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Ruchira Kaur Bali, Are Economic Sanctions or Other Forms of 'Legal Outcasting' Short of Resort to Armed Force: An Effective Means to Enforce International Law?, 4 Int'l J.L. Mgmt. & Human. 1357 (2021).

APA 7th ed.

Bali, Ruchira Kaur. (2021). Are Economic Sanctions or Other Forms of 'Legal Outcasting' Short of Resort to Armed Force: An Effective Means to Enforce International Law?. International Journal of Law Management & Humanities, 4, 1357-1373.

Chicago 17th ed.

Ruchira Kaur Bali, "Are Economic Sanctions or Other Forms of 'Legal Outcasting' Short of Resort to Armed Force: An Effective Means to Enforce International Law?," International Journal of Law Management & Humanities 4 (2021): 1357-1373

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AGLC 4th ed.

Ruchira Kaur Bali, 'Are Economic Sanctions or Other Forms of 'Legal Outcasting' Short of Resort to Armed Force: An Effective Means to Enforce International Law?' (2021) 4 International Journal of Law Management & Humanities 1357

MLA 9th ed.

Bali, Ruchira Kaur. "Are Economic Sanctions or Other Forms of 'Legal Outcasting' Short of Resort to Armed Force: An Effective Means to Enforce International Law?." International Journal of Law Management & Humanities, 4, 2021, pp. 1357-1373. HeinOnline.

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Are Economic Sanctions or Other Forms of ‘Legal Outcasting’ Short of Resort to Armed Force: An Effective means to Enforce International Law?

RUCHIRA KAUR BALI¹

ABSTRACT

Economic Sanctions are of various kinds- Internal and External and Physical and Non-Physical, their effects differ, with somewhat different outcomes, but their underlying objectives, by and large remains the same of ensuring recalcitrant state's compliance with International Law. It falls within the broader category of outcasting, which is used by a number of states to deprive the non-compliant state of the benefits of global trade, communication and diplomatic relations. Oftentimes, it can have a harsh impact on the vulnerable populations.

With this concept in mind, it is arguably very important to understand as to how gunboat diplomacy has taken a back seat in international relations, particularly in light of various UN Charter provisions that exclude or prohibit to a large extent to use of force, save in situations such as: necessity, self-defence, responsibility to protect, humanitarian intervention and collective security defence under Article 2 and 51 of the U.N Charter respectively. From a standpoint of increasing globalisation, and the need to establish peace and security globally, economic sanctions have come about to play significant role in influencing and regulating the conduct of the targeting state and the targeted state, the article will deliberate as to how successful have these forms of sanctions been, from a multidisciplinary perspective. Their spill over effects are equally important when assessing their probability of success.

The article will delineate about different types of outcasting measures available, and their relevance to the impact felt in relations between states through illustration of UN Sanctions imposed would be compared and illustrated in the article.

The article will also develop solutions to improvise the efficacy of implementing outcasting measures.

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I. INTRODUCTION

Mortimer N. S. Sellers well-articulated that, “*To be effective law, international law must be obeyed, often it is adhered to by even seemingly immensely powerful nation states such as the United States, not due to repercussions of force or coercion, but because of the presence of fear- the fear of looking as an unjust state in one’s view point, or in the books of one’s friends.*”²

On this note, the international law can be defined as a combination of principles, laws, conventions, customs, and it can be described from multiple perspectives, one of which states that the all valid rules of a legal system should flow from a *Grundnorm*³ (or *basic norm*). As per this view the law need not be supplemented by neither morality (as propounded by advocates of natural school of law), nor political influences (as realists would comment).⁴

Obedience of any set of code of behaviour is dependent upon factors such as: respect for authority. Sanctions, legitimacy, self-control, obligation, political force, and expediency. If the criteria laid down is not objective or clear, its adherence by a set of adherents becomes limited or less. Every satisfactory definition of law would imply a sanction and some penalty should be imposed on the law breakers that has to be exacted by use of power or force. However the power that enforces the sanction is derived from the will of the people⁵, in the sense the question arises whether economic sanctions and outcasting amount to use of force or not?

From the Old World Order perspective, physical violence was a typical enforcement mechanism (hence, a military action as a response, could be at the same time, be considered as an act of aggression),

After the effectuation of the 1928 Pact for the Renunciation of War, the authors of the book *The Internationalists* argue that the pact was not merely enough, and to in practicality to outlaw war, it had to be replaced by an alternative in the New World Order. The authors further put forth the argument that there were four pillars to the system: *illegality of conquest, criminality*

² Sellers M.N.S, the Effectiveness of International Law. In: Republican Principles in International Law, (Palgrave Macmillan: London, 2006). https://doi.org/10.1057/9780230505292_6

³ Ryan Mitchell, ‘International Law As A Coercive Order: Hans Kelsen And The Transformations Of Sanction’, Indiana Int’l & Comp. Law Review, 29 Vol 245; See Hans Kelsen, *Pure Theory Of Law* (Max Knight trans., 2nd ed. University of California Press 2008) (1967) (1960) 8.

⁴ For references to a noteworthy illustrations of natural law criticisms of positivism see John Finnis, ‘On the Incoherence of Legal Positivism’, 75 NOTRE DAME L. REV. 1597 (1999). To understand the various variations of realism in modern times, and its compatibility with the legal positivism (pertaining to the scope of restricted operation of determining formal contents of law as opposed to its real world operations. See, e.g., Brian Leiter, ‘Legal Formalism and Legal Realism: What Is the Issue?’ 16 Legal Theory 2, (2010) 111; Brian Leiter, ‘Legal Realism and Legal Positivism Reconsidered’, 111 ETHICS 2, (2001) 278-301.

⁵ Ronald F. Roxburgh, ‘The Sanction of International Law’, The American Journal of International Law, (Jan-Apr 1920), Vol. 14 (1/2) 26-37.

*of aggression, prohibition on coerced agreements; and permitting sanctions against violators.*⁶ Nevertheless, it is the likelihood of the outcasting being used as a replacement for war in the New World Order.

There need not always be an internalized violence use of force for a legal system to exist. One argument therefore can be stated that in order to get any state to adhere to is not merely coercion, or physical force, but through a cooperative mechanism of imposing sanctions or outcasting thereby depriving the violating state the benefits of membership of the international community and cooperation. Such an intervention without the resort to war can be done through: a) commercial and financial intervention coupled with naval blockade, and b) application of moral disapprobation.

Outcasting can be described as a process ‘*when a group denies those who breaks its rules the benefits available to the rest of the community*’⁷. It has also been recounted as in Norse tradition, inclusive of Iceland.⁸ The authors state that:

*“In a 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. Well quite ironically, international lawyers refer to this peaceful form of retaliation by a military term: ‘countermeasures’.”*⁹

The elements reflected in the process of outcasting resemble those reflected in the literature on “shaming” and its “collateral consequences”¹⁰ One of the prominent areas of international law domain is the human rights scholarship which specifically elaborates as to how and in what processes vide which states are singled out for violations of human rights violations, a nonviolent method of reducing law violating behaviour.¹¹ There are various variations of outcasting some of which are: a) *permissive or mandatory*, b) *adjudicatory or non-adjudicatory*, c) *proportional or non-proportional*, d) *kind, or unkind*, or e) *first parties, or*

⁶ OA Hathaway and SJ Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster, New York, NY, 2017)304.

⁷ Ibid 273

⁸ Ibid 375.

⁹ Ibid 375-376.

¹⁰ See Oona A. Hathaway, ‘Between Power and Principle: An Integrated Theory of International Law’, 72 U. CHI. L. REV. (2005) 469.

¹¹ See, e.g.; Margaret E. Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks In International Politics* (Cornell University Press, 1998); Emilie M. Hafner-Burton, ‘Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem’, 62 INT’L ORG. (2008) 689; Harold Hongju Koh, ‘Why Do Nations Obey International Law?’, 106 YALE L.J. 2599 (1997) See, e.g., Hedley Bull, *The Anarchical Society: A Study Of Order In World Politics* (MacMillan Publishers, 1977);

third parties, depending upon the nature of the conduct to be performed by the target nation - state.

Authors Hathaway and Shapiro have stated the following instances of outcasting in their article: *countermeasures by states, economic sanctions, countermeasures taken by members of an international organization* (e.g. the WTO) under the *mechanism envisioned by the treaty constituting this organization, expulsion from an international organization, e.g., expulsion from the Council of Europe*, in addition to which by implication to expulsion we can add, *prevention of access to the benefits of cooperation within an international organization, e.g., EU bodies conditioning EU membership*.¹²

Identifying and figuring out states in this way would enable the violating states to understand as to how they would lose the respect which is generally granted to the members of the international community, and this might have concrete collateral results. This process would be considered as outcasting only when the law contemplates or provides for such shaming in order to induce law obeying behaviour amongst the states.

Illustration for what amounts to be an outcasting measure could be given that of refusal of the EU Council to grant accession to a certain State for not complying with certain requirements or because of certain deficiencies in the rule of law, and again this had to be based on third level norms of the EU community, otherwise such an action would be merely political in relation to the framework of international relations. Another instance, could be given that of the absence of the ambassadors or diplomats from the Republic Day celebrations of a certain country with the consideration to dismal human rights record of the host state.

Economic sanctions falls into the category of external nonphysical and mandatory outcasting. Economic sanctions can be referred to by several names such as: blockades, boycotts, embargoes, sometimes even described as quarantine or economic coercion. These concepts are almost interchangeable. Authors Gowlland and Debbas have described economic sanctions as '*coercive measures undertaken in execution of a decision of a competent social organ, i.e., an organ which is legally authorized to conduct the actions in the name of the community or the society that is regulated by the legal system.*'¹³

The difference between the two concepts is that, while economic sanctions are by (stipulated) definition legal sanctions, the original outcasting concept includes instances which are not.

¹² Hathaway and Shapiro, *The Internationalists: How A Radical Plan To Outlaw War Remade The World*, (Simon and Schuster 2017) 371-390.

¹³ Gowlland-Debbas, Vera, ed. *United Nations Sanctions and International Law: Colloquium on United Nations Sanctions and International Law 1999*, Genève (The Hague: Kluwer Law International, 2001).

Similarity lies in the way both of them function as opposite to military force.

The sanctions and outcasting regime has been much in controversy, as to whether they are enforceable or not? These issues shall be discussed later in the essay.

The essay will primarily deal with issues such as threshold required for economic sanctions and other forms of outcasting as s use of armed force with explanation of adjudicatory mechanism under International Law legal system and its effectiveness comparing both UN and community outcasting measures.

How does enforcement takes place through international law instruments of outcasting and economic sanctions?

There are ways in which the system of enforcement of international law functions or operates:

- External Physical Enforcement- When the enforcement mechanism is delegated to the external actors who physically enforce them. All physical or nonphysical is in contravention of the modern state conception. For this above principle prohibition against force has been envisaged under Article 2 (4) of the UN Charter.

- Internal Outcasting – It occurs when the internal bureaucratic structure of a legal system enforces the law, without resorting to use of force or threat thereof. It complies with the Internality requirement as prevailing under Modern State Conception, as there is a presence of secondary enforcement link, dealing with the authorities of the nation- state in question. However, it does not prescribe for usage of physical violence. For instance, minor excommunication under canon law entailed separation of the targeted person from the church sacrament. This penalty relied upon enforcement of the officials who were internal to the church, by denial of benefit of the membership of the church. WHO, from the organisation's point of view, has such a practice in place, whereby if the member state party, does not comply with the obligatory financial contribution, its voting rights and other privileges are suspended by the WHO, but it is not all together removed or ejected from WHO.¹⁴

- External Outcasting- it is in contravention of both the requirement of both brute force and internality, and under this form of outcasting the regime is enforced by the officials, not within the regime, without application of physical force. For instance, under Icelandic Law, outlawry was enforced by the members of the societies itself and not all thing. WTO, is an example under this category under which, the decisions of the WTO DSB, whereby the decisions are enforced through authorized retaliation measures by the member states. From the

¹⁴ Working for Health: An Introduction to the World Health Organization, World Health Organisation, (2007), http://virww.who.int/about/brochure_en.pdf.

above it can be analysed that the law enforcement works in the following ways: a) by imposition of duties on violators or others or both or (2) by denial of rights to the violators or provision of rights to other or combination of both.¹⁵

It can also be further argued, that even though, there might not be trappings of a modern state conception such as having a police mechanism in place, yet the system can exist by enforcing laws through externalized outcasting, an instance of the same can be stated of medieval Iceland.¹⁶ It externalized enforcement to private parties, through a technique of outcasting. It bestowed a treatment of a social outcast upon a lawbreaker. This prevented him from leaving the country, and directed other members of the community to avoid sharing their hospitality or any sort of assistance with him. It could also release the duty to respect the property of the outlaw. Moreover due to scarcity of resources and a brutal environment it became extremely difficult for the outcast to survive and hence one was compelled to follow the law of the land.

Modern states in the form cooperative federalism also enforce their rules through a healthy mode of outcasting. The example of the same can be given of the US, in which the domestic public law is enforced through impeachment, job elections and termination.¹⁷

Moreover, Coercion takes place when an adequate amount of pressure is applied to enforce a certain course of conduct, as argued by Ekow. N. Yankah.¹⁸ With the advancement in *technology, refined, subtle and indirect use of force* is always replacing *coarse, obvious and direct* methods of applying it. Additionally, Economic sanctions as other form of outcasting, from historical point of view, have been used to influence the domestic and foreign policies of other states. Moreover, since the World War II, application of economic coercion has infused or invaded the economic relations between states.¹⁹ US has deliberately opted to not evade from the spread of coercive economic practice.²⁰ Perhaps, it is the willingness of the United States to put into practice economic sanctions that has been the main characteristic of post 1945

¹⁵ Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, 68-87 (1995)

¹⁶ Stanley Anderson, 'Human Rights and the Structure of International Law', 12 N.Y.L. SCH. J. INT'L & COMP. L. 1, 3-5 (1991).

¹⁷ Gillian K. Hadfield & Barry R. Weingast, *Collective Punishment: A Coordination Account of Legal Order* (Univ. of S. Cal, USC Law Legal Studies Paper No. 11-9, 2001), available at <http://ssrn.com/abstract=i7869i8> (exploring the similarity between a number of normative orders including medieval Icelandic law and the World Trade Organization).

¹⁸ Ekow N. Yankah, 'The Force of Law: The Role of Coercion in Legal Norms', 42 U. RICH. L. REV. 1195, 1216-17 (2008).

¹⁹ G. Huffbauer & Schout, 'Economic Sanctions in support of foreign policy goals, Policy Analyses in International Economics', *Journal of Policy Analysis and Management*, 4-22, (1983); R. Lillich, 'Economic Coercion and the New International Economic Order: A Second Look at First Impressions', 16 VA. J. INT'L L. 233, (1976) 234,

²⁰ Williams, 'The Coming of Economic Sanctions into American Practice', 37 AM. J. INT'L. 386 (1943)

period of international economic relations.²¹

It has been contended by the author John Dewey in the article *Force and Coercion*²² that even though economic methods for applying force may be so wasteful and so destructive as to be barbarous yet zealous and combative commercial methods may provide a development in the usage of natural resources and human resources over war.

Additionally, if we apply the *Prototype theory of International law* according to which coerciveness of law should be fluidly understood, which can include or concur outcasting as an enforcement technique as contrary to the requirement of physical coercion. Additionally, Jovanovic supplants the position that physical force or violent interference has been allocated within the sanction based concept of law with the term ‘coercive guarantees in International Law.’ According to the theory “*Law is thus primarily an institutionally guaranteed order, and only secondarily a normative order that relies on sheer physical force.*” Moreover if outcasting is included as a form of coercive guaranteeing it could give this theory an advantage over others, cultivating the idea of law as a coercive order. It is more narrowly suitable for the conception of Contemporary International Law, which some subjects have. Even though the PTIL has not completely ruled out physical force as a guaranteeing force under International Law yet it is insignificant as being characteristics of International Law. Moreover, Jovanovic in his book under Chapter V has described the similar position.²³

Furthermore, if the economic sanctions are able to affect the existence of the nations, and their consequences and impacts can be compared with those of a military action then in that case, then such a form of outcasting may supplant or supersede reprisals and war (measures under Old-International Order). However, they can be construed as sanctions in the narrow sense.

Furthermore, Ronald F. Roxburgh²⁴ in his article makes a compelling argument that some people inherit a mental predisposition to obey the law without doubt, along with the law abiding habit which is generated by such a conscious undertaking and which are further developed by various factors whose powers do not arise from physical force. He also stipulates as to how

²¹ C. Joyner, ‘The Transnational Boycott as Economic Coercion in International Law: Policy, Place, and Practice’, 17 VAND. J. TRANSNAT’L L. 205, 222-223 (1984). US maintained economic sanctions against states such as North Korea, Vietnam, Cambodia, East Germany and Nicaragua. See H. Moyer and L. Mabry, ‘Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases’, 15 LAW & POL’Y INT’L BUS. 1 (1983) (deliberating upon the issues of economic sanctions, including the case studies of Afghanistan, Poland, and Iran).

²² Dewey, John ‘Force and Coercion’ *International Journal of Ethics* 26, no. 3 (1916): 359-67. Accessed January 16, 2021. <http://www.jstor.org/stable/2377050>.

²³ Hathaway, O. & Shapiro S, ‘Outcasting: Enforcement in Domestic and International Law’, *The Yale Law Journal*, (2011) 121(2), 252-348.

²⁴ R.F. Roxburgh, *The Sanction of International Law*. *American Journal of International Law*, (1920)14(1-2), 26-37. doi:10.2307/2187838.

many thinking intellectuals have been influenced by such opinions that they have visualized the ultimate establishment of a form of a society in which the use of force might be completely eliminated.

Such is that the consent is also based on reverence of the law, although it is not a substitute for enforcement of law, nevertheless, it renders respect for law easier.

The article will dive into various contemporary issues concerning outcasting in general and various other kinds of measures adopted under this broader category.

II. CRITIQUE

1. Does resorting to UN Economic Sanctions and Outcasting Countermeasures amount to use of the armed force?

According to the Kelsen's approach to international law, there are two types of International sanctions that are other than war and reprisals, he states that,

*[i]f within a system of international security not only war but any use of armed force is prohibited in principle and exceptionally permitted only as a sanction, the two types of international sanctions must be designated as enforcement measures involving the use of armed forces and those not involving it, or as military and non-military sanctions, but not as war and reprisals. By non-military sanctions, economic, financial and diplomatic sanctions are usually meant. However, sometimes the term 'economic' sanctions covers all non-military sanctions and includes financial and diplomatic sanctions*²⁵ According to this analogy of positive law, we can consider that the both economic sanctions and Outcasting Countermeasures be considered as amounting to use of countermeasures.

On the other hand, upon textual interpretation of Article 42 of Chapter VII of the UN charter bestows the UNSC with the authority to take such suitable measures as it deems fit to prevent escalation of and outbreak of a conflict, and such measures comprise of using partial or complete interruption of economic relations through interruption of sea, rail, air, telegraphic and other means of communication and abruption of diplomatic relations, which shall not amount to use of force as has been stipulated under art. 41 of Chapter VII of the UN Charter, this might imply that the such measures under the authority of the UN do not amount to use of armed force, but the judicial decisions and UN Res. and other soft law instruments indicate otherwise.

The argument that the sanctioning regime does not have any legal force would be to undermine

²⁵ Hans Kelsen, *Collective Security under International Law* (The Law book Exchange, 2001) 104.

the existence of the international law and many advances it has brought to the global system of inducing cooperation. Existence of violent and external threat is not really required for a regime to be existent, however, whether it is effective or not is another point of contention.

In continuation of the previous argument, if the economic sanctions or other forms of outcasting in the form of reprimands through resolutions do not prove to be effective or are ineffective, the United Nations Security Council may authorize under art. 42, usage of such action via air, land, and sea forces as it deems necessary and appropriate for reinstating and maintaining international peace and security, and such actions can be in the form of demonstrations, blockade, and other operations by air, sea, and rail and land forces of the members of the UN.²⁶ Reading of this provision will clearly establish that sanctions can involve an element of use of force, when backed by this.

The point first needs to be established is that whether economic sanctions constitute use of force or short fall of armed conflict or not, and to comprehend it we need to elaborate on several legal points.

Firstly, Even though the U.N Charter does not explicitly deal with the issue of economic coercion, however, numerous scholars have interpreted article 2(4) of the U.N. Charter to impliedly to comprise economic and political conduct.²⁷ H. Brosche in his article on the Arab Oil Embargo stipulates that the current pattern of analysis necessitates a broader interpretation that is inclusive of both economic current and political coercion.²⁸ Adding further to the argument, Paul & Blaustein in their work have stated that armed force isn't the sole form of coercive force that could be in contravention of article 2(4).²⁹

Needless to say the content and scope of article 2(4) is of much controversy, for instance some scholars like Goodrich & Hambro do not view art 2 (4) to be inclusive of economic or political coercion³⁰, and few also question the importance of article 2(4) in prohibiting economic coercion.³¹ Moreover at the time in 1986, only a few UN member states considered article 2(4) to prohibit economic sanction or coercive economic policies. Historic example could be that of

²⁶ Id

²⁷ See U.N Charter art.2, para 4 (prohibition of threat or use of force); McDougal & Feliciano, *Law and Minimum World Order* (London and New Haven, 1961) 124-126 (view that the art. 2(4) does not ban non-military forms of coercion is suspicious).

²⁸ H. Brosche, 'The Arab Oil Embargo and United States Pressure' Against Chile: Economic and Political Coercion and the Charter of the United Nations', 7 CASE. W.RES. J.INT'L. 3, 18-30 (1974).

²⁹ Paul & Blaustein, 'The Arab Oil Weapon- A Threat to International Peace', 68 Am. J. Int'l. L. 410, 417 (Supp. 1974).

³⁰ Goodrich E. Hambro, P. Simons, *Charter of the United Nations: Commentary and Documents* 192-369 (3d ed. 1969).

³¹ D. Bowett, 'International Law and Economic Coercion', 16 VA. J. INT'L L. 245, 245-49 (1976).

the Nicaragua case in which the US had implemented a Comprehensive Trade Embargo against Nicaragua, for its support of FSLN rebels in El Salvador, during which entire economic relations were cut off, by the Regan administration³² under International Economic Emergency Powers Act of 1977 (IEEPA)³³. Justification provided by the Regan administration was a reaction to control the subversive activities of Nicaragua, and to prevent further military escalation against Central American States.³⁴

Furthermore, Iraq was ascertained by the UNSC to be a country that had breached upon peace and, thus measures under Chapter VII could be taken.³⁵ Through this Iraq was labelled as an aggressor, nevertheless the crude language was avoided, which was followed by a military concentration and a short intensive war between January and February 1991, thereby evicting the Iraqi troops from Kuwait, however, now the purpose of the same was to induce Kuwait to comply with the inspection measures imposed after the end of Gulf War. It shows that economic coercive measures could be followed by utilisation of brute armed force.

Additionally the period of the formation and functioning of the League of Nations sought to prevent war as a way of dispute settlement and instead it envisaged under Articles 12, 13 and 15, an offender would have **ipso facto** have committed an act of war against all other members of the league, which subject it to severance of all trade and financial relations, and prohibition of all intercourse and which shall be applied by other council members, along with which it also envisaged that the council could envisage the appropriate use of naval, military or air forces to protect the Covenant of the league. There was hence a use of both nonphysical use of force, and physical use of force.

Outcasting, on the other hand, in other words are referred to as countermeasures³⁶ under the terminology used in Public International Law, regulated not by the provisions of the Vienna Convention on the Law of the Treaties(VCLT), but by the ILC Draft Articles on Responsibility of the States for Internationally Wrongful Acts.³⁷ They are unilateral coercive economic

³² Exec. Order No. 12,513, 50 Fed. Reg. 18, 629 (1985)

³³ 50 USC . Section 1701-1706 (1908).

³⁴ Dep't ST. BULL. 22-24 (May 1985) (Speech of the then US President addressing the need to provide continued assistance to the Contras).

³⁵ It is a point to be kept in mind that the term "aggression" was nowhere used in the formal documents, however, it was frequently referred to during debates as pointed out by Christer Ahlstrom; Wallenstee, P., *A Century of Economic Sanctions: A Field Revisited*, Uppsala Peace Research Papers No.1, Department of Peace and Conflict Research, Uppsala University, Sweden.

³⁶ Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, (New York: Fredrick A Praeger,1964); International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts', November 2001, Supplement No 10 (A/56/10), article 22, part three, chapter II,

³⁷ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts', November 2001, Supplement No 10 (A/56/10), Part three, chapter II.

measures undertaken by the states in order to further their foreign policy objectives. The individual states impose them without prior authorization of the UNSC resolutions, and when read with the above mentioned provisions of article 2(4) of UN Charter and 51 of the UN Charter indicates that utilising coercive measures would be included in the term of armed force, and further evolution and consolidation of processes for compliance and enforcement in general international law. This recourse mechanism is not without problems though, and developing countries call for economic sanctions to be eliminated, as it infringes upon the right to economic and social development. UN GA has passed a resolution that directs states not to recognize unilateral extraterritorial coercive economic measures or legislative acts thrust by any state.

This recourse mechanism is not without problems though, and developing countries call for economic sanctions to be eliminated, as it infringes upon the right to economic and social development. UN GA has passed a resolution that directs states not to recognize unilateral extraterritorial coercive economic measures or legislative acts thrust by any state. The Asian-African Legal Consultative Organisation (AALCO) has also advised that unilateral coercive economic measures constitute as being extraterritorial sanctions, and hence are in contravention of rules and principles of International Law.

2. What are the Limitations of forms and methods of Outcasting and measures to mitigate the limitations?

As it has been previously stated by some authors that: ‘No method of enforcement is perfect, and outcasting is no exception.’³⁸

One of the first limitations is that it is a very strong type of a sanction requiring adequate political support for producing a drastic measure. It may also imply that opportunities for influencing the violating state may be foregone. For instance, if a state has been expelled from the Council of Europe, it may move farther from harbouring respect for democracy and human rights. In the 1960's suspension of voting rights of the USSR at the UN GA proved to be a majestic catastrophe.³⁹ Implying that outcasting might backfire at the most crucial moments.

Additionally, countermeasures could be misused for securing private justice by states, and the problem with such an analogy of the states is that what an armed attack differs, subjectively then if countermeasures were to be completely permitted. The states under the pretext of

³⁸ 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.

³⁹ A Chayes and AH Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, Cambridge, MA, 1995) 78.

securing interests of “justice”- retribution in general- or for vindicating the law.⁴⁰

Another issue that arises with outcasting, is its asymmetric nature in application that ultimately impacts its legitimacy, because of which, many states will not be willing to implement the domestic model of regulation at an international level because of lack of predictability and universality in the regime. Hence, a challenge arises in relation to its legitimacy.⁴¹

Adding to the foregoing study, the following are some of the prominent drawbacks that currently preoccupy the outcasting system and impact its overall effectiveness to deal with conflict:

- Outcasting can prove to be costly

Sometimes simple outcasting measures comprising of – permissive, non-adjudicatory, in-kind, proportional, and first parties cannot be applicable all the time, and is suitable for agreements creating or depriving private benefits of membership. So, external outcasting measure can be costly not just for the outcasting state but also for the outcasting states, after all it deprives the benefits of cooperation from both the states perspectives. A probable solution to the problem could be that, outcasting measure to be adopted should be mandatory in nature instead of permissive in character. An example of this scenario could be that of the sanctions against Libya under Chapter VII of the UN charter, under which the Security Council insisted that the member states participate in the measure. As a consequence of which, the resultant effects sought were successful, as compared to a scenario whereby an individual state had a choice to implement such sanctions or not.

- The regime sometimes creates public benefits, not private

Sometimes an agreement may create or deprive public rights such as human rights, which are provided for under some treaty, deprivation of such rights will not only be ineffective, but also illogical and illegal to say the least, to make the states comply with the obligations, instead, such a regime should be included broadly in the community, such as in case of the European Convention on Human Rights, that deprives an extreme violating member of the benefits of membership by his exclusion from Council of Europe. It is possible when in kind benefits cannot be deprived. Additionally, the cross countermeasures could be institutionalized in the treaty regime itself as is the case with the Montreal Protocol on Substances Depleting Ozone

⁴⁰ Syed Ali Akhtar, Do Sanctions Violate International Law, *Economic and Political Weekly*, April 27, 2019, ISSN Online- 2349-8846.

⁴¹ See Crawford, J and Nicholson, R, ‘The Continued Relevance of Established Rules and Institutions Relating to the Use of Force’ in Weller, M (ed), *Oxford Handbook of the Use of Force in International Law* (Oxford University Press, Oxford, 2015) 96, 108 Google Scholar OpenURL query (‘If the institutionalized inequality of the collective security system does generate a problem of effectiveness, it is that its effectiveness is asymmetric.’).

Layer⁴², and the approach adopted by the International Atomic Energy Association (IAEA),⁴³ whereby the treaties deal with public rights of reducing production and eventual elimination of ozone depleting substances, and non-proliferation of nuclear weapons, and peaceful uses of nuclear materials. They deal with the rights of economic and technical assistance, and trading privileges.

- At Times, The Process Of Outcasting May Seem Too Attractive For A State

The process of outcasting at times may be seen as an attractive tool to fulfil domestic policies, with the support of domestic interest groups, and most common measures usually misused are the trade restrictions and tariffs, such instances can be controlled by using adjudicatory mechanism by an independent authoritative decision maker, which not only ensure that the violation actually occurred but also ensure the legitimacy of the countermeasure. Proportional response would ensure that the outcasting state does not benefit more than the harm actually occurred.⁴⁴

Moreover the resort to outcasting measures or countermeasures has not been without controversies. Especially in relation to application of third party non forcible countermeasures to protect the fundamental communitarian values by individual states, which might be opposed by some states on the reasoning that the rule that permits this possibility has ‘no place or basis under International law, and would be destabilizing’, and that ‘countermeasures for violations of community rights should be undertaken through the United Nations, or at least there should be a reference to the Security Council for action.’⁴⁵ It has also been stressed by the likes of Russia and China that the unilateral sanctions may threaten or underestimate UN SC’s authority.⁴⁶

However, as the author Paolo Palchetti stresses that the main issue remains, as to how the problem of centralisation in the peacekeeping function, and the unilateralism in

⁴² United Nations Environment Programme, Handbook for the International Treaties for the Protection of Ozone Layer, 297 (6th ed. 2003).

⁴³ Promoting Science and Technology, INT’L ATOMIC ENERGY AGENCY, <http://www.iaea.org/OurWorVST/index.html>.

⁴⁴ Tom Tyler has extensively and persuasively argued that procedural justice contributes importantly to the legitimacy of the law and hence to people's willingness to comply with it. See, e.g., Tom R. Tyler, *Why People Cooperate*, 93-95 (2011) ; Tom R. Tyler, *Why People Obey The Law*, (2006) 104-57.

⁴⁵ See J Crawford, Fourth Report on State Responsibility, UN Doc A/CN.4/517, 18.

⁴⁶ See the ‘Declaration of the Russian Federation and the People’s Republic of China on the Promotion of International Law’ of 25 June 2016 (‘The adoption of unilateral coercive measures by States in addition to measures adopted by the United Nations Security Council can defeat the objects and purposes of measures imposed by the Security Council, and undermine their integrity and effectiveness.’).

countermeasures be managed, and the debate well goes beyond third party countermeasures.⁴⁷

3. How effective are economic sanctions and outcasting as instruments of enforcement mechanisms under International Law?

Effectiveness of outcasting measures depends on the tools to be employed and where, further depends upon the normative linkage between legal rules and the actors.

For prevention of war and new exceptions to the prohibitions to use of force from arising to Article 2(4) of the UN Charter, and prevent the breach of Article 2(4) and misuse of Article 51 pertaining to collective security force, as when system of collective sanctions does not function in a proper way, states may face various clamours in complying with the requirement under Article 2(4) of the UN Charter⁴⁸, and regime under Article 2(4) and 51 is very rigid and acts as a limitation to the parties.⁴⁹ There should be an effective collaboration between peace enforcement vide the UN collective Security system, and law enforcement through outcasting measures. But the main problem that arise is that peace enforcement system relies heavily on cooperative mechanism, and emphasizes on reaching a compromise between its P5 nations, which is costly in terms of effectiveness, nevertheless, the defectiveness is cured by the outcasting measure, as it relies upon the unilateral responsive acts of the similar minded states, and may prove to be highly effective in implementing laws.⁵⁰

The support or complementarity of isolation, and military action go hand in hand, for instance, in particular when the states are not satisfied with the track record of the sanctions, for instance, such an action was undertaken in Iraq and Sudan. Heavy bombardments were replicated in Iraq in December 1998. Such an action was undertaken outside the framework of the United Nations. Similarly, the sanctions against Sudan were bombings in Khartoum, as a consequences of attacks carried out on US embassies in Dar-ES-Salaam, and Nairobi. Prior to the events that followed the US had been a supporter of a military strategy against Sudan.⁵¹

Additionally, effectiveness of the out casting does not really come from exclusion of benefits of cooperation, as opposed to what Hathaway and Shaipro have to argue but from emerging

⁴⁷ Palchetti, 'Outlawry but with teeth: The problem of enforcing peace through international institutions. *Global Constitutionalism*', (2018) 7(3), 358-367. doi:10.1017/S2045381718000175

⁴⁸ Dörr, O and Randelzhofer, A, 'Article 2(4)' in Simma, B, Khan, D-E, Nolte, G and Paulus, A (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press, Oxford, 2012) 218, 233

⁴⁹ Franck (n 7) 2 ('New remedies, as we know from medicine, tend to produce unexpected side effects. Article 2(4) of the Charter seemingly cures the Covenant's normative ambiguities regarding states' "threat or use of force" against each other. It plugs the loopholes. But [...] has the pursuit of perfect justice unintentionally created conditions of grave injustice?').

⁵⁰ Supra Note 47.

⁵¹ Peter Wallensteen, *A Century of Economic Sanctions*, Uppsala Peace Research Papers No.1, Department of Peace and Conflict Research, Uppsala University, Sweden.

interdependence between states that necessitates cooperation, and it is precisely because of that interdependence that cooperation is rendered as being invaluable as argued by Miguel Maduro in his comment on the work of Hathaway and Shaipro, and he further argues that it is evident through cross-countermeasures.⁵²

As more and more non-state actors and individuals are covered under the regime of International Law it will be a more effective mechanism, with states playing the role of mediators to implement outcasting measures, but to legitimize such measures, mere reconciliation of sovereignty with international law through voluntary outcasting measures would not suffice. This would be more so in case where IL is increasingly perceived as an instrumentation by some actors in a state to move the balance of power, with respect to some actors, for instance- empowerment of executive branch of the government. Miguel Maduro, further reiterates that outcasting as an effective enforcement tool particularly because of the limits it places on sovereignty.

III. CONCLUSION

From the above descriptive and sociological analysis, it can be inferred, though it is subject to future course of development and codification in International law, that it is not imperative for legal system to physically enforce its rules, and that those who consider that such a legal system would be inferior, have been mistaken in doing so, as acquisition of that physical power may be contrary to the ends of justice both ethically and morally. Therefore, Economic Sanctions and other forms of outcasting can be considered to be both having the force of law, with coercive effect.

Furthermore, Hope lies in progressive development and codification of International Law which ensures use of physical or coercive force or use of self-help by a state unnecessary rather than forbidding it completely, as it would appropriate in situations where commercial, economic, financial or moral appropriation cannot be availed of, or is not strong or effective enough to command compliance of international law, and in particular treaty obligations by the recalcitrant state. To avoid humanitarian catastrophe, states must be willing to comply with the existing legal instruments pertaining to economic coercive measures and use of countermeasures amounting to armed conflict within the dichotomy of art 2(4) and 51 of the UN Charter.

Additionally, the sanctions and moral appropriations should carry more weightage as though

⁵² Miguel Maduro, Comment on Oona Hathaway and Scott Shapiro: They have some good news and some bad news, *Opinio Juris*, November 17 2011.

they might prompt states to not break the law, or to make reparations for wrong done, they cannot enforce the law or inflict the punishment. That should be done by making provision comprehensive enough in the treaties dealing with sanctions for their breaches.

Sanctions and other forms of outcasting cannot be merely discarded as instruments of regulating conduct of the norm violating state, however to adjudge their effectiveness comprehensively following are the some of the suggestions that I put forward after extensive literature review and references:

1. Success of the Sanctions to be adjudged from the overall objectives as stated by the sender country, and this is evident through its credibility to deliver changes in behaviour at reasonable costs, time and reasonable connection between the effect and the instrument so utilised.

2. We have to adjudge as to how exactly it promotes international norms and what are the effects to be expected?- (peace promotion, or norm development)

3. The ability of the norms in deterring norm breaking repetitive behaviour of the targeted state.

4. It does not have to depend upon the duration of the sanctions imposed, as merely meeting initial goals stated would give a miscalculated result. We can take the example of Rhodesia for this matter because, in this case the Rhodesian Leader, Ian Smith did not give up his position of power until years after Wilson of Britain had abandoned politics.⁵³ Another example could be given of Cuba, in which economic sanctions were in place for a long time, but it did have a dislocation effect on the public at large, which again becomes difficult for the regime to explain or justify.

5. Only if there has been a good track record of influencing or managing to somehow alter the behaviour of the target state, will the instrumental application of such a sanction act as a deterrent to other actors, and further be perceived as a demonstration of international commitment.

6. Selection of cases should be done keeping in mind the chances of success and failure of the instrument to be so employed.

7. Outcasting in terms of shaming, naming and depriving of the benefits of membership can only be effective, if some binding value in the form of non-physical punishment is attached

⁵³ Baldwin, *Economic Statecraft* (Princeton University Press, 1985).

to it, which should be deterrent in nature, example being that of South Rhodesia, and Dayton Accords.

8. There should be an increased institutionalisation of how retaliatory measures are used by the states to undo the wrong to the international community, in the light of how WTO Dispute Settlement Mechanism operates.
