

## Hauser Globalization Colloquium Fall 2010

Professors Ryan Goodman & Robert Keohane

Furman Hall 900, Pollack Colloquium Room  
Wednesdays 2:00 pm-3:50pm  
(unless otherwise noted)

Schedule of Sessions (subject to modification)

- September 15 **Professor Eric Posner**  
*Human Rights, the Laws of War, and Reciprocity*
- September 22 **Professor Michael Doyle**  
*A Global Constitution? The Struggle over the UN Charter*
- October 6 **Professor Mary Dudziak**  
*Law, War, and the History of Time*
- October 13 **Professor Tim Buthe**  
*Standards for global markets: domestic and international institutions for setting international product standards*
- October 20 **Professor Kal Raustiala**  
*Information and International Agreements*  
**Background Readings:**  
*Police Patrols and Fire Alarms in the NAAEC*  
*The Rational Design of International Institutions*
- October 22 **Professor Peter Katzenstein**  
(Friday) *The Transnational Spread of American Law: Legalization as Soft Power*
- November 10 **Professors Oona Hathaway & Scott Shapiro**  
*Outcasting: Enforcement in Domestic and International Law*
- November 17 **Professors Ann Marie Clark & Kathryn Sikkink**  
"Information Effects and Human Rights Data: Is the Good News about Increased Human Rights Information Bad News for Human Rights Measures?"  
**Background Reading:** Emilie M. Hafner-Burton, & James Ron, *Seeing Double: Human Rights Impact Through Qualitative and Quantitative Eyes*, World Politics, 2009.
- December 1 **Professor Benedict Kingsbury**  
*Obligations Overload for Fragile States*
- December 3 **Professor Beth Simmons**  
(Friday) *Subjective Frames and Rational Choice: Transnational Crime and the Case of Human Trafficking*

**Outcasting:  
Enforcement in Domestic and International Law**  
(Draft November 3, 2010)

*By Oona Hathaway & Scott J. Shapiro<sup>1</sup>*

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<sup>1</sup> Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School, and Professor of Law and Philosophy, Yale Law School, respectively. We thank Nicholas Parillo, Heather Gerken and Doug Kysar for helpful feedback early in this project. We thank Alex Iftime, Julia Malkina, Katie Chamblee, Danielle Lang, and Sara Aronchick Solow for their excellent research assistance. We are grateful to Teresa Miguel and Dick Hasbany for their outstanding research support.

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Last year, the American Society of International Law organized a panel at its annual meeting on the question of whether international law is properly considered law. Most of the panelists began their remarks, however, by expressing indignation at the very fact that such a panel had been convened. Andrew Guzman thought the question they were asked to address was a “futile” one;<sup>2</sup> Tom Frank was “surprised that we have gathered here again at the beginning of a new political era to ask this tired old question”;<sup>3</sup> and Jose Alvarez was “appalled we are still discussing this 1960s chestnut of a question”<sup>4</sup> and “like Tom Frank, I had thought we had gotten past it.”<sup>5</sup>

These reactions are far from idiosyncratic. The current generation of legal scholars, it is fair to say, regards the question of whether international law is law as decidedly old-fashioned and rarely engages it. As these scholars would be the first to admit, they ignore the question *not* because the debate has been settled. They do not, in other words, think that the question of whether international law is law has been asked and definitively answered by an earlier generation of international lawyers and social scientists. Rather, the current generation tends to reject *the question itself*. International law scholars often describe the question of the legality of international law as purely “semantic,” “academic,” “tautological” or “scholastic,” by which they mean irrelevant. The current consensus seems to be that scholars ought to focus on questions that have practical consequences. The organizing issue of the field, therefore, is no longer whether international law is law but rather when and how international law *matters*, that is, whether, and under which conditions, international law actually affects state behavior.

One gets the distinct sense, however, that the hostility many feel towards the question of whether international law is law does not really stem from belief in its irrelevance. The enmity, instead, belies a fear about its *importance*. The anxiety underlying the refusal to engage, perhaps, is that an inquiry into the status of international law is too dangerous to discuss openly. For what if international law scholars found out that international law is not law? What would they do then? By and large, international law scholars are lawyers who teach in law schools. They have a great respect for the law and legal institutions. They see law as a morally valuable instrument for effecting social change. They recognize that legal institutions are able to solve problems that no other comparable social institution is capable of resolving and are, therefore, morally indispensable in the modern world. Even entertaining the idea that the object of their study is not law threatens to delegitimize it. It might mean that the flouting of international law is justified because the violators would not be breaking *the law*.

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<sup>2</sup> Andrew Guzman, *Rethinking International Law as Law*, AM. SOC. INT’L L. PROC. (2009).

<sup>3</sup> Tom Frank, *Remarks*, AM. SOC. INT’L L. PROC. (2009).

<sup>4</sup> Jose Alvarez, *But is it Law?*, AM. SOC. INT’L L. PROC. (2009).

<sup>5</sup> *Id.*

They are right to be concerned. The moral stakes involved in the debate are enormous—a fact, by the way, not lost on skeptics. It is no accident that many critics of international law have challenged the jurisprudential status of international law. What better way to discredit international law than by showing that it lacks those properties which make law morally valuable? International law need not be obeyed, in other words, because it does not possess those qualities that render legal systems morally indispensable in the modern world.

Whether international law properly counts as law, and hence is a valuable tool for effective social change, is anything but an academic and irrelevant question. The conceptual challenge offered by the critics of international law has significant ethical implications and we ignore it at our own peril. To be sure, the debate over the legality of international law is large and complex and cannot be adequately addressed in all its fullness within the confines of a single paper. We will limit ourselves, therefore, to the principal objection that skeptics have offered against international law, namely, that international law cannot be law because it lacks mechanisms of coercive enforcement. Anthony D'Amato describes this objection as follows:

Many serious students of the law react with a sort of indulgence when they encounter the term "international law," as if to say, "well, we know it isn't *really* law, but we know that international lawyers and scholars have a vested professional interest in calling it 'law.'" Or they may agree to talk about international law *as if* it were law, a sort of quasi-law or near-law. But it cannot be true law, they maintain, because it cannot be enforced: how do you enforce a rule of law against an entire nation, especially a superpower such as the United States or the Soviet Union?<sup>6</sup>

Our strategy for addressing this familiar objection to international law is to isolate the conception of law that tacitly underlies the debate. We call this the "Modern State Conception" of law. The Modern State Conception maintains that regimes are legal systems only when they possess the distinctive capacities of the modern state, namely, they possess a monopoly over the use of force within a territory and use this monopoly to enforce its rules. In the domestic context, the monopoly is shared by a host of interlocking bureaucratic organizations that employ intimidation and violence as a method of enforcement, such as police, militia, prosecutorial agencies and correctional institutions. Skepticism about international law naturally follows from such a jurisprudential conception given that international law does not possess these bureaucratic institutions. Famously,

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<sup>6</sup> Anthony D'Amato, *Is International Law Really 'Law'?*, 79 NW. U. L. REV 1293 (1985).

it does not have its own army or police force. While international prosecutorial agencies and prisons have sprung up in recent years, nothing resembling the modern state's enforcement apparatus exists or is likely to exist for the foreseeable future.

Having shown that the Modern State Conception sets the terms on which the debate has proceeded, we go on to point out how this jurisprudential account subtly places defenders of international law into a catch-22. Either defenders have to bite the bullet and concede that international law is not “really law” because it does not possess the capacities of a modern state. Or they have to argue (somewhat implausibly) that international law does meet the strictures of the Modern State Conception with international police ready to exert physical force to enforce it. But in doing so, defenders end up defending a legal regime that tramples state sovereignty and, in the case of democracies, suppresses democratic self-determination. No wonder that supporters of international law do not want to engage in the debate: neither response—international law is not law or is law but is hostile to sovereignty and democracy—is one they wish to defend.

We attempt in this article to offer a way out of this false trap. Rather than argue over whether international law is or is not law based on the Modern State Conception of law, we maintain that the very concept of law that lies behind the critique of international law must be met head on. This article aims to take on that task.

We argue that the Modern State Conception reflects a woefully incomplete understanding of how law really is enforced. It errs by insisting that law may only be enforced in the same way that modern states enforce their law. First, it demands that the law be enforced *internally*, i.e., by the regime itself. Second, it requires that the law be enforced *violently*, i.e., through the threat and exercise of physical force.

This narrow vision of law enforcement ignores regimes that delegate law enforcement to external parties. We argue that, contrary to the Modern State Conception, as long as some party is tasked with using coercion in order to ensure compliance with the rules, the regime itself need not perform the role. We call this *externalized enforcement*. Moreover, we argue that the coercion used to enforce the law need not involve the threats and exercise of violence. Rather, it may involve the threat of social exclusion, or as we call it, *outcasting*. Disobedience need not be met with the law's iron fist – it may simply involve denying the disobedient the benefits of communal belonging and social cooperation.

We make our case in four Parts. The first Part examines the various objections levied against international law as law. We begin with John Austin's classic argument that international law does not meet the basic conditions of

law—most notably, there is no sovereign capable of issuing commands.<sup>7</sup> H.L.A. Hart famously demonstrated the flaws in Austin’s argument.<sup>8</sup> We suggest that it is possible to reframe Austin’s critique to accommodate Hart’s objections. In this reframed critique, international law is not law because it is (1) not backed by physically coercive sanctions and (2) not administered by members of the system in question. We develop these two objections—which we call the “Brute Force Objection” and the “Internality Objection.” Finally, we note that while the two objections are analytically distinct, they often come together as a package. That package is the Modern State Conception.

In Part II, we develop the Modern State Conception and its application to international law. In Part III, we go on to show that the Modern State Conception is demonstrably false to the extent it claims to be a complete description of what counts as law and law enforcement. A dominant mode of enforcement in domestic legal systems for the past two millennia has involved various forms of externalized outcasting. The law has routinely used private parties to banish, exile, excommunicate, outlaw, pillory, and shun those who break the rules. Indeed, it rarely has had a choice. Given the technological and economic challenges of assembling a centralized body of individuals who were entrusted with a monopoly on the legitimate use of force, legal systems have been forced to externalize enforcement to non-regime members and to ration the use of violence. The common law, for example, did not have police until Robert Peel organized the “Bobbies” in 1829. The United States did not have police forces until a few years after that. The Continent saw the rise of police earlier, but only in France and only beginning in the mid-Seventeenth Century. Before the widespread presence of police, law existed, but it relied for its enforcement almost entirely on externalized outcasting.

Having established both the possibility and ubiquity of externalized outcasting in domestic law, we turn in Part IV to examining the role of outcasting and external enforcement in *international* law. We show that the Modern State Conception provides a woefully incomplete understanding of international law enforcement. The Modern State Conception of law enforcement is only one part of the larger picture of law enforcement—it encompasses law that is enforced through internal systems using physical force. But there are three other forms of law enforcement: External Physical Enforcement (enforced by external actors using physical force), Internal Outcasting (enforced by internal actors using non-physical means), and External Outcasting (enforced by external actors using non-physical means). We show that while the Modern State Conception *is* a part of the picture of international law, it is only a very small one. To demonstrate

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<sup>7</sup> JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 5-8 (1832).

<sup>8</sup> H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1997).

this, we offer detailed descriptions of the other three forms of law enforcement in international law, drawing in the process on examples from the earlier examination of domestic law, as well as from international law. This much more complete picture of law not only gives the lie to the Modern State Conception, but it also provides a new way of understanding international law and its enforcement.

In the second half of Part IV, we show that externalized outcasting not only exists in international law, but it is ubiquitous. Across radically different subject areas—from human rights to trade to the international postal service—international legal institutions use others (usually states) to enforce their rules and typically deploy exclusion rather than brute physical force. These substantively diverse legal regimes have a set of common features. Once we describe these features—namely, their use of external enforcement and outcasting—we can see that regimes that appear on the surface to be very different are really just applications of the same law enforcement model. At the same time, we can begin to identify a set of variations in the way external outcasting operates. Part IV proceeds, then, to examine eight different categories of externalized outcasting which describe what might be called variations on the externalized outcasting theme. Understanding these variations allows us to identify the precise institutional design choices that underlie each international legal regime.

Finally, in Part V, we show that the more complete picture of international law offered in this Article sets the stage for a re-invigorated inquiry into some of the central organizing questions in the field of international law today. We show that the phenomenon of externalized outcasting is germane to the *efficacy* of international law. For if externalized outcasting is a form of law enforcement, then its existence is highly relevant to the task of tallying the successes and failures of international law. Put slightly differently, if the only form of law enforcement one is willing to recognize is intimidation and violence by police, then international law will look pretty ineffective. We contend, however, that there are sources of motivation generated by international law which have hitherto been invisible to scholars and whose existence should be countenanced when deciding when, how, and whether international law matters. Moreover, the deeper and more accurate picture of international law that we provide—one that views outcasting as an important and effective tool of law enforcement—does more than provide a more complete picture of international law. It offers a deeper understanding of how international law functions and thus allows scholars and practitioners to more effectively anticipate and address international law's shortcomings while enhancing its strengths.



## I. SKEPTICISM ABOUT INTERNATIONAL LAW

### A. Austin's Objection

The *locus classicus* for the view that international law is not law is John Austin's *The Province of Jurisprudence Determined*. To understand Austin's skepticism, we should recall the basic elements of Austin's theory of law. According to Austin, all rules are general commands.<sup>9</sup> A command is the expression of a wish by a person or determinate body, backed by a threat to inflict an evil in case the wish is not fulfilled, issued by someone who is willing and able to act on the threat.<sup>10</sup> Austin calls the evil resulting from the violation of a command a "sanction" or "enforcement of obedience."<sup>11</sup>

Having characterized the genus of rules as general commands, Austin proceeds to delimit the species of law. For Austin, only the rules of positive law are "law simply and strictly so called."<sup>12</sup> Positive law consists of those rules issued by the sovereign. What make the sovereign the sovereign are two things: first, the sovereign must be habitually obeyed by the bulk of the community and, second, the sovereign cannot habitually obey anyone else.<sup>13</sup> Austin took the King in Parliament to be the British sovereign because the bulk of British society habitually obeyed the King, while the King habitually obeyed no one else.<sup>14</sup> In the American context, Austin thought that sovereignty resides not in the President or the Congress, but in the People.<sup>15</sup> The People exercised their sovereign powers when they ratified and amended the Constitution and when they selected representatives during elections.<sup>16</sup>

According to Austin, then, what makes a law *the law* is that it constitutes a general command issued by someone who is habitually obeyed by the bulk of the population and habitually obeys no one else. Given this jurisprudential conception, it is understandable that Austin would reject the legal status of international law.

The law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. . . . [T]he law obtaining between

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<sup>9</sup> AUSTIN, *supra* note 7, at 5-6.

<sup>10</sup> *Id.* at 6-8.

<sup>11</sup> *Id.* at 8.

<sup>12</sup> *Id.* at 378.

<sup>13</sup> *Id.* at 378-80.

<sup>14</sup> Technically, Austin regarded the corporate body of the King, the peers, and the electors of the House of Commons as the sovereign. *See id.* at 192-96.

<sup>15</sup> *Id.* at 228-231.

<sup>16</sup> *Id.* *See also* Hart's description of Austin's view at HART, *supra* note 8, at 74.

nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.<sup>17</sup>

International law appears to suffer from two defects on the Austinian model. First, the elements of international law are not commands, for commands are expressions of wishes of some person or well-defined collective body. The community of nations, however, is an “indeterminate” body and is thus incapable of expressing wishes.<sup>18</sup> International law can only be set by general opinion, not command. Second, laws properly so-called are commands issued by the sovereign. International law lacks a sovereign—there is no nation or supra-national body that is habitually obeyed and obeys no one else.

Austin’s attack on international law was highly influential.<sup>19</sup> Sir Thomas Holland, who occupied the Chichele Chair of International Law and Diplomacy at Oxford for thirty-six years and wrote the famous treatise *The Elements of Jurisprudence*, was clear that international law was “law only by courtesy.”<sup>20</sup> Because international law lacks a “political arbiter by which it can be enforced,”<sup>21</sup> its rules are best considered as “the moral code of nations.”<sup>22</sup> Thomas Hearn, a passionate devotee of Austinian jurisprudence, declared that: “Law cannot be predicated of mere customs which are not even true commands, much less the commands of any competent State.”<sup>23</sup>

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<sup>17</sup> AUSTIN, *supra* note 7, at 201.

<sup>18</sup> *Id.* at 152.

<sup>19</sup> Not everyone accepted Austin’s skeptical view; indeed, many Austinian sympathizers accepted the legal status of international law. Though E.C. Clark regarded law as “a rule of human conduct sanctioned by human displeasure,” E.C. CLARK, PRACTICAL JURISPRUDENCE: A COMMENT ON AUSTIN 188 (1883), he was nevertheless adamant that international law fit such a definition. International law is law because it is backed by the general hostility engendered by the violation of its rules. “I maintain that the rules of International Conduct, as actually administered by the general consent and action of civilized nations, constitute a practical law, to which it is absurd to deny the name.” *Id.* at 186. J.L. Brierly not only denied that legal systems must make provisions for sanctions, but regarded self-help in international law as a form of sanctioning. “This absence of an executive power means that each state remains free . . . to take such action as it thinks fit to enforce its own rights. This does not mean that international law has no sanctions, if that word is used in its proper sense of means for securing the observance of the law.” J.L. BRIERLY, THE LAW OF NATIONS 101 (1963).

<sup>20</sup> THOMAS ERSKINE HOLLAND, THE ELEMENTS OF JURISPRUDENCE 133 (13th ed. 1924).

<sup>21</sup> *Id.* at 134 (“[L]aw without an arbiter is a contradiction in terms.”).

<sup>22</sup> *Id.* at 135.

<sup>23</sup> WILLIAM EDWARD HEARNS, THE THEORY OF LEGAL DUTIES AND RIGHTS 40 (1883). See also JAMES PATERSON, COMMENTARIES ON THE LIBERTY OF THE SUBJECT AND THE LAWS OF ENGLAND RELATING TO THE SECURITY OF THE PERSON 97 (1877).

Even those who objected strongly to Austin's theory of law nevertheless agreed with him on the defects of international law as law. Edward Jenks rejected the idea that all laws must be commands and that all laws must be issued by an omnipotent sovereign; yet, he thought that international law was not fully law. "Although, in fact, many important nations have agreed to submit certain classes of disputes between one another to judicial and arbitral treatment to international tribunals, . . . yet such tribunals have no executive authority, and cannot enforce submission to their decisions . . . ." <sup>24</sup> George Paton departed so far from Austin that he claimed that "it is possible to conceive of law without a sovereign authority or a court without compulsory jurisdiction or even perhaps if there are no organs of enforcement."<sup>25</sup> For Paton, the essential feature was instead the regulation of self-help: "The moment when law emerges is when self-help is regulated by the community."<sup>26</sup> Unfortunately, according to Paton, the regulation of self-help in the international sphere was only beginning to emerge. "So long as all declarations of war are lawful, it is difficult to say that a system of law is in operation."<sup>27</sup>

## B. The Internality Objection

In *The Concept of Law*, H.L.A. Hart showed that Austin's critique of international law is seriously flawed. As Hart pointed out, the fact that norms of international law are not enacted by commands does not impugn their status of law, given that most of the norms of domestic legal systems are not commands either.<sup>28</sup> Custom is a recognized source of law despite being set by mere general opinion and action. While some legislation may express the legislators' wishes, and hence be commands in Austin's sense, others may not. Legislation can be enacted even though legislators have no view on the matter. Indeed, as Hans Kelsen noted, lawmakers might not even know which laws they are creating.<sup>29</sup> Modern legislation is often packaged in documents hundreds of pages long—it would be impossible for legislators in such cases to know the legal effects of all

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<sup>24</sup> EDWARD JENKS, *THE NEW JURISPRUDENCE* 11 (1933). See also FREDERICK POLLACK, *A FIRST BOOK OF JURISPRUDENCE FOR STUDENTS OF THE COMMON LAW* 14 (1923) ("[T]hose customs and observances in an imperfectly organized society which have not fully acquired the character of law but are on the way to becoming law."); GEORGE W. KEETON, *THE ELEMENTARY PRINCIPLES OF JURISPRUDENCE* (1930).

<sup>25</sup> G.W. PATON, *A TEXTBOOK OF JURISPRUDENCE* 71 n.1 (1946).

<sup>26</sup> *Id.* at 71.

<sup>27</sup> *Id.*

<sup>28</sup> HART, *supra* note 8, at \_.

<sup>29</sup> HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 34 (1945).

of their actions. For law to be created, it is enough for legislators to vote for some proposal according to the appropriate legal procedures.

Nor does the fact that international law lacks an Austinian sovereign impugn its status as law, for as Hart showed, most domestic systems lack one as well.<sup>30</sup> The Austinian sovereign is legally omnicompetent, but in constitutional regimes, the sovereign's legal powers are limited. Though the American people are sovereign in the United States, the Constitution nonetheless limits their powers, both by making certain constitutional provisions unalterable (such as depriving a state of its equal representation in the Senate without its consent<sup>31</sup>) and prescribing an extremely onerous procedure that must be followed before an amendment is ratified (amendments must be proposed by at least two-thirds of the members of both houses of Congress or two-thirds of State legislatures and ratified by three-quarters of all State legislatures or conventions<sup>32</sup>).

While Hart's critique is certainly correct, it is possible to reframe the Austinian critique in a way that captures the essence of the challenge but dodges the Hartian responses. To do so, we should accommodate Hart's observations that not all laws are (1) commands (2) issued by a sovereign. Instead, we can relax the requirements imposed by Austin to insist merely that laws be (1) backed by sanctions (even if they were not created by commands) and (2) administered by members of the legal system in question (even if the regime does not have an Austinian sovereign). If a regime does not enforce its rules through the imposition of sanctions, or has sanctions but delegates enforcement to non-regime members, then such a regime cannot be a legal system.

Notice that this weaker set of conditions still impugns the legality of international law. For with few exceptions, which we will explore in Section IV, international law does not generally enforce its rules "internally," that is, through designated international bureaucracies. It relies primarily on nation-states to ensure that violations of the rules are sanctioned. We call this the "Internality Objection."

As an illustration of the Internality Objection, consider the World Trade Organization. The World Trade Organization (WTO), with 153 member states representing more than ninety-seven percent of world trade,<sup>33</sup> is widely considered one of the strongest and most effective international legal organizations of the modern era. And yet, the WTO itself does not have the

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<sup>30</sup> HART, *supra* note 8, at \_.

<sup>31</sup> U.S. CONST. art. V.

<sup>32</sup> *Id.*

<sup>33</sup> *Members and Observers*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Oct. 31, 2010); *The WTO in Brief*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/inbrief\\_e/inbr02\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr02_e.htm) (last visited Oct. 31, 2010).

authority under international law to enforce the rules that it creates. The internality objection therefore holds that it is not, in fact, law.

The enforcement of international trade law principles under the WTO is governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (Understanding).<sup>34</sup> The WTO establishes “a compulsory third party adjudication system.”<sup>35</sup> Under Article 23.2 of the Understanding, member states agree to resolve disputes *exclusively* through the adjudicative procedure outlined in the Understanding,<sup>36</sup> and states are required to abide by decisions issued by the expert panels and the appellate body of the Dispute Settlement Body (DSB) to avoid retaliation.<sup>37</sup> If the offending party refuses to comply, decisions of the DSB are enforced through authorized economic retaliation imposed by the aggrieved state party, as sanctioned by the DSB.

In the context of international trade, therefore, trade law principles are *not* enforced internally, namely, by the officials of the WTO itself. Rather, sanctions are imposed and administered by its membership—specifically by the aggrieved state party. The WTO, through the DSB, merely authorizes state parties with legitimate complaints to retaliate against noncompliant states through a limited denial of Most Favored Nation status. This authorization permits a state with a legitimate complaint to impose offsetting tariffs and other protectionist measures on a state that is found to have violated its treaty obligations. The WTO, in other

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<sup>34</sup> The enforcement mechanism of the WTO came out of the Uruguay Round of trade negotiations. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1140, 1226. The Final Act includes the Agreement Establishing the World Trade Organization, *opened for signature* Apr. 15, 1994, 33 I.L.M. at 1144. Annex 2 of the WTO Agreement is the Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. at 1226 [hereinafter DSU], *available at* [http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu.pdf](http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf).

The GATT, which preceded the WTO, had a weaker set of dispute settlement procedures due to the lack of timetables and the ease with which countries could block decisions. See *Understanding the WTO: Settling Disputes*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm) (last visited Oct. 31, 2010). Under the GATT, all decisions required a consensus ruling by member states, and the system provided no incentive for a defending party to support an adverse decision. See Pao-Li Chang, *Evolution and Utilization of the GATT/WTO Dispute Settlement Mechanism*, in TRADE DISPUTES AND THE DISPUTE SETTLEMENT UNDERSTANDING OF THE WTO: AN INTERDISCIPLINARY ASSESSMENT 92, 94-95 (James C. Hartigan ed., 2009).

<sup>35</sup> Petros C. Mavroidis, *Licence to Adjudicate: A Critical Evaluation of the Work of the WTO Appellate Body So Far*, in TRADE DISPUTES AND THE DISPUTE SETTLEMENT UNDERSTANDING OF THE WTO: AN INTERDISCIPLINARY ASSESSMENT 73 (James C. Hartigan ed., 2009); see also BERNARD M. HOEKMAN & PETROS C. MAVROIDIS, *THE WORLD TRADE ORGANIZATION: LAW, ECONOMICS, AND POLITICS* 77 (2007) (nothing that trade law and the law of the sea provide “the only two operational examples in international relations of compulsory third party adjudication”).

<sup>36</sup> See HOEKMAN & MAVROIDIS, *supra* note 36, at 78.

<sup>37</sup> See Chang, *supra* note 34, at 92.

words, delegates the enforcement of its rules to its membership. Enforcement of trade rules is a form of externalized sanctioning: the retaliation is performed by member states, not by the WTO. The WTO is simply the gatekeeper.

According to the Internality Objection, international law cannot be a genuine legal system because it does not enforce its own rules. As the WTO example illustrates, the enforcement of international law is not administered by designated international organizations. Rather, sanctions are delegated to external parties, typically member states, to impose and administer.

### C. The Brute Force Objection

Having sketched the Internality Objection, we now note a related challenge to international law. Recall the passage quoted above in which Austin notes that international law is backed only by “moral sanctions,”<sup>38</sup> namely, a diffuse hostility that nations express when the rules of international law are broken. This passage suggests that the worry about international law is that it does not sanction the violation of its rule through the use of brute physical force—it merely contents itself with weak “moral” sanctions. Call this the “Brute Force Objection.”<sup>39</sup>

One again, let us isolate the Brute Force Objection by considering the WTO. As one commentator put it, when states are found to have violated the trade rules, “there is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement. The WTO has no jailhouse, no bondsmen, no blue helmets, no truncheons or tear gas.”<sup>40</sup> The WTO, in other words, does not enforce its rules through the threat or exercise of physical force. Nor are member states permitted recourse to violence. As mentioned, trade law is enforced through retaliatory trade measures taken by the aggrieved parties.

The Brute Force Objection is distinct from the Internality Objection insofar as it does not focus on *who* enforces the law but rather *how* it is enforced. It claims that legal systems must ensure that their rules are enforced in the same way that modern domestic legal systems do, namely, through threat or exercise of brute physical force.

### D. The Modern State Conception

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<sup>38</sup> See *supra* note 17 and accompanying text.

<sup>39</sup> See, e.g., D’Amato, *supra* note 7 (“‘Law’ is present only when, in addition to social disapproval, there is physical coercion stemming from the sovereign power of the state.”)

<sup>40</sup> Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AM. J. INT’L L. 416, 416-17 (1996).

The Internality and Brute Force objections are analytically distinct, but they nonetheless frequently come together as a package. Critics often assume that a regime is law only when it 1) contains bureaucratic enforcement mechanisms, i.e., enjoys internality, and 2) those mechanisms employ intimidation and violence to ensure compliance, i.e., uses brute force. Thus, international law fails to be a legal regime for two reasons in this view: (1) it lacks its own enforcement mechanisms and (2) it lacks internal mechanisms that principally employ brute force.

It is not surprising that these two objections are commonly paired. For these objections are simply expressions of different aspects of the same jurisprudential account, namely, what we call the “Modern State Conception” of law. According to the Modern State Conception, legal systems can exist only within regimes which enjoy a monopoly over the use of force and employ this monopoly to enforce their rules. The Modern State Conception, in order words, requires legal systems to 1) possess *internal* enforcement mechanisms 2) that use the threat and exercise of *brute force*. It follows on this view that international law is not a proper legal system because it does not contain these sorts of institutions. For this reason, call the combination of the Internality and Brute Force objections the “Modern State Objection.”

The Modern State Objection takes modern domestic legal systems as the paradigm cases of law and judges all other regimes against this ideal. Because international law does not resemble the modern state in the right way, this objection denies international law the status of legality. Consider, in this regard, John Bolton’s critique of international treaty law. “It is a flat misunderstanding of reality,” Bolton argues, “to believe that there are enforcement mechanisms ‘out there’ internationally that conform to the kind of legal system that exists in the United States.”<sup>41</sup> When a contract is breached in domestic law, he notes, “there is a defined way to get remedies. There is a process to decide which promises are legitimate and a procedure to enforce a court order that a party has breached a promise.”<sup>42</sup> By contrast, no similar procedure exists for redressing the violation of treaty obligations.<sup>43</sup>

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress,

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<sup>41</sup> John R. Bolton, *Is There Really “Law” in International Affairs?*, 10 *TRANSNAT’L L. & CONTEMP. PROBS.* 1, 4 (2000).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

which may in the end be enforced by actual war. This is not domestic law at work. Accordingly, there is no reason to consider treaties as ‘legally’ binding internationally, and certainly not as ‘law’ themselves.”<sup>44</sup>

Bolton’s argument seems to be that treaties cannot generate real legal obligations because there are no force-based mechanisms “out there” to ensure their compliance. Treaties cannot be a source of law, in other words, because there are no treaty police. While contractual breaches can be redressed through the threat or exercise of physical coercion by the state, violations of treaty obligations can only be enforced by the moral sanctions of the international community or the self-help remedy of war.

## II. LAW ENFORCEMENT IN THE MODERN STATE CONCEPTION

### A. Primary and Secondary Enforcement

In the Sections that follow, we will attempt to evaluate the cogency of the Modern State Objection by examining and critiquing its underlying conception of law. It behooves us, therefore, to say a bit more about the Modern State Conception of law and its constitutive elements. To do so, we must first clarify the notion of law enforcement.

It is commonplace to say that the law enforces its demands by imposing costs on those who violate its rules. But what exactly does this mean? How does the law impose costs on rule-violators? Take a trivial example of law enforcement. Suppose you forget to put money in a parking meter when you park your car. The standard response from the police is a parking ticket. A parking ticket is a demand to pay a fixed sum of money because of a parking violation. In other words, the police do not wait until you return to the car and forcibly take your money. Rather, they impose a duty on you to pay the parking violation bureau. Of course, if you fail to pay, the law will likely become more aggressive. The police may end up booting your tire or seizing your car, or the sheriff may come to your house and confiscate goods equal to the value of the fine, or worse, lead you off to jail.

Let us distinguish, accordingly, between three kinds of legal rules. *Conduct rules* tell people which actions they are obligated, prohibited, or permitted to perform. They require us to put money in meters if we want to park, to pay taxes on our income, and not to engage in arson. A subset of conduct rules are *enforcement rules*. The function of enforcement rules is to ensure that the

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<sup>44</sup> *Id.*



conduct rules are followed. *Primary enforcement rules* are addressed to the conduct rule violators. These rules either impose duties on violators to perform some costly act or deny violators a beneficial right. Primary enforcement rules may obligate the conduct rule violator to pay a fine, report to jail, leave the country, wear a red letter, etc. or deny them the right to drive, serve liquor, exclude others from taking their property, etc.

*Secondary enforcement rules* come into play when the conduct rule violator fails to follow the primary enforcement rules. These rules either impose duties on people other than the primary rule violator to perform some harmful act to (or refrain from performing some beneficial act for) the conduct rule violator or permit them to perform some harmful act on (or refrain from performing some beneficial act for) the conduct rule violator. Thus, secondary enforcement rules may require the police to apprehend the conduct rule violator, maim their bodies, seize their property, etc., or permit creditors to seize property from debtors, crime victims to retaliate against offenders, property owners to physically exclude trespassers, etc.

It is important to note that the distinction between primary and secondary enforcement rules is not a statistical one. The primacy of primary enforcement rules is not constituted by the fact (if it is a fact) that the law is most effective when directed at conduct rule violators themselves or that primary rules are normally followed. Rather, the distinction is a logical one: secondary enforcement rules are supposed to be followed only when the primary rules are not. The secondary rules are, if you will, law enforcement's Plan B.

Primary enforcement rules are frequently backed by multiple secondary enforcement rules. For example, unpaid parking tickets may be enforced through wage garnishment (i.e., the parking bureau demands that the scofflaw's employer withholds wages and transfers the money to their agency instead). The rule requiring garnishment is a secondary one insofar as it is directed to someone other than the parking scofflaw and is operative only when the primary rule is not followed. Suppose the employer does not abide by this secondary enforcement rule (i.e., it fails to withhold wages). There will likely be additional secondary rules that require legal officials to take further steps to ensure that the employers comply (e.g., requiring the employer to pay a fine, revoking their license, etc). Ultimately, the law may require officials to use physical force against the employer (or others). They may shutter the doors, imprison the CEO for contempt, or enter the business premises and take the money themselves. In such cases, law enforcement bottoms out in physical force employed by legal officials.

We can think of legal rules, therefore, as forming "enforcement chains." The first link in the chain is the conduct rule being enforced by the subsequent rules. Typically, the second link is a primary enforcement rule that imposes duties on those who violate the initial conduct rule. Later links are normally

secondary rules that enforce the prior primary rules (and transitively the initial conduct rule).

Enforcement chains may also be split into “sub-chains.” A jurisdiction may respond to unpaid parking tickets by requiring employers to garnish wages *and* by requiring police to seize the offending cars. These sub-chains likely will be of differing lengths: the law may have contingency plans for the failure of employers to garnish wages but have no response for the failure of the police to seize the cars.

We can now see how the law enforces its rules: it imposes costs on rule-violators either by (1) *imposing duties on them or on others or on both* or (2) *denying them rights or providing rights to others or both*. Primary enforcement rules require conduct rule violators to act in ways thought to be costly or deny them the right to act in ways thought to be beneficial. Secondary enforcement rules require or permit others to act in ways thought to be costly to the conduct rule violator or not to act in ways thought to be beneficial. These primary and secondary rules form chains, each rule designed to enforce earlier links and, ultimately, to ensure that the initial conduct rule is followed.

Having clarified the notion of law enforcement, we can now state more clearly the basic presuppositions of the Modern State Conception of law. They are four:

- 1) Most conduct rules are part of enforcement chains;
- 2) Most enforcement chains have at least one secondary enforcement link;
- 3) Most enforcement chains have at least one secondary enforcement link that is addressed to officials of the regime in question;
- 4) Most enforcement chains have at least one secondary enforcement link that either requires or permits officials to use physical force on the person who violated the initial link or on their property.

Under the Modern State Conception, therefore, a regime can fail to be law in a number of ways. Consider a regime that has rules establishing the structure of government, defining criminal offenses, specifying when the exchange of promises must be kept, setting out dispute resolution mechanisms, delineating proof procedures, identifying the ways in which property can be acquired and transferred, and so on. This regime, however, lacks enforcement mechanisms. It prohibits, say, arson but does not set a punishment for such an offense. It specifies when promises must be kept but does not award damages when these promises are breached. It establishes courts but has no procedures for responding to contempt. Under the Modern State Conception, such a regime is not a legal system because its conduct rules are not backed by enforcement rules.

Such a regime might fail to be a legal regime under the Modern State Conception even if it did contain enforcement rules. Imagine that the regime backed its conduct rules chiefly by primary enforcement rules. It states, for example, that arsonists must go into exile. Those who breach their promises must pay expectation damages. Those who violate a court order must report to the authorities and remain in confinement until they comply. While the conduct rules in this regime will be part of enforcement chains, most of these chains will not contain secondary rules. Costs are levied on conduct rule violators but only by imposing duties on violators themselves to pay these costs. No one else is required to enforce the rules.

Even if the regime did have secondary rules, the Modern State Conception might not recognize the regime as a legal one. Suppose the regime relied exclusively on private citizens to enforce conduct rules. Thus, the rules state that if arsonists refuse to go into exile, neighbors are required to burn their houses down. If promisors do not pay damages, aggrieved promisees are permitted to use self help by confiscating their property in the amount of expectation damages. Employers of losing parties in a lawsuit must withhold wages until the losers abide by the relevant court orders. Even though most conduct rules are part of enforcement chains containing secondary rules, the rules in question impose duties on the wrong parties. By failing to obligate the officials of the regime, the system in question could not be a legal one.

Finally, even if the regime did obligate officials to enforce the conduct rules, the Modern State Conception would deny legal status to it unless the secondary rules imposed duties on officials to use physical force against conduct rule violators, either against their person or property. Thus, it would not be enough to require arsonists to report to prison: the regime in question would have to impose duties on officials to ensure that arsonists in fact report to prison and stay there for the duration of the sentence. Only in this way will the regime resemble a modern state sufficiently to be properly considered a legal system.

It should be pointed out that the Modern State Conception does not require the regime in question to include the full panoply of coercive bureaucratic institutions characteristic of contemporary states. It need not have police, militia, large prosecutorial agencies, *and* correctional institutions. But it must at least have some such bodies. It might have police but not public prosecutors; it might have jails, guards and wardens but not police; it might have police and prosecutors but not prisons. As long as some institution exists whose role is to use the threat or exercise of physical force in order to enforce conduct rules, the Modern State Conception will recognize the regime as law.

## B. The Modern State Conception and International Law

As we have seen, the Modern State Conception not only insists that law be enforced in order to count as law, but that it be enforced by the right *people* in the right *way*. It requires that law be enforced (1) by members of the legal regime (2) through the threat and exercise of violence. The problem with international law, in this conception, is that its rules are not enforced by bureaucratic institutions that employ brute force. International law cannot be law for the simple reason that it lacks police, militia, large prosecutorial agencies, and correctional institutions.

There are three possible responses one could offer to the Modern State Objection to international law. The first would be to deny that enforcement mechanisms are relevant to the question of whether international law is law. A regime could be a legal one, on this response, even though it did not visit sanctions on those who disobeyed its rules. From the theoretical point of view, this option is appealing given that the vast majority of legal philosophers reject the Austinian idea that enforcement is necessary for legality and accept the possibility of sanctionless legal systems.<sup>45</sup> Indeed, Hart used his rejection of Austin's jurisprudential model in order to rebut the claim that international law cannot be law because it lacks centrally organized system of sanction. "[O]nce we free ourselves from the ... conception of law as essentially an order backed by threats, there seems to be no good reason for limiting the normative idea of obligation to rules supported by organized sanction."<sup>46</sup>

Unfortunately, this response has been a hard sell. Lawyers and social scientists tend to be tough-minded folks who seem unable to accept the possibility of a legal system that does not enforce its rules. What would be the point of a regime that did not back its demands by threats? In what sense would the law be binding? Why would people accept the demands of authorities? And how would these rules be any different from positive morality, social custom, or the rules of a game? Engaging in more subtle conceptual analysis or concocting thought experiments in which altruistic humans or angels have law even though they have no need for police or jails is unlikely to win hearts and minds in this debate.

A second possible response to the Modern State Conception's critique of international law is to show that international law does, in fact, fit the Modern State Conception. Indeed, it is possible to point to instances where international law does meet this burden. Take, for example, mutual defense treaties, which are core instruments of international law. Mutual defense treaties offer a mechanism

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<sup>45</sup> See JOSEPH RAZ, PRACTICAL REASON AND NORMS 159-160 (1975); SCOTT J. SHAPIRO, LEGALITY 173-75 (forthcoming Jan. 2011).

<sup>46</sup> H.L.A. HART, THE CONCEPT OF LAW 218 (1961).

for enforcing the prohibition on the use of aggressive force—and the right to use individual and collective self defense to repel armed attack.

And yet, while it is true that there are some cases in which intentional law meets the stringent criteria of the Modern State Conception of law, most of international law does not. When defenders of international law respond to critiques of international law by pointing to such structures, they effectively fall into a trap. For the critics are likely to respond to such examples by (accurately) noting first that the defenders of international law are picking out a few good examples for their case, but that the examples are not representative. Second, they will likely point out that international law that actually fits this conception of law is arguably anti-sovereignist and anti-democratic: for if international law is enforced against member states in the way that domestic law is enforced against individuals in a modern state (through internal threats of force), then international law lays claim to the right to subjugate nation states to the will of the international organization in the same way that nation states lay claim to subjugating individuals to the will of the national government.<sup>47</sup> That position may be particularly difficult for advocates of international law to defend when the sovereign state in question is a democracy. Advocates of international law, unprepared to adequately respond to either critique, tend to let the conversation

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<sup>47</sup> Consider, for example, the following critiques of international law, drawn from public debates over international law.

“[I]t’s time to stop trying to manipulate the UN, and start asserting our national sovereignty. If we do not, rest assured that the UN will continue to interfere not only in our nation’s foreign policy matters, but in our domestic policies as well. UN globalists are not satisfied by meddling only in international disputes. They increasingly want to influence our domestic environmental, trade, labor, tax, and gun laws. . . . UN planners do not care about national sovereignty; in fact they are openly opposed to it. They correctly view it as an obstacle to their plans.

Congressman Ron Paul, U.S. House of Representative (member of the International Relations committee in Congress )

The Law of the Sea Treaty “represents a permanent loss of national sovereignty. Hence it is inherently un-American.” --Pat Buchanan

“Just as Hurricane Katrina ruptured the levees protecting New Orleans, the concerted U.N. assault on the barriers to further erosion of American sovereignty threatens to swamp our freedom of action and our Founding principle of ‘no taxation without representation.’” Frank Gaffney, *The Washington Times*.

“Do our constituents . . . really want a group of international bureaucrats telling them that the day set aside to honor our mothers must be abolished? I think not!”-- Representative Christopher Smith, speaking about the Convention to Eliminate All forms of Discrimination Against Women.

drop at this point—or they deny the legitimacy of the inquiry at all (witness the quotes with which this Article opened).

What advocates of international law fail to notice is that they, too, have accepted the premises of the Modern State Conception of law. By engaging in the debate on these terms, they uncritically accept that law is only law if it is enforced by members of the legal regime through the threat or exercise of violence. The Modern State Conception of law is so deeply ingrained that advocates of international law let it set the terms of the debate such that they are guaranteed to lose.

In the following Part, we aim to change the terms of the debate by showing that the Modern State Conception is, put simply, much too narrow. It misses much of what is law—both in the domestic and international spheres. In this way, the Modern State Conception blinds critics and advocates of international law alike to the richness of legal institutions and legal enforcement mechanisms.

We begin taking off the blindfold by traveling back in time to a period before the modern state. We show that before there were police and before there were jails, there was *law*. Moreover, that law was *enforced* but not in the way the Modern State Conception assumes. Rather than rely on internal enforcement, this law frequently depended on external enforcement. Rather than rely upon the imposition of physical force, this law frequently depended instead on exclusion from the benefits of community, or “outcasting.” Not only did such systems of law enforcement exist, they were effective enough to persist over the course of many centuries. Recognizing that law without police is not only possible but real sets the stage for re-engaging the debate over international law on new terms.

### III. LAW WITHOUT POLICE

The appeal of the Modern State Conception is obvious. Every modern domestic legal system has police, prosecutors and prisons. They are the most visible symbols of the law and its tremendous power. Indeed, it would be difficult to imagine a modern state maintaining control over its territory without bureaucratic organizations that employ the threat and exercise of physical force. Nevertheless, we would like to argue that legal systems are possible even in the absence of these organizations. As we will see, many legal regimes have existed without police forces, prosecutors or prisons. The Modern State Conception cannot be valid for the simple reason that it cannot account for the existence of these legal regimes.

The fact that certain legal systems have governed without the use of brute force does not, however, mean that they did not enforce their rules. Quite the

contrary, these systems have found effective methods to deter disobedience without the use of iron-fisted bureaucracies. As we will see, these systems typically externalized the enforcement of the rules to non-regime members. They relied on these outside parties either to use brute force against the disobedient or to deny the deviants the benefits of communal belonging and social cooperation.

In this section, we will briefly discuss three pre-modern legal systems: medieval Icelandic law, canon law and common law. As we will see, these systems existed for centuries without police or other force-backed bureaucratic organizations. Despite lacking the trappings of the modern state, these systems managed to develop effective enforcement mechanisms through the liberal use of externalization and outcasting.

Of course, we do not intend to provide detailed descriptions of these legal regimes in this paper. We hope to provide just enough information about these systems to achieve two limited objectives. First, we will attempt to convince the reader that medieval Iceland and the Catholic Church were actual legal systems (we take it for granted that the common law is law). In the case of Iceland, we will briefly sketch its history and constitutional structure to demonstrate that the country had a legislature and a court system for several hundred years. In the case of the Catholic Church, we assume that many know that it had (and still has) legislative institutions (papacy, Episcopal councils, college of cardinals) and will not bother to describe them. We will rather dwell on the lesser-known fact that the Church had a complex system of courts, much of which persists to the present day.

Our second aim in this section will be to describe these system's enforcement mechanisms. In the case of Iceland, we will discuss the institution of outlawry; in canon law, the sanction of excommunication; and in the common law, the system of the frankpledge. We will see the innovative ways in which these pre-modern legal systems were able to enforce their law.

### **A. Medieval Iceland**

Iceland has been described as history's "first new nation." Unlike most other societies whose geneses have been long forgotten and are otherwise unrecoverable, the founding of Iceland is well documented and written records describing the surrounding events survive. According to archeological evidence and extant sources, Iceland was settled between 870 and 930 primarily by Norwegians, with a minority of Irish and Scots. The first immigrants encountered a virtually empty land mass and within sixty years managed to divvy up the entire island into private farms and pasturelands.

The reasons for the mass migration to Iceland are not entirely clear. The scarcity of land in other Scandinavian countries and colonies, advances in

shipbuilding technology, improved defenses against Viking invasions in other parts of the Atlantic world and the sense of adventure are among the reasons frequently cited by historians. The famous sagas written by the Icelanders pin the blame on the oppressive rule of King Harald Finehair of Norway. According to this native account, Harald imposed taxes on the petty landowners of Norway and sought to limit their rights. Many of these landowners left Norway to escape Harald's rule and search for freedom.

The society these immigrants established was remarkably egalitarian. Iceland did not have a king, feudal lords or an aristocracy. Regional leaders, called chieftains or *godi*, had little executive power and did not rule within their territory. Farmers were free to choose the chieftains they wished to support and were permitted to switch alliances each year. And while social divisions existed between chieftains and farmers, the landed and the landless, freemen and slaves, the class hierarchy was considerably flatter than the complex stratification of Norwegian society and other European nations.

As mentioned, Iceland did not have a king. Nor did Icelanders accept rule by Norway. Instead, the settlers governed themselves via assemblies, or *things*, that they set up almost immediately upon arriving in the country. Initially, *things* were exclusively local events and resolved disputes involving neighboring chieftains and farmers. These assemblies were governed by established procedures and met at regular intervals at predetermined locations. District chieftains were responsible for convening these assemblies and the farmers who were allied with them, called *thingmen*, were required to attend.

The most important local thing, the *varthing*, met each spring. The *varthing* were divided into two parts: courts of prosecution and courts for dealing with debts. All cases were tried before juries composed of thirty-six farmers appointed by the chieftains. Chieftains could appear before these courts as litigants and often represented their *thingmen* as legal advocates.

In addition to these local assemblies, a national assembly, called the *althing*, was instituted in 930.<sup>48</sup> The *althing* met for two weeks during the summer and functioned as a national legislature and court system. The law council, called the *logretta*, made new laws, revised old ones and, for a fee, granted exemptions for certain parties. The *logretta* was comprised of every chieftain in the nation, and only the chieftains were permitted to vote there, although they could each choose two advisors to accompany them into the proceedings.

The courts convened at the *althing* were called quarter courts, each of which represented a quarter of the country. Each chieftain appointed a portion of

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<sup>48</sup> According to tradition, Ulfjotur was sent back to Eastern Norway around 927 to study the law of the gulathing. On the basis of this study, he compiled and brought back a new law code. This code was adopted in 930 as the law of the land by the community of settlers



the jury panel from the farmers of his region, thereby ensuring that each court would be constituted by representatives of each part of the nation. Litigants from each quarter could have their case tried at the quarter court during the *althing* in lieu of trial at their local *varthing*, provided that the stakes at issue were more than minimal. The quarter courts also functioned as appellate courts, where cases deadlocked at the *varthing* could be resolved. Deadlock at one of the quarter courts could be broken at the Fifth Court, which decided cases by simple majority.

The only national office holder was the lawspeaker. His principle duty was to recite annually a third of the laws by memory at the *logberg*, or Law Rock. Attendance at this ceremony was required by each chieftain or two stand-ins. The lawspeaker was also obligated to announce any new legislation enacted at the *logretta*. The lawspeaker might also be consulted during legislative debate to recall any laws that might be relevant. If he could not remember or a difficult issue arose, he was required to speak with five legal experts before opining.

Through the device of the *althing*, Iceland created a unified legal community. Each chieftain of the nation was a member of the *logretta*. The rules enacted were the law of the land and eventually collected and systematized in the *Gragas*, the Icelandic code. Courts at the *varthing* and *althing* were required to apply these common rules in order to decide cases. And because the quarter courts became the dominant fora for resolving important disputes, the most significant cases were tried before juries that were composed of representatives from each region of the country.

While Iceland had a well-developed legislative and judicial system, it had no executive institutions. It had no army, fire departments, tax collectors, or social workers. Most important for our purposes, it had no law enforcement personnel. No officials were charged with preventing criminal acts, prosecuting those that did occur, enforcing court rulings, or executing sentences. When a violation of the rules occurred, victims had to take the legal initiative themselves: they had to initiate a prosecution by suing the accused wrongdoer in court.<sup>49</sup>

The fact that Iceland did not have public prosecutors, police or executioners, however, did not prevent it from imposing sanctions on rule-violators. Defendants who were convicted in a prosecution brought by the victim were subject to one of three penalties. Petty offenses were punished by a three mark fine. More serious offenders were subject to “outlawry.” Someone declared an “outlaw” was cast outside the law: that person lost the rights normally accorded members of the Icelandic community, such as the rights to reside in Iceland, to hospitality and to own property.

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<sup>49</sup> Victims, however, were not constrained to legal channels. They were entitled to retaliate and initiate or perpetuate a feud. They could also seek a settlement via private arbitration. On these private alternatives, see Miller.

Icelandic law provided for two forms of outlawry. In “lesser” outlawry, the outlaw was banished from the country for three years. His property was confiscated and awarded to the plaintiff. In “full” outlawry, the outlaw was exiled for life. In fact, the full outlaw lost all of his rights and was treated as though he were dead. Not only could his property be confiscated, but he could be killed with impunity.

Using the terminology introduced in the previous Part, we can describe the norms levying fines and declaring outlawry as Iceland’s primary enforcement rules. They imposed duties on the losing defendant to engage in certain costly activities, i.e., to pay a fine or to leave the country. It stands to question, then, how the primary enforcement rules were themselves enforced, given that Icelandic law did not possess executive institutions. Put bluntly, why did losing defendants pay their fines and leave the country if there were no sheriffs forcing them to do so?

In the case of fines, Icelandic law provided that those who did not pay the three marks were subject to lesser outlawry. Lesser outlaws who did not leave the country were in turn subject to full outlawry. We can see, therefore, that Icelandic legal rules formed enforcement chains. The primary enforcement rules imposing fines were backed by primary enforcement rules imposing lesser outlawry. And the primary enforcement rules imposing lesser outlawry were backed by primary enforcement rules imposing full outlawry.

It would seem, however, that our original question persists: if someone was not willing to pay a small fine, why would they then leave the country for three years? And if someone was unwilling to leave the country for three years, why would they respond to this act of disobedience by leaving it for life?

The answer is simple: Icelandic law also provided that anyone assisting or harboring an outlaw were themselves subject to outlawry. Icelandic law, in other words, contained secondary enforcement rules. It imposed a duty on those other than the conduct rule violator not to assist the conduct rule violator. This secondary enforcement rule was itself backed by another secondary enforcement rule, one that prohibits others from assisting those who assist outlaws.

Outlawry brought other unwanted legal consequences. The winning prosecutor, for example, was entitled to the outlaw’s property. Two weeks following an outlawry judgment an ad hoc confiscation court was established to divide the outlaw’s property: portions of the estate were reserved for the outlaw’s wife, children and chieftain, while the remainder was awarded to the winning party. Moreover, anyone was permitted to kill a full outlaw. Killers of full outlaws, therefore, could not themselves be outlawed for this action. Finally, the winning private prosecutor was obligated to kill the full outlaw. If the plaintiff did not kill a captured outlaw, then whoever captured the outlaw could prosecute the original plaintiff for outlawry. As Bill Miller has pointed out, however, this

last rule was rarely obeyed. Since trying to kill another person was a very risky proposition, most victorious prosecutors did not satisfy this onerous responsibility and contented themselves with the social exclusion and property confiscation that outlawry brought upon the losing defendant.

As we can see, the fact that Iceland did not have police, public prosecutors, or prisons did not mean that Icelandic law was not enforced. Those who broke the law were subject to sanctions for their offenses. Depending on the act, primary enforcement rules required the violator to pay a fine or go into exile. Icelandic law also contained an escalating schedule of sanctions for those who failed to abide by the initial penalties. Finally, Icelandic law contained secondary rules for dealing with those who refused to obey the primary enforcement rules. Thus, Icelanders were forbidden to assist or harbor an outlaw and were permitted to confiscate their property and, in the case of full outlawry, to take their life.

In the language introduced earlier, Icelandic law *externalized* enforcement onto the community. Unlike modern states that have professional bureaucracies, Iceland relied on private parties to enforce the law. Icelandic law not only externalized law enforcement, but did so mainly through the technique of “outcasting.” The standard technique of enforcement, outlawry, treated the law-breaker as a social outcast. It denied him rights that other members of the community enjoyed. Thus, it excluded the outlaw from the country and prohibited others from according him hospitality or assistance in any way. It also released others from respecting the outlaw’s property rights.

It should not be surprising that, in the context of Iceland, social exclusion would be a powerful tool of law enforcement. Given the harsh environment and scarce resources, Icelanders had difficulty surviving on their own. Exclusion from social life made life intolerable for most inhabitants. The law did not have to employ physical coercion against offenders: losing one’s property and the assistance of one’s neighbors was a compelling enough reason to take the law seriously.

## **B. Classical Canon Law**

Iceland is not the only regime to have had a legal system despite not possessing police or other law-enforcement personnel. In fact, the longest surviving legal system in history, the canon law of the Roman Catholic Church, is similar to medieval Iceland in this regard: it managed to have a legal regime, and enforce its law, despite the absence of internal coercive institutions.

The burden of exposition in this section is considerably lighter because of the greater familiarity of the subject matter. In contrast to the Medieval Icelandic commonwealth, most readers know a good deal about the history and structure of the Catholic Church. They know that the Catholic Church has legislative officials

and institutions such as the pope, the College of Cardinals, bishops, Vatican councils, and so on. They know that these individuals and bodies create many rules, such as those relating to holidays, sacraments, sexual conduct, family structure, ordination of clergy, heresy, and so on, and prescribe sanctions for their violation.

What they might not know, however, is that the Catholic Church has had—and continues to have—a very complex court system. We will begin, then, by describing this court system as it existed at the heyday of canon law, during the so-called “Classical Period.” We will see that classical canon law had the right to be called a legal system, for it not only possessed legislative institutions but a sophisticated structure of adjudicative ones as well.

Canon lawyers normally mark the beginning of the classical period at 1140 with the publication of Gratian’s *Decretum*. In this book, Gratian sought to synthesize and harmonize the conflicting host of canon rules derived from disparate sources, such as scripture, papal decisions, church councils, saying of church fathers, and so on. The *Decretum* quickly became the principal legal textbook in the newly founded law schools throughout Europe and stimulated a surge in legal scholarship devoted to explaining the various doctrines of Gratian.

In general, law begets law, and canon law is no exception. One of the great accomplishments of Gratian’s textbook was to demonstrate how abstract principles of canon law could be used to resolve apparent conflicts between rules and how these rules could then be used to answer concrete questions. This increase in legal knowledge led to increase in litigation, which in turn generated considerable amount of new law.

The growth in legislation and litigation created tremendous pressure for the institutional reform of ecclesiastical courts. Before the advent of the classical period, adjudication was mainly an ad hoc affair. At the local level, bishops and archdeacons decided cases in the normal course of their official duties and did so without a cadre of trained personnel. Bishops who faced particularly difficult legal questions could call a “synod,” which was a general assembly of clergy from the region. During these meetings, legal problems would be discussed and the members would advise the bishop on how to rule.

By the close of the twelfth century, however, bishops and synods could no longer keep up with the rising caseloads and responded by delegating judicial responsibilities to legally-trained judges. These judges were often called the “bishop’s officials,” and chief judges the “officials-principal.” By the latter half of the thirteenth century, many of these officials-principal presided over complex judicial bureaucracies. In addition to a staff of clerks who produced and copied documents, registrars who maintained the docket, and bailiffs who notified parties about their appearances, subordinate judges would often take depositions and try cases delegated by the official-principal. Because this court was a standing

judicial forum, it became known as the bishop's "consistory court." Consistory courts were distinguished from those at which the bishop himself presided. They were known as "courts of audience."

Lesser prelates, such as archdeacons, also developed courts of their own. These courts concerned themselves with minor disputes not sufficiently important to warrant episcopal attention and with the enforcement of disciplinary rules of the church. Thus, these lesser courts punished sexual misbehavior, drunkenness, violations of the Sabbath and so on. Archdeacons too responded to the rising tide of litigation by delegating their judicial responsibilities to trained legal professionals to adjudicate cases that would ordinarily come before them.

Above both archdeacon and bishop consistory courts were provincial courts. Archbishops established provincial courts to hear appeals coming from below as well as exercising original jurisdiction over particularly weighty matters. At the top of the judicial hierarchy, of course, was the pope and his curia in Rome. The pope exercised both original and appellate jurisdiction over all matters that arose within the entirety of western Christendom.

By the late twelfth century, popes began to appoint trained legal professional to the College of Cardinals who would advise the pope when hearing cases. The resulting judicial body became known as the "Roman consistory." The pope and cardinals met daily in consistory to hear arguments and appeals and then to deliberate about the proper outcome in each case. This system ultimately proved unworkable given the crushing demands of other papal responsibilities. As a result, the pope delegated all but the most important cases to general hearing officers known as "auditors-general." Because the auditors-general heard cases in a round courtroom taking turns presiding, the court was nicknamed "the Wheel." The pope uses the Wheel as the main tribunal of justice to this very day.

During the thirteenth and fourteenth centuries, the papal curia developed additional specialized courts. The *audientia litterarum contradictarum* managed the proctors who represented parties at the curia, while the penitentiary courts sorted through requests for papal dispensations. The pope's chief financial officer, the chamberlain, had his own court where financial disputes were adjudicated. And the group of officials known as the *referendarii signaturae*, whose original function included preparing documents, evolved into sitting judges and formed the highest appellate papal court known as the *signature iustitiae*.<sup>50</sup>

Tomes, of course, could be written about the ecclesiastical courts during the classical period. Our aim here has merely been to sketch the basic structure of the ecclesiastical courts so as to give the reader a reason to believe that canon law was an actual legal system. Church canons were not simply the rules of an

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<sup>50</sup> Popes also appointed judge-delegates within local communities to resolve papal matters, thereby saving the litigants as well as papal officials significant time and expense. See JAMES A. BRUNDAGE, *MEDIEVAL CANON LAW*, 127-28 (1995).

organized religion—they were laws of a living, breathing legal regime. They were created by legislative processes and applied by a hierarchical and complex system of duly constituted courts.

Having argued that classical canon law was a legal system, we will now explore the ways in which the Roman church enforced its rules. To do so, we begin with the debate among canon lawyers about whether Church was permitted to use “temporal” sanctions such as monetary fines, corporal punishment, and the death penalty. Initially, many argued that the Church ought to remain in the higher realm and eschew physical coercion. Punishments, they argued, should be limited to spiritual sanctions: prayer, fasting, public displays of contrition, and so on. Gratian quotes the bible to support this point: “Resist not evil; but whosoever shall smite thee on thy right cheek, turn to him the other also.”<sup>51</sup>

Gratian does, however, collect authorities justifying the use of force. Augustine, for example, argued that such counsels of patience were meant to soften the hearts of good people. If one applied such maxims to bad people, one would be giving them license to commit evil. Augustine also argued that inflicting force to turn someone away from evil is actually more charitable than letting them persist in sin. Even execution is a far better than eternal damnation.

The canonists tried to harmonize these opposing viewpoints in the following way. First, and foremost, they held that the church is forbidden to *directly* inflict most types of physical punishment. In particular, the death penalty could never be directly imposed by the church. Nevertheless, the church could seek the death penalty through the proper secular authorities, though only in the interest of justice and only when there was no longer any reasonable hope the criminal would amend their ways.

Canon law did permit bishops to keep armed personnel in their retinue and to threaten physical force in order to enforce their judgments. However, it emphatically prohibited them from following through on their threats if the person subject to the punishment resisted. Bishops had only two main choices for dealing with contumacy: excommunication or recourse to secular authorities to impose temporal sanctions. Let us discuss each option in turn.

Excommunication came in two basic forms, minor and major. Minor excommunication entailed separation of the person from the sacraments of the Church. Thus, the excommunicated person could not receive the Eucharist, go to confession, be married and so on. Nor could such a person hold ecclesiastical office or participate in the liturgy in a ministerial capacity (though they were permitted to attend Mass). Major excommunication entailed a complete

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<sup>51</sup> *Matthew* 5:39.

separation from the Christian community. Such a person was shunned from his or her neighbors; no one was permitted to talk, eat or do business with them.<sup>52</sup>

Because excommunication was the most serious sanction the Church could impose on those who disobeyed its rules—the *glossa ordinaria* to the Decretals called it “the eternal separation of Death”—the Church imposed strict requirements on its use. Both major and minor excommunication could be imposed only by an authorized episcopal court and only after due process had been served.<sup>53</sup> Thus, the person would have to have had fair warning, the opportunity to defend himself and the right of appeal to a higher court. Sentences of excommunication had to be in writing where the cause of excommunication was clearly set out, and the person excommunicated was entitled to a copy.

The extreme gravity of excommunication also led canonists to insist that it be used only “medicinally.” It was designed to restore spiritual health, not to punish. Thus, if a poor man could not pay his debt, he was not to be excommunicated for his failure. Indeed, canon law required that a sentence of excommunication be lifted if it were clear that the person excommunicated had no intention of complying with the court’s original order.

In special cases, canon law dispensed with the necessity of adjudication. In situations of heresy or violent assault on a cleric, the offender was subject to automatic excommunication, known as “excommunication *latae sententiae*.” In order to circumvent the requirement of due process, canon law promulgated the fiction that offenders had been warned in advance that excommunication would automatically follow a certain offense and thus they had fair notice of this sanction. Once a person was excommunicated *latae sententiae* and not in danger of dying, only the papal court could grant absolution and lift the sanction.

If excommunication did not motivate the offender to reform his ways, canon law permitted ecclesiastical courts to refer the matter to the secular authorities. In the terminology of canon law, the recalcitrant person would be “relaxed” to the secular arm for punishment. A lively debate arose among canon lawyers as to whether the church was merely permitted to request that secular authorities impose temporal punishment or whether it could demand assistance as a matter of right. Canon law eventually settled on the latter option. The legitimacy of secular authorities, they claimed, ultimately derived from the church and thus the government was obligated to heed ecclesiastical referrals. Failure on the part of the king to comply with ecclesiastical demands would itself be met with a sentence of excommunication.

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<sup>52</sup> Canon law made exceptions for children and servants. They were permitted to interact with the excommunicated person.

<sup>53</sup> Persons could only be excommunicated by judicial superiors. Thus, bishops could not be excommunicated by bishops but only by archbishops or higher.

That the church claimed authority over the secular arm did not mean that the secular arm always acquiesced. In France, for example, King Louis IX refused to respect ecclesiastical referrals on the grounds that doing so would lead to grave injustices. The church was more successful in the German-speaking lands where secular authorities were receptive to the entreaties of the church. Cooperation between spiritual and secular authorities was strongest in England. From the early thirteenth century, the common law granted the church the right to petition the royal courts to impose sanctions that were unavailable to ecclesiastical courts. After forty days of excommunication, a bishop could submit a petition, called a “*significavit*,” to Chancery requesting that the recalcitrant offender be imprisoned. Upon receipt of the *significavit*, the Chancery would issue a writ, called a “*letter of caption*,” ordering the sheriff to imprison the offender until he received absolution from the church. Importantly, English courts made no inquiry into the legitimacy of the church’s requests. As long as the *significavit* was issued by a duly constituted episcopal authority, secular authorities would issue letters of caption as a matter of course.

As this brief sketch indicates, medieval canon law was able to enforce its rules despite the prohibition on using physical coercion. While it did not have control over the body, the church claimed the power over something even more precious: the soul. Thus, canon law’s primary enforcement rules authorized ecclesiastical courts to control the expiation of sin. They could impose spiritual sanctions on the offender requiring certain acts of public penance before absolution would be granted. If these primary rules proved ineffective, canon law’s secondary enforcement rules permitted courts to up the spiritual ante by excommunicating recalcitrant individuals. Through minor excommunication offenders were denied the sacraments of the Church and, as a result, risked eternal damnation.

In the terminology of this paper, minor excommunication is a form of internalized outcasting. It is internalized in that church officials are prohibited from ministering to the excommunicated individual. It is a form of outcasting because excommunication denied the excommunicated the benefits of belonging to the Christian community, namely, the benefits of receiving church sacraments and hence the possibility of salvation. Indeed, “excommunication” means “separated from the community.”

By claiming power over the spiritual lives of offenders, the church was able to leverage control over their social lives as well. Through major excommunication, the church could deprive offenders of social interaction and thereby cut them off from their communities. Major excommunication, thus, is a form of externalized outcasting, because it prohibits non-church officials from associating and cooperating with the offender.



We have also seen that the church had yet another enforcement tool in its arsenal. Though it denied itself the powers of a state, the church had the next best thing: access to states that were willing to use brute force. Thus, the church was able to externalize law enforcement by referring the matter to secular authorities. While the church did not dirty its hands by using brute force, it was able to see to it that physical forms of coercion would ultimately be used against sinners.

### C. Common Law

[TBD]

## IV. OUTCASTING AND EXTERNAL ENFORCEMENT IN INTERNATIONAL LAW

As the cases of medieval Icelandic law, canon law and common law demonstrate, the Modern State Conception is both an excessively narrow and historically inaccurate account of law. Legal systems can and have existed despite lacking the capacities of a modern state. Even without police, jails and professional prosecutors, these systems were able to do what legal systems normally do: enact legislation by officials who follow formal rules, resolve disputes according to pre-existing norms by judges following rules of procedure and evidence, and enforce legislation and court orders using various forms of coercion.

With the blinders imposed by the Modern State Conception removed—and a fuller vision of law that includes outcasting and external enforcement as really and truly law—international law appears in an entirely new light. We are able to see that allowing the Modern State Conception to set the terms of the debate over international law leads us to ask and answer the wrong questions. Yes, very little of international law meets the Modern State Conception of international law—very little (if any) of it is enforced through brute force deployed by an institution enforcing its own rules. But what is interesting is not so much what international law is not, but *what it is*. And that is law that operates almost entirely through outcasting and external enforcement.

We begin this Part by documenting how international law works in light of the broader understanding of law we have put forth. What we see is that time and again, international legal institutions use others (usually states) to enforce their rules, and they use typically deploy exclusion rather than brute physical force. Indeed, different international legal regimes can be classified depending on the particular modes of enforcement to which they resort: whether internal or external, physical or non-physical. The much more complete picture of law

offered above thus not only gives the lie to the Modern State Conception, but it also provides a new way of understanding international law and how it functions.

Next, we examine more closely the type of legal enforcement regime that is most prevalent in international law: Law that externalizes enforcement and operates through outcasting. We call this “external outcasting.” A closer look at external outcasting in international law demonstrates that substantively diverse legal regimes have a set of common features. These features can be described in a way that allows us to see that regimes that appear on the surface to be very different are, at heart, merely site-specific applications of the same law enforcement model. In addition to describing the common features of legal regimes that were previously missed, we can now identify a set of variations in the way external outcasting operates. Is it adjudicated or not? Permissive or mandatory? Partial or complete? Temporary or permanent? We identify these variations and show how they operate across international law.

#### A. Outcasting and External Enforcement in International Law

The Modern State Conception of law establishes two conditions for law. First, law must contain internal bureaucratic enforcement mechanisms. Second, those mechanisms must employ physical violence at some point in the chain of enforcement. Above, we showed that these criteria are too narrow. In fact, a legal system can rely on others to enforce its law (what we call external enforcement). And law can be enforced through exclusion from community benefits (what we call outcasting).

Put differently, we can divide law enforcement into internal and external enforcement; we can also divide enforcement into that which resorts to physical force and that which does not. These two different axes can be overlapped to create four separate categories: (1) internal & physical; (2) external & physical; (3) internal & non-physical; (4) external & non-physical. To illustrate this, consider the following four-square diagram:

	<i>Internal</i>	<i>External</i>
<b>Physical Force</b>	<i>Modern State Conception</i>	<i>External Physical Enforcement</i>
<b>Non-Physical</b>	<i>Internal Outcasting</i>	<i>External Outcasting</i>

As this diagram makes clear, the Modern State Conception of law enforcement is only one part of the larger picture—it encompasses law that is enforced through internal systems using physical force. But there are three other forms of law enforcement: External Physical Enforcement (enforced by external actors using physical force), Internal Outcasting (enforced by internal actors using non-physical means), and External Outcasting (enforced by external actors using non-physical means). As we defined the Modern State Conception of law in some depth above, we focus here on completing the picture with more detailed descriptions of the other three forms of law enforcement.

### 1. *External Physical Enforcement*

External physical enforcement operates by externalizing enforcement onto other actors that, in turn, resort to physical force. As we noted above, the Modern State Conception demands that enforcement be enforced internally—that is, by the regime itself. All external legal enforcement (whether physical or non-physical) violates this demand. It instead tasks some party outside the regime with ensuring compliance with the rules. External *physical* enforcement involves the use of physical force—but not by the legal regime itself. Instead, the regime relies upon an outside party to deploy physical force in service of enforcing the law.

Put differently, recall that in Part II above we explained that the Modern State Conception assumes four basic conditions: (1) most conduct rules are part of enforcement chains, (2) most enforcement chains have at least one secondary enforcement link, (3) most enforcement chains have at least one secondary enforcement link that is addressed to officials of the regime in question, and (4) most enforcement chains have at least one secondary enforcement link that either requires or permits officials to use physical force on the person who violated the initial link or their property. External physical enforcement violates the third condition—the secondary link is not addressed to officials of the regime in question. It is instead addressed to actors outside the regime.

Consider an example drawn from the canon law regime described above. That regime provided that if excommunication did not cause an offender to reform his behavior to conform to canon law, then he could be referred—or as it was perversely termed, “relaxed”—to the secular authorities by the ecclesiastical courts. Hence canon law enforcement was externalized to actors outside the legal regime (in this case, outside the church). The secular authorities, in turn, could—and did—use physical force upon the recalcitrant actor. In England, for instance, the bishop could request that an unrepentant offender be imprisoned. The secular authorities—in the form of the Chancery—then issued a writ ordering the sheriff to imprison the offender (hence deploying physical force) until the

church determined he was to be absolved. The English courts were not acting under the command of the church—they could, in principle, refuse to imprison an offender. But they were acting in cooperation with the church—voluntarily choosing to enforce church law by imprisoning as a matter of course those identified by the church as offenders.

Now consider an example drawn from international law. A central principle of international law—codified in Article 2(4) of the United Nations Charter—is the prohibition on the use of aggressive force by a sovereign state against the sovereign territory or political independence of another state.<sup>54</sup> As described in more detail above, the United Nations has one internal mechanism for enforcing this rule through the use of physical force: the United Nations Security Council, acting under Chapter VII authority to deploy forces operating under UN command. But, as we have seen, that mechanism is rarely deployed, in part because any action can be vetoed by any one of the Permanent Five members of the Council.

As a result, much of the enforcement of the prohibition on the use of aggressive force relies on actors outside the institutional bureaucracy of the United Nations (thus making the enforcement *external* to the UN). This enforcement occurs primarily through the use of self-defense and mutual defense treaties, both of which either use or threaten the use of physical force (thus engaging in external *physical* enforcement). Under international law, again codified in the UN Charter, states are permitted to use physical force to engage in self-defense and collective self defense to repel an armed attack launched in violation of Article 2(4).<sup>55</sup> Mutual defense treaties enforce these provisions by providing that if one of the parties to the treaty is attacked, the other will come to its aid to repel the attack, thereby enforcing the right of the first state to be free from aggression and to use force in self-defense.

A particularly robust mutual defense treaty illustrates the point. The North Atlantic Treaty Organization (NATO) provisions for collective self defense

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<sup>54</sup> Article 2(4) of the UN Charter provides: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. Charter art. 2, para. 4.

<sup>55</sup> Article 51 provides: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.” U.N. Charter art. 51.

represent the core of the NATO alliance.<sup>56</sup> They initially emerged as a way to deter the threat of Soviet aggression—and to respond to it using armed force, if needed—after the conclusion of World War II.<sup>57</sup> Under Article V of the North Atlantic Treaty, member states “agree that an armed attack against one or more of them . . . shall be considered an attack against them all” and they pledge that, if an armed attack occurs, they will “assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.”<sup>58</sup>

## 2. *Internal Outcasting*

Internal outcasting occurs when internal bureaucratic structures of a legal system enforce the law without resorting to the threat or use of physical force. To explain this mode of enforcement, it is useful to once again return to the four conditions established by the Modern State Conception. External physical enforcement violated the third condition—as it is addressed not to officials in the regime in question but to those outside it. Internal outcasting, by contrast, meets the third condition—it has at least one secondary enforcement link that is addressed to officials of the regime in question. But it violates the fourth—it has no secondary enforcement link that either requires or permits officials to use *physical force* at any point in the enforcement chain.

To illustrate how internal outcasting operates, let us return to canon law. Excommunication came in two forms: minor and major. Major excommunication involved complete separation from the Christian community. Minor excommunication, on the other hand, did not involve complete separation from the community as a whole, but it did entail separation of the person from the sacraments of the Church. This *non-physical* enforcement was carried out

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<sup>56</sup> See PAUL E. GALLIS, CONG. RESEARCH SERV., NO. 97-717 F, NATO: ARTICLE V AND COLLECTIVE DEFENSE (1997).

<sup>57</sup> See MARTIN EDMONDS & OLDRICH CERNY, FUTURE NATO SECURITY: ADDRESSING THE CHALLENGES OF EVOLVING SECURITY AND INFORMATION SHARING SYSTEMS AND ARCHITECTURES vii (2004).

<sup>58</sup> The Article reads in full: “The Parties agree that an armed attack against one or more of them . . . shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area” North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 34 U.N.T.S. 243, 246. The second Protocol expanded the territory covered by the Treaty.

through “outcasting”—that is, by exclusion from the benefits of community membership.

It was, moreover, *internal* enforcement because the actors engaging in enforcement action were internal to the legal regime itself. An authorized Episcopal court would hear the case against a person charged with violating church law. If it found the accused guilty, it could issue a sentence of minor excommunication. The punishment, in turn, also relied entirely on officials internal to the regime: the minor excommunicate was permitted to remain in the community but could not receive the Eucharist, go to confession, be married within the church,<sup>59</sup> hold ecclesiastical office, or otherwise receive the benefits of church membership ordinarily granted by officials of the church to members of the church community.

Today, some might consider this internal outcasting—the exclusion from the sacraments of the Church—to be a mild penalty. That was decidedly not so for those living under the classical canon law. Even the “minor” form of excommunication was considered an extremely severe sanction—separation from the church meant separation from God. Separation from God, in turn, meant spiritual death and eternal punishment.<sup>60</sup> The threat of exclusion from those benefits of church membership granted by the church therefore served as a powerful inducement to compliance with church law.

Now let us turn to an example drawn from international law. The World Health Organization directs and coordinates international public health programs. It has a vast array of global programs aimed at everything from combating infectious diseases (such as HIV/AIDS, swine flu and SARS) to setting health-related norms and standards, to improving access to clean water.<sup>61</sup> There are 193 state parties to the WHO. Member states have the right to appoint delegations to the World Health Assembly (“Health Assembly”), which is the WHO’s decision-making body.<sup>62</sup> The Assembly elects its President and other officers,<sup>63</sup> adopts its rules of procedure,<sup>64</sup> determines politics of the Organization,<sup>65</sup> appoints the WHO

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<sup>59</sup> The excommunicate could enter a contract of marriage, but sinned by doing so. R.H. HELMHOLTZ, *THE SPIRIT OF CLASSICAL CANNON LAW* 381 (2010).

<sup>60</sup> Yet there was hope for the excommunicate. Because excommunication was understood to be medicinal rather than retributive, the excommunicate could be absolved if he “should recognize his fault and turn toward God.” *Id.* at 377. Once restored to full spiritual health by officials of the church, no adverse consequences were to remain. *Id.* at 377.

<sup>61</sup> *Working for Health: An Introduction to WHO*, WORLD HEALTH ORGANIZATION, <http://www.who.int/about/role/en/index.html> (last visited Oct. 24, 2010).

<sup>62</sup> Constitution of the World Health Organization, art. 11, July 22, 1946, 62 Stat. 2679 14 U.N.T.S. 185 (“Each Member shall be represented by not more than three delegates, one of whom shall be designated by the Member as chief delegate”).

<sup>63</sup> *Id.* art.16.

<sup>64</sup> *Id.* art. 17.

<sup>65</sup> *Id.* art. 18(a).

Director General,<sup>66</sup> and establishes committees necessary for the work of the Organization,<sup>67</sup> to name just a few of its enumerated functions.<sup>68</sup> The Health Assembly also has the authority to adopt regulations regarding sanitary requirements, standards for diagnostic procedures, and standards for the safety of biological and pharmaceutical products—regulations that are binding on Members that do not expressly opt out within a specified period.<sup>69</sup> Finally, the Health Assembly also elects the Executive Board of the WHO.<sup>70</sup> That Board, in turn, acts as the executive organ of the Health Assembly, empowered to take action to give effect to its decisions.<sup>71</sup>

The WHO is supported by mandatory contributions by state parties, as well as voluntary donor contributions. The mandatory state party contributions are enforced, moreover, by the prospect of internal outcasting. If a Member “fails to meet its financial obligations to the Organization . . . the Health Assembly may, on such conditions as it thinks proper, suspend the voting privileges and services to which a Member is entitled. The Health Assembly shall have the authority to restore such voting privileges and services.”<sup>72</sup> Note that the party is not ejected from WHO altogether. Instead, the party loses the ability to participate as a voting member in the Health Assembly—and thus loses control over the activities of the WHO, which the Health Assembly oversees and directs. In other words, the sanction for the offense of non-payment is exclusion from the benefit of participating in the governance of the institution—an enforcement action carried out by the Health Assembly itself. Hence the enforcement regime is *internal*—the punishment is carried out by officials internal to the regime—*outcasting*—the punishment constitutes exclusion from some of the benefits of community membership.

### 3. *External Outcasting*

This brings us to the final form of law enforcement—external outcasting. To put external outcasting into context, recall that external physical enforcement violates the third of the four conditions established by the Modern State Conception—it is addressed not to officials in the regime in question but to those outside it. Internal outcasting, on the other hand, meets the third condition but violates the fourth—it has no secondary enforcement link that either requires or

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<sup>66</sup> *Id.* art. 18(c).

<sup>67</sup> *Id.* art. 18 (e).

<sup>68</sup> *Id.* art. 18.

<sup>69</sup> *Id.* art. 21, 22.

<sup>70</sup> *Id.* art 23.

<sup>71</sup> *Id.* art. 28, 29.

<sup>72</sup> *Id.* art. 7.

permits officials to use *physical force* at any point in the enforcement chain. External outcasting is distinguished from these two forms of law enforcement in that it violates *both* the third and the fourth conditions—it is enforced by officials outside the legal regime without the use of physical force at any point in the enforcement chain.

To illustrate this form of enforcement, let us travel back in time once again to Medieval Iceland. As we say, Iceland had an extraordinarily elaborate set of laws and institutions for generating laws and resolving disputes. Yet it did not have public prosecutors, police, or executioners. It had, in short, no internal mechanism for exerting physical force to force Icelanders to follow the law. Nor did it have any way to physically force those found guilty of violating the law's commands to pay the fines levied on them as penalty for those violations. What it had, instead, was outlawry.

As we described in detail above, those who violated the law in medieval Iceland were prosecuted by the victim himself. Aside from those minor offenses enforced by the imposition of a small fine, offenses were enforced by various forms of outlawry (including, not incidentally, failure to pay the small fine). This ranged from “lesser” outlawry—banishment from the country for a period of three years—to “full” outlawry—in which the outlaw was exiled for life and so fully lost the rights and protections of community membership that he was treated as if he were dead. Indeed, he could even be killed with impunity for he no longer enjoyed the protection of the community's laws.

Outlawry—whether lesser or full—provided for external enforcement. Yes, internal institutional determined whether the law had been violated. Once a defendant was outlawed, however, it was the individual members of the community—not officials of the legal system—that enforced the judgment. It was the outlaw's family and neighbors that denied him food and shelter. It was the outlaw's fellow community members that might kill him without fear of consequence. It was the individual actions of the members of the community as a whole that denied the outlaw any form of hospitality, assistance, or even the barest legal protections.

Moreover outlawry did not require any threat of physical harm but operated entirely through exclusion from community benefits, or “outcasting.” Exclusion from the protections of community membership was an extraordinarily harsh punishment in and of itself. The outlaw's loss of the protections of the law and his loss of the right to lay claim to hospitality by other members of the community—indeed the affirmative prohibition on that hospitality or assistance—could amount to a death sentence in the harsh climate of Iceland, even if no member of the community chose to use physical force to kill the outlaw.

To see how external outcasting applies in international law, we return to the example of the WTO. As we noted in Part I, the WTO falls far short in the



estimation of the Modern State Conception: it violates both the internality requirement and the brute force requirement. And yet, the WTO is widely regarded as one of the strongest and most effective international legal regimes in existence. How is that possible?

We can now see that the WTO uses *external outcasting* to enforce its rules. The trade law principles established in the General Agreement on Tariffs and Trade are *not* enforced internally—that is, by the officials of the WTO itself. Yes, the WTO has a compulsory dispute resolution system. But the decisions rendered by the WTO's Dispute Resolution Body are *enforced* through authorized retaliation by the aggrieved state party. It is the *states*, not the legal regime of the WTO itself that imposes the sanction. Enforcement is thus *external* to the legal regime. The enforcement regime of the WTO is also devoid of any threat or use of physical force. As we noted earlier, “[t]he WTO has no jailhouse, no bondsmen, no blue helmets, no truncheons or tear gas.”<sup>73</sup> Nor are member states permitted recourse to violence to enforce the rules. Instead, enforcement is limited to specific, approved, retaliatory trade measures taken by the aggrieved parties after a process of adjudication. Like the Icelandic outlaw, the state party found in violation of the General Agreement on Tariffs and Trade simply loses a measure of protection under the legal regime.<sup>74</sup> And just as in Medieval Iceland, the threat of losing the protections of the legal regime provides a powerful inducement to compliance.<sup>75</sup>

The WTO is far from alone. Indeed, once we begin to look at international law through the prism of external outcasting, we see that it is everywhere. It is used to enforce international regulatory regimes such as the

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<sup>73</sup> Judith Hippler Bello, *supra* note 26, at 416-17.

<sup>74</sup> Of course, the loss of protection is not complete as it is for the full outlaw. Instead, the loss of protection, and hence permissible retaliation by the victim, is limited to an amount approved by the Dispute Settlement Body, which will only approve retaliatory sanctions comparable to the harm originally inflicted. The principle remains the same: the law is enforced by lifting the legal protections ordinarily enjoyed by offender and allowing external actors to retaliate without fear of sanction. We discuss the difference between “full” and “partial” outcasting in Part IV below.

<sup>75</sup> It is worth pausing to note that in international law, internal and external outcasting often occur hand-in-hand. A state found in violation of an international legal regime will often lose its voting or other rights to participate in governance of the regime (internal outcasting), while at the same time losing the right to claim the protections or other benefits enjoyed by members of the legal regime (external outcasting). See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL LEGAL REGULATORY AGREEMENTS* 68-87 (1995) (discussing “membership sanctions,” which often encompass both internal and external outcasting). Alternatively, a legal regime might provide for internal outcasting for some types of violations (for example, nonpayment of membership fees), and external outcasting for other types of violations (for example, violation of the substantive norms of the international legal regime). Our claim is not that these are mutually exclusive modes of enforcement but that they can—and should—be logically distinguished.

International Civil Aviation Convention and the International Telecommunication Union; it is used to enforce regional organizations such as the European Convention of Human Rights; it is used by the United Nations Security Council to “give effect to its decisions;”<sup>76</sup> and it is used to enforce environmental legal agreements such as the Convention on International Trade in Endangered Species (CITES). It is so pervasive that it is fair to say that external outcasting is the primary mode of law enforcement utilized by international legal regimes. In the next part, we further explore externalized outcasting and examine the various shapes that it takes across widely varying areas of international law.

### **B. A Typology of Externalized Outcasting in International Law**

The concept of external outcasting serves to describe a form of law enforcement that is entirely distinct from the Modern State Conception. And in the process, it helps us see a set of common features that run through diverse international legal institutions—features that the Modern State Conception previously rendered invisible. Legal institutions that could not be substantively more different—for example, the International Telecommunications Convention and the Convention on International Trade in Endangered Species—use precisely the same law enforcement model. That model takes on different forms in different contexts, but in each case external actors enforce the law through exclusion from the benefits of community. Seeing this common thread opens up a new way of understanding the basic structural foundations of international law.

At the same time that we can see the common features of international legal institutions that utilize external outcasting, we can see their differences as well. We can see that there are, in fact, systematic variations in the way external outcasting regimes operate. They might be called variations on the externalized outcasting theme. This part aims to identify these variations and examine how they operate across international law.

The categories through which we examine externalized outcasting here include whether the enforcement regime: (1) is permissive or mandatory, (2) is adjudicated or not, (3) involves a partial exclusion from community benefits or complete exclusion; (4) is temporary or permanent; (5) involves the suspension of a related obligation (countermeasures) or an unrelated obligation (cross-countermeasures); (6) requires proportional sanctions or permits disproportional sanctions; and (7) permits third party sanctions or not.

The seven categories are designed so that every international legal regime that uses external outcasting can be classified under each one. Every regime is either permissive or mandatory. Every regime is either adjudicated or not. Hence

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<sup>76</sup> U.N. Charter art. 41.

we can see that there are, on these categories alone (which we do not claim are exhaustive), 128 possible variations in externalized outcasting regimes. By giving shape and order to this complex array of international legal regimes, we can identify the institutional design choices that underlie each regime. This sets the stage, in turn, for a renewed inquiry into the influence of international law on state behavior, allowing researchers and practitioners alike to better understand and anticipate the law's shortcomings and strengths.

### 1. *Permissive or Mandatory?*

An externalized outcasting regime may either *permit* outcasting of the party that has violated the law or it may *mandate* outcasting—requiring an external actor to outcast the outlaw.

The World Trade Organization is an example of a *permissive* regime. Once the Dispute Settlement Body has found a state to have acted in violation of the law—and the violating state has chosen not to change its behavior—the state that originally brought the complaint *may* impose trade sanctions. As already explained, those sanctions are a form of externalized outcasting—the state (external to the WTO) is permitted to deprive the violating state of the usual legal protections offered by the GATT up to an amount determined by the Dispute Settlement Body. However, it is not required to do so. Recently, for example, Antigua and won a case against the United States for illegal trade restrictions on internet gambling sites operated from Antigua. In compliance proceedings, the arbitrator authorized an “annual level of nullification or impairments of benefits accruing to Antigua” equal to \$21 million per year, and permitting Antigua to “suspend obligations under the TRIPS Agreement at a level not exceeding US \$21 million annually.”<sup>77</sup> Antigua has so far chosen not to engage in the permitted external outcasting by suspending its obligations to the United States.

Economic sanctions under Chapter VII of the UN Charter offer an example of a system of *mandatory* externalized outcasting. Chapter VII establishes the powers of the United Nation's Security Council to maintain or restore peace and security.<sup>78</sup> The Security Council may use an array of techniques to achieve this aim, including “complete or partial interruption of economic

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<sup>77</sup> *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Current Status Summary)*, WORLD TRADE ORGANIZATION (Feb. 24, 2010), [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds285\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm).

<sup>78</sup> It provides that, “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security.” U.N. Charter, art. 39.

relations”—in other words, outcasting from existing economic relations.<sup>79</sup> The United Nations does not actually impose the sanctions itself, however. Rather, it directs member states to do so; hence the outcasting is *externalized*. Participation, moreover, is *required*. The UN Charter provides that action “*shall* be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.”<sup>80</sup>

To illustrate how the Chapter VII sanctions regime works in practice, consider Security Council sanctions against Libya in the early 1990s.<sup>81</sup> The Security Council issued a Resolution that called on the Government of Libya to comply with requests relating to the investigation of the bombing of Pan Am Flight 103 over Lockerbie, Scotland and UTA Flight 772 over Chad and Niger. It called on Libya to “cease all forms of terrorist action and all assistance to terrorist groups and . . . demonstrate its renunciation of terrorism.”<sup>82</sup> And it announced in no uncertain terms that “*all States shall*” adopt aviation, diplomatic, and arms sanctions against Libya “until the Security Council decides that the Libyan Government has complied.”<sup>83</sup> After Libya surrendered the suspects for trial in the Netherlands and took significant steps to comply with UN Resolutions, the Security Council lifted all sanctions against the country, permitting UN member states to resume full economic and diplomatic relations.<sup>84</sup> States that had imposed

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<sup>79</sup> *Id.* art. 41 (“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”).

<sup>80</sup> *Id.* art. 48, par. 1 (“The action required to carry out the decisions of the Security Council for the maintenance of international peace and security *shall* be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.”) (emphasis added). In addition, under Article 49 of the Charter, “The Members of the United Nations *shall* join in affording mutual assistance in carrying out the measures decided upon by the Security Council.” *Id.* art. 49.

<sup>81</sup> S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 31, 1992), available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/011/07/IMG/NR001107.pdf?OpenElement>.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* ¶3 (emphasis added). The Security Council later expanded sanctions to require states with “financial resources . . . owned or controlled” by Libya to “freeze such funds and financial resources.” S.C. Res. 883, U.N. Doc. S/RES/883 (Nov. 11, 1993). And in 1998, the Security Council again reiterated its demands that Libya comply with the earlier resolutions, ordered Libya to transfer those accused in the Lockerbie bombing to the Netherlands for trial, and threatened “additional measures if the two accused have not arrived or appeared for trial promptly.” S.C. Res. 1192, U.N. Doc. S/RES/1192 (Aug. 27, 1998), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/251/64/PDF/N9825164.pdf?OpenElement>.

<sup>84</sup> S.C. Res. 1506, U.N. Doc. S/RES/1506 (Sept. 12, 2003).

sanctions as required by the resolutions lifted their sanctions regimes,<sup>85</sup> and the country's economy, which had stagnated during the lengthy period of the sanctions regime, expanded at a rapid rate, rising 5 percent in 2003, 6 percent in 2005, and 7 percent in both 2007 and 2008.<sup>86</sup>

## 2. *Adjudicated or Not?*

Some international legal regimes require adjudication of the wrongdoing of the accused before permitting externalized outcasting. Generally these regimes have an authoritative decision-making body with which a party that claims to have been harmed by the law-breaking behavior of another party lodges a complaint. That body then hears arguments by both sides and may examine evidence or engage in other information-gathering activities. It then decides whether to allow external outcasting as a sanction for the wrongdoing; it may also dictate the form and level of outcasting permitted. On the other hand, a regime that uses externalized outcasting might permit external actors to engage in outcasting without first presenting their claims to an authoritative body for adjudication.

We have already seen one clear example of an adjudicated external outcasting regime: the WTO. A state party that claims to have been harmed by another state party's violations of the underlying trade agreement may lodge a complaint with the Dispute Settlement Body (DSB). Once the DSB has considered the arguments of both sides, it rules on whether the behavior of the accused state party is, in fact, inconsistent with its treaty obligations. If it is, and

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<sup>85</sup> See 31 CFR § 550 (Libya Sanctions Regulations). Libya, however, remained on the U.S. terrorist watch list, meaning that it remained in a restrictive export licensing category. Nonetheless, lifting of the sanctions regime meant that nonstrategic (what do you mean by nonstrategic?) trade, financial transactions, and investment in Libya were permitted.

<sup>86</sup> *World Development Indicators*, WORLD BANK, <http://ddp-ext.worldbank.org> (Note: I took a shot at this citation, but I cannot reach the website, so it is difficult to guess on the formatting). This is not the only such example. Between 1946 and 2002, the Security Council used its Chapter VII authority to impose sanctions tens of times. See Johansson, Patrik, *UN Security Council Chapter VII resolutions, 1946-2002. An Inventory*. Uppsala: Department of Peace and Conflict Research 2003. Text of the resolutions from 1946 through 2009 is available at <http://www.un.org/documents/scres.htm>. In Resolutions 232, 253, 277, 314, 388, and 409, for example, the Security Council imposed or tightened financial sanctions against Rhodesia. In Resolution 418, it imposed an arms embargo on South Africa. In Resolutions 661, 666, 670, it imposed economic sanctions on Iraq (this does not count the many resolutions relating to the oil-for-food program or other controls imposed on the sale of oil by Iraq). In Resolutions 713, 757, 787, 820, 942, it imposed arms controls and other economic sanctions on Yugoslavia. In Resolutions 733, 1407 and 1425, it imposed an arms embargo and economic sanctions on Somalia. In Resolutions 748, 883, and 910, it imposed aviation, diplomatic, economic, and military sanctions on Libya. All of these actions and many more were undertaken under Chapter VII. *Id.*

if the wrongdoing state refuses to cure its behavior (and an appellate body upholds the DSB's decision), the state that filed the complaint may then put in place the retaliatory trade sanctions that have been approved by the DSB.

There are also international legal regimes that do not require adjudication before state parties engage in externalized outcasting of states that violate their legal obligations. Yet they are becoming less common as international legal regimes grow increasingly robust. Perhaps the most notable example of externalized outcasting without adjudication is the longstanding international law doctrine of countermeasures. The International Law Commission defines countermeasures as “measures that would otherwise be contrary to the international obligations of an injured State *vis-a-vis* the responsible State, if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation.”<sup>87</sup> It continues, “[c]ountermeasures are feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act.”<sup>88</sup> Countermeasures thus allow a state party to an international agreement to cease performing its obligations toward another state party in retaliation for a wrongful act.<sup>89</sup> They must be proportional and must terminate as soon as the responsible state has complied with its obligations.<sup>90</sup> Although adjudication is not required, an

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<sup>87</sup> Rep. of the Int'l Law Comm'n, 53<sup>rd</sup> Sess., April 23 – June 1, July 2 – Aug. 10, U.N. Doc. A/56/10, at 128 (2001).

<sup>88</sup> *Id.*

<sup>89</sup> Vienna Convention on the Law of Treaties, Article 60, provides: “A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part,” and “A material breach of a multilateral treaty by one of the parties entitles any party specially affected by the breach “to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State.” The ILC contends that it is possible to distinguish suspension or termination under the Article 60 from countermeasures: “Where a treaty is terminated or suspended in accordance with article 60, the substantive legal obligations of the States parties will be affected, but this is quite different from the question of responsibility that may already have arisen from the breach. Countermeasures involve conduct taken in derogation from a subsisting treaty obligation but justified as a necessary and proportionate response to an internally wrongful act of the State against which they are taken. They are essentially temporary measures, taken to achieve a specified end, whose justification terminates once the end is achieved.” Rep. of the Int'l Law Comm'n, *supra* note 72, at 128. Structurally, however, the two are essentially identical. Both involve externalized outcasting—allowing parties harmed by a breach to respond by suspending the obligations of the harmed party toward the party that caused the harm. The key structural difference between the two is that countermeasures suspend only the obligations of the wronged state, whereas the VCLT Article 60 suspends the treaty obligations of both parties.

<sup>90</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, *in* Yearbook of the International Law Commission, arts. 51, 53 (2001).

injured state must “[c]all upon the responsible state” to fulfill its obligation and “[n]otify the responsible State of any decision to take countermeasures and offer to negotiate with that State.”<sup>91</sup>

The International Law Commission makes clear that unadjudicated countermeasures are only permissible where there is no dispute settlement procedure available. The ILC’s articles on state responsibility provide that countermeasures may not be taken or must be suspended if the “wrongful act has ceased” and “the dispute is pending before a court or tribunal which has the authority to make decision binding on the parties.”<sup>92</sup>

An example of this use of countermeasures—and thus of unadjudicated externalized outcasting—can be found in a now-famous 1978 dispute between the United States and France.<sup>93</sup> The United States and France were parties to a bilateral air service agreement. A U.S. airline flew a flight from the United States to London, where passengers switched to a smaller plane to fly on to Paris. France claimed that this change of planes violated the air services agreement. In retaliation, French authorities shortly thereafter ordered a U.S. airline to return a flight to London after landing at an airport in Paris, without allowing the plane to unload passengers or cargo. Believing that the French action violated the agreement, the U.S. Civil Aeronautics Board issued an order requiring French airlines to file all their flight schedules to and from the United States—thus partially suspending a benefit of the treaty. Once the governments agreed to submit the case to arbitration, the order was lifted and normal flights resumed.<sup>94</sup>

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<sup>91</sup> *Id.* art. 52.

<sup>92</sup> *Id.* art. 52, para. 3. An ad hoc tribunal is not considered “pending” for the purpose of Article 52 until it is actually constituted, since it can take quite some time to appoint members and set up the tribunal. “Court” or “tribunal” is meant to apply to all settlement procedures, including state to state arbitration. It does not however refer to an arbitration procedure between an individual and a responsible state, even if that underlying dispute is what has given rise to a state to state dispute. However, in the case of such an arbitration, countermeasures would rarely be justified. If the responsible state refuses to cooperate, through non-appearance, non compliance or refusal to accept or implement the final decision, the injured state may apply countermeasures. *Id.* art. 52 cmt. paras. 8-9. [Danielle—I took this language from your memo. I’m assuming this is original writing and not a quote? If a quote, then please add the proper quotation marks and citation. regardless, a citation might be a nice addition. Professor Hathaway – It is original language paraphrasing the commentary for article 52, I put in the cite. Let me know if you have any other questions.]

<sup>93</sup> International Arbitral Tribunal in the case of Air Service Agreement of 27 March 1946 (U.S. v. Fr.), 1978 R.I.A.A. XVIII, 417, 417 (Dec. 9). The term “counter-measures” was coined in this decision.

<sup>94</sup> MATH NOORTMANN, ENFORCING INTERNATIONAL LAW: FROM SELF-HELP TO SELF-CONTAINED REGIMES 35 (2005); HJORTUR B. SVERRISON, COUNTERMEASURES, THE INTERNATIONAL LEGAL SYSTEM, AND ENVIRONMENTAL VIOLATIONS 93 (2008); David Bederman, *Counterintuiting Countermeasures*, 96 AJIL 817, 820 (2002).

### 3. *Partial or Complete?*

Externalized outcasting may be partial or complete. Partial externalized outcasting occurs when a state remains a part of the legal regime, but some subset of the state's membership benefits is suspended and hence no longer observed by other state parties. Complete externalized outcasting, on the other hand, involves complete exclusion from the benefits of membership.

*Partial* externalized outcasting can be found in a variety of international law contexts. The WTO, for example, provides that once a party is found to have violated the GATT, the wronged state may only suspend a small portion of the operation of the treaty in response.<sup>95</sup> The vast majority of the obligations between the parties under the treaty remain in effect. Similarly, countermeasures are generally understood to be partial. In the *Air Services Agreement* case between the United States and France discussed above, the two states continued to abide by the vast bulk of the obligations between them even as the countermeasures operated.

An example of *complete* externalized outcasting is provided by the European Convention of Human Rights.<sup>96</sup> The Convention is the most ambitious—and successful—international human rights regime in the world. It provides that individuals may file complaints with the European Court of Human Rights for a violation of the Convention by a state party.<sup>97</sup> The Court is

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<sup>95</sup> Article 22 of the Dispute Settlement Understanding provides: “The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.”

<sup>96</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, art. 32 (“The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34 and 47.”). The current court is largely a creation of Protocol No. 11 (entered into force on 1 Nov. 1998). See also *id.* art. 33 (“Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.”); and *id.* art. 34 (“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”).

<sup>97</sup> The Court is at present the most active international court in existence, with more than 30,000-50,000 new applications lodged every year. The Court has arguably been a victim of its own success. Its ability to process complaints cannot keep up with the rate with which they arrive. In 2007, the Court had a backlog of over 90,000 cases. *Profile: European Court of Human Rights*, BBC NEWS, Jan. 15, 2010, [http://news.bbc.co.uk/2/hi/europe/country\\_profiles/4789300.stm](http://news.bbc.co.uk/2/hi/europe/country_profiles/4789300.stm). A case begins when an individual or State files a complaint or “application” alleging a violation of the Convention. An application must be deemed admissible before the complaints within it are considered: Domestic remedies must have been exhausted, the allegations must concern rights provided in the Convention, and the application must be made by a victim of the violation within



empowered to require measures to redress the specific individual harms alleged in the case and make recommendations for more general measures to prevent similar violations in the future.<sup>98</sup> Once a decision is rendered—and individual or general measures outlined by the Court ordered by the Court—state parties are required to comply.<sup>99</sup>

If a state party refuses to cooperate with a decision of the Court, it could—in an extreme case—find its membership in the entire Council of Europe suspended or revoked by the Committee. The Statute of the Council of Europe provides that “Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7.”<sup>100</sup> Moreover, if the member does not comply with the Committee’s request, “the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.”<sup>101</sup> The authority of the Court and the strength of its orders thus

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six months of the last judicial decision in the case. Convention for the Protection of Human Rights and Fundamental Freedoms. art. 35 (admissibility criteria).

<sup>98</sup> The first type of remedy provided by the Court—“individual measures”—aim to address the harm to the individual complainant as a result of the violation and to achieve, as far as possible, “*restitutio in integrum*.” COUNCIL OF EUROPE, Committee of Ministers: Supervision of the execution of judgments of the European Court of Human Rights, 3rd Annual Report 2009, at 18 (14 April 2010), available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1538854&SecMode=1&DocId=1565496&Usage=2>. These individual measures may include a finding of a violation (equivalent to a declaratory judgment) or payment of “just satisfaction” (usually money damages) under Article 41 of the European Convention on Human Rights. Individual measures may also involve the “re-opening of unfair criminal proceedings, the destruction of information gathered in breach of the right to privacy, the enforcement of an unenforced domestic judgment or the revocation of a deportation order issued despite a real risk of torture or other forms of ill-treatment in the country of destination.” *Id.* at 18. Money damages awarded by the Court are substantial. Cite? Example? States may also be ordered to take “general measures,” which aim to put an end to similar violations in the future. *Id.* at 18. General measures may include required review of legislation, regulations, or judicial practice. They may even involve required “constitutional changes.” *Id.* at 18. In addition, more specific measures may be specified by the Court, including, “the refurbishing of a prison, increase in the number of judges or prison personnel or improvements of administrative arrangements or procedures.” *Id.* at 18.

<sup>99</sup> Article 46 of the Convention states that state parties to the Convention must comply with decisions of the Court. *Id.* art. 46 (“The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.”). The Court automatically transmits the file to the Committee of Ministers of the Council of Europe after rendering a final judgment and the Committee is charged with executing the judgment. *Id.* art. 46

<sup>100</sup> Statute of the Council of Europe art. 8. Article 3 provides: “Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.” *Id.* art. 3.

<sup>101</sup> *Id.* Is this meant to refer to art. 3 or art.8? If art. 8 you must specify in the citation.

ultimately rest on a threat of ejection from the Council of Europe, and a complete loss of the benefits that come with that membership—including a vast array of political, economic, and regulatory programs, and access to over two hundred treaties open only to Council of Europe members.<sup>102</sup>

#### 4. *Temporary or Permanent?*

An international legal regime may provide for temporary or permanent externalized outcasting. Temporary outcasting is expressly limited in duration. The duration is often linked to the behavior of the state that has behaved wrongfully—hence, as soon as a violating state cures its wrongful behavior, the outcasting generally comes to an end.

A primary example of *temporary* externalized outcasting is the countermeasures regime discussed above. The International Law Commission expressly states that countermeasures are intended to remain in place only as long as necessary to bring about lawful behavior. Article 49 of the ILC’s Draft Articles provides: “Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.”<sup>103</sup>

A variety of international agreements similarly provide for *temporary* outcasting. An example can be found in the Convention on International Trade in Endangered Species (CITES), which puts in place controls on international trade in selected endangered species. The Convention puts in place a licensing system for the import and export of species covered by the Convention. State parties are also required to designate an internal bureaucratic body responsible for administering the licensing system. The Convention separates covered species into three categories: (1) those threatened with extinction (which may be traded only in exceptional circumstances), (2) species not currently threatened with extinction but in which trade is controlled, and (3) species protected in at least one country that has asked other State parties to assist in controlling the trade.<sup>104</sup> A specimen of a listed species may only be imported or exported from a State party if the appropriate license has been obtained and presented at the point at which it crosses national boundaries.

When a state party violates the terms of the treaty, the Conference of the Parties can recommend a temporary suspension of trade with the violating state. In an effort to improve the effectiveness of the Convention, this has become an

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<sup>102</sup> COUNCIL OF EUROPE TREATY OFFICE, <http://conventions.coe.int/> (last visited Oct. 31, 2010).

<sup>103</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, *in* Yearbook of the International Law Commission, art. 49, para.3 (2001).

<sup>104</sup> Convention on International Trade in Endangered Species, Mar. 3, 1973. These are species covered in Appendices I, II, and III, respectively.

increasingly frequent practice.<sup>105</sup> The State that has violated a provision of the treaty may respond to the recommendation to suspend trade by enacting required legislation, reducing illegal trade, submitting missing annual reports, or otherwise responding to specific recommendations of the Standing Committee. If it takes the actions necessary to bring its practices into compliance, the recommendation to suspend trade is immediately withdrawn.<sup>106</sup>

*Permanent* externalized outcasting has no fixed duration. It is frequently found in situations in which a state is expelled from, or denied all of the benefits of membership in, the community—in other words, in cases of complete outcasting.<sup>107</sup> Again, therefore, the European Convention of Human Rights provides an example. The provision for expulsion from the Council of Europe for violating the Convention and refusing to abide by a judgment of the European Court of Human Rights is not time limited. It is, instead, understood to be permanent. It is possible, of course, that a state that has been expelled may be readmitted at a later date. But at the time the externalized outcasting occurs, it is not limited in duration. Nor will the outcasting come to an end when the law-violating behavior stops. Rather, the state will remain outside the Council of Europe unless and until it is admitted anew.

### 5. *Related Benefits or Not?*

An externalized outcasting regime may enforce the law by denying an outcast party the benefits related to the law it violated—or not. Denying related benefits simply means denying the outcast some or all of the benefits of the cooperative regime the outcast violated. This form of outcasting is captured in the game theory concept of “tit-for-tat.” But it is not the only possibility. An externalized outcasting regime might instead enforce the law by denying an outcast party the benefits of a different cooperative regime—or a different aspect of the same cooperative regime, if the regime encompasses different substantive obligations—thus denying unrelated benefits. We call these “cross-countermeasures.”

Externalized outcasting regimes that deny *related benefits* are more common than are those that deny unrelated benefits, perhaps because it is easy to calibrate a response equivalent to the harm done by the outcast—and to justify the law-breaking behavior as retaliatory rather than simply law breaking behavior of

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<sup>105</sup> For a list of all countries currently subject to such trade suspensions, see *Countries subject to a recommendation to suspend trade*, CITES, [http://www.cites.org/eng/disc/trade\\_suspension.shtml](http://www.cites.org/eng/disc/trade_suspension.shtml) (last updated June 15, 2010).

<sup>106</sup> *Id.* (“Recommendations to suspend trade are withdrawn immediately upon a country’s return to compliance.”).

<sup>107</sup> While these categories frequently coincide, they are not logically required to do so..

its own. Nearly every regulatory regime employs a version of externalized outcasting that denies the benefits of the immediate cooperative regime to those that violate it. The international postal service offers a classic example. The service is overseen by the Universal Postal Union (UPU), which was created by treaty in 1874 and is now the third oldest active international institution.<sup>108</sup> The treaty that founded the UPU and successive additions and changes together provide for an elaborate system that allows mail to be delivered from any member state to any other member state. Moreover, the Union ensures that mail can be delivered to any member state using a more or less uniform flat rate, that postal authorities in every member state give equal treatment to foreign and domestic mail, and that each country retains all money collects for international postage (though subsequent revisions provided for a system of payments between countries according to the difference in the rate of mail delivery between countries).<sup>109</sup> States that fail to meet these obligations may lose their equivalent rights. Thus a member state may suspend the mail delivery to and from a state that refuses to reciprocate.<sup>110</sup> Thus the UPU uses denial of a *related benefit* as a means of enforcement.

Less common, but perhaps even more interesting as a result, are externalized outcasting regimes that deny *unrelated benefits*—deploying what we call cross-countermeasures. Cross-countermeasures are most likely to be found in contexts in which it is illegal, impossible, or excessively costly for states to retaliate for law-breaking behavior by denying an outcast state the benefits of the violated agreement. For an example, let us return once again to the European Convention of Human Rights. If a member state fails to meet its obligations under the Convention by, say, torturing one of its citizens, the other member states may not retaliate by torturing one of their own citizens. To do so would be obviously illegal and ineffective. The Convention instead uses externalized outcasting from the Council of Europe as the penalty—effectively threatening to deny the outcast state the benefits it enjoys from participating in the web of economic, political, and legal ties with other member states.<sup>111</sup>

Another example of cross-countermeasures can be found in Chapter VII economic sanctions. Such sanctions are deployed not as punishment for economic violations but for a “threat to the peace, breach of the peace, or act of aggression” and are intended to “maintain or restore international peace and security.”<sup>112</sup> For example, the United Nations has put in place a series of

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<sup>108</sup> Treaty of Bern (9 October 1874). The Universal Postal Union was originally called the “General Postal Union.”

<sup>109</sup> Treaty of Bern, *supra*; 1969 Protocol.

<sup>110</sup> GEORGE A. CODDING, *THE UNIVERSAL POSTAL UNION* 97 (1964).

<sup>111</sup> See *supra* text accompanying notes 96-103.

<sup>112</sup> U.N. Charter, art. 39.

economic sanction against Iran for failing to comply with international law and directives of the International Atomic Energy Agency concerning its nuclear program.<sup>113</sup> Like the sanctions against Libya described above, these economic sanctions are designed to bring an end to the prohibited activity. But rather than respond in kind (through, say, reciprocal deviation from prohibitions on developing and transferring nuclear weapons technology), Chapter VII economic sanctions allow states to respond by denying the offending state unrelated benefits of cooperation—such as trade, inspection of cargo, or access to financial services.

#### 6. *Proportional or Not?*

Externalized outcasting regimes either require a proportional response to law-breaking behavior or permit a disproportional one. Outcasting regimes that require a proportional response generally require that the harm done *to* the outcast state through the denial of the benefits of community membership be equivalent to the harm done *by* the outcast state through its lawbreaking behavior. This requirement is more often found in outcasting regimes that provide for the withdrawal of related benefits, for the obvious reason that it is simpler to craft a proportional response when the response is similar in kind to the original violation. The alternative is a regime that permits a disproportional response—one in which the harm done to the outcast state through denial of community benefits need not be calibrated to match the harm done by the outcast state through its lawbreaking behavior.

We return to the international law doctrine on countermeasures for an example of *proportional* externalized outcasting. The International Law Commission states that “[c]ountermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.”<sup>114</sup> The proportionality requirement for countermeasures means that, as Thom Franck once put it, “an otherwise lawful response to an unlawful act, if it crosses the threshold of proportionality, may become unlawful.”<sup>115</sup> As the arbitral tribunal explained the *Air Services Agreement* arbitration discussed above, “It is generally agreed that all counter-measures must,

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<sup>113</sup> UN Security Council Resolutions 1929 (2010); UN Security Council Resolution 1696 (2006), UN Security Council Resolution 1737 (2006), UN Security Council Resolution 1747 (2007), UN Security Council Resolution 1803 (2008), UN Security Council Resolution 1835 (2008), and UN Security Council Resolution 1887 (2009)

<sup>114</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, *in* Yearbook of the International Law Commission, art. 51 (2001).

<sup>115</sup> Thomas M. Franck, On Proportionality of Countermeasures in International Law 102 A.S.I.L.715,716 (2008).

in the first instance, have some degree of equivalence with the alleged breach.”<sup>116</sup> That requirement was clearly met in that case, the ILC later pointed out, because the countermeasures were taken in the “same field as the initial measures and concerned the same routes.”<sup>117</sup>

A regime that provides for disproportionate externalized outcasting—or at least does not expressly require a response proportionate to the injury suffered—is Chapter VII’s economic sanctions. As noted above, Chapter VII allows the Security Council to respond to any “threat to the peace, breach of the peace, or act of aggression” and to act to “maintain or restore international peace and security.”<sup>118</sup> One way in which the Security Council does so is through economic sanctions—essentially denying the lawbreaking state the benefits of economic cooperation with other UN member states. Although this enforcement action by member states may be proportional to the harm inflicted by the lawbreaking behavior that incited the Chapter VII action, it need not be. Indeed, it is hard to know how one could assess proportionality in cases that involve cross-countermeasures if a proportionality requirement did exist. What economic sanctions would constitute a proportionate response to rampant human rights violations? What economic sanctions would be a proportionate response for suspected development of nuclear weapons technology? A rough gauge may be possible—for example, total exclusion might not be an appropriate response for failure to fully cooperate with an inspection regime. But beyond a kind of rough equivalence, a proportionality requirement would be impossible to administer in such cases. It is perhaps for this reason that externalized outcasting regimes that enforce by withdrawing unrelated benefits (providing for cross countermeasures) never expressly require proportional outcasting.

### 7. *Outcasting by Third Parties Permitted or Not?*

International legal regimes that enforce through externalized outcasting may either permit outcasting by third-parties or not. Those that permit third-party outcasting allow states other than the injured state to exclude the lawbreaking state from the benefits of community membership. Those that do not permit third-party outcasting permit only the injured state to suspend benefits.

Almost any international legal regime that suspends membership rights of an outcast state party *permits* third-party outcasting. For an example, let us return

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<sup>116</sup> *Air Services Agreement*, para.83 (cited in Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, in *Yearbook of the International Law Commission*, art. 51 commentaries (2001).

<sup>117</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, in *Yearbook of the International Law Commission*, art. 51 commentary (2001).

<sup>118</sup> U.N. Charter, art. 39.

to the Universal Postal Union. There, a state that fails to meet its obligations can find its reciprocal rights suspended. During the suspension, states that are members of the UPU are no longer be obligated to deliver mail to or from the outcast state. That is true even for states never directly harmed by the outcast state's unlawful actions, whatever they may have been. Another example of third-party outcasting is offered by Chapter VII economic sanctions. As already described, U.N. member states are not only permitted to participate in Chapter VII economic sanctions against states that have done them no direct harm, but they are in fact *required* to do so.

Third-party sanctions are *prohibited*, however, under the Agreement Establishing World Trade Organization's Dispute Settlement Understanding. A state must not only have been actually harmed by the illegal behavior of a state in order to participate in its outcasting, but the injured state is even required to participate in the case against the offending state. Only an injured party may invoke the dispute settlement procedure and only parties that have invoked the dispute settlement procedure may suspend the concessions or other obligations vis-à-vis the lawbreaking state. The Dispute Settlement Understanding makes this plain: "any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements."<sup>119</sup> Hence third party outcasting is expressly prohibited.

## V. INTERNATIONAL LAW ENFORCEMENT RE-IMAGINED

The picture of international law offered in this Article aims to open up a new way of seeing international law and thus cast the central organizing questions of the field in a new light. We have shown that the Modern State Conception of law reflects only a small slice of what is, in fact, law. It is now apparent that the debate over whether international law is or is not law based on the Modern State conception of law is largely beside the point. International law need not meet the Modern State conception's conditions of internality and physical force to be law, for law that is enforced externally rather than internally and through outcasting rather than through physical force is law, too.

Here we briefly discuss three central contributions this new understanding of international law promises to make. First, we aim to offer a new account of international law *as law*—and thereby show that the "1960s chestnut of a question" is not irrelevant but has simply been considered on the wrong terms. Second, we show that this new understanding of international law opens up a

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<sup>119</sup> Dispute Settlement Understanding Art. 22.

series of new questions for scholars of international law, allowing them to look at the organizing questions of the field through a new lens and thereby re-imagine the possibilities for international law. Third, and finally, we argue that the new picture of international law that we offer here casts the normative debate over international law in new light. We aim to turn the sovereigntist critique on its head—showing that states that choose not to participate in international legal institutions are simply voluntary outcasts.

### A. Seeing International Law as *Law*

The Modern State Conception derives its appeal not only from the fact that all paradigmatic instances of law in the modern world have well developed enforcement institutions that employ physical intimidation and coercion. Its appeal is also explainable by the fact that the properties which make law law are, as we claimed in the Introduction, also those properties which make law morally valuable. On the Modern State Conception, internal physical enforcement is necessary for a regime to be a legal system because what makes regimes worthy of respect – indeed morally indispensable in the modern world – is that they can accomplish certain tasks that no other comparable social institution can, namely, they can wield and focus an enormous amount of brute force to ensure that people obey its demands. In the words of Hans Kelsen, the law is “organized force.” Thus, despite the fact that legal officials are almost always a small minority of a population, the bureaucratic organization of enforcement personnel harnesses and magnifies their power, thereby enabling them to compel obedience to the will of the law.

On our view, the moral distinctiveness of the law does not derive from its ability to use internally-controlled physical coercion in order to enforce its will. Rather, it stems from the fact that legal systems are extremely sophisticated instruments for effecting social change through the creation and application of rules. The idea might be expressed as follows: when a community faces moral problems which are numerous and serious, and whose solutions are complex, contentious or arbitrary, certain modes of governance such as improvisation, spontaneous ordering, private bargaining or communal consensus will be costly to engage in, sometimes prohibitively so. Unless the community has a way of reducing the costs of governance, resolving these moral problems will, at best, be expensive and, at worst, impossible. On our view, the moral indispensability of the law is that it is able to meet this demand in an efficient manner. By providing a highly nimble and durable method for creating and applying rules, the law enables communities to solve the numerous and serious problems that would otherwise be too costly or risky to resolve.



To be sure, law would not be morally indispensable if it were purely aspirational in nature. Legal systems not only create and apply rules: they also see to it that their demands are met. But as opposed to the Modern State Conception, we do not require that legal systems ensure that their will be done in any particular fashion. Their methods for motivating compliance are a contingent matter. Whether a particular regime deems it appropriate to employ brute force depends on the costs and benefits of doing so. Much will depend on the material wealth of the society, the current state of technology, the legitimacy enjoyed by the regime, the cultural meaning of violence, the climate and geography of the territory, the degree of social interdependence and cooperation, the availability of external sources of coercion and so on. Indeed, the ability of the law to solve moral problems may in some cases *depend* on its decision to eschew violence as a means of enforcement. As we saw in the case of Iceland, the egalitarian ethos of the commonwealth demanded that the law be enforced by private individuals. And the Roman Catholic Church took itself to be spiritually barred from using temporal sanctions. If it was to do God's will, it would have to turn the other cheek. So, too, the nature of state sovereignty demands that international law only apply physical force in rare instances. Like Iceland and classical cannon law, international law must—and does—rely on another means of law enforcement. And that means, more often than not, is externalized outcasting.

### **B. Re-Imagining Possibilities in International Law**

Seeing external enforcement and outcasting as modes of law enforcement allows scholars to re-imagine the possibilities for international law. Recognizing that international law often operates through external enforcement—by calling on states to enforce the law—can lead to us to see the successes and failures of international law in an entirely new light.

Once we see that international law relies heavily on external enforcement, this shifts our attention to how external enforcement works—and when and why it doesn't. Law that relies on external actors to enforce is vulnerable in an obvious way to the independent choices of those external actors. An international legal regime might rely on external actors to enforce, but that does not mean they will always do so. Attention, therefore, must be paid to when, why, and how external actors will act to enforce international legal obligations. Viewed in this light, the problem of international legal enforcement is turned upside down—when an international legal regime that relies on external enforcement goes unenforced, it is not a failure of the international institution as such, but the failure of states to act. Viewing the problem through this lens, then, offers a new agenda for scholars seeking to understand how to make international legal regimes more effective.

Recognizing outcasting as a central mode of international law enforcement also opens up entirely new lines of inquiry. Seeing that the threat of exclusion from community benefits can be a powerful tool for motivating state compliance with international law invites investigation into the nature of those benefits and their impact on state compliance. For example, it suggests that the larger the number of participants in a legal regime that relies on outcasting, the more powerful its outcasting sanction will be because the threat of exclusion grows as the group from which one is excluded expands.

It also casts light on why powerful states are often offered special treatment under international law. The more a state contributes to the collective benefits shared by all the members of a particular legal regime, the harder it is for the other member states to discipline that member through outcasting. That is because when a state that contributes a great deal to the regime is outcast, all the members of the regime lose the benefits of cooperation with the outcast. The cost per member is fairly small if there are a significant number of members and they all contribute roughly equal amounts to the regime. But if a single member contributes a significant share of the communal surplus, then other states may hurt themselves as much as, if not more than, the wrongdoer when they discipline through outcasting. It may be more expedient, instead, to turn a blind eye to the wrongdoing. To be clear, this is meant not to excuse this behavior but to explain it and to begin a conversation about how to address this not-uncommon vulnerability.

It suggests, as well, that for a regime that relies on externalized outcasting to be effective, it must generate private benefits for member states. In some contexts, the generation of private benefits happens naturally as a result of the subject matter of the agreement. For example, a state that joins a trade agreement gains preferential access to the markets of every other member state—the loss of which would be costly. Many outcasting regimes follow this model, providing tit-for-tat outcasting—punishing a violation of the law by suspending a related and proportional benefit.

In other contexts, this simple form of outcasting is not available. For example, an agreement among states to forebear from human rights violations against their own citizens does not itself create private benefits for other member states. Hence the outcasting of the form used in the trade context is infeasible—suspending a human rights treaty norm (such as the prohibition on torturing one's own citizens) in response to the violation of that norm would be both illogical and ineffective. The same is obviously true of many environmental agreements, as well as a variety of other agreements that create public goods.

One might think that in these contexts outcasting is impossible. But, in fact, it simply requires more careful institutional design—using cross-countermeasures or creating private benefits which can then be withdrawn from a

state that fails to comply. It is true, for example, that a stand-alone human rights agreement does not permit enforcement through externalized outcasting. But that problem can be solved by embedding the human rights regime in a larger community structure, just as the European Convention of Human Rights is embedded within the Council of Europe. Embedding the Convention within a broader community makes it possible to employ cross-countermeasures as part of the Convention's externalized outcasting regime. The threatened penalty for extreme noncompliance is exclusion from the Council of Europe and all the benefits of membership that come with it—the violation of the human rights agreement is thus ultimately enforced by a threat of exclusion from the private benefits generated by the broader set of relationships of which the human rights agreement is but a part.

Intentional institutional design can also be used to create private membership benefits which may then be withdrawn from states that violate the rules of the legal regime. An example of this can be found in the Montreal Protocol on Substances That Deplete the Ozone Layer<sup>120</sup>—an agreement designed to protect the ozone layer by restricting and eventually eliminating the production of substances that cause ozone depletion, chlorofluorocarbons (CFCs) chief among them. The Protocol places various obligations on states, including a requirement to report certain data on a regular basis,<sup>121</sup> as well as to limit their production and consumption of certain specified ozone depleting chemicals.<sup>122</sup> In return, state parties receive some private benefits above and beyond the social benefit of halting the depletion of the ozone layer. Specifically, state parties gain access to trading privileges that nonparties do not have: Parties must ban the import and export of certain designated substances from and to non-parties. But they are permitted to import and export those substances from and to parties. Hence parties are included in the trading regime for the designated substances and are able to buy and sell them, whereas nonparties are not. These provisions were intended, in part, to maximize participation in the Protocol, by denying nonparties access to (and making it difficult for them to sell) the listed ozone-depleting substances. But they also have the effect of creating a tangible benefit that can be denied to non-complying states. The trading rights of parties can be suspended under the “indicative list of measures” from “specific rights and privileges under the Protocol . . . including those concerned with . . . trade.”<sup>123</sup>

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<sup>120</sup> The Montreal Protocol is a protocol to the Vienna Convention for the Protection of the Ozone Layer.

<sup>121</sup> Montreal Protocol art. 7.

<sup>122</sup> Montreal Protocol art. 2 & 5.

<sup>123</sup> ‘Indicative list of measures that might be taken by a MOP in respect of non-compliance with the Protocol’, section C, *Handbook for the International Treaties for the Protection of the Ozone Layer*, p. 297.

A state that fails to comply with its obligations under the Protocol may find its rights and privileges under the Protocol suspended.<sup>124</sup>

The International Atomic Energy Agency (IAEA) takes a similar approach in a very different substantive context. The IAEA aims to prevent the proliferation of nuclear weapons while promoting peaceful nuclear programs. The Treaty on the Non-Proliferation of Nuclear Weapons requires that non-nuclear-weapon states sign a contract with the IAEA, called a Comprehensive Safeguards Agreement. That agreement requires states not to use nuclear material to make weapons or other explosive devices. To ensure that they are living up to their commitments, they agree to grant the IAEA access to peaceful nuclear facilities and allow it to employ various verification systems. Countries that sign the contract then gain access to a variety of programs through the IAEA for promoting scientific and technical cooperation on peaceful uses of nuclear technology. The IAEA offers participating states economic assistance, expert services, specialized equipment, training, and other types of support. It also supports research and development, and “helps countries assess and plan their energy needs.”<sup>125</sup> Any state that then fails to permit inspectors access or otherwise violates its Safeguards Agreement can be outcast from this regime, in the process losing all access to the financial and technical support that it provides.

Finally, the typology offered above aims to open up a set of questions about how and why externalized outcasting regimes are designed as they are—and what impact particular policy design decisions might have on the legal regime. Take just the first category—permissive versus mandatory outcasting. One might think that permissive outcasting is more likely to be used in cases where states are likely to have internal motivation to outcast. Trade sanctions, for example, can be permissive because it is generally not necessary to require states to take advantage of permitted derogations from trade rules. And it might be wise to allow states to come to an agreement that does not involve the actual imposition of a permitted trade sanction but that allows an outcast to offer some other benefit to the state it has harmed. On the other hand, mandatory outcasting might be necessary in cases like Chapter VII economic sanctions, where the

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<sup>124</sup> See Duncan Brack, *International Trade and the Montreal Protocol*, Earthscan/Royal Institute of International Affairs, London, 1996. State parties that fail to comply with any aspect of the treaty are initially engaged in an iterative non-confrontational exchange meant to bring them back into compliance with the Protocol. The procedure for monitoring and enforcing compliance under the Protocol is overseen by the protocol’s Implementation Committee. At each meeting of the Committee, the secretariat reports on which states have failed to meet their obligations under the convention. Where these deviations from the treaty obligations cannot be explained by the state party, the Committee may conclude that a state of non-compliance exists and draw up a plan for returning the state party to compliance. Duncan Brack, *Monitoring the Montreal Protocol*, in VERIFICATION YEARBOOK, at 217-224 (2003).

<sup>125</sup> <http://www.iaea.org/NewsCenter/News/2010/safeguardsknowledge.html>.

regime calls on states that might not have been directly harmed by the outcast state's actions to participate in the outcasting.

This Article thus aims to begin a new conversation—opening up a new set of questions that can move the debate about international law in a new and more productive direction.

### C. The Sovereignist Fallacy

The Modern State Conception insists that regimes are legal systems only when they enforce their commands internally through the threat and exercise of physical force. This vision of law places defenders of international law in an indefensible position: If international law is “really” law, then it is like a modern state—with international police ready to use violence to force states to comply with its commands. To be real law under the Modern State Conception, then, international law must live up to the greatest fears of its critics—trampling state sovereignty and democratic self-determination.

We have attempted in this Article to show that this is a false trap. The Modern State Conception is *one* form of law enforcement, but it is not the *only* form. There are other forms of law enforcement that violate the conditions of the Modern State Conception—enforcing commands through external actors or relying on outcasting rather than physical force or, as in the case of most of international law, both.

Once we see that international law most often operates not through the tools of the Modern State Conception but instead through externalized outcasting, we can see that the sovereignist critique of international law stands on a false foundation. By relying on external actors to enforce the law, international law places responsibility for the success or failure of law back upon the states that created it. It is not the blue helmeted police of the United Nations that enforce the vast majority of international law, but pressures brought to bear by other states. Those states act, moreover, not by threatening physical force. Rather, they create agreements that produce benefits for all their members—and then threaten to exclude those who violate its rules from some or all of the benefits of the regime.

Indeed, the very nature of the international legal system *requires* that it be so. International law, like Icelandic and classical cannon law, *must* rely on some means of enforcement other than physical force. The international legal system is both created by and creates sovereign states. A treaty, for example, is “an international agreement concluded *between States*.”<sup>126</sup> Similarly, customary international law results from a general and consistent practice *of states* followed by them from a sense of legal obligation. At the same time, the very idea of what

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<sup>126</sup> Vienna Convention on the Law of Treaties, art. 2 (emphasis added).

it is to be a “state” is, in very real sense, a legal construction—one based on physical facts, to be sure—but nonetheless constructed through shared understandings. Perhaps the most important of these shared understandings is that the quintessential defining characteristic of a “state” is its monopoly over the legitimate use of force within its geographical boundaries. International law thus creates, protects, and reinforces state sovereignty through various legal rules including the obligation not to use aggressive physical force against another sovereign state except in rare circumstances. International law cannot primarily rely on physical force as a means of law enforcement, because to do so would threaten to collapse the very idea of what it is to be a “state” and thus eliminate the precondition for the existence of international law in the cause of enforcing it.

The recognition that international law most often relies on outcasting rather than physical force turns the sovereigntist critique on its head. If international legal regimes are best understood as arrangements that generate community benefits for member states and impose discipline through outcasting (excluding lawbreakers from the benefits of membership), then international law does not have the power to rob states of their sovereignty. Instead, it only has the power to take away the very benefits that it has itself generated. If that is true, then states that refuse to join international agreements out of a fear that doing so will undermine their sovereignty are simply voluntary outcasts.