

SIXTEEN

OUTCASTING

During his first presidential campaign, in 2000, George W. Bush started out preaching the gospel of free trade, though, in trademark style, the Texas Republican mangled some of its verses. “If the terriers and bariffs are torn down,” he proclaimed to a puzzled crowd in Rochester, New York, “this economy will grow!”¹

Bush was well ahead in the polls when he issued his jumbled ode to international trade. By the end of October, however, his general election opponent, Democrat Al Gore, had caught up. When polls showed a tied race, Bush saw the light. Terriers and bariffs never looked so good.

With the election less than a week away, Bush’s running mate, Dick Cheney, made a campaign stop at the Weirton Steel plant in the battleground state of West Virginia. The Weirton factory was once ahead of its time, an integrated manufacturing facility that handled every stage of production from mining ore to shipping finished steel coils to customers. Weirton won the “Battle of Production,” according to an army propaganda film, by fabricating thousands of eight-inch howitzer shells to be fired on D-Day.² After the war, Weirton was the largest employer in the traditionally Democratic state. Yet starting in the 1980s, it had been pummeled by cheap imported steel from Russia, Brazil, and Japan. Gore himself had visited Weirton as Bill Clinton’s running mate in 1992, promising to help the struggling steelworkers. But he and Clinton had subsequently concluded that international law ruled out protectionism, and the Clinton administration had imposed only a few token safeguards. By the turn of the millennium, Weirton Steel was on the verge of bankruptcy—its furnaces cold, its plants

shuttered. The industrial hero of D-Day had been reduced to specializing in tinplate, the coated steel used to make soup cans.

Standing in the truck entrance of the blackened mill, Cheney blamed Weirton's decline squarely on the man against whom Bush was running. Gore was "a threat to the steel industry," Cheney declared, and if Bush were elected, he would take a more aggressive stand in defense of beleaguered American workers.³

Bush did become president, of course, and in 2002 he kept Cheney's promise, slapping tariffs as high as 30 percent on steel from abroad. Steelworker unions and industry groups cheered. But the countries hit by the tariffs were not so happy. The European Union filed a case in the World Trade Organization (WTO) in Geneva challenging the tariffs as a violation of the General Agreement on Tariffs and Trade, the principal treaty regulating global commerce. The WTO held in the EU's favor: It declared that the president's policy—a policy on which he had campaigned, a policy central to his appeal to an important domestic constituency, and a policy with strong support within Congress—was illegal.

So what did the great defender of the steel industry do? He removed the tariffs. A treaty caused the world's leading superpower to yield.⁴

President Bush is not known as someone with enormous respect for international law. In his first year in office, he withdrew from the Anti-Ballistic Missile Treaty with Russia. During the run-up to the Iraq War, he promised to wage war regardless of whether the Security Council authorized it.⁵ And he made good on that threat, sending 150,000 soldiers into Iraq without Security Council authorization to depose a sitting head of a sovereign state. But his scorn for the law of nations may have been most memorably expressed by his administration's 2005 National Defense Strategy, which darkly predicted: "Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism."⁶

Comparing international lawyers to suicide bombers does not suggest a great deal of deference to international law. And yet President Bush beat an embarrassing retreat in the face of an unarmed bureaucracy that told him he couldn't carry out a top campaign promise. Why did he listen to the WTO? The answer, in a word, is outcasting—a practice that took root more than a millennium ago in a tiny outpost of civilization at the top of the world.

THE “FIRST NEW SOCIETY”

Iceland has been described as history’s “first new society.”⁷ When Norse sailors braved the rough and frigid waters of the North Atlantic and landed on the coast of Iceland in 870, they encountered a wild, vast, and uninhabited land ripe for subduing and settling.⁸ In colonizing it, they built not only physical structures—the ruins of which still can be found today—but also sophisticated governmental institutions. Within sixty years, Iceland’s political structures had taken the form that would last for three centuries.⁹

The society these immigrants created was remarkably egalitarian: Iceland did not have a king, feudal lords, or an aristocracy. There were regional chieftains, but they had little formal power, and Icelanders could switch their allegiances at will.¹⁰ The settlers governed themselves via assemblies, called “Things.” These Things had extensive legal procedures and took place at regular intervals in predetermined locations. The most important met each spring (called *vårping*, or “Spring-Thing”) to hear lawsuits and resolve administrative issues.¹¹

In addition to these local gatherings, a national assembly, known as the “Althing,” began meeting in 930.¹² This congress of notables gathered in the southeast of the island in June, when travel was least treacherous, and functioned as a national court and legislature.¹³ The Lawspeaker (*lögsögumadr*), who presided over the Althing, was the only significant national officer, but his role was largely ceremonial. His main task was to recite the laws from memory at the “Law Rock,” a grassy hill crowned by a rugged outcropping of volcanic stone around which the Althing convened (early on, the laws were not written down).¹⁴

While Iceland had legislatures and courts, it lacked public prosecutors.¹⁵ Victims seeking justice had to prosecute the accused in a Thing. If the victim was successful, the Thing would declare the defendant guilty and sentence him to one of several penalties: a fine or compensation for smaller offenses, and “outlawry” for more severe offenses.¹⁶ Someone declared an “outlaw” was cast outside the law, losing the rights normally accorded members of the Icelandic community, including the rights to remain in Iceland, to hospitality, and to own property.¹⁷

Icelandic outlawry came in two grades. In “lesser” outlawry, the Thing banished the outlaw from the country for three years and confiscated his

property, some of which it awarded to the victim. In “full” outlawry, the Thing exiled the outlaw for life. The full outlaw lost his legal personality—from the perspective of the law, he was a dead man. Full outlaws could therefore be killed with impunity. Indeed, the prosecutor of the case was often not only permitted but *obliged* to carry out the punishment himself, assuming the outlaw didn’t flee first.¹⁸

What’s striking about this legal system is not so much what it had but what it didn’t. Icelandic government was not just missing public prosecutors—it had no executive branch at all. There was no army or fire department, no tax collectors or social workers. Nor were there police, executioners, or jailers to impose sanctions.

By and large, Icelanders paid the penalties. In part, they complied because they believed the legal system was legitimate and disobeying the law shameful. “With laws shall our land be built,” an Old Norse proverb went, “but with disorder laid waste.”¹⁹ But there was another motivation for Icelanders’ obedience: failure to do so—to engage in “judgment breaking”—led to greater sanctions. Icelandic law provided that those who did not pay a fine were subject to lesser outlawry. Lesser outlaws who did not leave the country were subject to full outlawry.²⁰ Anyone who helped an outlaw could be punished, even outlawed. Full outlawry was a terrible punishment, one Icelanders rightly feared. Iceland is no Eden. Winters are long, dark, and bitterly cold, and summers are brief. To be denied the benefits of membership in the community was not only to be deprived of the normal joys of kinship and camaraderie. It was to lose the tools essential for survival in an extreme climate.

The law was effective even though there were no public institutions of law enforcement, because outlawry turned *all* Icelanders into law enforcers. The community carried out the punishment—the exclusion—itsself.

OUTCASTING

Outlaws in medieval Iceland experienced what we call “outcasting.” Outcasting occurs when a group denies those who break its rules the benefits available to the rest of the group. Outcasting is nonviolent: Instead of doing something *to* the rule breakers, outcasters refuse to do something *with* the rule breakers.

Though outcasting is not itself violent, it can be combined with violence to create more potent forms of social control. In medieval Iceland, a person declared to be a “full outlaw” not only lost his rights to residency, hospitality, and property, but could also be killed. Being deprived of legal personality—being excluded from the law’s protection—was the outcasting part of the outlawry decree. Being hunted down by the prosecutor was the violent part.

The Bible tells us that outcasting was the first punishment. Adam and Eve were cast out of Eden for tasting the forbidden fruit, and Cain was exiled for murdering his brother, Abel. Outcasting is indeed as old as human society itself, but it has largely been ignored by scholars. This neglect is not surprising, for in well-functioning modern states, there are complex professional bureaucracies that enforce the law backed by the threat of violence. If you rob a bank, the police will come to arrest you. If you are convicted of bank robbery, they will throw you in jail. If you don’t pay your taxes, the state will garnish your wages, freeze your assets, or impound your property. Try to stop it and you will be arrested for obstructing justice.

International law does not have any of these institutions of law enforcement. There are no world police, no global courts with compulsory jurisdiction. And in a post–Peace Pact world, war is no longer a legitimate means for enforcing the law.

In place of war, international law relies on outcasting. The 1969 Vienna Convention on the Law of Treaties, which is a treaty about 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.”²¹ 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.” Countermeasures must be proportional to the harm done by the original breach. Countermeasures must also be productive, not punitive. The goal is not vengeance, but rather to bring the bad actor back into line.²²

A classic example of countermeasures took place in 1978.²³ Pan Am airlines began offering flights from the West Coast of the United States to Paris, with a stopover in London where passengers were moved to a smaller plane. The French objected to this change of aircraft, known in aviation as a “change in gauge,” because it gave the United States flexibility not expressly allowed under a treaty, concluded in 1946, that governed air service between

the two countries. Pan Am ignored the objection and continued to run the flights. On May 3, French police surrounded a Pan Am airplane after it landed in Paris and refused to allow the passengers off. The United States argued that France's refusal to let passengers disembark violated the 1946 treaty. When the French refused to back down, the United States suspended the West Coast–London–Paris flights. But it did not stop there. It put in place a countermeasure that was calculated to mirror France's illegal behavior: The United States issued an order banning French air carriers traveling from Paris from landing in Los Angeles if they stopped over in Montreal. An arbitral body later upheld the U.S. decision to outcast France—the United States was entitled to refuse France the full benefits of the treaty so long as France refused to give the United States the full benefits of the treaty.

Many treaties are explicit about the right to outcast. Consider airmail. If you want to send a letter from the United States to Germany, you only need American stamps. You don't have to go to the German embassy to purchase a German stamp, much less add a stamp for every country through which your letter will pass. The seamlessness of airmail is made possible by an organization called the Universal Postal Union (UPU) located in Berne, Switzerland. Though few have heard of it, the UPU was created in 1874, and its membership today includes 192 states.²⁴ The treaty that founded the UPU established a system allowing mail to be delivered from any member to any other member using only the sender's stamp.²⁵ If one state fails to deliver the mail, the treaty does not direct the UPU to dispatch armed couriers. Rather, it permits the sender to outcast the negligent state. Any member may suspend mail delivery to and from other members who break the rules, thereby depriving them of the benefits of the international postal system.²⁶

There are hundreds of similar examples throughout international law, from the International Coffee Organization, which can kick bad actors out of the association, to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, which prohibits members from trading in endangered species unless all parties to the trade follow the rules designed to protect these species.²⁷ Outcasting, then, is a victim of its own success. It is so ubiquitous and so often effective that it is usually invisible. When is the last time that the evening news reported on a trade war that did *not* erupt, or

that mail *was* delivered on time? Outcasting is the Holmesian dog that doesn't bark.

Widespread outcasting was made possible by the change in the law of neutrality triggered by the Peace Pact and that Hersch Lauterpacht identified and explained—first in his memo for Robert Jackson, then in the later editions of *Oppenheim*, and finally in his work for the International Law Commission. As Lauterpacht explained to Jackson, and then Jackson explained to the world, the Peace Pact “did not impose upon the signatories *the duty* of discriminating against an aggressor, but it conferred upon them *the right* to act in that manner.”²⁸ The shift from prohibiting to permitting discrimination meant that states that had once been required to remain impartial could now distinguish between belligerents. Doing so was no longer a violation of neutrality, and therefore no longer a just cause for war.

Outcasting as it exists today, however, did not spring fully formed from the head of Hersch Lauterpacht. It took decades for the tools and techniques of modern outcasting to emerge. Outcasting faced different challenges in trade than it did in human rights, in environmental law than it did in nuclear nonproliferation. In time, new versions of outcasting emerged to meet these challenges.

THE POWER OF OUTCASTING

After the Second World War, the United States and its Allies built a set of international institutions, including the International Monetary Fund and the World Bank, to aid recovery of a global economy devastated by war. But the hallmark of the New World Order was the treaty that led President Bush to back down from his campaign promises in 2003, the General Agreement on Tariffs and Trade (GATT).

Signed by twenty-three nations in 1947, the GATT facilitates and regulates international trade and, in doing so, affects daily life the world over. It influences everything from the price of bananas and iPhones to the text of food and clothing labels, from how tuna and shrimp are caught to the permissibility of excluding genetically modified crops, from the kinds of agricultural subsidies governments can pay their farmers to whether pharmaceutical firms in developing countries can produce generic antiviral drugs to halt the progression of AIDS. The GATT was created to make it

easier for states to trade with each other, and it has. Nearly everything you buy today costs less thanks to the increase in free trade enabled by the GATT and its successor organization, the WTO. The ordinary American consumer gains 37 percent in purchasing power thanks to free trade, meaning that she can buy 37 percent more products and services for the same number of dollars. The same is true for the median consumer the world over—with 29 percent gains in France, 24 percent in Japan, 31 percent in Italy, 40 percent in Germany, and 33 percent in Great Britain.²⁹ By one estimate, the U.S. economy as a whole gains on the order of \$1 trillion a year from free trade, and trade drove a threefold increase in the variety of products available to U.S. consumers during the last three decades of the twentieth century.³⁰

The main means by which the WTO encourages trade—indeed, the central tenet of the treaty—is the most favored nation principle.³¹ According to this principle, any party to the WTO receives the best treatment that any other party receives. If one trading partner has access to lower tariff barriers, every other has to enjoy those lower barriers, too. If one is covered by favorable trade regulations, every other has to be covered by those regulations, too. The most favored nation principle, therefore, is something of a misnomer—since all favorable treatment immediately becomes universal.³² In effect, the WTO requires all its 164 member states to treat every other as its “most favored” trading partner. States who have signed on give low trade barriers *to* everyone in return for low trade barriers *from* everyone.³³

All these rules have to be enforced to be effective, and here the founders of the postwar trade system faced a major problem: If war was no longer allowed, how could the WTO force states to comply? To solve this problem, they relied on outcasting.

If a state breaks the rules, another state can file a complaint and prosecute its case before a tribunal. If this tribunal rules in its favor, the WTO does not send in the troops because, of course, it does not have any. Instead, the WTO authorizes the state that filed the complaint to break the rules in return. In a provision that seems lifted straight out of the *Gragas*, medieval Iceland’s code of law, the WTO agreements entitle the victorious party to suspend the benefits of membership in the community.³⁴ Thus, if the tribunal finds that Mexico imposed an illegal tariff on Peru, and Mexico does

not lift the tariff, Peru will be authorized to impose an otherwise illegal trade barrier of equal value on Mexico. The WTO is like a global Thing.

While a clever solution, the GATT's initial version of outcasting had a major flaw. It required unanimous agreement among all the member states to resolve any dispute—including *the parties to the dispute*. Predictably, unanimity did not occur often. In fact, it happened once: in 1953, when a GATT panel authorized the Netherlands to retaliate against dairy import quotas imposed by the United States. The United States did not veto the panel's decision and thus allowed itself to be outcasted. It accepted the defeat in part because it realized that its legal position was indefensible. But it also capitulated because it knew that the Netherlands would not impose the penalty. To outcast the United States would have done the Netherlands more harm than good, because the Netherlands needed to trade with the United States more than the United States needed to trade with the Netherlands.³⁵

The unanimity requirement was eliminated in 1995, as part of a massive overhaul of the GATT, which created the WTO. States that complain about a violation of the trade rules by another state can now file a complaint with the WTO's Dispute Settlement Body. A panel then hears the case and makes a decision, after which the losing party can appeal. Besides the complaints and responses, the disputing parties must now stay out of decision process altogether.

Thus, in 2002, when Bush boosted steel tariffs from 1 percent all the way up to 30 percent, as Cheney had promised he would, the European Union filed a complaint with the WTO. Japan, South Korea, China, Switzerland, Brazil, Norway, and New Zealand joined the suit. These steel-exporting countries claimed that Bush's actions violated the WTO rules. The United States responded that, under the rules, a state is allowed to raise tariffs temporarily to safeguard domestic industries against an upsurge in imports. Since the American steel industry was being ravaged by a flood of imported steel, such safeguards were appropriate.

The WTO panel rejected this defense. Though it acknowledged that imports had swelled in 2000, by the time that Bush imposed the new tariffs, imports were on the wane. The panel allowed the European Union to retaliate with two billion dollars' worth of tariffs, the highest damage amount ever awarded, if the United States did not remove its "safeguards."

The Europeans then proved to be astute students of American politics. Bush was facing the prospect of a tough reelection the following year. The European Union threatened to train its fire on swing states—to slap high tariffs on Harley-Davidson motorcycles built in Pennsylvania, sport utility vehicles assembled in Michigan, and oranges grown in Florida. Bush succumbed to this clever form of legal blackmail. Removing steel tariffs was politically painful and embarrassing, but the alternative would have been far worse. Bush lifted the steel tariffs, though he refused to credit the WTO ruling when explaining his reversal. Instead, he followed George Aiken’s famous advice about Vietnam—he declared victory and went home. “[S]afeguard measures have now achieved their purpose, and as a result of changed economic circumstances it is time to lift them,” Bush said as he retreated, going through the motions and fooling no one.³⁶ The terriers and bariffs were torn down.

THE LIMITS OF OUTCASTING

No method of enforcement is perfect. And outcasting is no exception. It threatens to deny the benefits of cooperation to encourage cooperation. But when states really don’t want to cooperate, there isn’t much that outcasting can do.

North Korea is the subject of extensive economic sanctions by many countries and has become so isolated from the international community and the global economy that there are few cooperative benefits left to withdraw. The international community thus has relatively little capacity to enforce the law against North Korea using outcasting. It is impossible to outcast a voluntary outcast.

The dependence of outcasting on cooperative benefits also means that, generally speaking, outcasting is more powerful if there are more participants in the outcasting regime. The WTO is so effective in part because more than 160 countries are party to it. As the WTO has grown in size, the cost of exclusion has risen and the power of the system to police the rules has multiplied as a result.

Another drawback of outcasting is that outcasting goes both ways: When a state outcasts another, it also hurts itself. Remember that the single winning case in the pre-WTO GATT was a Pyrrhic victory. Since Dutch

farmers could not afford to be cut off from the United States, the Netherlands did not cash the check given them by the GATT. As the political philosopher Thomas Hobbes put the dilemma in the seventeenth century, “[W]hen a pope excommunicates a whole nation, methinks he rather excommunicates himself than them.”³⁷

Because outcasting hurts both sides, it often favors larger, stronger states over smaller, weaker ones. In 2007, Antigua prevailed against the United States in a WTO arbitration over U.S. restrictions on access to Antiguan Internet gambling sites. The WTO authorized Antigua to put in place retaliatory measures worth \$21 million,³⁸ but Antigua did not impose those penalties. It had far more to lose from cutting itself off from the United States than it had to gain, for the United States accounted for 23.5 percent of Antigua’s exports and 58.2 percent of its imports in 2007.³⁹ By contrast, Antigua was no more than a rounding error for U.S. exports and imports. From Antigua’s perspective, the United States was “too big to outcast.”

Of course, Antigua would not have fared better in the Old World Order, where disputes were settled with war. But the “too big to outcast” problem is a reminder that the New World Order is not divorced from global power dynamics; it is, instead, both a producer and a product of them. As Mel Brooks once observed, “It’s good to be the king.”

But perhaps the biggest problem for outcasting is that countermeasures do not always work. Yes, they are effective for enforcing rules on trade and mail delivery, but there is a whole array of rules that cannot be enforced through simple tit-for-tatting. For example, countermeasures cannot be used to enforce human rights agreements like the United Nations Convention Against Torture.⁴⁰ A state cannot torture its own people in response to illegal torture by another state against *its* people. Not only would such retaliation undermine the purpose of the agreement, which is to prevent torture, but it would also be ineffectual. If a government does not care about the torture of its own people, it won’t care about the torture of some other people. Many international laws on the environment face the same problem. If a treaty prohibits states from dumping oil in international waters, a state cannot respond to its violation by dumping even more oil into international waters. Like the child who threatens to hold her breath until her parents do something, such threats are simply not credible. They are also self-defeating.

For much of international law, then, simple outcasting, such as WTO countermeasures, won’t work. But that doesn’t mean outcasting cannot be

used. It just needs to be smarter.

SMART OUTCASTING

Cyprus is home to two, largely distinct, ethnic groups: the Greek and Turkish Cypriots. The Greek Cypriots are the more numerous, comprising approximately 80 percent of the population, and have deep roots on the island, tracing their origins back almost four millennia. Turkish Cypriots comprise less than 20 percent of the population. They also arrived later, though still long ago, having settled on Cyprus when the Ottoman Empire conquered Cyprus in 1571. During the Ottoman period, the Turkish ruled the Greek Cypriots.

When Britain granted independence to Cyprus in 1960, it forged a delicate power-sharing arrangement between the Cypriots, granting both the Greek and Turkish communities political authority and constitutional rights. To enforce the compromise, Britain, Greece, and Turkey signed a Treaty of Guarantee permitting military intervention in a case of a constitutional crisis.

The fragile settlement held until 1974, when the military junta in Greece overthrew the binational government in Cyprus and demanded *enosis*—the Greek word for political unification with Greece. Because it had orchestrated the coup, Greece refused to intervene to stop it. Britain refused as well—having lost India, Britain no longer needed Cyprus to protect the sea route to the east. This left Turkey, which asserted its rights under the Treaty of Guarantee and invaded on July 20. By the time a cease-fire was negotiated, Turkey had killed thousands of people, gained control of close to 40 percent of the island, most of which had been owned by Greek Cypriots, and displaced approximately 160,000 people.

Among those who lost their homes was a tour guide named Titina Loizidou.⁴¹ Loizidou decided to create a tour of sorts to publicize the plight of displaced Greek Cypriots. Beginning in 1975, she became an active participant in “Women Walk Home,” a group that organized Greek Cypriot women to walk from the southern part of Cyprus through the “Green Line”—the U.N. buffer zone—to reach the occupied Turkish part of the island. Loizidou led contingents of foreign delegates to demonstrate the injustice of the Turkish invasion and occupation. As political theater, the

marches were brilliant. Videos of the marches, now posted on YouTube, resemble a surreal reenactment of the playground game “boys catch girls.” They show a handful of Turkish soldiers chasing hundreds of women waving white flags, grabbing and tackling a few, losing them as they wriggle away, and then looking around confusedly for new women to catch.⁴²

On the last march, held on May 16, 1989, Loizidou made it to the Turkish-occupied North, only to be stopped by Turkish soldiers and driven back to the South by Turkish Cypriot police. At this point, she had had enough of walking home. She was ready to go to court.

Loizidou filed a complaint in the European Court of Human Rights, seeking redress under the European Convention of Human Rights, a treaty that extends human rights protections to the 820 million people of the nations in the Council of Europe. The eighth article of the convention guarantees every individual “the right to respect for his private and family life, his home and his correspondence.”⁴³ Loizidou complained that her arrest by Turkish soldiers the previous year had violated her right to her home in the outskirts of Kyrenia, a picturesque fishing village located between Mount Pentadaktylos and the northern coast of Cyprus—a place, she explained, that “is the place where my family lived for generations, where I grew up, where every stone holds memories and meaning for me.”⁴⁴ The court ruled in her favor and ordered Turkey to pay Loizidou compensation for property loss and for “the anguish and feelings of helplessness and frustration which the applicant must have experienced over the years in not being able to use her property as she saw fit.”⁴⁵

Turkey refused to pay. The Council of Europe, however, would not yield. It demanded that Turkey abide by the court’s ruling.⁴⁶ On December 2, 2003, Turkey decided to comply, transferring \$1.34 million (the full award plus interest) to the Council of Europe for violating Loizidou’s human rights.⁴⁷

The Council of Europe has no army, militia, or police force. It did not threaten to invade Northern Cyprus unless Turkey obeyed. What would compel a sovereign state to cave on such a politically sensitive issue? And why would it risk setting such a precedent, one that could not only open it up to billions of additional dollars in compensation for claims of other displaced Greek Cypriots, but also legitimate the claims of Greece and the Republic of Cyprus in their decades-long feud?

The answer, again, is outcasting—but a kind different from that used by the WTO. The court could not allow Cyprus to violate the property rights of a Turkish Cypriot in retaliation for Turkey’s denial of Titina Loizidou’s property. But it could threaten to take away *another* benefit in return for Turkey’s failure to live up to its commitment—specifically, the court could promise to kick Turkey out of the Council of Europe if it failed to meet its obligation to provide compensation for the violation of Loizidou’s rights. And it did just that: On November 12, 2003, the Committee of Ministers of the Council of Europe resolved “to take all adequate measures against Turkey if Turkey fails once more to pay the just satisfaction awarded by the Court to the applicant.”⁴⁸ A week before Turkey relented, the court made clear that these included genuine coercive measures ranging from financial penalties to exclusion from the Council of Europe.

Expulsion would have been humiliating. Turkey had been part of the Council of Europe since the organization’s inception in 1949. Membership was a source of national pride and moral legitimacy. Expulsion would also have had far-reaching political and financial ramifications. Not only would Turkey have lost its vote in the Council of Europe, but it would also have lost its chance at being allowed into the European Union with its zero tariffs, labor mobility, and investment capital.

The Council of Europe solved a problem that has plagued other human rights regimes by making compliance a condition of continuing membership. Here outcasting worked by making law-abiding behavior in one arena—human rights—a condition of continued access to the benefits of cooperation in another: membership in the Council of Europe and all the economic benefits that it entails.

MY HAIRSPRAY’S A KILLER

On June 28, 1974, three weeks before Turkey invaded Cyprus, two chemists at the University of California at Irvine, Mario Molina and Frank Rowland, published a paper in the journal *Nature* with the title “Stratospheric Sink for Chlorofluoromethanes: Chlorine Atom-Catalysed Destruction of Ozone.”⁴⁹ They claimed that chlorofluoromethanes, including chlorofluorocarbons (CFCs), popular as propellants in aerosol cans, coolants for refrigeration, and ingredients for making Styrofoam, had the potential to destroy the

ozone layer. According to Molina and Rowlands, the property that made CFCs so useful—their inertness—also posed a danger to the environment. Because CFC molecules remain stable in the earth's lower atmosphere, they eventually drift up to the stratosphere, where they are exposed to solar radiation. CFCs degrade there and release copious amounts of free chlorine. These chlorine atoms eviscerate the ozone layer.

Despite the alarming report published in a prestigious scientific journal, almost no one paid attention. Frustrated, Molina and Rowlands held a press conference in September. The press picked up the story, with several articles published in *The New York Times* and *Time* magazine.⁵⁰ The report was even featured on the American sitcom *All in the Family*.⁵¹ In a scene from the episode broadcast on October 26, 1974, Michael explains to his wife, Gloria, why he does not want to have a baby with her. He loves children too much, he claims, to bring them into a polluted world. When Gloria says she is sure that people will clean up the environment, Michael responds, "What about spray cans?" Seeing that Gloria is bewildered, Michael goes to their dresser and picks up her hairspray. "Here, right here, this is a killer." "Oh," Gloria responds sarcastically, "so now my hairspray's a killer." "Your hairspray, my deodorant, all spray cans," Michael shouts in panic. "I read that there are gases inside these cans, Gloria, that shoot up into the air and can destroy the ozone." After he finishes explaining how the ozone layer is the planet's protective shield without which there would be no life on earth, Gloria proposes a compromise: "You let me have a baby and I'll let you have my hairspray."

The Molina-Rowlands theory was frightening, but it was just a theory. There was no evidence to suggest that CFCs were actually destroying the ozone layer. That evidence came a decade later when the British Antarctic Survey reported a huge hole in the ozone layer over Antarctica.⁵² Just as Molina and Rowlands predicted, CFCs were devouring ozone. Gloria's hairspray really was a killer.

Though galvanized to tackle the problem, governments understood the futility of unilateral action. Even negotiating a global agreement would not work. Though every state in the world had an interest in banning ozone-depleting chemicals, every state had an even greater interest in a ban that included everyone but them. A treaty that required the phase-out of CFCs, even if it could command worldwide assent, would be subject to massive

cheating. States might renounce the use of cheap, effective chemicals but would ignore the ban and free-ride off of the sacrifice of others.

An environmental agreement to eliminate CFCs would succeed, in short, only if its provisions were enforceable. But waging war to enforce the law was illegal in the New World Order. And simple outcasting was useless in this context. Emitting CFCs in response to cheating—I'll start destroying the ozone layer unless you stop destroying the ozone layer—would merely make things worse.

But the international community did figure out how to save the ozone layer. CFCs have been phased out all around the world, and the hole in the ozone layer has stopped growing and even begun to shrink. The solution, embodied in the 1987 Montreal Protocol on Substances That Deplete the Ozone Layer, was to create a club of sorts.⁵³ Like all clubs, this one required members to pay dues. When members signed up, they undertook two obligations. The first one was to phase out their consumption of CFCs according to a schedule listed in the protocol. The phase-out was gradual enough to allow chemical substitutes to be developed and produced, but rapid enough to prevent the eventual destruction of the ozone layer. The second commitment was to sell ingredients for producing CFCs only to other members of the club.⁵⁴ These trade privileges gave nonmembers the incentives to join. To be left out of the club meant not being able to buy ingredients from those in the club. The benefits of membership, and costs of nonmembership, increased as the club got bigger. Because of the trade ban, every member that joined the club meant one fewer supplier of CFC ingredients to nonmembers.

EVEN SMARTER OUTCASTING—AND ITS LIMITS

Not all outcasting has worked so smoothly, however. During the 1980s and 1990s, one type of outcasting became ubiquitous: economic sanctions. South African apartheid, communist Cuba's expropriation of private American property, human rights violations by the Chinese government, the takeover of Burma by a military junta, Iraq's invasion of Kuwait—each prompted repeated economic sanctions.

There was only one problem: They often didn't work. In many cases, autocrats already had enough money and clout to insulate themselves from

the worst effects, even while their citizens suffered. Kim Jong-un, the leader of North Korea, which has little trade with the West, reportedly favors Johnnie Walker whisky, Yves Saint Laurent cigarettes, and cowboy movies.⁵⁵ After the U.S. invasion of Iraq in 2003, U.S. soldiers found a pink Testarossa, a few Porsche 911s, a Ferrari F40, a BMW Z1, and a Lamborghini LM002 SUV that had belonged to Uday Hussein, the elder son of Saddam Hussein.⁵⁶

Meanwhile, ordinary citizens in the targeted countries—often the intended *beneficiaries* of the efforts to bring their leaders back in line—have found it more difficult to access food, water, and medicine. In Iraq, infant mortality more than tripled after sanctions were put in place to punish Saddam Hussein. According to a 1999 analysis, these sanctions contributed to an increase of forty thousand deaths annually of children under the age of five.⁵⁷ Efforts to address these humanitarian complications by exempting food and medicine have alleviated, but rarely solved, the problem. In countries where the economy is ravaged by sanctions, many ordinary citizens have been unable to afford such basic necessities even when available.

For two decades, U.S. sanctions on Iran could have been a case study for the ineffectiveness of sanctions. America began sanctioning Iran after the 1979 seizure of the U.S. embassy in Tehran. President Ronald Reagan lifted the sanctions when the hostages were released, but put them back in place in 1984 after Hezbollah, a Shiite militia funded by Iran, killed 241 American servicemen in a Beirut attack. Over the course of the next two decades, the United States imposed a range of sanctions aimed at blocking Iranian efforts to obtain nuclear weapons.⁵⁸ But by 2005, decades of sanctions had produced little, if any, progress. The Iranian economy was relatively healthy, averaging an annual GDP growth rate of 5.5 percent over the first half of the decade.⁵⁹ Meanwhile, there was little evidence that the sanctions were dissuading the Iranians from pursuing nuclear research.⁶⁰

The first step toward more effective sanctions was an increase in international cooperation. Outcasting, after all, is not very effective if carried out by a single state—even one as powerful as the United States. The more states participate, the more effective the sanction. The turning point for Iran came in 2006, when the U.N. Security Council joined the American effort. It demanded that Iran stop uranium enrichment and imposed progressively painful sanctions in response to its continued intransigence.⁶¹ As a result,

Iran was shut out not only by the United States and a few sympathetic countries but by nearly every nation in the world.

But there was another crucial step, as well: an innovation in the technology of outcasting. An obscure office in the U.S. Treasury Department is tasked with enforcing sanctions rules: the Office of Foreign Assets Control, or OFAC. Over the course of the last two decades, OFAC has developed more targeted—and effective—sanction tools.⁶² The biggest innovation came in 2010. At the behest of OFAC, Congress passed the Comprehensive Iran Sanctions, Accountability, and Divestment Act, which strengthened U.S. sanctions on the Iranian energy industry and financial sector.⁶³ Whereas previous measures had targeted Iranian firms, Congress now authorized the imposition of “secondary sanctions” on any bank, anywhere in the world, that transacted with Iran’s central bank. By placing it on the black list, OFAC could cut off any bank from access to the U.S. financial sector. The United States offered banks a choice: You can do business with the United States or you can do business with Iran; you can’t do both.⁶⁴

The U.S. coupled the banking freeze with sanctions aimed at individual members of the Iranian regime and their collaborators. In 2011 and 2012, President Barack Obama issued a series of executive orders authorizing the Treasury Department to target those helping Iran circumvent sanctions, acquire U.S. dollars, develop its energy sector, or violate human rights.⁶⁵ These orders took advantage of new tools developed by the Treasury Department to hone sanctions very precisely—all the way down to a single person. Unlike the ham-fisted embargoes of the past, sanctions were now being used to shut out individuals from the United States and its economy, freeze any assets they held in the country, and prevent anyone under U.S. jurisdiction from doing business with them.

This ongoing upgrade of the technology of outcasting enables sanctions to be more comprehensive and yet more targeted than earlier versions. It magnifies the power of the sanctions by making access to the U.S. financial sector conditional on cooperation with sanctions. Not only those responsible for the international law violation, *but also those who do business with those responsible* would be outcasted. At the same time, outcasting can now be more narrowly tailored. New sanctions make it possible to target individual banks, individual businesses, even individual persons who are responsible for violations.

What's more, these new outcasting sanctions worked remarkably well: Iran's oil exports fell by more than 50 percent, the value of the nation's currency (the rial) plummeted, and Iran's economy shrank, prompting Iranian president Mahmoud Ahmadinejad to complain: "The enemy has mobilized all its forces to enforce its decision, and so a hidden war is underway, on a very far-reaching global scale."⁶⁶

Ahmadinejad's statement was evidence that the sanctions were imposing costs. But as David Cohen, the Treasury official who oversaw OFAC, pointed out, the sanctions were not part of a hidden war. They were instead "done for all the world to see" and, indeed, "done by all the world." Nor were they a war, Cohen continued, but "the alternative to war."⁶⁷ And that alternative worked. Smarter outcasting accomplished what three decades of old-school sanctions had not. In August 2013, Hassan Rouhani succeeded President Ahmadinejad, running on a platform of improving relations with the rest of the world and sanctions relief.⁶⁸ The new Iranian leadership began negotiations with the "P5+1"—the permanent five members of the Security Council plus Germany, the economic steward of the EU.⁶⁹ In November 2013, they reached an interim agreement limiting Iran's nuclear program and partially lifting sanctions and made plans to complete a more permanent comprehensive agreement. For the first time in decades, there was real hope that a nuclear Iran could be prevented through discussions at the negotiating table rather than with military strikes. Whether this will continue to hold depends on many things—chief among them the willingness of both sides to stick to the deal.

UNFINISHED BUSINESS

Even as the new Iranian leadership sat around the table with the P5+1, Russia invaded Crimea. Armed men in unmarked uniforms appeared in Crimea in February 2014, and one month later Russia completed the first successful conquest in Europe since the Second World War. A U.N.-backed military response was impossible, because Russia holds a permanent seat on the Security Council and thus is in a position to veto any authorization. More important, Russia is a nuclear power, and its military strength is second only to the United States'. Even though the U.N. Charter would

have allowed the U.S. and others to use force legally to defend Ukraine, a military response was not an option.

Attention thus turned to outcasting. The international community walled off Crimea, in a reaction reminiscent of the League of Nations' response to Japan's seizure of Manchuria nearly eighty years earlier. This time, however, there was much more cooperation to withdraw. The United States and Europe prohibited nearly all investment and trade with the territory.⁷⁰ McDonald's, PayPal, Amazon, Visa, and MasterCard all pulled out from Crimea. Fresh water and electricity, more than 80 percent of which had come from Ukraine, was subject to fluctuations in supply. Tourism to Crimea, once flourishing, fell by half in the first year after Russia's annexation.⁷¹ Even the Universal Postal Union suspended mail service.⁷² As one U.S. official explained, the sanctions regime carried a message: "It basically says you can claim your war prize, but it's not going to be worth much to you, and we're not going to make it easy for you."⁷³

To outcast Russia, the United States and Europe had to work together, a project made difficult not only because the Security Council was hamstrung but also because the Russian economy is so important to the global economy, more important than any previous target of Western sanctions.⁷⁴ For Europe, in particular, the costs of sanctions were—and are—immense. Russia supplies 30 percent of Europe's natural gas,⁷⁵ and is its third-largest trading partner.⁷⁶ With Europe still recovering from the 2008 financial crisis and subsequent recession, political leaders were understandably wary of hurting their own economies.⁷⁷ Those members of the EU with significant political and economic ties to Russia—including Greece and Germany—were particularly concerned about the negative impact of economic sanctions.⁷⁸

Yet Europe did act. The European Union declared that "the sovereignty, territorial integrity and independence of Ukraine must be respected. The European Union does neither recognise the illegal and illegitimate referendum in Crimea nor its outcome. The European Union does not and will not recognise the annexation of Crimea and Sevastopol to the Russian Federation."⁷⁹ President Obama, too, proclaimed that "Ukraine's sovereignty and territorial integrity must be respected, and international law must be upheld."⁸⁰ Both made clear that a bedrock principle of the global legal order had been broken.

Within a week of Russia's annexation of Crimea, the Group of 8 industrialized democracies suspended Russia. Condemning "Russia's illegal attempt to annex Crimea" as a "contravention of international law," the remaining seven members announced they would boycott a planned meeting in Sochi, Russia, and would instead gather without Russia in Brussels, where both NATO and the EU are headquartered. Michael McFaul, who had just stepped down as U.S. ambassador to Russia, explained that although the move was largely symbolic, it sent an important message: "The G-8 was something they wanted to be part of. This for them was a symbol of being part of the big-boy club, the great power club."⁸¹

The new generation of outcasting tools also allowed for smarter, more narrowly tailored sanctions. The first targets were individuals. President Obama issued an executive order authorizing "sanctions on individuals and entities responsible for violating the sovereignty and territorial integrity of Ukraine, or for stealing the assets of the Ukrainian people." According to the State Department, the travel restrictions demonstrated the U.S. government's "continued efforts to impose a cost on Russia and those responsible for the situation in Crimea."⁸² Likewise, the European Union imposed sanctions on those whose actions contributed to "undermining or threatening the territorial integrity, sovereignty and independence of Ukraine," such as Sergei Ivanov, Putin's chief of staff; Vyacheslav Volodin, Putin's first deputy chief of staff, who was responsible for overseeing the political integration of Crimea into Russia; Igor Sechin, the CEO of the Russian state-owned oil giant Rosneft and a close Putin confidant; and Dmitry Rogozin, a Russian deputy prime minister.⁸³

The United States and Europe wanted to impose sufficient costs to stop Russian aggression in Ukraine. But they also wanted to minimize collateral damage to the global economy. So instead of targeting the day-to-day health of Russia's economy, they went after its long-term growth. As with the sanctions on Iran, the Russia sanctions cut off access to U.S. and European capital markets. But rather than prohibiting all transactions with large Russian banks as they had in the case of Iran, the United States and Europe tried something new. They blocked only a certain kind of financial transaction—the provision of long-term loans—to certain Russian banks, energy companies, and companies involved in the defense industry. These restrictions made significant capital investment in Russia difficult and expensive. In the long term, they were expected to hinder the Russian

economy substantially, but they did not threaten a sudden shock to the global economy.⁸⁴

The United States and Europe also blocked exports of Western technology essential to Russian oil exploration of shale, Arctic, and deepwater oil deposits.⁸⁵ The restrictions forced ExxonMobil to abandon a joint venture with the Russian energy company Rosneft in the Kara Sea.⁸⁶ These sanctions, like the others deployed against Russia, were fine-tuned to address a state that seemed “too big to outcast.” Instead of blockading an entire sector, sanctions pinpointed vulnerabilities—instances where Western resources or technology were valuable and difficult to replace—while minimizing the direct economic impact on the sanctioning countries.

Russia retaliated by adopting what it called “mirror sanctions.” A statement posted on the Foreign Ministry’s website stressed that sanctions are a “double-edged thing” and put in place “reciprocal sanctions” on several U.S. politicians, including Speaker of the House John Boehner and Senator John McCain, who celebrated their sanctions on Twitter.⁸⁷ Perhaps most self-defeating, Russia adopted an import ban on food, prohibiting meat, fish, dairy products, fruit, and vegetables from countries that supported or participated in economic sanctions.⁸⁸ When food continued to flood in—the substitute cheese was nearly inedible, as many producers substituted cheap palm oil for expensive milk fat—Putin declared that contraband would be destroyed. The government proceeded to burn and bulldoze tons of confiscated bacon, cheese, and other smuggled foodstuffs. Meanwhile, food prices in Russia rose 20 percent in the first half of 2015.⁸⁹

Together with falling oil prices, the sanctions contributed to a recession in Russia. Trade with the European Union fell by more than a third in the first two months of 2015. Prime Minister Dmitry Medvedev estimated the toll of sanctions to be \$106 billion in 2014 and 2015. A report by the IMF a year and a half after the annexation of Crimea stated that it expected Russian GDP to shrink by 3.4 percent in 2015, and it projected that prolonged sanctions could lead to a cumulative output loss over the medium term of up to 9 percent of GDP.⁹⁰ In October 2016, Putin publicly admitted the sanctions were taking a toll: “Sanctions are hurting us . . . particularly with technology transfers in oil and gas.”⁹¹

The outcasting of Russia may appear a failure. President Putin has not buckled. If anything, he has doubled down by continuing to foment unrest and conflict in Eastern Ukraine. But the sanctions were precisely designed to

burn slow: to avoid crashing the Russian economy—an implosion that would bring Europe down with it—and specifically hurt those who enabled the takeover of Crimea, reduce the size of the war prize, and threaten the overarching trajectory of the Russian economy. The United States and Europe devised a strategy to compel Russia to respect international law over the long term—if the United States and Europe stay the course.

THE ALTERNATIVE TO WAR

If the situation in Crimea offers a sobering reminder of the limits of outcasting, the situation with Iran suggests that even outcasting that fails in the short term can eventually triumph. In August 2015, more than two years of negotiations between Iran and the P5+1 finally produced an unprecedented deal.⁹² It provided that the United States, China, Russia, and the European Union would lift many of the most recent sanctions. In return, Iran would drastically scale back its nuclear program. It would remove two thirds of the centrifuges, maintain low levels of enrichment for at least fifteen years, reduce its stockpile of enriched uranium by 98 percent, and allow comprehensive access to the International Atomic Energy Agency (IAEA) to monitor compliance.

A year after the agreement, in May 2016, the IAEA found that Iran had lived up to its commitments. Iran went from over 19,000 uranium enrichment centrifuges to just 5,060. It ended uranium enrichment and removed all nuclear material from its once secret facility at Fordow. It reduced its stockpile of enriched uranium and filled the core of its heavy-water reactor at Arak with concrete, making it permanently inoperable. Together, these terms increased Iran’s “breakout time”—the period to produce enough fissile material for a single nuclear weapon—from about two to three months to at least one year.⁹³ Although critics complained that the deal still allowed Iran to enrich nuclear material, some later acknowledged that it had succeeded in eliminating an imminent threat. In 2016, Moshe Ya’alon, Israel’s former defense minister, who had vigorously opposed the deal during negotiations, reversed course and belatedly endorsed it, admitting that Iran’s nuclear program had been “frozen in light of the deal signed by the world powers and does not constitute an immediate, existential threat for Israel.”⁹⁴

The evolution of outcasting has not been without setbacks. The path from its emergence in the early 1930s through the present is littered with failures. But over time, through a process of trial and error, the international legal order has developed an extraordinary array of tools to address global challenges that build on the simple system that made Iceland's cooperative civilization without central coercion possible. While not perfect, the tool of outcasting has proven highly flexible, limited chiefly by the creativity of those who wield it. From maintaining global trade, to the international postal service, to human rights protections, to the environment, to nuclear proliferation, outcasting has been used to encourage states to comply and punish those that have not in a world where Might no longer makes Right.

Some may ask whether outcasting—"the alternative to war," as David Cohen put it—is really much better than the war it replaced. After all, states may still be coerced into joining agreements—if not by threat of physical force (which, in the New World Order, would trigger a duress defense) then by threat of economic force (which would not). The outlawry of war and the system of law that has grown up around it are grounded in the principle that the physical destruction of war is uniquely harmful. Political theorist Judith Shklar famously argued that cruelty—"the deliberate infliction of physical, and secondarily emotional, pain upon a weaker person or group by stronger ones in order to achieve some end, tangible or intangible, of the latter"—is the greatest evil.⁹⁵ Outcasting replaces this evil with exclusion from the benefits of community membership. Like force and threats of force, outcasting constrains choices. But it does so without the cruelty and destruction that normally accompany war.

That outcasting is not violent has another advantage: It leaves state institutions intact. War is, after all, an exceedingly blunt tool. Using military force to coerce states damages the very institutions necessary to provide basic services and security to residents. In a world where weak states can become failed states and failed states give rise to civil war and terrorism, it is not only good law but good sense to pressure state institutions with outcasting rather than destroy them with war.