2013


Saira Mohamed

Berkeley Law

Follow this and additional works at: https://scholarship.law.berkeley.edu/facpubs

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by Berkeley Law Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
OMISSIONS, ACTS, AND THE SECURITY COUNCIL'S (IN)ACTIONS IN SYRIA

Saira Mohamed*

ABSTRACT

This essay explores the responsibilities of Security Council members for abuses perpetrated in foreign humanitarian crises. As death tolls mount and massive violations of human rights continue in Syria, the Security Council plods along, doing little to respond to the escalating violence there. Some have portrayed the Council as a mere bystander, an onlooker with no connection to or responsibility for the atrocities undertaken by others. In another view, the Council is not merely standing by, but instead is complicit in the violence because it does nothing. Drawing on insights from the criminal law, this essay considers how we can better understand what it means to be a bystander in the context of humanitarian crises. Specifically, this essay examines two questions. First, it considers whether the resistance of Anglo-American criminal law to bystander liability should be replicated in the context of international affairs. Investigating the rationales for limited bystander liability in criminal law and the distinct rationales present in international law, this essay argues that even though the responsibility of the Security Council for international peace and security provides a strong reason for placing heightened expectations

* Assistant Professor of Law, University of California, Berkeley School of Law. I am grateful to Michelle Wilde Anderson, Andrew Bradt, Anupam Chander, Laurel Fletcher, Stavros Gadinis, David Gamage, Kate Jastram, Chris Kutz, Katerina Linos, Máximo Langer, Melissa Murray, Bertrall Ross, Fred Smith, Richard Steinberg, Karen Tani, Jennifer Urban, and Beth Van Schaack for helpful comments and conversations.
on the Council in the event of humanitarian crises, distinct concerns in international law caution against treating Council members as obligated to intervene in foreign states. Second, this essay draws on the criminal law distinction between acts and omissions to explore whether Security Council conduct in the context of humanitarian crises should properly be labeled participation or inaction. I contend that in light of the Security Council's defined role under the U.N. Charter, a lack of involvement on the part of the Council should be understood as an affirmative choice, rather than as a failure to act. Exploring the broader moral intuitions of both criminal law and international law about the conduct of certain actors toward suffering caused by third parties, this essay seeks to illuminate some assumptions at work in our understanding of the Security Council's role in humanitarian crises, thus furthering debates about the Council and humanitarian intervention, a crucial question in contemporary international law and politics.

I. INTRODUCTION

Two years have passed since the government of Bashar al-Assad began a brutal crackdown against Syrian activists in the midst of the 2011 Arab Spring, and by many accounts, the U.N. Security Council has done nothing to respond to the escalating violence. The Council, charged under the U.N. Charter with "primary responsibility for the maintenance of international peace and security," has held meetings and issued statements condemning the violence, but it has yet to take more decisive measures. It has not imposed economic sanctions, or threatened to prosecute military or political leaders for war crimes, or even hinted at the


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


possibility of using military force may be used. Paralyzed by disagreements among the permanent members on the proper approach to the violence, the Security Council instead stands by as the killings continue. As the world watches the Council engage in hand-wringing and debate, we are reminded of the genocide in Rwanda, where hundreds of thousands of individuals were massacred over the course of one hundred days while the Security Council held meetings and debated the legal characterizations of the killings. Watching the Council today also invokes memories of its halting and ineffective activities during the Bosnian civil war and in the years of massive violence in Darfur. Throughout these devastating humanitarian crises, some have portrayed the Security Council as a mere bystander, an onlooker with no connection to or responsibility for the atrocities undertaken by others. In another view, the Council is not merely a bystander, but instead is complicit in the violence because it does nothing; by standing by silently, it contributes to the crises it ignores. The Muslim Brotherhood, for example, recently accused the international community of becoming “a partner” in the violence of the Assad regime by “standing silent for too long.” Abdul Wahib, an activist leader in the village of Kafr Takharim, similarly described the United Nations as “a partner in destroying Syria.” The complicity of bystanders in the sins that they tolerate is, of course, a question that arises outside the context of international law and mass atrocity as well. The Security Council’s role in the violence in Syria could


6 The language of “bystanding” has been used by numerous officials and commentators. See, e.g., President Barack Obama, Remarks Following a Meeting With Prime Minister Helle Thorning-Schmidt of Denmark 2 (Feb. 24, 2012), available at http://www.gpo.gov/fdsys/pkg/DCPD-201200125/pdf/DCPD-201200125.pdf (“It’s important that we not be bystanders” to the events in Syria); Charles Krauthammer, Op-Ed., While Syria Burns, Obama Stands Idly By, CHI. TRIB., Apr. 30, 2012, at 17.


9 See infra Part VI (discussing whether Security Council is a bystander in Syria).


be likened, say, to the thirty-eight onlookers who failed to come to the aid of Kitty Genovese when she was brutally stabbed to death by Winston Mosely in front of her apartment building in 1964. Or perhaps the permanent members are no different from seventeen-year-old David Cash, who, in 1997, entered the restroom of a Reno, Nevada casino and saw his friend, Jeremy Strohmeyer, assaulting seven-year-old Sherrice Iverson. Cash left the room without doing or saying anything. Strohmeyer murdered Iverson a few minutes later.

Are these situations indeed comparable? The law governing each suggests that they are. David Cash bore no criminal legal responsibility for the death of Sherrice Iverson, and he had no separate legal responsibility for his failure to come to the aid of a person in danger. The thirty-eight onlookers were similarly free of any legal responsibility for Genovese's death or for their own failures to act. And under international law, the member states of the Security Council have no legal responsibility for the deaths of civilians in Syria, nor does their inaction trigger any separate state responsibility for a failure to intervene.

That each of these situations involves bystanders who bear no legal responsibility for their conduct suggests that they are similar. Still, should we conceive of these situations as analogous? This essay takes on this question as an exploration of what responsibilities third-party states should bear in humanitarian crises. Is the Security Council a partner to the violence in Syria? Is it merely a bystander? Can it choose to remain on the sidelines or does it have some necessary connection to the abuses taking place there? Is a failure to act any less morally or legally blameworthy than acting in support of the violence? Drawing on insights from the criminal law, this essay considers how we can better understand what it means to be a bystander in the context of humanitarian crises. Specifically, this essay examines two questions. First, it considers whether the resistance of Anglo-American criminal law to bystander liability should be replicated in the context of international affairs. Investigating the rationales for limited bystander liability in criminal law and the distinct rationales present in international law, I argue that even though the responsibility of the Security Council under the U.N. Charter for interna-

---


14 See infra Part III.

15 This is a question that arises in many areas of law. See, e.g., DeShaney v. Winnebago Cnty. Dept. of Soc. Servs., 489 U.S. 189, 212 (Brennan, J., dissenting) ("[I]naction can be every bit as abusive of power as action, [and] oppression can result when a State undertakes a vital duty and then ignores it.").
tional peace and security provides a strong reason for placing heightened expectations on the Council in the event of humanitarian crises, distinct concerns in international law caution against treating Council members as obligated to intervene in foreign states. Second, this essay draws on the criminal law distinction between acts and omissions to explore whether Security Council conduct in the context of humanitarian crises should properly be labeled participation or inaction. I contend that in light of the Security Council's defined role under the U.N. Charter, a lack of involvement on the part of the Council should be understood as an affirmative choice, rather than as a failure to act.

I proceed with this analysis cognizant of the significant differences between the two bodies of law examined in this essay. The criminal law deals primarily with the behavior of individuals, while international law focuses on the actions of states.\textsuperscript{16} The criminal law relies on a centralized authority for enforcement, while international law lacks any such authority in most contexts and instead employs a diverse array of informal mechanisms for enforcement. Still, even acknowledging these differences, both bodies of law reflect broader moral intuitions about the conduct of certain actors toward suffering caused by third parties.\textsuperscript{17} A comparison of the two consequently may illuminate some assumptions at work in our understanding of the Security Council's role in humanitarian crises. Accordingly, despite the differences in these areas, I anticipate that this exploration can further debates about the Council and humanitarian intervention and contribute to this crucial question in contemporary international law and politics.\textsuperscript{18}

\textsuperscript{16} Of course, states are ultimately made up of the individuals who decide their activities and implement those decisions. See Jose E. Alvarez, Do States Socialize?, 54 Duke L.J. 961, 969 (2005) (noting that in order to understand “socialization” of states, “factors such as who the people within these organizations are, the characteristics of the bureaucracies in which these actors perform, and these individuals’ connections to relevant epistemic communities elsewhere matter a great deal”); see also Jack S. Levy, Prospect Theory, Rational Choice, and International Relations, 41 Int’l Stud. Q. 87, 102–03 (1997) (describing “aggregation problem” in international politics).

\textsuperscript{17} George Fletcher and Jens Ohlin, for example, have drawn on self-defense in domestic criminal law to analyze self-defense in international law. See generally George P. Fletcher & Jens David Ohlin, Defending Humanity: When Force Is Justified and Why (2008).

\textsuperscript{18} I focus in this analysis on the conduct of Security Council permanent members, as those permanent members largely control the Council’s agenda and, because of the veto power, have the capacity to dictate the Council’s activities. Of course, non-permanent members, too, could do the same. If enough non-permanent members opposed a resolution that the measure did not attain the required nine votes for adoption, see U.N. Charter art. 27, para. 1, then they could effectively have a veto power as well. This has come to be known as the “hidden veto.” See Sydney D.
II. The (In)Action of the Security Council in Syria

The uprising in Syria began amid regional demonstrations throughout the Arab world, but two years later, violence in the country has reached a level of devastation that far surpasses the rest of the region. Since the beginning of the uprising, the government of Syria has escalated its crackdown against activists, while opposition groups also have intensified their attacks; both sides have been accused of committing massive violations of human rights and international humanitarian law. The result has been a bloodbath, with estimates in December 2012 of some 40,000 deaths, including 20,000 civilians. The conflict has created more than 400,000 refugees, a number expected to rise rapidly in the coming months. In addition, according to U.N. Secretary-General Ban Ki-moon, arbitrary detentions number in the “tens of thousands.”

The Security Council, meanwhile, has responded only weakly, if at all. Although the Council first discussed the violence in Syria during a meeting on Israeli-Palestinian negotiations in April 2011, it was not until August of that year that it issued a public statement on the rapidly deteriorating situation. That document, notably a Presidential Statement (“PRST”) and not a resolution, expressed the Security Council’s “grave concern” and condemned the “widespread” human rights violations, called for an end to the violence, reaffirmed the “sovereignty, independence, and territorial integrity of Syria,” and noted the Council’s intention to remain involved in the situation. Although the PRST took no affirmative action, it came to mark the high point of activity in the Security Council for the year. In October, France, Portugal, and the United Kingdom introduced a draft resolution that repeated many of the points that had been made in the PRST, but the resolution disintegrated in the face of vetoes from both Russia and China. The Council again attempted to adopt a resolution on Syria in February 2012. The resolu-

---


tion expressed "[f]ull[ ] support[ ]" for the Arab League’s recently proposed peace plan, which called for Assad to step down and set out a blueprint for the formation of a new national unity government.\(^{26}\) Russia and China vetoed the resolution, with China expressing concerns that it would exacerbate the crisis and Russia charging that it inappropriately called for "regime change."\(^{27}\) France, Germany, Portugal, the United Kingdom, and the United States brought a third resolution to the Security Council in July 2012. More forceful than previous drafts, the July text demanded that Syrian government forces stop the use of all heavy weapons and withdraw troops from populated areas.\(^{28}\) Moreover, it threatened to use coercive measures under Article 41 of the Charter, which addresses measures not involving the use of armed force such as economic sanctions or the severance of diplomatic relations,\(^{29}\) if the regime did not comply with those demands in ten days.\(^{30}\) Both Russia and China again voted against the resolution.\(^{31}\)

In the midst of this inaction, the Security Council has taken some affirmative steps to intervene. The body successfully passed resolutions calling on all parties to cease any violence, demanding that Syrian authorities allow humanitarian personnel access to populations in need of assistance, and deciding to deploy teams of unarmed observers to the country.\(^{32}\) Permanent members have taken their own approaches outside of the Security Council as well, through individually or regionally implemented sanctions or exertions of diplomatic pressure.\(^{33}\) Nonetheless, neither the Council as a whole, nor the permanent members on their own, have taken decisive action.

III. THE LAW OF SECURITY COUNCIL (IN)ACTION

Voices around the world have condemned the failure of the Security Council and its members to respond adequately to the violence in Syria. Some say the Council’s inaction has caused the violence to escalate. For


\(^{29}\) U.N. Charter art. 41.


\(^{31}\) See Gladstone, *supra* note 5, at A8.


example, after the second resolution failed in February 2012, U.N. High Commissioner for Human Rights Navi Pillay warned that the Security Council’s inability to act “appears to have fueled the Syrian Government’s readiness to massacre its own people in an effort to crush dissent.” 34 Syrian activist leader Abdul Wahib described the United Nations as “a partner in destroying Syria.” 35 Because it does nothing when more forceful intervention could be pursued, it is said, the idle international community has blood on its hands. 36 Even the U.N. General Assembly has expressed its outrage at the Security Council’s failures. 37

Vehement criticism has been widespread, but neither the Security Council as a whole, nor its permanent members individually, are required to take any action. International law imposes responsibility on states for abuses undertaken by other states only in limited situations. If a state aids, assists, directs, or controls another state that is committing an internationally wrongful act with knowledge of the wrongful act, then that state is responsible for the act just as the direct perpetrator is. 38 Absent such a close nexus, however, state obligations toward human rights abuses committed by foreign states are nearly nonexistent. Some supporters of the notion of a “responsibility to protect” claim that states have a legal obligation to take measures against a foreign state that is committing human rights abuses of particular gravity, usually rising to the level of war crimes, genocide, or crimes against humanity, but this remains merely an aspiration rather than a legal obligation. 39

The Genocide Convention provides a unique source of obligations for states with respect to genocide perpetrated by other states, but these obli-

gations are triggered in only very limited circumstances.\textsuperscript{40} According to the International Court of Justice, which interpreted the Convention in the context of a suit brought by Bosnia against Serbia alleging responsibility for genocide based on its failure to prevent the commission of the crime, states are required to “take certain steps” to fulfill their Article 1 obligation to “prevent” genocide.\textsuperscript{41} This obligation arises, however, only if a state “had the means” to prevent genocide.\textsuperscript{42} Whether a state had the means to prevent genocide, in turn, depends on a “capacity to influence effectively the action of persons likely to commit, or already committing genocide,” which will be assessed according to several 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.\textsuperscript{43}

Where a state does have a capacity to influence that gives rise to an obligation to prevent genocide, it is unclear what action it must take to effectively discharge its obligation. In resolving the Bosnia-Serbia dispute, the Court did not delineate any particular measures that Serbia should have undertaken, and instead based Serbia’s responsibility for a breach of the Convention on its failure to take “any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed.”\textsuperscript{44} More generally, the Court held that a state must “employ all means reasonably available” to it to discharge the responsibility to prevent genocide.\textsuperscript{45} This could mean that a state is required to “apply diplomatic pressure, to impose sanctions, and even to take coercive measures.”\textsuperscript{46} This duty, however, would be triggered only in the event of an impending genocide. Accordingly, because the situation has not yet escalated to the point of impending genocide, the Bosnia-Serbia


\textsuperscript{42} Id. ¶ 438.

\textsuperscript{43} Id. ¶ 430; {\textit{see also}} Alex J. Bellamy & Ruben Reike, {\textit{The Responsibility to Protect and International Law}}, 2 Global Resp. to Protect 267, 276–77 (2010). Notably, in reaching this decision, the ICJ cautioned 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.” Application of Convention on Prevention and Punishment of Crime of Genocide, 2007 I.C.J. 91, ¶ 429.


\textsuperscript{45} Id. ¶ 430.

decision does not trigger any responsibilities for Security Council members with respect to the crisis in Syria, at least at this time.\textsuperscript{47}

The above discussion describes the obligations of states generally, but in light of the special role of the Security Council in international affairs, it is important to address whether there are separate legal responsibilities imposed on the members of the Council. The U.N. Charter imposes on the Council “primary responsibility for the maintenance of international peace and security,” but it is generally understood that neither the Security Council nor its member states are legally required to take particular action to discharge that responsibility. Supporters of a responsibility to protect have sought to change this understanding. The International Commission on Intervention and State Sovereignty, the independent body that drafted the original statement of a responsibility to protect, insisted that the Charter “requires[ ] prompt and effective engagement by the Council when matters of international peace and security are directly at issue.”\textsuperscript{48} It is clear, however, that states have not embraced this view.\textsuperscript{49} Similarly, although many commentators have urged the Security Council permanent members to impose their own limits on veto use,\textsuperscript{50} it remains the case that the permanent members may choose to act or not act at their discretion. There is no requirement on the Security Council or its members to take up a particular matter in a meeting; nothing requires a

\textsuperscript{47} See HRC Report, supra note 19, ¶¶ 1–2 (finding evidence of crimes against humanity, war crimes, and gross human rights violations). Whether members of the Security Council would be deemed to “have the means” to prevent genocide in the event that violence rises to that level in Syria is a separate question. This obligation under the Genocide Convention would not trump the U.N. Charter obligation to refrain from the use of non-defensive force without authorization of the Security Council, but Security Council members may still be responsible for a failure to prevent based on their political and military capacity to affect the conduct of the Assad regime. Just as “[t]he Serbs in Belgrade were not the only ones who might have done more to protect the Muslims of Srebrenica,” William A. Schabas, Genocide and the International Court of Justice: Finally, A Duty to Prevent the Crime of Crimes, 2 GENOCIDE STUD. & PREVENTION 101, 115 (2007), if the Council has knowledge of an impending genocide, parties to the Convention could have a treaty obligation to try to prevent it.

\textsuperscript{48} INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 52 (2001); see also Louise Arbour, The Responsibility to Protect as a Duty of Care in International Law and Practice, 34 REV. INT’L STUD. 445, 454 (2008) (proposing that the Genocide Convention’s duty to prevent may trigger obligations in Security Council permanent members to not veto a resolution intended to prevent or stop genocide).

\textsuperscript{49} See 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 139, U.N. Doc. A/60/L.1 (Sept. 15, 2005) (expressing mere “prepared[ness]” to intervene in humanitarian crises through the Security Council, but refusing to articulate any obligation to do so); see also Mohamed, supra note 5, at 326–29.

\textsuperscript{50} See, e.g., INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, supra note 48, at 51.
permanent member to support a decision in the Security Council in the event that a meeting is held; and there is no obligation for a permanent member to have a good reason for using the veto.51

IV. The Rationale for Tolerating Security Council Inaction

Why does international law impose no obligation to intervene in massive humanitarian crises, even for the states that constitute the decision-making core of the Security Council? Several reasons explain this seeming inconsistency in the Council’s job description. First, practical realities dictated the creation of the Security Council; it was clear that the most powerful states would not participate in the United Nations absent freedom to do what they liked, so they were given significant powers without corresponding burdens.52 Perhaps it was anticipated that in exchange for the veto, the permanent members would “shoulder an extra burden in promoting global security,” but this was merely an expectation that did not become codified as a legal obligation.53 Second, the United Nations was built on a platform not only of respect for human rights and concern for threats to international peace and security, but also of nonintervention and sovereign equality of all states.54 The relative balance of these objectives has shifted over time, as the organization has taken a more active role in intervening in crises that previously would have been characterized as “internal” matters that were inappropriate for U.N. intervention.55 Moreover, the understanding of these objectives has transformed, as the concept of sovereignty has shifted from being envisioned as a shield against intervention into an expectation of the responsibilities of a government toward its people.56 Nonetheless, a requirement of intervention would be seen as an inappropriate infringement on the sovereign rights of the states on which that obligation is imposed.

54 See ANTONIO CASSESE, INTERNATIONAL LAW 104 (2001) (reflecting on the tension between respect for human rights in the Charter and the principles of sovereignty equality and nonintervention in the domestic affairs of states). Human rights, of course, had a less-than-starring role in the U.N. Charter and were subordinated to concerns of international security in the founding of the United Nations. See SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 181 (2010) (“[I]n the UN Charter [human rights] were reduced to embellishment.”).
56 See INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, supra note 48, at 10–12.
Additionally, reluctance to impose on the permanent members any obligation to intervene stems from a recognition that states have obligations toward their own people, and any commitment to respond to foreign-state atrocities necessarily means that a state will have fewer resources to devote to its domestic responsibilities. Accordingly, as sovereignty comes to be understood as a state's duty of protection toward its own citizens, any responsibility imposed by law on a state with respect to suffering taking place in a foreign state must not detract from that state's ability to respond to its own people's needs.

Finally, some have resisted a requirement of intervention because of concerns that states will too easily abuse their duty of intervention and use the requirement of intervention as a pretext for wars undertaken for ulterior motives. History supports these concerns. Hitler, of course, infamously framed Germany's invasion of Czechoslovakia as a humanitarian intervention. Although the Charter's requirement of multilateral authorization for any non-defensive use of force should protect against such exercises of unilateral military aggression, fear that humanitarian intervention will be used as a pretext for other ends remains a concern even for collective uses of force. The recent military campaign in Libya, for example, has been condemned as "regime change" in the guise of

67 What these responsibilities are as a legal matter may be different from what they are as a political matter. Under international law, states are expected not to actively harm their populations and may have certain affirmative obligations to provide for their populations, as under the International Covenant on Economic, Social and Cultural Rights, but they are not necessarily required to act according to the public's wishes in foreign affairs. As a political matter, however, governments that are responsive to their publics will consider the appetite of their citizens for intervention in making decisions about Security Council activities (or will seek to shape the public's attitude to fit the government's chosen course). Moreover, the commitment of Security Council members to protect international peace and security may be better regarded as a commitment made by governments, rather than by their peoples, and as a result, governments may face a conflict between the responsibilities set out under the Charter and those that their citizens expect them to fulfill.

68 See Osman v. United Kingdom, 29 Eur. Ct. H.R. 245, 33 (1998), quoted in Glanville, supra note 46, at 20 (citing Hakimi, supra note 39, at 375); James W. Nickel, How Human Rights Generate Duties to Protect and Provide, 15 Hum. Rts. Q. 77, 81 (1993) ("When we ask whether a certain party can bear a burden, we really want to know whether that party can bear that burden without abandoning other responsibilities that ought not to be abandoned."). Leaders supporting intervention thus often justify the decision to devote resources to foreign human rights crises as a matter of national interest. See Mohamed, supra note 39, at 333-35.


60 See id. at 113.
humanitarian intervention, even despite the fact that the action carried the imprimatur of Security Council authorization.  

V. COMPARING THE INTERNATIONAL LAW AND CRIMINAL LAW OF BYSTANDING

Having established that there is no law prohibiting the Security Council’s inaction with respect to Syria, I now turn to the question of whether Security Council inaction should be understood as legitimate or condemnable. To explore this question, I consider the criminal law regarding bystanders as a way of furthering our understanding of the relevant international law. The Anglo-American criminal law of omissions is in many ways similar to the international law of omissions. Under the criminal law, there is no general duty to rescue, with obligations on bystanders imposed in only limited situations.  

In one set of situations, statutes impose a duty to take some particular action, and failure to undertake that action is explicitly defined as prohibited. For example, failure to file a tax return represents an offense defined explicitly by an omission. In a second set of situations, omissions are sufficient for criminal liability even though they do not explicitly constitute the basis of the offense. In these situations, an omission triggers liability only when an individual breaches a duty to act and that breach, in turn, produces the social harm delineated in the particular offense with the mental state required for the offense. Such a duty to act arises in four circumstances. First, criminal law imposes a duty to act where there is some status relationship between the bystander and the victim, such as that of a parent and child. Second, a duty may be imposed—expressly or by implication—by contract, as in the case of a lifeguard who, in the course of her employment, accepts duties toward the patrons of the pool she oversees. Third, a bystander takes on a legal duty when she voluntarily assumes care of a victim and isolates the victim from other help. Finally, criminal law imposes a legal

---

61 See Adrian Johnson & Saqeb Mueen, Introduction to Short War, Long Shadow: The Political and Military Legacies of the 2011 Libya Campaign 4 (Adrian Johnson & Saqeb Mueen eds., 2012) (“[T]here is indeed a legacy of the Libya conflict: China and Russia will presume that the model in future operations is rather regime change under the cloak of R2P.”).

62 ALAN W. NORRIE, CRIME, REASON AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW 122 (1993) (“Anglo-American criminal law operates with an extremely narrow conception of those situations in which an omission can take the place of an act as the basis for criminal liability.”).

63 See GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 46 (1998) (discussing criminalization of “[a]ctivities that can be described as failures to act”).

64 See Dressler, supra note 13, at 976–77.

65 See Larry May, Complicity and the Rwandan Genocide, 16 RES PUBLICA 135, 137-38 (2010). For example, homicide crimes are defined by the act of killing with a particular mental state, but a failure to act may form the basis for liability.
duty when a person creates a harm, as where a driver hits a pedestrian with her car. Other nations impose wider responsibilities on bystanders. France and Germany, for example, require individuals to assist a person who is in danger even without these special relationships. The absence of a general duty of care, however, is widespread, and the criminal laws of Argentina, China, India, Israel, and Spain, among others, all reflect a reluctance to impose obligations to step in unless there is some prior relationship or role of responsibility. Thus, David Cash had no duty of care toward Sherrice Iverson and, accordingly, could not be held liable for her murder. Similarly, the residents of Kitty Genovese’s apartment building had no duty of care toward her, and thus were not legally responsible for her death.

Anglo-American criminal law and international law are thus unified in their delineation of responsibilities to take action only in limited circumstances. The rationales, however, are quite different. In its focus on the principle of non-intervention, international law concerns itself with protecting the target state—the party that would be the direct perpetrator in the criminal-law scenario. In contrast, the criminal law does not limit omissions liability out of concern for Jeremy Strohmeyer or for Winston Mosely. Instead, it does so primarily out of concern for the third-party bystander and because of a reluctance to impose affirmative duties on a person to act in a particular way, as opposed to duties on a person to

---

66 See Leo Katz, Bad Acts and Guilty Minds: Conundrums of the Criminal Law 139 (1987); Dressler, supra note 13, at 976. Some states have expanded on these duties by enacting “Bad Samaritan laws” that provide punishments for persons who fail to take certain actions towards other persons in need. Under these laws, the “Bad Samaritan” is not guilty of the underlying offense, but instead is liable only for violation of the Bad Samaritan law. See Dressler, supra note 13, at 977 (describing Bad Samaritan laws and providing examples).

67 See Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (1993) (“[M]ost European countries do impose a legal duty on individuals to come to the aid of an imperiled person where that can be done without risk of harm to the rescuer.”); Catherine Elliott, France, in The Handbook of Comparative Criminal Law 209, 216 (Kevin Jon Heller & Markus D. Dubber eds., 2011); Graham Hughes, Criminal Omissions, 67 Yale L.J. 590, 632 (1958) (discussing French law imposing liability for failure to assist a person in danger); Thomas Weisgend, Germany, in The Handbook of Comparative Criminal Law, supra, at 252, 260–61.

68 See Marcelo Ferrante, Argentina, in The Handbook of Comparative Criminal Law, supra note 67, at 12, 22–24; Wei Luo, China, in The Handbook of Comparative Criminal Law, supra note 67, at 137, 147; Stanley Yeo, India, in The Handbook of Comparative Criminal Law, supra note 67, at 288; 326; Itzhak Kugler, Israel, in The Handbook of Comparative Criminal Law, supra note 67, at 352, 355–57; Carlos Gómez-Jara Diez & Luis E. Chiesa, Spain, in The Handbook of Comparative Criminal Law, supra note 67, at 488, 498–500.
avoid particular behavior. As Joshua Dressler explains, "[a] penal law that prohibits a person from doing X . . . permits that individual to do anything other than X . . . In contrast, a law that requires a person to do Y . . . bars that person from doing anything other than Y." Because "[o]ne aim of the law is to maximize individual liberty," the law sets out "only minimalist goals." In its concern for the responsibilities of states toward their own peoples, international law, too, seeks to preserve the autonomy of the intervenor, but international law also looks upon the intervenor with suspicion and fear. Whereas the person who comes to the aid of Kitty Genovese or Sherrice Iverson will necessarily be a hero, the state that comes to Syria's aid may instead be viewed as militarist, neocolonialist, imperialist.

Interest in preserving the autonomy of the intervenor, however, should be less important in a system in which certain parties have voluntarily taken on particular duties. The criminal law does not concern itself with the autonomy of the parent, for example, because that parent has assumed a responsibility toward the child, and as such, may fairly be held liable when she breaches that duty even despite the reluctance of the criminal law in most contexts to impose affirmative obligations. So, too, with the lifeguard, or even the layperson who jumps in the pool to save the drowning stranger and, as a result, prevents other onlookers from doing the same. In these situations, the interdependence that the criminal law hesitates to force already exists.

Similarly, in understanding the duties of the Security Council's members, we ought to be less concerned with preserving the autonomy of the intervening state, as these states have willingly taken on a responsibility for international peace and security. In that sense, the Security Council is no different from the parent or the lifeguard. The Security Council was created in 1945 with admittedly different concerns in mind from those

69 See Fletcher, supra note 63, at 48 (explaining that laws demanding aid to others "supposedly violate[] our autonomy or liberty").
70 Dressler, supra note 13, at 986.
71 Id.
72 Id. at 987; see also Hughes, supra note 67, at 634 (citing "objections to compelling one man to serve another" as a primary criticism of a duty to rescue).
73 There is some concern in the criminal-law rationales for limiting bystander duties that an intervening bystander could make matters worse by exacerbating an injury, but this concern does not rely on an expectation that bystanders will abuse opportunities for intervention for self-interested reasons. See Dressler, supra note 13, at 985.
75 See Hughes, supra note 67, at 634 (urging the law's acceptance of "interdependence").
that occupy it today, but to the extent that the permanent members continue to enjoy the privileges associated with their unique position, they can reasonably be expected, at least as a matter of commitment if not of legal obligation, to fulfill the responsibilities set out in the U.N. Charter even in the absence of a broader duty to intervene in international law. As much as the contemporary system of international law and politics prioritizes individual states' independence and equality, the Charter establishes a system that prioritizes communitarianism as well, and it tasks the members of the Security Council with realizing those communitarian impulses.

The difficulty with this interpretation, of course, is that the criminal law does not expect the lifeguard of pool A to protect the individuals at pool B to the detriment of her constituents at pool A. States do have obligations toward their own people, and these obligations take precedence over any obligations toward third states. Thus, additional concerns exist in international law that do not arise so clearly in the criminal context. These concerns suggest another reason to differentiate between what David Cash did, or failed to do, in that Reno casino and what Russia or the United States is doing with respect to Syria. Although Russia and the United States do bear a duty of care toward the victims of their inaction based on their role in the Security Council, they also have commitments to other parties as well. Any duty of intervention on the part of a state must exist alongside the duties owed to the state's own population.

How can the two duties be reconciled? One way is to conceive more broadly of intervention. Too often, intervention in human rights crises is thought of exclusively as military intervention, which is necessarily costly, destructive, and disruptive to a state's population. Greater focus on other measures, ranging from triggering the jurisdiction of an international criminal tribunal to imposing diplomatic pressure or economic sanctions, may enable states to discharge their responsibility toward third parties while also fulfilling their sovereign responsibilities toward their own peoples.

Moreover, even acknowledging the commitments that states take on as Security Council members, it is important to recognize that there are good reasons for supporting a model of international law that focuses on

---

76 Perhaps the more apt question under the criminal law is whether a police officer, say, has any duties toward her own family that take precedence over the professional duties owed to individuals in her jurisdiction. We might expect the officer to be cautious, rather than foolhardy, in exposing herself to violence in order that she may fulfill her obligations to take care of her own children.

77 An analog of this suggestion of less destructive interventions may be found in the criminal law: Many states that impose a duty to rescue do so only if that duty can be discharged without posing "substantial danger" to the rescuer. See Andrew Ashworth, Public Duties and Criminal Omissions: Some Unresolved Questions, 2 J. Commonwealth Crim. L. 1, 15–18 (2011).
autonomy rather than responsibility. Just as in the criminal law a wider sense of duty may "turn us all by force of law into subsidiary policemen and tell-tales," an expectation that the Security Council should always act in the face of humanitarian crisis may inflate the role of the Council beyond the desires of individuals and other states. The Security Council is a flawed institution. It is unrepresentative, it reflects sixty-year-old power dynamics, and the states that control its decision-making are not making those decisions flawlessly. To the extent that we place expectations on the Security Council, we may be taking away from the discretion or interest in intervention of other potentially useful actors, such as regional partners, or we may detract too much from the responsibilities of expectations we have of the target state itself, which may be in the best position to respond to burgeoning crises before they escalate.

VI. IS THE SECURITY COUNCIL A BYSTANDER?

A final question concerns the very characterization of the permanent members of the Security Council as bystanders, and of their conduct as omissions rather than acts. Where to draw the line between act and omission is a question that plagues the criminal law. As Leo Katz notes, some cases are easy: "To fail to help Kitty Genovese is an omission; to stab Kitty Genovese is an act." But, as George Fletcher notes, even that failure to help is itself a choice. Moreover, what should be made of the person who closes his apartment door when a bleeding Kitty Genovese approaches? Is this a failure to help, or is it an affirmative act that endangers the victim? Katz proposes that whether an actor has committed an act or an omission can be evaluated by asking, "If the defendant did not exist, would the harmful outcome in question still have occurred in the way it did?" The thirty-eight bystanders to Genovese's murder thus committed omissions, as Genovese would still have been murdered if they did not exist. But the individual who shuts the previously open apartment door may have cut Genovese off from shelter that would have prevented her murderer from further pursuing her.

78 Norrie, supra note 62, at 132 (quoting Glanville Williams, Criminal Omissions: The Conventional View, 86 Law. Q. Rev. 88, 90 (1991)).
79 Katz, supra note 66, at 140.
80 See Fletcher, supra note 63, at 45 (noting difficulty of identifying omissions behavior as "doing nothing," as the bystander "is not unconscious, and he is not oblivious to the plight" of the victim, and explaining that "[h]uman agency is built into the example").
81 Katz raises the same situation with the following hypothetical case: "A child, chased by a wild dog, runs toward the open door of a nearby villa. The malicious owner slams the door in his face, and the dog tears the child to pieces. Act or omission?" Katz, supra note 66, at 140.
82 Id. at 143.
My goal in this discussion is not to settle on an answer to how acts and omissions can be distinguished, but rather to illuminate the complexities of the choice of whether to understand an actor as an omitting bystander or as an active participant. The permanent members of the Security Council are predominantly conceived of as bystanders rather than as parties to the abuses they do not address. Although bystanders are often thought of as innocent, the term too may suggest censure. In titling her chilling account of the U.S. government’s inaction during the Rwandan massacres *Bystanders to Genocide*, Samantha Power clearly sought to condemn the choice to stand by in the face of massive violence. But the language of bystanding also insulates an actor, at least to some degree, from criticism. When a state is identified as a bystander rather than as a more direct participant, the state is necessarily distanced from ultimate responsibility for the harm. Thus, by urging that the United States should “not be [a] bystander[,]” to the situation in Syria, President Obama was suggesting that the United States could be at worst a bystander, thus implicitly fending off accusations that Washington was complicit in, and thus at fault for, the violence.

Are the permanent members merely bystanders to the violence in Syria, or are they something more? In the many situations in which the Security Council has purportedly stood idly by, the body has done something distinct from simply failing to act. During the Rwandan genocide, for example, the Council slashed the U.N. peacekeeping force stationed in the country, fearful of attacks against peacekeepers. Some argue that the withdrawal of the force may have “facilitated the genocide.” The Rwandan situation, of course, is unique; the Security Council rarely downgrades its assistance in the face of a crisis. A second category of cases—those in which the Security Council does not act—is more common. In these types of cases, such as the situation in Darfur, identifying an affirmative act that contributes to the abuses is more difficult. Nonetheless, defining the Council as a third-party bystander obscures its role

85 See Obama, supra note 6, at 2.
87 But see UN Human Rights Chief Urges Action to Halt Escalating Violence in Syria, supra note 34 (suggesting that the failure of the Security Council to act in Syria has fueled the government’s willingness to massacre its own people).
in these crises. As discussed above, the U.N. Charter endows the Council with primary responsibility for the maintenance of the world’s peace and security. The Security Council was conceived as the “world’s police force,” and when it chooses not to serve in this capacity, this choice should be considered distinct from mere bystanding or a simple omission. A final category of cases encompasses situations in which some members of the Security Council are prepared to act, as was the case during the crisis in Kosovo in the late 1990s, and as is the case with respect to certain measures in Syria. In these situations, it may not be fair to characterize permanent members that are blocking Security Council action as bystanders. By vetoing resolutions calling for an end to violence in Syria, Russia and China are not merely standing idly by, but instead are obstructing the path toward a solution to the crisis. Indeed, one could go further and argue that by refusing to consider military intervention, or by allowing Russia and China to veto with no consequence, the United States, too, is responsible for continuing violence in Syria.

To characterize the Security Council’s permanent members as bystanders in humanitarian crises thus fails to recognize the role the Charter sets out for them and discounts the choices that they are making with respect to these situations. This suggests that these are problems not of omission, or of bystanding, but rather of action. To characterize the Security Council as a separated bystander, rather than an entity with some duty to act, also fails to take account of expectations of the Council. In contrast to the causation-based approach to the act-omission distinction articulated by Leo Katz, Alan Norrie explains the difference between act and omission as rooted in deviation from accepted norms: “[A]n omission in human conduct may be identified when there is a failure to act in conformity with an expected or required norm. . . . Omissions arise out of situations where a person fails to act where it would be ‘normal’ so to do.” Thus, we derive the culpability of the lifeguard who chooses to remain on the deck while a child drowns in the pool from the idea that the “normal” action for a lifeguard in that situation is to jump in the pool and save the child. One could say, of course, that the normal action for a passerby, too, would be to jump in the pool, but we might think of rea-
sons that the passerby might not do so. Perhaps the passerby cannot swim, or is paralyzed by shock at seeing the child in distress, or the passerby has her own child to take care of while walking by the pool. Irrespective of the circumstances of the passerby, the norms of conduct for the lifeguard and the passerby are distinct, and we expect more of the former than we do of the latter.

This raises the question of what is "normal" for the Security Council. It is clear that there is no legal requirement on the Security Council to act in the event of a humanitarian crisis, but this fact does not answer definitively the question of what is expected. Even absent any legal obligation, there is a moral expectation that the Security Council will do something when an international crisis is taking place. The expectation of what that something is varies widely. Some take the position that military intervention is necessary in situations of massive loss of life; others maintain that military intervention should be a last resort or not pursued, while peacekeeping or judicial mechanisms should be initiated as soon as possible. But even despite these variations in what action is considered best, it seems clear that doing something is expected. When the Security Council simply ignores a crisis, confusion, frustration, and disappointment ensue. Given the body's power, its defined role under the Charter, and its history, it is assumed that the Council will do something when a mass atrocity is taking place. And when it fails to act at all, it is "failing to act in conformity with an expected norm."

Accordingly, even though the crimes taking place in Syria would happen even if the Security Council did not exist, the Security Council cannot be relegated to the role of mere bystander, innocent or otherwise. But to characterize the permanent members as parties to the violence in Syria simply on account of the deadlock in the Council also misconceives their role. This is another lesson of the criminal law. Anglo-American criminal law largely avoids omission liability in part because equating the inaction of one party with the action of another would muddle the law's expression of a message that certain conduct is more morally culpable.

---

92 See id. at 125 (internal quotation marks omitted) (disputing acceptance of autonomy concerns as resulting in an expectation that the passerby would not save the drowning child).

93 See Cass R. Sunstein, Social Norms and Social Roles, 96 COLUM. L. REV. 903, 915 (1996) (noting that only "[s]ometimes norms are codified into law").

94 Jennifer Welsh, Implementing the "Responsibility to Protect": Where Expectations Meet Reality, 24 ETHICS & INT'L AFF. 415–16 (2010) (discussing changing "climate of expectations" around international institutions facing humanitarian crises); see also RAMESH THAKUR, WAR IN OUR TIME: REFLECTIONS ON IRAQ, TERRORISM AND WEAPONS OF MASS DESTRUCTION 135 (2007).

95 NORRIE, supra note 62, at 124.

96 See supra notes 81–82 and accompanying text (discussing alternative theory for analyzing distinction between act and omission).
than other conduct.\textsuperscript{97} To describe Russia's veto of a Security Council resolution as culpable to the same degree as the Assad regime's murder of thousands of civilians would destroy the normative message of international law in this area. In protecting the perpetrators of human rights abuses against sanctions or even mere condemnation, Russia may well be responsible for a wrong. Still, assuming that Russia is doing so not to contribute to the massacres, but rather because of a belief that these measures are inadvisable or counterproductive,\textsuperscript{98} this wrong is distinct from the actions of a regime that directly spills the blood of its people.\textsuperscript{99} Similarly, when the Security Council actively withdrew peacekeepers from Rwanda, even if that decision emboldened the genocidaires, the Council did not act with any intent to assist in the killings. The absence of that culpable mental state, of a goal of furthering the crimes, necessarily distinguishes the Security Council in this situation from, say, an actor that provides arms to a murderous regime in hopes that the massacres will continue.\textsuperscript{100}

\section*{VII. Concluding Thoughts}

This brief exploration of the concepts of act and omission in criminal law and international law has sought to illuminate some of the assumptions and understandings around the role of the Security Council in humanitarian crises. The world watches the Security Council with expectations that it will do something, but the world also typically insulates the Council from condemnation by understanding it to be a disconnected bystander rather than an active participant in the crises that it views from afar. The Council's permanent members should be understood as distinct from direct perpetrators of abuses; in the absence of any intent to further violence, a choice even to obstruct Security Council action should be dis-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{97} See Dressler, \textit{supra} note 13, at 978 (explaining that the moral guilt of a parent who fails to prevent harm to her child "is not as great" as the moral guilt of the person who directly causes harm to that child, and therefore the "liability, if any [of the parent] should be for violation of some less serious and narrowly defined statute that compels parents to act to protect the well-being of their children").
\item \textsuperscript{98} See, e.g., U.N. SCOR, 66th Sess., 6627th mtg. at 2, U.N. Doc. S/PV.6627 (Oct. 4, 2011) (statement of Russian representative explaining position that draft resolution was unnecessarily "confrontation[al]").
\item \textsuperscript{99} This conclusion aligns with the derivative nature of complicity in criminal law. For a Security Council permanent member that chooses to veto a resolution not because the state wants to further violence against civilians in Syria, but rather because it disagrees with the strategy set forth in the resolution, that vetoing permanent member is not associating itself with the direct perpetrator of abuses (the regime in Syria) in the way that the accomplice is thought to associate herself with the principal. See Kadish, \textit{supra} note 89, at 353–55.
\item \textsuperscript{100} See id. at 346–49 (discussing intent requirement for complicity liability); May, \textit{supra} note 65, at 151 (distinguishing "many forms of legal complicity" and noting that "most of them were present in the Rwandan genocide").
\end{itemize}
\end{footnotesize}
tinguished from complicity. Nonetheless, even absent intent to further violence, a choice by the Council to remain on the sidelines of crisis conflicts with expectations about its unique role in a system of independent states.

What can be done about this tension? This essay proceeds from the assumption that the law will not change readily and that the permanent members of the Security Council will continue to retain complete discretion as to whether intervention in foreign human rights crises should be pursued. But expectations of states can be powerful instruments of change. To the extent that commentators wish to influence the Security Council to take note of the crises that it has the discretion to ignore, they can less freely deploy the language and concept of bystanding, and instead identify the affirmative choices the Council and its members make in not responding to humanitarian crises, not only once those crises take the shape of massive killings of tens of thousands, but in the early days of civil strife, when action of any kind may be more politically feasible.