. THE DYNAMICS OF SHAME IN THE SECURITY COUNCIL

Based on the persistent reliance on shaming in efforts to influence the behavior of the Security Council's permanent members, one would expect that this tool would have proven itself effective. Any such effectiveness, however, has been assumed rather than studied. Analyses of state behavior in this context are in short supply, and they tend to focus on the ultimate outcome of shaming without examining the conditions that lead to either success or failure. We know that the United States avoided intervention in

181. See Bellamy, *supra* note 178, at 149.

182. See MICHAEL BARNETT, *EMPIRE OF HUMANITY: A HISTORY OF HUMANITARIANISM* 236 (2011) (describing efforts to create “something close to a moral equivalence between the perpetrator and the bystander”).

Rwanda and spearheaded it in Kosovo.¹⁸³ We know that China and Russia were expected to veto military action in Darfur,¹⁸⁴ a subject that ultimately never came before the Council. We know that they abstained when the Security Council authorized intervention in Libya.¹⁸⁵ And we know that they vetoed resolutions that would have imposed sanctions, expressed condemnation, and called for a change in government against Syria.¹⁸⁶ Why each government made these decisions, however, has been subject to only cursory discussion.

This Part examines the dynamics of shame in the Security Council. Based on a study of shaming efforts and outcomes in post-Cold War humanitarian crises, this Part seeks to provide insights on when and why pressure on U.N. Security Council members results in support or tolerance for military intervention in humanitarian crises. After considering preliminarily the frequency of the use of shaming efforts to influence the Security Council in its approach to humanitarian intervention, this Part isolates four factors that impact whether shaming efforts affect behavior in the Council: (1) the influence of the agent of shame; (2) the subject of the shame; (3) the attention of audiences other than the agent of shame; and (4) the repeated interactions of the Council.

Three points on scope are in order. The discussion here focuses primarily on the behavior of the United States, China, and Russia, as France and the United Kingdom, it is thought, are not primary, independent drivers of either authorizations for intervention or vetoes in the Council's decisions on humanitarian intervention. It also considers only post-Cold War interventions, in light of the significant differences in the Council's activities and dynamics prior to 1990. Finally, as this Article is concerned with intervention to prevent or stop humanitarian crises, it limits its discussion to efforts to influence third-party states to take action in foreign atrocities, rather than looking at shaming intended to affect the perpetrators of those atrocities in the first place.¹⁸⁷

183. See *supra* notes 13–20 and accompanying text.

184. *Current Situation in Darfur: Hearing Before the H. Comm. on Foreign Affairs*, 110th Cong. 30 (2007) [hereinafter *Current Situation in Darfur*] (statement of John Prendergast, Senior Advisor, International Crisis Group) (discussing theories about anticipated Chinese veto); WOUTERS & RUYS, *supra* note 76, at 17.

185. See *supra* note 12 and accompanying text.

186. See *supra* note 23 and accompanying text.

187. See *supra* Part II.E (discussing difference between first-order shaming of direct perpetrators and second-order shaming of third parties with the power to stop or punish the direct perpetrators).

A. *A Note on the Use of Shaming in Humanitarian Crises*

Popular and scholarly accounts of dynamics in the Security Council often assume that permanent members are pressured heavily by the media, domestic populations, and other states to support intervention in humanitarian crises.¹⁸⁸ A closer examination of the situations before the Council, however, indicates that this is often not the case.

Television has been understood to have a powerful impact on humanitarian intervention,¹⁸⁹ but evidence is mixed. For example, Somalia is often cited as a classic case of the “CNN effect”: heart-wrenching images on twenty-four-hour television news depicting starving children and widespread bloodshed purportedly captured the attention of the American public, which in turn pressured the U.S. government to send military forces to Somalia in 1992.¹⁹⁰ Scholars such as Warren Strobel and Jonathan Mermin, however, have documented that this causal story is inaccurate, as media coverage of Somalia was taking place at the same time that the U.S. government had developed an interest in the crisis there, not prior to it.¹⁹¹ The same is true for the U.S. intervention in Kosovo. Instead of television images of horrific violence motivating the U.S. government to intervene in the crisis in response to public outcry, the news

188. See, e.g., Richard Falk, *The Complexities of Humanitarian Intervention: A New World Order Challenge*, 17 MICH. J. INT’L L. 491, 493 (1996) (“[H]eightened expectations about conformity to minimal human rights standards generate interventional pressures”); Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT’L L. 599, 604 (2003) (noting “mounting pressure to intervene against . . . governments engaged in . . . reprehensible practices”).

189. See, e.g., Falk, *supra* note 188, at 493 (noting capacity of television to generate criticism of government inaction); Lawrence Freedman, *Victims and Victors: Reflections on the Kosovo War*, 26 REV. INT’L STUD. 335, 338 (2000) (noting that the “CNN effect” is “often assumed to be the major factor behind humanitarianism”); George Melloan, *Kofi Annan’s World View Is Not a Model of Clarity*, WALL ST. J., Oct. 5, 1999, at A27 (arguing that television images of violence in Kosovo impelled NATO’s intervention).

190. See, e.g., Bernard C. Cohen, *A View from the Academy*, in TAKEN BY STORM: THE MEDIA, PUBLIC OPINION, AND U.S. FOREIGN POLICY IN THE GULF WAR 8, 9–10 (W. Lance Bennett & David L. Paletz eds., 1994) (claiming that television “mobilized the conscience” of the U.S. government); George F. Kennan, *Somalia, Through a Glass Darkly*, N.Y. TIMES, Sept. 30, 1993, at A25 (asserting that widespread acceptance of the U.S. decision to intervene “lies primarily with the exposure of the Somalia situation by the American media”).

191. See WARREN P. STROBEL, LATE-BREAKING FOREIGN POLICY: THE NEWS MEDIA’S INFLUENCE ON PEACE OPERATIONS 132–36 (1997); Jonathan Mermin, *Television News and American Intervention in Somalia: The Myth of a Media-Driven Foreign Policy*, 112 POL. SCI. Q. 385, 386; see also SUSAN L. CARRUTHERS, THE MEDIA AT WAR 220 (2000); JON WESTERN, SELLING INTERVENTION AND WAR: THE PRESIDENCY, THE MEDIA, AND THE AMERICAN PUBLIC 265 n.63 (2005). According to Robert DiPrizio, the fact that George H.W. Bush was at that point a lame-duck president confirms that even if there was media pressure, it likely did not play into the decision. See ROBERT C. DIPRIZIO, ARMED HUMANITARIANS: U.S. INTERVENTIONS FROM NORTHERN IRAQ TO KOSOVO 148 (2002).

media devoted extensive coverage to the conflict only after the U.S. government was already becoming involved.¹⁹²

In some cases, an absence of shaming efforts targeting inaction has confirmed a government's decision not to intervene. During the Rwandan genocide, U.S. policymakers kept an eye on public attitudes toward the lack of involvement by the United States and United Nations, but no significant public criticism arose regarding the morality of the U.S. inaction (or, for that matter, the policy implications of the U.S. approach).¹⁹³ Instead, many observers expressed agreement with the decision not to intervene in the genocide. The *Washington Post* opined that "not much" could be done, conceding that "in a world of limited political and economic resources . . . Rwanda is in an unpreferred class."¹⁹⁴ Similarly, the *New York Times* took the position that because there was no U.N. force that could deploy quickly enough to respond to such emergencies, "the world has little choice but to stand aside and hope for the best."¹⁹⁵ It was only after the genocide that observers came to vocally denounce U.S. inaction.¹⁹⁶

It is also typically assumed that when the Security Council is divided in its approach to a humanitarian crisis, the state supporting intervention—usually the United States—attempts to shame those states opposing intervention—usually Russia and China—for enabling the continuation of the crisis.¹⁹⁷ This narrative predominates in accounts of battles between the United States and China over intervention in Darfur.¹⁹⁸ Although China did consistently seek to weaken any Security Council action against the Sudanese government,¹⁹⁹ during much of the worst violence in Darfur, the U.S. government was not attempting to shame China into accepting deeper

192. See Steven Livingston, *Media Coverage of the War: An Empirical Assessment*, in *KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION: SELECTIVE INDIGNATION, COLLECTIVE ACTION, AND INTERNATIONAL CITIZENSHIP* 360, 368–70 (Albrecht Schnabel & Ramesh Thakur eds., 2000).

193. SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 373 (2002) (noting that governments "look[] to op-ed pages of elite journals, popular protest, and congressional noise to gauge public interest" in intervention).

194. Editorial, *One, Two, Many Rwandas?*, WASH. POST, Apr. 17, 1994, at C6.

195. Editorial, *Cold Choices in Rwanda*, N.Y. TIMES, Apr. 23, 1994, at A24.

196. POWER, *supra* note 193, at 374.

197. See, e.g., Gary J. Bass, *Human Rights Last*, FOREIGN POL'Y, Mar./Apr. 2011, at 81.

198. See, e.g., *id.* at 83; Bruce W. Jentleson, *Yet Again: Humanitarian Intervention and the Challenges of "Never Again,"* in *LEASHING THE DOGS OF WAR* 277, 288 (Chester A. Crocker et al. eds., 2007).

199. See, e.g., JAMES TRAUB, *THE BEST INTENTIONS: KOFI ANNAN AND THE UN IN THE ERA OF AMERICAN WORLD POWER* 220 (2006); Ian Taylor, *The People's Republic of China*, in *THE INTERNATIONAL POLITICS OF MASS ATROCITIES: THE CASE OF DARFUR* 176, 180 (David R. Black & Paul D. Williams eds., 2010).

U.N. involvement. Instead of pushing China and condemning its tolerance of the atrocities taking place, the United States acquiesced in China's demands for greater leniency. Washington chose this approach in hopes that China would use its leverage with the Sudanese government to pressure Khartoum into accepting the deployment of a U.N. peacekeeping force to Darfur.²⁰⁰ Indeed, because of the U.S. government's judgment that it needed China's cooperation in order for any progress to be made in resolving the conflict, it in fact sought to deflect criticisms of China's policy on Darfur.

For example, during his term as U.S. Special Envoy for Sudan, Andrew Natsios repeatedly called attention to Chinese efforts to seek peace in Darfur, while behind the scenes the United States was relying on China to convince the Sudanese government to accept deployment of a U.N. peacekeeping force.²⁰¹ During a January 2007 visit to China, for example, Natsios told reporters that the Chinese were "engaging much more aggressively" with the Sudanese leadership to resolve the conflict in Darfur.²⁰² Even when Chinese President Hu Jintao proudly announced the following month that his government was providing an interest-free, multimillion-dollar loan to the government of Sudan to build a new presidential palace, along with an additional \$104 million in debt forgiveness,²⁰³ Natsios defended China's conduct to the U.S. Congress.²⁰⁴ In a televised appearance soon after the revelation that China and Sudan were friendlier than the U.S. government had thought, Natsios maintained, "I still think [China] can be helpful" and insisted that "the Chinese can play an important and stabilizing role" in Sudan.²⁰⁵

As the violence in Darfur continued over the coming months and years, domestic activists who were once focused on the crimes of the Sudanese

200. See *infra* notes 201–05 and accompanying text.

201. See JOEL WUTHNOW, CHINESE DIPLOMACY AND THE UN SECURITY COUNCIL: BEYOND THE VETO 95–112 (2013); Ngaire Woods, *Whose Aid? Whose Influence? China, Emerging Donors and the Silent Revolution in Development Assistance*, 84 INT'L AFF. 1205, 1208 (2008) ("China's efforts to end the conflict and to ensure the presence of a joint AU–UN peacekeeping force have been recognized by the United States as very constructive."); see also S.C. Res. 1769, ¶ 1, U.N. Doc. S/RES/1769 (July 31, 2007) (authorizing the establishment of the African Union / United Nations Hybrid Operation in Darfur (UNAMID)).

202. Edward Cody, *China Given Credit for Darfur Role*, WASH. POST, Jan. 13, 2007, at A13.

203. HUMAN RIGHTS FIRST, INVESTING IN TRAGEDY, CHINA'S MONEY, ARMS, AND POLITICS IN SUDAN 22 (2008).

204. See *The Escalating Crisis in Darfur: Are There Prospects for Peace?: Hearing Before the H. Comm. on Foreign Affairs*, 110th Cong. 34 (2007) ("The Chinese were open with us. They were very helpful. We had good conversations.").

205. *PBS Newshour with Jim Lehrer* (PBS television broadcast Feb. 16, 2007), http://www.pbs.org/newshour/bb/africa/jan-june07/darfur_02-16.html, quoted in WUTHNOW, *supra* note 201, at 108.

government began to expand their campaigns to criticize the Chinese for their “complicity” in the atrocities in Darfur.²⁰⁶ Even as this increasingly vocal and powerful community called for the U.S. government to step up its criticism of China’s ties to the regime in Khartoum, the United States continued to pursue a strategy of engaging China on Darfur rather than shaming.²⁰⁷

Accordingly, this analysis of the dynamics of shame must begin with an understanding that shaming is not as pervasive in humanitarian intervention as many believe it is. Although humanitarian crises often capture the attention of civil society groups, the media, and affected states, in some cases it is the governments, pressured by no one, that lead the charge to intervention. In situations in which actors do attempt to shame states into supporting intervention, however, these attempts do not always affect state behavior. The following Section explains four determinative factors in the dynamics of shame.

B. The Dynamics of Shame

1. Influence of the Agent of Shame

The impact of shaming varies widely according to the influence of the agent of shame. To the extent that domestic publics seek to mobilize shame in hopes of influencing governments to support humanitarian intervention, these domestic publics have primarily played a role in shaming efforts in the United States. In contrast, there has been no apparent pressure on Russia or China by domestic populations to support humanitarian intervention; indeed, these regimes claim that their citizens generally oppose the use of military force in human rights crises.²⁰⁸

206. See, e.g., Taylor, *supra* note 199, at 182.

207. See, e.g., *Current Situation in Darfur*, *supra* note 184, at 30 (statement of John Prendergast, Senior Advisor, International Crisis Group) (urging U.S. government pressure on China); Editorial, *Shaming China on Darfur*, N.Y. TIMES, May 31, 2007, www.nytimes.com/2007/05/31/opinion/31iht-edsudan.1.5942739.html (noting pressure on China “not from other governments but from a grassroots movement to shame China”); Aili McConnon, *Activists Target the ‘Genocide Olympics,’* BUS. WK., Feb. 20, 2008, www.businessweek.com/stories/2008-02-20/activists-target-the-genocide-olympicsbusinessweek-business-news-stock-market-and-financial-advice.

208. See, e.g., Dmitry Shlapentokh, *The Russian Approach to Human Rights Intervention*, CONTEMP. REV., Mar. 2001, at 156, 156–58; Chris Buckley, *Chinese “Disgusted” over Pressure on Darfur*, REUTERS (Feb. 13, 2008), www.reuters.com/article/2008/02/14/us-olympics-darfur-idUSPEK27761920080214; see also *infra* Part III.B.3 (discussing attention of domestic audiences); *infra* notes 278, 285–89 and accompanying text (discussing Russian and Chinese commitment to nonintervention).

In the United States, citizens and local activist groups are understood to play a role in affecting the government's choice to support humanitarian intervention. Indeed, when he was asked how activists could influence the U.S. government's policy in Rwanda, National Security Advisor Tony Lake responded, "Change public opinion You must make more noise."²⁰⁹ But even when a noisy public has aimed to convince the government to intervene in humanitarian crises, public opinion has succeeded in pressuring the government to support intervention only in limited circumstances.

Haiti offers an illuminating case study of a successful use of shaming by the domestic public. After Jean-Bertrand Aristide, the first democratically elected president in Haiti's history, was ousted in a coup by military leader Raoul Cédras, the United States and United Nations imposed economic sanctions, including an oil embargo, in an effort to pressure the coup leaders to negotiate.²¹⁰ These measures initially produced some concessions: Cédras agreed to the Governor's Island Accord, which provided that Aristide would return to the presidency within three months, but the agreement quickly fell apart.²¹¹

During this time, as violence was escalating in Haiti, influxes of Haitian migrants were attempting to reach the shores of the United States, and the Clinton Administration adopted a policy that none would be allowed on American territory.²¹² It was this repatriation policy that sparked the attention of the public. TransAfrica Forum director Randall Robinson began a widely publicized hunger strike in an effort to pressure the government to reconsider its lax sanctions and harsh repatriation policy.²¹³ The Congressional Black Caucus rallied around the Haitian crisis, condemning President Clinton's unconscionable failure to respond adequately.²¹⁴ The *New York Times* published a full-page advertisement decrying the government's meek approach to the violence in Haiti.²¹⁵ Signed by ninety-five movie stars, politicians, and activists, the letter

209. POWER, *supra* note 193, at 377 (quoting ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* 624–25 (1999)).

210. MURPHY, *supra* note 19, at 260–62.

211. *Id.* at 275–77; *see also* S.C. Res. 867, at 2, U.N. Doc. S/RES/867 (Sept. 23, 1993).

212. *See Randall Robinson to Stay on Hunger Strike Until Clinton Changes Policy Toward Haiti*, JET, May 2, 1994, at 5.

213. *See id.*

214. *See* PHILIPPE R. GIRARD, *CLINTON IN HAITI* 58, 62–66 (2004).

215. *See* Clarence Page, *The Shame of Our Policy on Haiti*, CHI. TRIB., Mar. 20, 1994, at A26.

proclaimed, “One is left to reasonably conclude that our policy is driven by considerations of race.”²¹⁶

Amid a firestorm of criticism, the Clinton Administration began to shift away from its prior stance of strongly opposing increased protections for the migrants and avoiding U.S. involvement on the ground in Haiti. In April 1994, Clinton replaced his former Special Envoy for Haiti, who had recommended compromising with Cédras, with William H. Gray III, the former leader of the Congressional Black Caucus.²¹⁷ The Administration aggressively began to pursue strategies to guarantee Aristide’s return to the presidency, and it changed its policy toward Haitian migrants to stop forced repatriation and to allow shipboard asylum applications.²¹⁸ By the following month, the United States had imposed a near-complete trade embargo against Haiti and was calling for a tougher U.N. sanctions regime, a position it had opposed earlier that same year.²¹⁹ In June, the United States stepped up its own sanctions, banning air traffic to Haiti and imposing an expanded assets freeze.²²⁰ Soon, responding to calls by domestic communities to restore Aristide by force if necessary, Clinton proposed military action, which ultimately was authorized by the United Nations in July.²²¹

The circumstances of successful shaming in the case of Haiti can be contrasted with the efforts of activists ten years later to convince the U.S. government to take action in Darfur. The genocide in Darfur inspired the creation of perhaps the most developed domestic American activist network in response to any humanitarian crisis.²²² The community ranged from grassroots activists to Washington insiders to Hollywood celebrities,

216. *Id.* (quoting letter and noting signatures by Quincy Jones, Sigourney Weaver, Robin Williams, Spike Lee, Paul Newman, Gregory Peck, and Jesse Jackson, among others); *see also* GIRARD, *supra* note 214, at 92; John M. Goshko, *Groups Call U.S. Haitian Policy a ‘Disaster,’* WASH. POST, Apr. 10, 1994, at A26.

217. LEON D. PAMPHILE, *HAITIANS AND AFRICAN AMERICANS: A HERITAGE OF TRAGEDY AND HOPE* 187 (2001).

218. *See* DiPRIZIO, *supra* note 191, at 93.

219. *See* THOMAS H. HENRIKSON, *CLINTON’S FOREIGN POLICY IN SOMALIA, BOSNIA, HAITI, AND NORTH KOREA* 20–23 (1996).

220. *See* DiPRIZIO, *supra* note 191, at 149; *see also* RAYMOND W. COPSON, *THE CONGRESSIONAL BLACK CAUCUS AND FOREIGN POLICY* 37–40 (2003); PAMPHILE, *supra* note 217, at 186–88; Steven A. Holmes, *With Persuasion and Muscle, Black Caucus Reshapes Haiti Policy*, N.Y. TIMES, July 14, 1994, at A10 (quoting an anonymous State Department official as saying that the Administration adopted all of the basic components of the caucus’s approach to Haiti).

221. *See* S.C. Res. 940, ¶ 4, U.N. Doc. S/RES/940 (July 31, 1994); Ann Devroy & R. Jeffrey Smith, *Debate over Risks Split Administration*, WASH. POST, Sept. 25, 1994, at A1.

222. *See* Luke A. Patey, *Against the Asian Tide: The Sudan Divestment Campaign*, 47 J. MODERN AFR. STUD. 551, 556–57 (2009); Colin Thomas-Jensen & Julia Spiegel, *Activism and Darfur: Slowly Driving Policy Change*, 31 FORDHAM INT’L L.J. 843, 849–50 (2008).

and they succeeded in penetrating the highest levels of government.²²³ Despite their vociferous, organized, well-funded efforts to push for intervention, however, the United States refused to support military action.

What explains the resistance of the U.S. government to political pressure for intervention in Darfur and its concession to pressure for intervention in Haiti? The strategic interests at work were of course different at the two times. When the violence in Darfur began to catch the attention of the activist community, the United States already was bogged down fighting two other wars in Iraq and Afghanistan, and it treated Sudan as an ally in U.S. counterterrorism efforts. Similar dynamics, of course, did not surround the decision on whether to intervene in Haiti. Still, there were geopolitical interests that would seem to have mitigated the role that domestic pressure would play in shaping the government's approach to Haiti. For example, at the time of the crisis in Haiti, the United States was aware of even greater violence taking place in Rwanda and chose not to act; civil war was escalating in Bosnia; and just the previous year, the U.S. military intervention in Somalia had turned into a horrific bloodbath, with the body of one U.S. Marine dragged through the streets of Mogadishu.²²⁴ Beyond facing these numerous foreign-policy crises, with no easy limiting principle to explain why U.S. involvement in Haiti should not trigger intervention in every mass atrocity around the world, Clinton also was attempting during his first term to pursue an ambitious domestic agenda.²²⁵

It is this last point that illuminates the significant difference between the impact of shame during the Haiti crisis and during the conflict in Darfur. Domestic criticism of the government's Haiti policy came from some of Clinton's most loyal supporters—African-American voters and backers who had been critical to Clinton's successes in gubernatorial elections and in his 1992 presidential victory.²²⁶ After winning the presidency, Clinton continued to cultivate his relationship with African-American constituents and elites. He was the first president to attend every dinner of the Congressional Black Caucus, and he regularly invited

223. See Alex de Waal, *The Humanitarian Carnival: A Celebrity Vogue*, *WORLD AFF.*, Fall 2008, at 44, 45.

224. See GIRARD, *supra* note 214, at 40–41.

225. *Id.* at 70.

226. Douglas Farah, *Aristide's Backers: Latest Plan Falls Short*, *WASH. POST*, May 2, 1994, at A1; see also Robert Novak, *Clinton Pondering Haiti Intervention*, *CHI. SUN-TIMES*, May 2, 1994, at 29 (“To accept [Haitian refugees] will lose both Florida and the immigration issue for Democrats. To turn them back will alienate the Congressional Black Caucus. That is why Haitian war drums are beating along the Potomac.”). The criticism also focused on a subject of deep importance to the Clinton Administration—a subject of less interest to the traditional definition of shaming in this context—and a subject of deep importance to Clinton himself. See *infra* Part III.B.2.b.

African-American leaders to the White House to consult on issues critical to the black community. He needed these leaders and constituents to endorse the Administration's legislative agenda.²²⁷ Maintaining their support was critical, and maintaining their support required reinstating Aristide in the Haitian presidency. Accordingly, efforts to shame the President for his inaction proved successful. During the conflict in Darfur, in contrast, President Bush did not rely so heavily on the Darfur activist community for support. Although Christian conservatives, an important constituency for Bush, were calling for greater U.S. involvement to stop the genocide, Darfur was merely one issue among many, and activists' demands were largely placated by the Bush Administration's approach of frequently expressing outrage about the violence and pouring money into humanitarian aid without doing much more.²²⁸ More important interests—especially preserving resources and military capabilities for other ongoing wars—thus took precedence over any embarrassment that the U.S. government might suffer for its inaction in the crisis.²²⁹

While domestic audiences are responsible for much of the shaming deployed in the context of humanitarian intervention, foreign audiences also seek to shame states. This is increasingly the case given the growth of transnational advocacy networks in recent years.²³⁰ The U.S.-based Darfur activist community, for example, lobbied not only the U.S. government, but also the Chinese government. A large-scale shaming effort, centered on the 2008 Beijing Olympics—renamed the “Genocide Olympics” by human rights activists—aimed to highlight China's role in protecting the government of Sudan against Security Council action.²³¹ The shaming, however, had little impact. Although the Chinese government did eventually make some minor concessions,²³² it persisted in its position that

227. See GIRARD, *supra* note 214, at 65; see also Remarks at the Congressional Black Caucus Foundation Dinner, 2 PUB. PAPERS 1568, 1569 (Sept. 17, 1994) (thanking Congressional Black Caucus members for support in economy and crime policies).

228. See GÉRARD PRUNIER, *DARFUR: THE AMBIGUOUS GENOCIDE* 140–41 (2005).

229. This observation that the influence of the agent of shame affects the success of shaming efforts may ultimately be no different from an observation that domestic audiences can deeply affect their democratic governments and that domestic audiences have less apparent influence in non-democracies. This is consistent with theories on the influence of domestic political opinion. Still, however, governments in non-democracies may still be interested in being responsive to their constituencies. See *infra* note 270 and accompanying text.

230. See Risse & Sikink, *supra* note 30, at 25.

231. See *Shaming China on Darfur*, *supra* note 207.

232. See Helene Cooper, *Darfur Collides with Olympics, and China Yields*, N.Y. TIMES, Apr. 13, 2007, at A1 (characterizing visit of Darfur refugee camps by a senior Chinese official as a significant concession triggered by Olympics shaming campaign).

the events in Darfur did not warrant coercive foreign action, and it continued to hold firm to its opposition to humanitarian intervention.²³³

Some commentators have suggested that, if a resolution authorizing intervention had ever reached a vote in the Council, the Chinese would have ultimately abstained,²³⁴ as they did on some other coercive measures toward Sudan.²³⁵ This reasoning, however, ignores an important indicator of the effect of shaming in humanitarian intervention: the subject of the shame.

2. *Subject of the Shame*

The norm that forms the basis of the shame strongly affects the ultimate effectiveness of the shaming effort. Because shaming involves moral condemnation of a target state for failure to adhere to some shared norm of conduct, two elements—the notion that the targeted conduct is immoral, as well as the assertion that the targeted conduct diverges from a community norm—are crucial in yielding effective shaming.²³⁶ In the context of humanitarian intervention, however, these two elements are often missing.

a. *Norms of Responsibility and Intervention*

The norm of conduct most directly at issue in shaming in the context of humanitarian intervention is the expectation that the international community, through the Security Council, should intervene to prevent or stop massive human rights crises. This expectation lies at the root of the

233. *But see Shaming China on Darfur, supra* note 207 (discussing Chinese intransigence and maintaining that “civil society has a chance to shame China into forcing Bashir to stop the genocide in Darfur”).

234. *See, e.g., Current Situation in Darfur, supra* note 184, at 30 (suggesting possibility of Chinese abstention).

235. *See, e.g.,* U.N. SCOR, 61st Sess., 5519th mtg. at 4–5, U.N. Doc. S/PV.5519 (Aug. 31, 2006) (explaining Chinese abstention on Resolution 1706, which expanded the mandate of the United Nations Mission in Sudan to include enforcement of the Darfur Peace Agreement); U.N. SCOR, 61st Sess., 5423rd mtg. at 3, U.N. Doc. S/PV.5423 (Apr. 25, 2006) (statement of representative of China) (explaining abstention on Resolution 1672, which imposed targeted sanctions on four Sudanese individuals); U.N. SCOR, 60th Sess., 5158th mtg. at 5, U.N. Doc. S/PV.5158 (Mar. 31, 2005) (statement of representative of China) (explaining abstention on Resolution 1593, which referred the situation in Darfur to the International Criminal Court). *But see* Alex J. Bellamy, *The Responsibility to Protect and the Problem of Military Intervention*, 84 INT’L AFF. 615, 628 (2008) (arguing that predictions that China would have been pressured into abstaining are unfounded, as “China’s actual performance in the Council suggests that it would be more than willing to use its veto in such cases”).

236. *See supra* Part I.A (defining shaming in international law).

responsibility to protect movement²³⁷ and, more generally, forms the basis of calls for more decisive and consistent responses by the Security Council to internal conflicts and mass atrocity.²³⁸ Although the responsibility to protect movement and the question of humanitarian intervention are among the most talked-about developments in international law and politics in recent years, the principle that the Security Council should authorize intervention to protect human rights provides, at best, a fragile source of shaming.

Several factors lie at the root of this weakness. First, the notion of a responsibility to protect remains a principle with little legal basis.²³⁹ International law does impose obligations on states to prevent or respond to violations by third parties in some cases, but these arise only in limited circumstances.²⁴⁰ The broadest basis for such obligations is the responsibility of a state for actions that take place in its territory or in territory under its control.²⁴¹ By contrast, a state generally has no responsibility for the acts of third parties in other states. Because Security Council responses to mass atrocity involve authorization of intervention by Security Council members in foreign states, this category of state responsibility for third-party violations does not provide a legal basis for the notion of a responsibility to protect.

Separate from a state's responsibility to protect individuals in its territory, the Genocide Convention expands bases for liability for a state beyond a territorial nexus, but this obligation, too, is restricted. Deciding an action alleging Serbia's responsibility for genocide, the International Court of Justice acknowledged that states parties to the Convention are

237. See *supra* Part II.D (discussing responsibility to protect).

238. See MURPHY, *supra* note 19, at 381; ANNE ORFORD, *READING HUMANITARIAN INTERVENTION* 1–5 (2003).

239. It is important to note, however, that norms may shape behavior even if they have not hardened into law. See William W. Burke-White, *Adoption of the Responsibility to Protect*, in *THE RESPONSIBILITY TO PROTECT: THE PROMISE OF STOPPING MASS ATROCITIES IN OUR TIME* 17, 34 (Jared Genser & Irwin Cotler eds., 2012) (“[N]orms may develop into legal obligations . . . [o]r they may remain non-legal, but nonetheless influential understandings that structure the expectations and behavior of actors in the international system.”).

240. See Monica Hakimi, *State Bystander Responsibility*, 21 *EUR. J. INT’L L.* 341, 344 (2010) (“No generalized framework exists for appraising when a state must protect against third-party harm or what that obligation requires.”).

241. See Gordon A. Christenson, *Attributing Acts of Omission to the State*, 12 *MICH. J. INT’L L.* 312, 323–24 (1991); Rep. of the Int’l Law Comm’n on the Work of Its Twenty-Sixth Session, May 6–July 26, 1974, U.N. Doc. A/9610/Rev.1; see also *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 22 (Apr. 9) (holding that Albania, which knew of a minefield in its territorial waters, was legally responsible for a failure to warn ships proceeding through those waters).

obligated to “take certain steps to prevent” genocide.²⁴² Nonetheless, it constructed this legal duty narrowly, noting that it would be triggered only if the state “had the means” to prevent genocide and “manifestly refrained from using them.”²⁴³ The Court further cautioned that the duty to prevent genocide depends on the state’s “capacity to influence effectively the action of persons likely to commit, or already committing, genocide,” which varies according to factors including the geographical distance between the state and the location of the genocide, and the strength of political links between the state and the “main actors” in the genocide.²⁴⁴ Moreover, the Court began its discussion of the duty to prevent genocide with a caution that its decision would not “establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts,” and it noted explicitly that it was not addressing the question of whether “there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law.”²⁴⁵ Accordingly, although a legal basis for a responsibility to protect may be found in some cases with respect to the crime of genocide, it does not extend to other crimes, and even the extent of the obligations with respect to genocide is contested at this time.²⁴⁶

Because of the absence of general bystander responsibility under international law except in cases of territorial authority or a capacity to influence the direct perpetrators of genocide, the responsibility to protect principle seeks to inculcate an understanding, outside of hard law, that the Council has moral, even if not legal, obligations to intervene in mass atrocity. The U.N. Secretary-General has voiced this same sentiment, reminding the permanent members that the Charter granted them the right of veto “[i]n exchange” for an expectation that they would “use their power for the common good”²⁴⁷ and “shoulder an extra burden in promoting global security.”²⁴⁸ There are two problems with this argument, however. First, this is a revision of the original bargain struck at the founding of the United Nations. While it is accurate to say that the Charter

242. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43 (Feb. 26), ¶ 429.

243. *Id.* ¶ 438.

244. *Id.* ¶ 430.

245. *Id.* ¶ 429.

246. See Alex J. Bellamy & Ruben Reike, *The Responsibility to Protect and International Law*, 2 GLOBAL RESP. TO PROTECT 267, 276 (2010).

247. High-Level Panel Report, *supra* note 151, at 77.

248. *Id.* ¶ 244.

granted the permanent members a veto power in exchange for their commitment to take on some additional responsibilities, “maintenance of international peace and security” at the time of the Charter’s drafting was not understood to encompass authorization for humanitarian intervention in internal civil wars and atrocities.²⁴⁹ Intervention in the human rights abuses taking place in foreign states was not among the responsibilities of the Council understood by the drafters of the Charter.²⁵⁰

The second problem is that there is no agreed understanding of the common good in this context, and there is no determinate, agreed content defining when humanitarian intervention is appropriate and when it is not. States disagree widely about whether and when the Security Council should intervene at all in foreign human rights crises, and there is even greater disagreement about whether or when military intervention to protect human rights is appropriate.²⁵¹ Despite celebrations that the responsibility to protect triumphed when the Security Council voted to authorize intervention in Libya, it is clear that the world has yet to reach any consensus that the Security Council has a duty to intervene in humanitarian crises.²⁵² The massive crisis in Syria shows the extent of states’ disagreement on the proper approaches to human rights abuses, foreign intervention, and the role of the Security Council in international security. After a Russian and Chinese veto destroyed a resolution proposing the institution of sanctions against the Assad regime in October 2011,²⁵³ the Council dropped the issue of sanctions and has focused instead on demanding an end to the government’s campaign of violence and expressing support for an Arab League proposal to initiate some political process to bring a new government to power.²⁵⁴ This second

249. See U.N. Charter art. 24; 1 CHARTER OF THE UNITED NATIONS: A COMMENTARY 660 (Bruno Simma et al. eds., 2d ed. 2002).

250. See MARK MAZOWER, NO ENCHANTED PALACE: THE END OF EMPIRE AND THE IDEOLOGICAL ORIGINS OF THE UNITED NATIONS 8 (2009) (“One can view the Charter and especially its preamble, along with the UDHR and the GC, as testifying to the foundational imperatives of the new world order established in the fight against Nazism. Or one can read them as promissory notes that the UN’s founders never intended to be cashed. . . . [S]everal recent critics of the new idealist historiography point to the sheer implausibility of trying to trace the roots of our current humanitarian activism back to the mid-1940s, when talking about human rights was—for the key policymakers—often a way of doing nothing and *avoiding* a serious commitment to intervene.”).

251. See Press Release, General Assembly, More Than 40 Delegates Express Strong Skepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect, U.N. Press Release GA/10849 (July 24, 2009).

252. See Mohamed, *supra* note 169, at 326–29.

253. See France, Germany, Portugal and United Kingdom of Great Britain and Northern Ireland: Draft Resolution at 2–3, U.N. Doc. S/2011/612 (Oct. 4, 2011).

254. See Bahrain, Colombia, Egypt, France, Germany, Jordan, Kuwait, Libya, Morocco, Oman, Portugal, Qatar, Saudi Arabia, Togo, Tunisia, Turkey, United Arab Emirates, United Kingdom of

resolution garnered the support of nineteen states as cosponsors, including eleven in the Middle East and North Africa.²⁵⁵ The Arab League has sided against the Syrian government and supports U.N. intervention.²⁵⁶ The weight of international opinion and even of the regional stakeholders seems to be against Russia and China. Nonetheless, they have resisted calls for a U.N. response to the crisis. Even in the Libya intervention, the Security Council cited the principle in its resolution authorizing military force only for an assertion that the Libyan government has a responsibility to protect its own population; there was no mention of the international community's responsibility to protect individuals in Libya.²⁵⁷ Beyond a lack of agreed content on the responsibility to protect, there is a great deal of uneasiness about intervention more generally, and states articulate strong reasons for supporting the idea that military intervention is not always a good idea.

Moreover, despite the efforts of advocates of humanitarian intervention to instill a sense of duty in the members of the Security Council, the understanding that the Council has a *choice* about whether or not it should intervene has prevailed. Instead of portraying the Council as a responsible party in unaddressed atrocities, popular and academic commentary continues to conceive of the Council as a bystander, one step removed from the action.²⁵⁸ This language predominates even in situations like the Rwandan genocide, when the Security Council did not stand by; instead, it removed U.N. forces from the area within days of the first massacres.²⁵⁹ To be sure, Council members did not perpetrate violence directly against the people of Rwanda, but their decision to nearly eliminate the peacekeeping presence from the country may have emboldened the

Great Britain and Northern Ireland and United States of America: Draft Resolution at 2–3, U.N. Doc. S/2012/77 (Feb. 4, 2012).

255. See U.N. SCOR, 67th Sess., 6711th mtg. at 2, U.N. Doc S/PV.6711 (Feb. 4, 2012).

256. See Liam Stack & Neil MacFarquhar, *Arab League Steps Up Pressure on Syria and Calls for U.N. Help*, N.Y. TIMES, Feb. 13, 2012, at A9.

257. See S.C. Res. 1973, at 1, U.N. Doc. S/RES/1973 (Mar. 17, 2011); see also Security Council 6498th Meeting, *supra* note 11, at 2, 7.

258. See, e.g., Ban Ki-moon, *Secretary-General's Address to the Commission on Human Rights*, UNITED NATIONS (Apr. 7, 2004), <http://www.un.org/sg/statements/?nid=862> (declaring that “the international community cannot stand idle”); *Current Situation in Darfur*, *supra* note 184, at 16 (urging the Committee to “make it politically costly for this administration or any future one to stand idly by while atrocities such as those in Darfur are being committed”); David D. Kirkpatrick, Steven Erlanger, & Elisabeth Bumiller, *Allies Open Air Assault on Qaddafi's Forces*, N.Y. TIMES, Mar. 20, 2011, at A1 (quoting statement by U.S. President Barack Obama that “we can't stand idly by when a tyrant tells his people that there will be no mercy”).

259. See *supra* text accompanying notes 17–20.

genocidaires.²⁶⁰ Indeed, when President Clinton addressed survivors of the Rwandan genocide in 1998, he made a rare admission of the close connection of the Security Council to the massacres, acknowledging that “each bloodletting hastens the next as . . . violence becomes tolerated.”²⁶¹ It is thus understandable to conceive of the permanent members who did nothing as not merely standing by, but rather as facilitating, emboldening, even participating.²⁶²

Nonetheless, it is impossible to equate the degree of participation of the Security Council with that of the direct perpetrators of atrocity. The sense that the Council remains one step removed from the crises in which it does or does not intervene is pervasive because it is indeed removed. A Security Council that chooses not to become involved, or that chooses to become less involved without an intent to further the atrocity, is necessarily distinct from an actor that commits atrocities or willfully abets the bloodshed. When shaming shifts from a first-order shaming of direct perpetrators to a second-order shaming of the powers that can stop it, the force of that shaming is diluted.²⁶³ Even if there was moral condemnation to be found in a permanent member’s refusal to support intervention, without an intent to facilitate the atrocities being committed, that state can insulate itself from condemnation simply by pointing fingers at the real perpetrators.²⁶⁴

260. See FRED GRÜNFELD & ANKE HUIJBOOM, *THE FAILURE TO PREVENT GENOCIDE IN RWANDA: THE ROLE OF BYSTANDERS* 217 (2007) (asserting that the withdrawal of UNAMIR I “facilitated the genocide”); Ervin Staub, *The Psychology of Bystanders, Perpetrators, and Heroic Helpers*, 17 INT’L J. INTERCULTURAL REL. 315, 316 (1993) (asserting that the passivity of bystanders “allows perpetrators to see their destructive actions as acceptable and even right”).

261. Press Release, Remarks by the President to Genocide Survivors, Assistance Workers, and U.S. and Rwanda Government Officials (Mar. 25, 1998), <http://clinton4.nara.gov/textonly/Africa/19980325-16872.html>.

262. A Netherlands court adopted this characterization in holding the Dutch government responsible for the deaths of three individuals who were murdered at Srebrenica. When Bosnian Serbs overran the town in July 1995, Serb troops demanded that Dutch U.N. peacekeepers force Bosnian Muslim civilians out of the U.N. compound where they had taken refuge. The Dutch forces acceded to the Serbs’ demands, and an estimated two hundred individuals who were ejected from the compound were among the eight thousand ultimately killed. The Court held that “the State is responsible for the death of these men,” as they had already witnessed Bosnian Serbs attacking and killing Bosnian Muslim men outside the compound. See Lauren Comiteau, *Court Says the Dutch Are to Blame for Srebrenica Deaths*, TIME (July 6, 2011), <http://www.time.com/time/world/article/0,8599,2081634,00.html>; *Netherlands Found Liable for 3 Deaths*, N.Y. TIMES, July 6, 2011, at A6.

263. See *supra* Part II.E; see also Fernando R. Tesón, *The Liberal Case for Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 93, 119 (J.L. Holzgrefe & Robert O. Keohane eds., 2003) (discussing difference between killing and letting die).

264. Moreover, the sanction that a state may suffer for failing to undertake acceptable conduct in the second-order shaming context may be far less threatening than the sanction that would be contemplated in the first-order shaming context. While a state directly perpetrating human rights

b. Alternative Norms as the Basis for Shaming

Given that the responsibility to protect principle is neither sufficiently strong nor sufficiently shared to generate effective pressure to intervene, it is important to consider other norms that may be at work in the context of humanitarian intervention.²⁶⁵ In particular, a domestic agent of shame may add another basis for shaming the target. As discussed above, pressure on the Clinton Administration to intervene in Haiti succeeded in motivating action in part because Clinton needed the support of the community that was condemning his policy.²⁶⁶ Beyond the influence of this community, the subject of the shame also was significant. Instead of merely identifying Clinton as committing a sin of inaction, the activist community condemned the inaction as racism.²⁶⁷ Tying the Administration's policies in Haiti directly to the treatment of African-Americans in the United States, advocates of intervention forced Clinton into a position of having to defend against a criticism that threatened his own political survival and, in light of the American experience with racism, struck at the soul of the nation.²⁶⁸ The Administration thus faced an effort aimed to achieve shaming both by exploiting fear of political sanctions from the Congressional Black Caucus and voters, and by capitalizing on discomfort with the projection of an image of the United States as a racist state. A strong norm at the basis of the shaming, around which there is consensus both on content and on the inappropriateness of violation, thus enables a more successful application of shame.

3. Attention of Alternative Audiences

Shaming generally consists of an interaction between the agent of shame and the target of shame, but in the context of humanitarian

abuses against its own people may be the target of military intervention, it seems quite unlikely that a state blocking humanitarian intervention, or tolerating abuses by another government, would be subject to military intervention as a result.

265. This part discusses norms as the basis for shaming states into supporting or tolerating intervention, but there are, of course, also norms supporting nonintervention. *See infra* Part III.B.3.

266. *See supra* Part III.B.1.

267. *See supra* note 216 and accompanying text.

268. Interestingly, it also played into norms important to Clinton himself. Anointed by some commentators as the nation's "first black president," *see, e.g.*, Toni Morrison, *The Talk of the Town*, THE NEW YORKER, Oct. 5, 1998, available at www.newyorker.com/archive/1998/10/05/1998_10_05_031_TNY_LIBRY_000016504, Clinton must have been profoundly affected by these allegations of racism. Under the traditional approach to shaming, we would not consider Clinton's personal feelings as a factor in determining state behavior, but, as discussed above, this may lead us toward an anemic understanding of shaming. *See supra* text accompanying notes 41, 226.

intervention, the rest of the world is watching. While the agent of shame views the target's conduct with disapproval, other audiences may approach it quite differently. Accordingly, the attention of those alternative audiences, which may have commitments to alternative norms, may impact the effectiveness of shaming efforts because that attention can offset the impact of the initial shaming.²⁶⁹ This factor is especially instructive in explaining Russian and Chinese responses to American-supported military interventions. Although many would like to believe that a norm of responsibility is what motivated the Chinese and Russian abstention in the Security Council decision to authorize military action in Libya, they demonstrated no interest in showing their adherence to any such norm. Even despite pressure from both within the Council and outside of it,²⁷⁰ Russia and China issued their abstentions with pronounced statements of their strong objections to the Council's decision. During the Security Council meeting on Resolution 1973, the Russian representative described the turn to military force to resolve the situation in Libya as "most unfortunate and regrettable."²⁷¹ The Chinese representative also expressed opposition to the Security Council's decision to authorize military action, declaring, "[T]he Security Council should follow . . . the norms governing international law, respect the sovereignty, independence, unity and territorial integrity of Libya and resolve the current crisis in Libya through peaceful means."²⁷² China abstained on the resolution, the representative explained, because the Arab League supported the establishment of a no-fly zone.²⁷³

In the days after the adoption of the resolution, these abstaining permanent members escalated their attacks on the Security Council's decision. Russian Prime Minister Vladimir Putin described the resolution as "defective and flawed" and opined that the decision to authorize intervention "resembles medieval calls for crusades."²⁷⁴ The day after the Council adopted the resolution, the Chinese Ministry of Foreign Affairs

269. For an interesting look at the power of "norms and moral duty" in motivating China to act on climate change, see Jonathan B. Wiener, *Climate Change Policy and Policy Change in China*, 55 *UCLA L. REV.* 1805, 1812–16 (2008).

270. See, e.g., Richard Leiby & Scott Wilson, *Arab League Endorses No-Fly Zone Over Libya*, *WASH. POST*, Mar. 13, 2011, at A01; Press Release, Int'l Crisis Grp., Immediate International Steps Needed to Stop Atrocities in Libya (Feb. 22, 2011), <http://www.crisisgroup.org/en/publication-type/media-releases/2011/immediate-international-steps-needed-to-stop-atrocities-in-libya.aspx>.

271. Security Council 6498th Meeting, *supra* note 11, at 8.

272. *Id.* at 10.

273. *Id.*

274. Gleb Bryanski, *Putin Likens U.N. Libya Resolution to Crusade Calls*, *REUTERS* (Mar. 21, 2011), <http://www.reuters.com/article/2011/03/21/us-libya-russia-idUSTRE72K2J220110321>.

issued a statement that expressed “serious reservations” about the resolution and declared unequivocally, “We oppose the use of force in international relations.”²⁷⁵

Acknowledgement of the attention of alternative audiences is crucial to understanding why, despite their objections, Russia and China did not exercise a veto to stop the Security Council’s authorization of military force. The two-track approach of combining vocal objection with abstention enabled them to satisfy the many communities to which they belong. On the one hand, the expressions of outrage over the intervention served to satisfy domestic audiences who opposed intervention. Political analysts characterized Putin’s statement, which was delivered to workers at a Russian arms factory,²⁷⁶ as a gesture to individuals who were likely frustrated by the potential for the no-fly zone to compromise Russian arms sales to Libya.²⁷⁷ Putin thus made this statement “for internal consumption” by domestic audiences.²⁷⁸

The act of abstention, on the other hand, was “for external consumption” by states in the region that sought a resolution to the crisis in Libya.²⁷⁹ Russian and especially Chinese foreign policies have prioritized the interests of regional stakeholders in the context of humanitarian crises. The Arab League and African Union both voiced their support for international intervention in the Libyan conflict, with the Arab League for the first time in its history taking a position in the region with a people and against a regime,²⁸⁰ and issuing a resolution that called for imposition of a no-fly zone.²⁸¹ Both Russia and China stated that they would defer to the regional stakeholders in their decisions on the intervention.²⁸² This same concern for the interests of regional

275. Foreign Ministry Spokesperson Jiang Yu’s Remarks on the Adoption of UNSC Resolution 1973 on the Libya Issue (Mar. 21, 2011), <http://www.chinaconsulatesf.org/eng/xw/t808091.htm>.

276. Bryanski, *supra* note 274; *see also* Julia Ioffe, *Who’s Crusading Now?*, FOREIGN POL’Y, Mar. 23, 2011, http://www.foreignpolicy.com/articles/2011/03/23/whos_crusading_now.

277. *See* Ioffe, *supra* note 276.

278. *Id.* (quoting comments of Masha Lipman, analyst with the Carnegie Moscow Center); *see also* Alexandra Guisinger & Alastair Smith, *Honest Threats: The Interaction of Reputation and Political Institutions in International Crises*, 46 J. CONFLICT RESOL. 175, 180 (2002); Jessica L. Weeks, *Autocratic Audience Costs: Regime Type and Signaling Resolve*, 62 INT’L ORG. 35 (2008) (arguing that nondemocracies also face threats to their power).

279. *See* Ioffe, *supra* note 276.

280. *See* Catherine Powell, *Libya: A Multilateral Constitutional Moment?*, 106 AM. J. INT’L L. 298, 313–14 (2012).

281. Ethan Bronner & David E. Sanger, *Arab League Endorses No-Flight Zone Over Libya*, N.Y. TIMES, Mar. 13, 2011, at A1; *see also* Annex to the letter dated Mar. 14, 2011 from the Permanent Observer of the League of Arab States to the United Nations to the United Nations addressed to the President of the Security Council, ¶ 1, U.N. Doc. S/2011/137 (Mar. 15, 2011).

282. *See* Security Council 6498th Meeting, *supra* note 11, at 8, 10.

governments has guided decisions in this area since the early 1990s. For example, when permanent members put the Somali civil war on the Council's agenda, African states were initially cautious about the move and did not support intervention. During early discussions, China indicated that it would abstain on any action authorizing military intervention in Somalia because of the reservations of African states.²⁸³ Once those governments came out in support of intervention, however, China instead voted in favor of the resolution authorizing intervention because of its deference to the African states' position.²⁸⁴

In the context of humanitarian intervention, this deference to regional stakeholders appears to be the only consideration that overrides the Russian and Chinese governments' governing principle of nonintervention in the internal affairs of states. Although commitment to the nonintervention principle is often characterized as pretext or mere contrarianism,²⁸⁵ it has deep roots. As Robert Legvold describes, "the very thought of outsiders setting aside the safeguard of state sovereignty to intrude in domestic events—no matter how ugly—rouses deep historical reflexes" for Russia and China.²⁸⁶ Both countries bitterly remember the indignity of intervention by foreign states in their own territories.²⁸⁷ Both also fear the contemporary implications of humanitarian intervention. In forming approaches to humanitarian intervention, it would be unimaginable for China to ignore the possibility of foreign powers intervening to support separatist movements in Tibet and Xinjiang, and Russia—no stranger to undertaking military action in foreign countries—surely is considering the prospect for intervention in Chechnya or

283. China indicated that it would abstain rather than veto because its deference to the principle of nonintervention in the internal affairs of states did not apply in this case, as there was no functioning government in Somalia. See WHEELER, *supra* note 14, at 187.

284. See Martin Walker & Mark Tran, *UN Votes to Send Troops to Somalia*, GUARDIAN (London), Dec. 4, 1992, at 1; see also WHEELER, *supra* note 14, at 186; Powell, *supra* note 280, at 314 (describing the "central way that . . . international and regional organizations working in tandem . . . shaped states' perceptions of their identities and interests, and ultimately of the norms that they were willing to accept" in the Libyan crisis).

285. *But see, e.g.*, Kathrin Hille & Michael Peel, *China Takes More Nuanced Stance on Syria*, FIN. TIMES, Feb. 22, 2012, <http://www.ft.com/cms/s/0/4b772dca-5d64-11e1-869d-00144feabdc0.html#axzz2IIYMncPy>.

286. See Robert Legvold, *Foreword*, in 2 PUGWASH OCCASIONAL PAPERS: STUDY GROUP ON INTERVENTION, SOVEREIGNTY AND INTERNATIONAL SECURITY (Jeffrey Boutwell ed., 2001) [hereinafter INTERVENTION, SOVEREIGNTY AND INTERNATIONAL SECURITY].

287. See Vladimir Baranovsky, *Humanitarian Intervention: Russian Perspectives*, in INTERVENTION, SOVEREIGNTY AND INTERNATIONAL SECURITY, *supra* note 286.

Georgia.²⁸⁸ This concern for nonintervention, then, is both a matter of identity and interests—a reflection of national history, culture, and local preferences, as well as a way to erect protective barriers against intrusion in national affairs in the future.²⁸⁹

The commitment to nonintervention is also crucial to Russian and Chinese relations with the nonaligned movement (“NAM”), the group of states representing the developing world in the United Nations.²⁹⁰ China especially has cultivated a position of closeness and trust with the NAM, and in recent years, Russia has become more connected to the movement as well.²⁹¹ The NAM typically objects to foreign intervention in the internal affairs of any state unless the state consents to it,²⁹² and Russia and China generally voice similar positions unless regional stakeholders demand otherwise.²⁹³ For example, even while China endured significant criticism for its opposition to humanitarian intervention in Darfur, the position of the NAM provided important political cover. Condemnation by human rights activists—even when they threatened China’s successful hosting of the Olympic Games—meant little when it was counteracted by support from the African Union, Arab League, and Organization of Islamic Conference.²⁹⁴ Thus, a multiplicity of audiences enables a state to shake off criticism by one audience when it can generate support within another audience with that same behavior. In the context of humanitarian intervention, the deep contestation over norms of intervention and nonintervention makes the impact of alternative audiences even more

288. See Jean Krasno & Mitushi Das, *The Uniting for Peace Resolution and Other Ways of Circumventing the Authority of the Security Council*, in *THE UN SECURITY COUNCIL AND THE POLITICS OF INTERNATIONAL AUTHORITY* 173, 190 (Bruce Cronin & Ian Hurd eds., 2008).

289. See *supra* note 278 and accompanying text (discussing attention by autocratic governments to domestic population’s preferences).

290. See K.J. Grieb, *Non-Aligned Movement (NAM)*, in 1 *ENCYCLOPEDIA OF THE UNITED NATIONS* 310, 311 (John Allphin Moore, Jr. & Jerry Pubantz eds., 2d ed. 2008).

291. See Alexander Orlov, *The Non-Aligned Movement: 40 Years After*, 48 *INT’L AFF.* 49, 55 (2002).

292. See Grieb, *supra* note 290, at 311.

293. See *supra* notes 283–84 and accompanying text. The consent exception also explains China’s and Russia’s acceptance of U.N. intervention in Haiti, as the Aristide regime—thought to be still the legitimate government after the coup—requested intervention. Russia and China may have been influenced by their views on consent in the Libya intervention as well, as Libya’s UN ambassador was urging the Security Council at least to impose sanctions against Qaddafi. See Bill Chappell, *Libyan Ambassador Denounces Gadhafi at U.N.*, NPR (Feb. 25, 2011), <http://www.npr.org/blogs/thetwo-way/2011/02/25/134069630/libyan-ambassador-denounces-gadhafi-at-u-n>.

294. See Goodman & Jinks, *supra* note 7, at 641 (recognizing role of “back-patting” in influencing state behavior); see also Michael G. Mackinnon, *The United Nations Security Council*, in *THE INTERNATIONAL POLITICS OF MASS ATROCITIES: THE CASE OF DARFUR*, *supra* note 199, at 71, 89–90.

salient, as different audiences are more likely to have different opinions on the conduct at issue. While Security Council members or human rights activists might pressure resisting states to acquiesce in humanitarian intervention, domestic publics or other foreign audiences neutralize that shaming by insisting on heartier opposition to what they perceive as self-interested adventurism or even a potential threat to future national stability.

4. *Repeated Interactions Within the Security Council*

Shaming cannot be understood in this context without recognizing the role of the repeated interactions of the Council. The states of the U.N. Security Council are individual actors, but the permanent members participate consistently in a collective institution, one that has shaped their place in the world for more than sixty-five years. This institution is under threat from reformers who seek to dismantle it and to remove the permanent members from their positions of impenetrable power.²⁹⁵ It is thus in the interest of the individual states to protect the institution. This might explain why the permanent members aim to mitigate the shame that targets even their opponents within the Council. This dynamic is evinced by the rhetoric that permanent members often use when a veto thwarts collective action. Instead of pointing fingers at the vetoing state, condemning its obstruction of global cooperation as Herbert Evatt would have hoped, in many cases they instead take collective responsibility for the failure of the institution as a whole. When China and Russia vetoed a resolution calling on the government of Myanmar to cease attacks against civilians, for example, outside commenters vilified their immoral support of the murderous regime.²⁹⁶ Inside the Council, in contrast, the United States and United Kingdom, the sponsors of the resolution, merely expressed their “disappoint[ment]” at “the failure of the Council.”²⁹⁷ This

295. See FASSBENDER, *supra* note 126, at 7–19.

296. See Evelyn Leopold, *China, Russia Cast Rare Veto Against U.S. on Myanmar*, REUTERS (Jan. 12, 2007), <http://www.reuters.com/article/2007/01/13/us-myanmar-un-idUSN1148874520070113>; Rosemary Righter, *Brazen China Strings Along Burmese Pearl*, AUSTRALIAN TIMES, Oct. 2, 2007, at 11.

297. U.N. SCOR, 62d Sess., 5619th mtg. at 6–7, U.N. Doc. S/PV.5619 (Jan. 12, 2007) [hereinafter Security Council 5619th Meeting]. For similar incidents, see, for example, Security Council 6627th Meeting, *supra* note 23, at 5 (statement of representative of Portugal) (expressing, after veto by Russia and China, “deep[] regret that the Security Council was unable to unanimously and unequivocally condemn, and demand an immediate end to, the Syrian Government’s violent repression against its population”); *id.* at 10 (statement of representative of Germany) (“Today the Council failed to live up to its responsibilities under the Charter of the United Nations”); U.N. SCOR, 66th Sess., 6484th mtg. at 6, U.N. Doc. S/PV.6484 (Feb. 18, 2011) (statements of representatives of Russia and China)

failure was attributed not to Russia and China, but instead to the organization as a whole.

This collective understanding of the failures of the Council undercuts the impact of any shaming effort that is targeted against individual states. Governments blocking collective action can insulate their own obstructions with language of collective failure, and the states that push for intervention are incentivized to minimize the extent of these breakdowns because of their reflection on the institution as a whole.²⁹⁸ Indeed, after acknowledging the Council's failure, delegations typically turn to alternatives to concerted action, downplaying the impact of the Council's inability to act instead of focusing attention on the vetoing party's transgressions.

Moreover, the fact that permanent members have repeated interactions means that opportunities both for violation and for vindication are always on the horizon. The prospects for cooperation in the future—which, for example, motivated the United States to limit its shaming of China during the Darfur crisis—deter states from too heartily voicing condemnation of those that may soon be partners. Further, given the propensity of the United States to use the veto power in what many observers view as an inappropriate manner,²⁹⁹ Washington is wise to be careful in how often or how intensely it criticizes the same practice of inappropriate veto by Russia or China. Some have exalted shaming in the criminal law for its “deeply democratic” character—that is, the fact that shaming is a punishment rooted in condemnation by one's peers.³⁰⁰ But the deeply democratic nature of shaming in international law is also one of its great

(noting that “the draft resolution was not adopted” without attributing that failure to the United States, which vetoed the measure); U.N. SCOR, 63d Sess., 5933d mtg. at 8, U.N. Doc. S/PV. 5933 (July 11, 2008) (statement of representative of the United Kingdom) (opining, following veto by Russia and China of resolution calling for sanctions against Zimbabwe's president, that “the Security Council has failed to shoulder its responsibility to do what it can to prevent a national tragedy deepening and spreading its effects across Southern Africa”); Security Council 5619th Meeting, *supra*, at 9 (statement of representative of France) (expressing, after veto by Russia and China, “regret that the Security Council was not able to adopt” a resolution calling for a cessation to attacks against civilians by government of Myanmar); U.N. SCOR, 59th Sess., 5051st mtg. at 3, U.N. Doc. S/PV.5051 (Oct. 5, 2004) (statement of representative of Algeria) (attributing demise of resolution demanding end to Israeli military activities in Northern Gaza to a “fail[ure]” by the Council, rather than to a veto by the United States).

298. Cf. Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303 (2002) (explaining that two states participating in a treaty may choose not to adopt a dispute resolution clause because mechanisms may impose costs on one of the parties that are not offset by any gain by the other party).

299. See WOUTERS & RUYLS, *supra* note 76, at 15.

300. Amitai Etzioni, *Back to the Pillory?*, AM. SCHOLAR, Summer 1999, at 43, 47.

difficulties: in many cases, the shamers are no different from the shamed.³⁰¹

C. Implications

Because of the limited time period and narrow set of cases from which humanitarian intervention in the Security Council can be examined, it would be unwise to make sweeping conclusions about the operation of shame in motivating permanent members.³⁰² Nonetheless, the four dynamics defined here facilitate a more systematized understanding and allow the creation of a basic narrative of the mechanism of shame in the context of humanitarian intervention. The United States usually acts as an instigator of intervention, either of its own volition (and often in coordination with allies) or in response to pressure by a mobilized community with particular political influence. Once the United States is seized of a situation, Russia and China are active either in blocking, threatening to block, or in tolerating humanitarian intervention. Which approach they take depends in large part on the position of regional stakeholders; if regional stakeholders support intervention, this will sway Russia and China to deviate from their default position of nonintervention in the internal affairs of states.³⁰³ These repeated interactions further motivate all states in the Council to seek to lessen the impact of shaming from the outside.

Beyond illuminating the factors that explain how shaming operates in the context of humanitarian intervention, this examination of the dynamics of shame has several important implications. First, this study should guide the efforts of parties seeking to influence permanent members, as efforts to shame are likely to be fruitless when they are based merely on an expectation that the U.N. Security Council should act in humanitarian crises. Unless that expectation ripens into a norm that is seen to be of central importance to the United States, China, or Russia—a development that seems quite unlikely at this point—it will remain merely an argument

301. Cf. NUSSBAUM, *supra* note 39, at 235 (arguing that this “deeply democratic” nature is problematic because “[w]hen government invites the mob to punish, it can expect targeting of people who are regarded as unsavory, even if they have done nothing, or nothing much, wrong”).

302. Indeed, some argue that “[t]here is no such thing as Security Council jurisprudence” and that “the lessons learned from the first case usually wear off after the second.” Peter van Walsum, *The Security Council and the Use of Force: The Cases of Kosovo, East Timor, and Iraq*, in *THE SECURITY COUNCIL AND THE USE OF FORCE: THEORY AND REALITY—A NEED FOR CHANGE?* 65, 65 (Niels Blokker & Nico Schrijver eds., 2005).

303. See *supra* note 293 and accompanying text.

used to justify intervention that is already supported rather than a tool for advocates of intervention to wield influence.³⁰⁴ Actors seeking to successfully mobilize shame should acknowledge that the positions of regional stakeholders are key to the reactions of China and Russia to humanitarian intervention. Commentators portray Russian and Chinese resistance to intervention as an arbitrary attempt to obstruct U.S. interests or as a self-interested measure to protect against outside intervention,³⁰⁵ but past practice shows that this is a matter of national identity and continued support from their key partners in foreign policy.³⁰⁶ Finally, it is crucial to recognize that pressure from domestic audiences within the United States typically does not convince the government to support humanitarian intervention. While the president has sought public support for planned interventions, it has yielded to public pressure on whether to pursue those interventions only when that pressure comes from powerful constituencies.³⁰⁷

Advocates of shaming thus should recognize that it is only in limited circumstances that shaming ultimately succeeds in influencing the behavior of states in the context of humanitarian intervention. This suggests that instead of seeking to blindly criticize the governments that fail to take action or that seek to block action by others, advocates should focus more on building the necessary conditions for shaming: reaching constituencies with some influence—whether powerful legislators in the United States or other governments in the region of the humanitarian crisis—or securing the consent of governments facing intervention so as to cure the Russian and Chinese resistance to nonintervention. In past interventions, criticism has been meaningless without some other connection to the core interests of the governing regime.

These particular dynamics inspire three broader conclusions. First, the dynamics of shame in the Security Council raise questions about whether shaming based on the notion of a responsibility to protect yields productive results. Much ink has been spilled over whether the responsibility to protect is or is not law, but a more pertinent inquiry may be whether it is affecting state behavior, and in what way, whether or not it is law. Because moral condemnation forms the basis of shaming, this tool works best when it targets actions that cannot be justified. It is clear that massacres of innocent people—the first-order subject of shame—cannot

304. See Sunstein, *supra* note 55, at 914.

305. See sources cited *supra* note 296.

306. See *supra* notes 290–93.

307. See *supra* Part III.B.1.

be convincingly justified by their perpetrators. But the second-order subject of shame—a failure or refusal of the Security Council to authorize intervention—is so contested that shaming based on this notion of responsibility has largely failed to produce results. Questions about whether humanitarian intervention is a good way to respond to mass atrocity, about what constitutes a sufficiently serious crisis as to warrant intervention, and about what steps ought to be taken in order to avoid military intervention remain heartily contested in the chambers of the United Nations and in the debates of governments and civil society. As a result, shaming based on a responsibility to protect invites the target of the shame to offer justifications and explanations for its opposition to intervention. The act of shaming thus creates a new site of contestation over the principle of a responsibility to protect; every time Russia or China or any other state is made to answer to criticism it faces, that state is given an opportunity to further its arguments opposing any norm of intervention. Accordingly, while shaming may operate to reinforce norms in some cases, in the context of humanitarian intervention the principle of a responsibility to intervene remains so contested and contingent that shaming instead may lead to further deterioration of the already-contested principle.

Second, the dynamics of shame in the Security Council suggest that the deontological focus of the contemporary human rights movement may contribute to the movement's weaknesses. Rights talk today often consists of expressing a need to protect rights because they are fundamental, because they are undeniable, because they are rights. Consequentialism played a role in the first international human rights instruments; the Universal Declaration of Human Rights, for example, expresses that the declaration is necessary not simply because human rights are fundamental, but rather because human rights violations lead to war and because respect for human rights can enable social progress and better standards of living.³⁰⁸ The U.N. Charter, too, characterizes the protection of human rights as a way to create "conditions of stability and well-being which are necessary for peaceful and friendly relations among nations."³⁰⁹ This consequentialist understanding of rights, however, has faded away over the years, with the useful benefits of protecting rights taking a back seat to the transcendent idea that rights are fundamental and therefore must be

308. Universal Declaration of Human Rights, G.A. Res. 217 (III)A, pmb., U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

309. U.N. Charter art. 55.

protected.³¹⁰ This study of shaming efforts indicates that the fundamental nature of rights is simply not enough to move the most powerful states in the world to action. They have made some difference; given the reaction of some states to the possibility of an atrocity in Libya, for example, it seems unlikely that the world would react to an event like the Rwandan genocide today in the way that it did in 1994. State preferences have changed in some ways, but this is limited, and it is difficult to conclude even despite these changes that states now see intervention as simply the right thing to do. State interests, however—a need to protect relationships with domestic constituencies or with other states—do succeed in motivating action.³¹¹ Scholars and advocates in human rights may fear the impurity of consequentialist approaches to rights; to focus on politics as a reason for protecting individuals from massive human rights violations seems to cheapen the content of those rights, whereas a moral duty to protect and respect human rights regardless of the consequences aligns better with the respect that should be given to their inviolable and fundamental nature. This discomfort with admitting the consequentialist rationales for protecting human rights, however, may prove to be a disservice to the human rights advocates seeking to inspire intervention, whether military or otherwise. Consequentialist rationales for rights protection may instead constitute the more effective approach.

Third, this analysis suggests that the lofty expectations of the promise of shaming run into very high barriers in the context of humanitarian intervention. This should be expected. The warm blanket of the term “humanitarian intervention” obscures the fact that humanitarian intervention, despite the euphemism, is war. It is costly; it is destructive; tanks and schools and churches and factories are blown to pieces; soldiers and sisters and brothers and children die cruel and ugly deaths. Humanitarian intervention may be the point at which the power of humanitarianism runs out. Interests in protecting relationships with allies or political constituencies may carry the day in convincing a state to tolerate or support intervention, but without that threat of harmful

310. See BRIAN OREND, HUMAN RIGHTS: CONCEPT AND CONTEXT 89 (2002); WILLIAM J. TALBOTT, WHICH RIGHTS SHOULD BE UNIVERSAL? 17 (2005). See generally SAMUEL SCHEFFLER, THE REJECTION OF CONSEQUENTIALISM: A PHILOSOPHICAL INVESTIGATION OF THE CONSIDERATIONS UNDERLYING RIVAL MORAL CONCEPTIONS (1994).

311. See MAZOWER, *supra* note 250, at 199–200 (“[T]he notion of moral community that . . . theorists have argued necessarily bound members of a common civilization no longer exists. . . . [B]oth the legalist and the moralist versions of international organization conceived as the alternatives facing the world on the eve of the First World War have, a century later, been defeated by the global triumph of the sovereign state.”).

consequences, shame will have little effect. The decision to intervene in Libya was not a triumph of shame in the Security Council, as many would like it to be; it was instead an exposure of the tool's limited power.

CONCLUSION

This Article has demonstrated that moral condemnation of states for their failure to support or tolerate humanitarian intervention faces significant challenges in motivating the desired impact. The limited influence of the agent of shame, the absence of a norm of intervention, the attention and divergent interests of competing audiences, and the repeated interactions of the members of the Security Council prevent shaming—which can be effective in other areas of human rights protection—from securing Security Council support for intervention in humanitarian crises. Accordingly, proponents of a responsibility to protect or of humanitarian intervention—or of any movement that seeks to convince powerful states to use coercive tools to end human rights abuses by other states—should turn away from blindly seeking to mobilize shame. This may mean more carefully tailoring efforts to generate conditions that will enhance the effect of condemnation on Security Council members. This approach, however, ignores the high barriers to influencing states in the area of warmaking, the power that governments most cautiously protect. Turning to alternatives to military intervention may thus provide a more auspicious solution, one that not only may provoke less opposition from the governments in the Security Council, but also may prove a more promising and less destructive road for rights protection in the long run.