

The role of outcasting in the world order

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Abstract: *The Internationalists* is a fascinating book. The authors present a clear proposition about the significance of the 1928 Pact for the Renunciation of War for a more peaceful world. My focus is on the role of what the authors call outcasting, as an alternative to war. I argue that outcasting is hardly new. It has been known as reprisals or self-help, and currently as countermeasures. It is essential that such measures are brought under international control. What is more, the current US administration is a threat to the current world order. Other states and civil society need to continue to develop internationally controlled sanctions against violations of international law – also in the absence of the USA.

Keywords: countermeasures; international courts; international law; international organisations; use of force

I. Introduction

The Internationalists is a fascinating book.¹ The authors present a clear proposition about the significance of the 1928 Pact for the Renunciation of War for a more peaceful world. The volume weaves together the small and big history with its biographies of well-known figures in international law and their significance for the Peace Pact. Well-written and fast-paced, the book keeps a firm grip on the reader throughout.

While the authors place key emphasis on the significance of the 1928 Pact, they recognise that the Pact was not enough: ‘If war were truly outlawed, something else had to replace it. Nothing had.’² Consequently, they ask what could replace war in the New World Order.

The authors argue that there were four pillars of this new system – what they call a ‘photo negative of the Old World Order’: conquest is illegal; aggression is a crime; no coerced agreements are allowed; and sanctions

¹ OA Hathaway and SJ Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster, New York, NY, 2017).

² *Ibid* 273.

against violators are permitted.³ But it is the possibility of *outcasting* that substituted for war in the New Order. They claim that ‘in the New World Order, states have developed a rich set of tools to replace war as a way of enforcing international law – tools we call outcasting’.⁴

My focus is on the role of outcasting in the New World Order and the special function of international institutions, including international courts and tribunals. I discuss what outcasting is, and explore its possibilities and limits. Finally, I examine current threats to the present World Order.

II. What is outcasting?

The authors define outcasting as ‘when a group denies those who break its rules the benefits available to the rest of the group’.⁵ The book recounts outcasting as known in the Norse tradition, including in Iceland.⁶ But, as the authors note, the strategy of outcasting is found in the stories of Adam and Eve, and Cain and Abel.⁷

The authors claim:

In place of war, international law relies on outcasting. The 1969 Vienna Convention on the Law of Treaties ... states that a breach of an important provision of a treaty entitles any affected party to terminate it or suspend its operation in whole or in part. This means that if a state fails to follow a treaty, the states that are affected can refuse to follow it as well. Ironically, international lawyers refer to this peaceful form of retaliation by a military term: ‘countermeasures’.⁸

It is correct that parties violating a treaty may be suspended from the rights of the treaty, or their treaty rights may be terminated. But technically speaking, the Vienna Convention does not regulate countermeasures. As the authors correctly state, countermeasures are regulated in the law on state responsibility – where the International Law Commission’s (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001 is of particular importance.⁹ This raises the question of the relationship between countermeasures and outcasting.

³ Ibid 304.

⁴ Ibid 370. The authors have earlier discussed outcasting in more depth; see OA Hathaway and SJ Shapiro, ‘Outcasting: Enforcement in Domestic and International Law’ (2011) 121(2) *The Yale Law Journal* 252.

⁵ See (n 1) 375.

⁶ Ibid 373.

⁷ Ibid 375.

⁸ Ibid 375–6.

⁹ International Law Commission, *Responsibility of States for Internationally Wrongful Acts* (Yearbook of the International Law Commission, vol II (Pt Two) 2001).

III. Substantive aspects of outcasting

The use of countermeasures in international law is not new, and long predates the 1928 Pact. In earlier times, countermeasures were known as ‘reprisals’ or ‘self-help’. Hence, countermeasures have hardly *replaced* war. What is new is that as a result of the Pact and subsequent developments the use of armed force – including war – is prohibited as a countermeasure. Furthermore, the conditions for use of countermeasures and their limits are set out in the ILC Draft. Thus, in stark contrast with the Norse tradition, where an actor subject to outcasting was literally beyond the protection of the law, the New World Order contains complex rules that both authorise and constrain the use of countermeasures.

Despite these rules, however, significant issues remain unresolved. One is the extent to which countermeasures may be taken by non-injured states. ILC Draft Article 54 contains a savings clause, whereby the proposed rules do not ‘prejudice’ the right of non-injured states to take ‘lawful measures’ against the violating state. This provision was one of the most disputed aspects of the law on countermeasures.¹⁰ The Commentary to this article points out that ‘[p]ractice on this subject is limited and rather embryonic’. The lack of guidance in state practice and in the Draft Articles represent an unsatisfactory legal *vagueness*, and entails risks of misuse.

Perhaps more importantly, under the ILC formulation countermeasures retain their character as *private justice*. Thus, the decision to apply countermeasures is made by individual states, and does not require institutional authorisation. This limits their effectiveness and increases the potential for abuse.

IV. Institutional aspects of outcasting

The authors emphasise the importance of international institutions in the New World Order. They say that ‘the hallmark of the New World Order was the treaty that led President Bush to back down from his campaign promises in 2003, the GATT’.¹¹ Further: ‘The WTO is like a global Thing’,¹² i.e. the traditional decision-making body in the Norse tradition.

This characterisation raises the issue of the relationship between the WTO as an international organisation and its dispute settlement system – and the difference between countermeasures as private justice and as international measures.

¹⁰ EK Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-injured State and the Idea of International Community* (Routledge, London, 2010) 85.

¹¹ See (n 1) 378.

¹² *Ibid* 379.

First, it seems clear that the authors refer to the WTO Dispute Settlement System (DSS), not to the WTO as such. The DSS has been characterised as an afterthought – but, still, the ‘jewel in the crown’ of the WTO.¹³ One particularly notable feature of this system is that the DSS not only has the power to resolve legal disputes, but also the power to control use of retaliatory measures. It seems to me that it is such *internationally controlled* countermeasures that we should strive for.

V. International courts and outcasting

In possessing the power to authorise – and to limit – the use of countermeasures, the WTO Dispute Settlement System is the exception rather than the rule. Other international courts and tribunals (ICs) can adopt *remedies* in the form of reparations, but they usually do not have the power to authorise enforcement in the form of retaliatory measures.

This means that ICs can impose *new* obligations in the form of reparations, rather than take away benefits by authorising outcasting. This is also the case for the European Court of Human Rights (the ECtHR) – which the authors mention.¹⁴ The ECtHR has no authority of outcasting in the form of expelling member states from the Council of Europe for massive violations of human rights – or Russia for the use of force in Crimea. Such authority is vested in the political organ of the Council, i.e. the Committee of Ministers (Statute of the Council of Europe, Article 8).

VI. International organisations and outcasting

However, the threat of expelling states shows the *limits* of outcasting. As the authors say: ‘No method of enforcement is perfect. And outcasting is no exception.’¹⁵ One difficulty with outcasting is that it is a very *strong* sanction, and it may be difficult to obtain sufficient political support for such a drastic measure.

Even more importantly, outcasting may mean that the possibilities of *influencing* the violating state may be lost. For example, if a state is expelled from the Council of Europe, it may drift further away from respect for democracy and human rights. The suspension of the Soviet Union’s voting rights in the UN General Assembly in the early 1960s has

¹³ See G Shaffer, M Elsig and S Puig, ‘The Extensive (but Fragile) Authority of the WTO Appellate Body’ (2016) 79(1) *Law and Contemporary Problems* 237, 246 with further references.

¹⁴ See (n 1) 382–5.

¹⁵ *Ibid* 381.

been characterised as ‘a spectacular failure’.¹⁶ Therefore, even if states violate fundamental rights, the principal rule should be continued *inclusion*, rather than outcasting.

We have in recent decades experienced extensive international judicialisation. Nonetheless, the use of countermeasures are not under sufficient international control. What is more: we lack ICs in important issue areas. And effective remedies and the enforcement of court orders are wanting. Therefore, the problem *remains*: what can effectively replace the use of force by states? My response is that we need a more *varied* set of responses against violators – both in the form of withdrawal of benefits and by imposition of sanctions – to be *controlled* by international institutions, including by ICs.

VII. Threats to the international order

The authors argue, correctly, that outcasting is not without setbacks¹⁷ and that the New World Order is at risk.¹⁸ The threats come, *inter alia*, from the Islamic State (ISIS) and similar terrorist groups,¹⁹ expansive use of self-defence²⁰ and unilateral humanitarian intervention.²¹

The authors point to the essential role of the United States:

The success of the system depends on the willingness of the United States to continue to play a central role in maintaining the legal order in the face of these many challenges. Indeed, the greatest threat to the New World Order comes from those who wish to abandon this role and turn inward.²²

This understanding places much emphasis on the positive role of the USA. But today we can ask not only whether USA is turning inwards, but also whether it is currently an active threat to international law? Does the United States itself choose to be an outcast? Do the US attacks on international institutions signal that we are moving back towards the Old World Order?

Hence, an essential question is whether other states should act – and continue to act – without relying on the United States, e.g. on the UN

¹⁶ A Chayes and AH Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, Cambridge, MA, 1995) 78.

¹⁷ See (n 1) 395.

¹⁸ Ibid 415.

¹⁹ Ibid 416.

²⁰ Ibid.

²¹ Ibid 417.

²² Ibid.

Law of the Sea Convention, the International Criminal Court, the Paris Agreement on climate change, the Iran deal on nuclear armament, and to save the WTO Dispute Settlement System? One can also ask how states and civil society may continue to develop internationally controlled sanctions against violations of international law – possibly without the USA? How can this be done without pre-empting the possibilities for later participation by the United States?

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