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Evan J. Criddle
*William & Mary Law School*, ejcriddle@wm.edu

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## Abstract

*Over the past several decades, states have used international asset freezes with increasing frequency as a mechanism for promoting human rights abroad. Yet the international law governing this mechanism, which I refer to as 'humanitarian financial intervention', remains fragmented. This article offers the first systematic legal analysis of humanitarian financial intervention. It identifies six humanitarian purposes that states may pursue through asset freezes: preserving foreign assets from misappropriation, incapacitating foreign states or foreign nationals, coercing foreign states or foreign nationals to forsake abusive practices, compensating victims, ameliorating humanitarian crises through humanitarian aid or post-conflict reconstruction, and punishing human rights violators. Whether intervening states may pursue these objectives in any given context depends upon the interplay between several international legal regimes, including international investment law, collective-security agreements such as the UN Charter, the customary law of countermeasures, the law of armed conflict, and customary law governing the enforcement of judicial decisions. By disentangling the various international legal regimes that govern humanitarian financial intervention, this article furnishes a preliminary road map for evaluating the legality of past, present, and future financial interventions – including asset freezes directed against the Qaddafi regime during the 2011 Libyan Revolution.*

## 1 Introduction

For a generation of international lawyers who came of age during the 1980s and 1990s, the words 'humanitarian intervention' call to mind images of NATO bombers over Kosovo, US Marines in Haiti and Panama, and blue-helmeted UN peacekeepers in Somalia and East Timor. Scholarly commentary on the law and ethics of humanitarian intervention has focused almost exclusively on the threat or use of force in military and peacekeeping operations. Over the past several decades, however, states have developed a variety of other tools for advancing human rights abroad. These tools include non-forcible measures such as asset freezes, arms embargoes, travel bans,

* Associate Professor, Syracuse University College of Law. Email: ecriddle@law.syr.edu.

and the suspension of diplomatic relations. Among these alternatives to military force, asset freezes have become the international community's preferred response to humanitarian crises. Because asset freezes, as purely economic measures, do not involve the 'use of force' under Article 2(4) of the UN Charter,[1] they sidestep some of the thorny legal and ethical issues associated with military intervention. Nonetheless, international asset freezes qualify as a form of 'humanitarian intervention' to the extent that states freezing foreign assets ('host states') purposefully interfere in the domestic affairs of a foreign state (the 'target state'), undermining the target state's political independence and transgressing legal protections for the fair and equitable treatment of foreign investment, in order to promote cosmopolitan humanitarian values abroad.[2]

This article offers the first systematic legal analysis of humanitarian financial intervention. I argue that there are at least six distinct humanitarian objectives that host states may pursue through international asset freezes: preservation, incapacitation, coercion, compensation, amelioration, and punishment. Whether host states may pursue any particular humanitarian objective in a given context depends upon the interplay between several discrete strands of international law. Generally speaking, customary norms prohibiting foreign 'intervention' and protecting foreign investment from 'expropriation' prevent host states from singling out the assets of foreign states or foreign nationals for a discriminatory asset freeze without their consent. Hence, when host states impose asset freezes for humanitarian purposes, they bear a special burden of establishing that international law affirmatively authorizes foreign intervention into the political and economic affairs of a target state in contravention of ordinary protections for foreign investment. Host states may satisfy this burden by linking humanitarian asset freezes to one of four *lex specialis* regimes. First, collective-security agreements such as the UN Charter permit states to freeze foreign assets as authorized by the UN Security Council or a comparable regional body. Secondly, under the customary international law of countermeasures, states may freeze the assets of target states that violate obligations *erga omnes* to respect fundamental human rights. Thirdly, when states undertake humanitarian military intervention, they may freeze foreign assets pursuant to the law of armed conflict. Fourthly, customary international law permits states to freeze foreign assets for the enforcement of judicial decisions.

1 Although some states might be tempted to argue that international asset freezes violate the UN Charter's prohibition against the use of force, the inclusion of economic measures within Art. 2(4) was debated and soundly rejected by a vote of 26–2 during the drafting of the Charter: see Chayes, 'Nicaragua, the United States, and the World Court', 85 *Columbia L Rev* (1985) 1445, at 1463 n. 89; Elagab, 'Economic Measures Against Developing Countries', 41 *Int'l & Comp LQ* (1992) 682, at 688.

2 See Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, GA Res. 2131 (XX) (21 Dec. 1965), at paras 1–2 (hereinafter the 'Declaration on Intervention'); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV) (24 Oct. 1970) (hereinafter the 'Friendly Relations Declaration'); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Merits, Judgment [1986] ICJ Rep 14, at 101–103, paras 191–192, 202–203. Although the term 'humanitarian financial intervention' may encompass other measures such as bankrolling a foreign insurgency to undermine a repressive regime: see *Nicaragua*, *supra*, at paras 195, 205, 242, such measures are beyond the scope of this article.

Whenever states freeze foreign assets for humanitarian purposes, they must ground their intervention in one of these four *lex specialis* regimes, while respecting fundamental norms enshrined in international human rights law (HRL) and international humanitarian law (IHL).

By weaving together the various strands of international law that govern humanitarian financial intervention, this article furnishes an integrated framework for evaluating the legality of past, present, and future financial interventions. To illustrate the practical value of this framework, the article examines the framework's application to a series of controversies that arose during the 2011 Libyan Revolution, when the international community froze roughly US$160 billion in assets belonging to individuals and entities associated with Libyan leader Muammar Qaddafi.[3] Although these asset freezes enjoyed broad international support, international lawyers and diplomats openly debated whether (or how) the frozen assets could be used to advance humanitarian objectives in Libya. Most experts agreed that the Security Council could use Libya's frozen assets as a negotiating chip to persuade the Qaddafi regime to forsake its violent attacks against peaceful civilian demonstrators. Whether international law would support other humanitarian objectives was less clear. For example, could host states leverage Libya's frozen assets to force Colonel Qaddafi to relinquish power? Could they liquidate the assets to purchase humanitarian aid for Libyan civilians, compensate foreign victims of Libyan terrorism, or purchase arms for Libya's fledgling Transitional National Council (TNC)? Facing a dizzying array of policy alternatives, some host states dug in their heels, rejecting all invitations to release frozen assets pending further action by the Security Council.[4] Others proceeded to unfreeze Libyan assets without awaiting Security Council approval.[5] Notably absent from these debates was a rigorous account of the international legal regimes that govern humanitarian financial intervention.

This article concludes that international law supports key features of the international community's humanitarian financial intervention in Libya, but it also offers grounds for criticizing how some states administered – or proposed to administer – asset freezes against the Qaddafi regime. In accordance with conventional wisdom, the article confirms that the Security Council's mandatory sanctions regime against Libya (Resolutions 1970 and 1973) was consistent with international law, superseding the customary principle of non-intervention.[6] Asset freezes imposed by the US and the EU without prior Security Council authorization also constituted lawful responses to the Qaddafi regime's war crimes and crimes against humanity. On the other hand, this article raises the possibility that France, Italy, and Turkey might have violated

[3] See Meyers and Balefsky, 'UN Releases $1.5 Billion in Frozen Qaddafi Assets to Aid Rebuilding of Libya', *NY Times*, 25 Aug. 2011, available at: www.nytimes.com/2011/08/26/world/africa/26assets.html?pagewanted=all.

[4] E.g., Global Civilians for Peace in Libya, 'Russia: France Has No Authority To Give Libya Money to Rebels', 8 Mar. 2011, available at: http://globalciviliansforpeace.com/2011/08/03/russia-france-has-no-authority-to-give-libyan-money-to-he-rebels (Russia).

[5] E.g., *ibid.* (France).

[6] See UN Charter Art. 2(7) (exempting 'enforcement measures under Chapter VII' from the prohibition against intervention); SC Res. 1970, S/RES/1970 (26 Feb. 2011); SC Res. 1973, S/RES/1973 (17 Mar. 2011).

international law by releasing frozen assets to the TNC without Security Council authorization, and it rejects proposals advanced by American and French officials during the summer of 2011 for the redistribution of Libyan assets to foreign governments and victims of Libyan terrorism. The international community's asset freezes against the Qaddafi regime thus illustrate both the promise and the limits of state authority to promote human rights through international financial intervention.

## 2 The Humanitarian Objectives of International Financial Intervention

The basic mechanics of international financial intervention are straightforward: state regulators direct financial institutions to freeze assets of a foreign state or foreign nationals. Once assets have been frozen, they may not be paid out, withdrawn, transferred, or set off without the host state's permission. States frequently combine asset freezes with other measures such as blocking a target state from obtaining loans, credit, interest payments, transfer payments, and international aid – all in an effort to limit the target state's access to foreign capital. In some contexts, humanitarian financial intervention terminates when a host state 'unfreezes' foreign accounts, permitting investors to recover their assets. In other contexts, a host state might decide instead to redirect frozen assets toward compensating domestic judgment creditors or funding humanitarian aid or post-conflict reconstruction within the target state.

Although states have employed international asset freezes for decades, they rarely articulate their objectives with precision, and the international community has yet to develop a consistent vocabulary for distinguishing the various purposes that asset freezes may serve in international relations. Former UN Secretary-General Kofi Annan underscored these concerns in a 1995 position paper, 'Supplement to an Agenda for Peace', when he lamented that the Security Council's objectives for sanctions have 'not always been clearly defined' and, indeed, 'sometimes seem to change with time. This combination of imprecision and mutability makes it difficult for the Security Council to agree on when the objectives [of financial sanctions] can be considered to have been achieved and sanctions can be lifted.'[7]

Close scrutiny of state practice suggests that states have employed targeted asset freezes for at least six distinct humanitarian purposes: preservation, incapacitation, coercion, compensation, amelioration, and punishment. While these purposes are by no means mutually exclusive, the decision to prioritize one objective over another may have important consequences for the administration of frozen assets.

### A *Preservation*

On some occasions, host states have frozen foreign assets to preserve them from misappropriation or spoliation. For example, shortly after the outbreak of World War II,

7 Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, at para. 68, UN Doc. A/50/60-S/1995/1 (1995) (hereinafter 'Supplement to an Agenda for Peace').

many countries in North and South America froze the assets of Denmark and Norway to ensure that those assets would not fall into the hands of Nazi Germany.[8] Some of these measures remained in place for decades as host states sought assurances that frozen assets would return in an orderly fashion to the original investors.[9] In 1990, many states took similar precautionary measures in response to Iraq's invasion of Kuwait, freezing accounts to ensure that Kuwait's assets would remain intact pending the expulsion of Iraq's military.[10] In other contexts, international asset freezes have been used to combat public corruption, preserving a target state's national patrimony to ensure that misappropriated public funds would be available to advance international human rights for a foreign people.[11] In each of these settings, international intervention ensured that frozen assets would remain available to promote human rights.

### B *Incapacitation*

International financial intervention may also advance human rights by restricting a target state's access to resources that could be used to advance pernicious policies. During World War II, many states froze the offshore assets of Axis powers to limit their capacity for military aggression.[12] More recently, states have endeavoured to combat international terrorism, narco-trafficking, and nuclear proliferation by imposing financial sanctions against renegade non-state actors and their state sponsors.[13] While some of these examples arguably fall outside the scope of 'humanitarian intervention', they illustrate how targeted asset freezes may be used to limit the destructive capacity of human rights violators abroad. Even when international asset freezes do not render foreign actors financially incapable of violating human rights, they may shift the political dynamic within a target state, empowering rights-respecting factions to introduce reforms that would narrow the legal authority and practical capacity of state and non-state actors to violate human rights.

### C *Coercion*

A third potential objective of international financial sanctions is coercion: by freezing foreign accounts, host states acquire a powerful bargaining chip that they may



8 Domke, 'Western Hemisphere Control over Enemy Property: A Comparative Survey', 11 *L & Contemp Prob* (1945) 3, at 4.

9 See Newcomb, 'Office of Foreign Asset Control', in R.R. Newcomb, *Coping with US Export Controls 1994* (Practising Law Institute Commercial Law and Practice Handbook Series No. 705, 1994), at 397, 411.

10 *Ibid.*, at 409–411.

11 See e.g., 'Swiss Freeze $1bn in Gaddafi, Mubarak, Ben Ali Assets', *BBC News Middle East*, 3 May 2011, available at: www.bbc.co.uk/news/world-europe-13264931.

12 See Sommerich, 'A Brief About Confiscation', 11 *L & Contemp Prob* (1945) 152, at 152.

13 See Staibano, 'Trends in UN Sanctions: From ad hoc Practice to Institutional Capacity Building', in P. Wallensteen and C. Staibano (eds), *International Sanctions: Between Words and Wars in the Global System* (2005), at 31, 41–42.

use to extract humanitarian concessions from a foreign state.[14] States have imposed coercive asset freezes for a variety of humanitarian purposes, including facilitating the release of American hostages in Iran, securing reparations for victims of Libyan terrorist attacks, and incentivizing target states to accept human rights monitors.[15] Asset freezes have pressured states to abandon the pursuit of nuclear weapons, sever ties with drug cartels and terrorist organizations, and reinstate democratically elected governments.[16] Experience suggests that coercive asset freezes often fail to achieve their objectives due to tepid enforcement among participating host states and target states' unwavering commitment to repressive policies. Whether coercive asset freezes can be employed successfully to promote human rights abroad will naturally depend, as well, upon the relative value of a target state's frozen assets and whether the target state is reliant upon these resources to advance its core interests.

### D *Compensation*

Fourthly, states have employed asset freezes to secure compensation for victims of human rights abuse abroad. Compensatory asset freezes differ from coercive asset freezes to the extent that they do not seek to *compel* a target state to act or refrain from acting in any particular manner. Instead, compensatory asset freezes bypass a foreign state's volition entirely, using frozen assets to secure remedies for victims of the target state – typically without the target state's consent. Such was the case, for example, when US courts froze assets of former-Philippine President Ferdinand Marcos to ensure that victims of human rights abuse in the Philippines could obtain compensation in civil actions.[17] Similarly, assets frozen during the Cuban Missile Crisis and Iran Hostage Crisis have been used to satisfy civil judgments against Cuba and Iran for human rights violations such as extrajudicial killing, kidnapping, and torture.[18] Thus, international asset freezes may ensure that targets states cannot escape their legal obligation to provide remedies for human rights violations.

[14] As employed throughout this article, the term 'coercion' has a narrower meaning than is typical in international law and international relations scholarship. While all financial interventions are 'coercive' in the broad sense that they interfere with a target state's administration of its own resources, only some financial interventions are 'coercive' in the narrower sense contemplated here, in that they aspire to induce a target state to satisfy its human rights obligations.

[15] See Carswell and Davis, 'The Economic and Financial Pressures: Freeze and Sanctions', in C. Warren *et al.*, *American Hostages in Iran: The Conduct of a Crisis* (1985), at 173, 177; O'Harrow and Grimaldi, 'Libyan Gold Rush Followed End to Sanctions'. *Washington Post*, 25 May 2011, available at: www.washingtonpost.com/world/middle-east/libyan-gold-rush-followed-end-to-sanctions/2011/05/25/AGGgbVBH_story.html.

[16] See, e.g., SC Res. 1737, S/RES/1737, pmbl and paras 3–12 (27 Dec. 2006); Staibano, *supra* note 13, at 41.

[17] See *Hilao v. Estate of Marcos*, 103 F 3d 762 (9th Cir. 1996).

[18] E.g., *Alejandre v. Republic of Cuba*, 996 F Supp 1239 (SD Fla. 1997); *Cicippio v. Islamic Republic of Iran*, 18 F Supp 2d. 62 (DDC 1998); see generally J.K. Elsea, *Congressional Research Service Report for Congress: Suits Against Terrorist States by Victims of Terrorism* (8 Aug. 2008), at 8–9, 69, available at: www.fas.org/sgp/crs/terror/RL31258.pdf.

## E *Amelioration*

A fifth humanitarian objective that states have pursued through international asset freezes is the amelioration of humanitarian crises. Ameliorative financial intervention, like compensatory intervention, involves the redistribution of a target state's resources without its consent. Rather than focus on remediating past human rights violations, however, ameliorative intervention involves the unfreezing of a target state's assets to address conditions that continue to threaten human rights. For example, host states might use frozen assets to purchase food, construct temporary shelter, or deliver medical care to internally displaced persons within a target state. Alternatively, frozen assets might be directed toward post-conflict reconstruction such as rebuilding roads and schools. These ameliorative objectives have been invoked on several occasions when the international community has imposed asset freezes against Iraq. During the early 1990s, when the Iraqi government refused to use its oil revenues to address severe shortages of food and medicine within its borders, the Security Council directed UN-member states to freeze and transfer Iraqi assets into an international escrow account for 'the provision of humanitarian relief in Iraq'.[19] Coalition forces imposed similar measures when they returned to Iraq ten years later, sequestering the assets of Saddam Hussein's Baath Party to ensure that these resources would be available to address 'urgent humanitarian relief and reconstruction requirements'.[20] While these examples are unusual in a variety of respects, they illustrate how international asset freezes may be employed to ameliorate humanitarian crises abroad.

## F *Punishment*

Lastly, host states may seek to freeze foreign assets to punish target states or individual foreign nationals for violating human rights. International asset freezes have expressive power as a signal that the international community condemns a target state's behaviour. In theory, asset freezes may also enable the international community to inflict retribution upon target states for past human rights violations and deter future violations. Indeed, US officials frequently characterize international asset freezes as 'punitive', emphasizing both deterrence and retribution as important objectives.[21] Punitive asset freezes are distinct from coercive asset freezes, for present purposes, because their primary purpose is not to compel a human rights violator to change its current practices but rather to bolster the rule of law by imposing a penalty for past violations and discouraging future violations.

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[19] SC Res. 778, pmble and para. 5(c)(ii), S/RES/778 (2 Oct. 1992).

[20] Walerstein, 'Coping with Combat Claims: An Analysis of the Foreign Claim Act's Combat Exclusion', 11 *Cardozo J Conflict Resolution* (2009) 319, at 340 (quoting Paul Bremer).

[21] See Newcomb, *supra* note 9, at 412 (characterizing financial sanctions against Iran in 1979 as 'punitive'); Garmise, 'The Iraqi Claims Process and the Ghost of Versailles', 67 *NYU L Rev* (1992) 840, at 841 n. 11 (noting US officials' contention 'that severe punishment of Iraq [through financial sanctions] would serve as a deterrent to other countries').

In the past, state regulators have tended to characterize all international asset freezes as 'coercive',[22] or have divided asset freezes into two categories: 'protective' and 'punitive'.[23] The foregoing discussion suggests, however, that these traditional categories do not capture the full range of options for humanitarian financial intervention. While coercive asset freezes are a common response to human rights crises, they are not the only conceivable response; host states may also freeze foreign assets to incapacitate a repressive regime, secure compensation for victims, or fund the procurement and distribution of humanitarian aid abroad. In all, there are at least six distinct options that host states may consider when they freeze foreign assets for humanitarian purposes: preservation, incapacitation, coercion, compensation, amelioration, and coercion.[24] To be sure, states could have other reasons for freezing foreign assets, including the desire to focus international attention on a global problem, provide moral support to political allies, or lay the groundwork for military action.[25] The international community's reasons for freezing a target state's assets are often multi-faceted and may evolve over time as circumstances change. Nonetheless, whenever states use international asset freezes as a tool for human-rights promotion, their humanitarian objectives are likely to fall into one or more of these six categories.

## 3 The International Law of Humanitarian Financial Intervention

Does international law permit states to freeze foreign assets for all six of these humanitarian objectives? In the discussion that follows, I seek to answer this question by surveying the various international legal regimes that govern international asset freezes. As with any exercise in legal cartography, some nuances of the legal terrain receive only passing consideration, inviting further elaboration in future scholarship. To the extent that the legal norms governing asset freezes require further clarification or refinement, the following sections identify significant gaps and ambiguities while suggesting tentative strategies for progressive development. What emerges over the course of this discussion is a serviceable roadmap that states and international organizations may use to navigate the international law of humanitarian financial intervention.

### A *Asset Freezes as International Intervention*

Humanitarian asset freezes require special legal justification because they represent a form of 'dictatorial interference' that violates general principles of international legal



22 See, e.g., Watson Institute for International Studies, *Targeted Financial Sanctions: A Manual for Design and Implementation, Contribution from the Interlaken Process* (2001), at ix, available at: www.seco.admin.ch/themen/00513/00620/00639/00641/index.html?lang=en.

23 See, e.g., Newcomb, *supra* note 9, at 656.

24 Some asset freezes within these categories might not constitute 'humanitarian' measures, strictly speaking. For example, asset freezes designed to disrupt transnational drug cartels (incapacitation) or deter target states from developing nuclear weapons (coercion) would bear only a highly attenuated connection to international human rights.

25 See G.C. Hufbauer and J.J. Schott, *Economic Sanctions Reconsidered: History and Current Policy* (1985), at 4–10.

order.[26] There are at least two possible paths one might take to explain why international asset freezes constitute a *prima facie* wrong under international law. Both paths lead to the conclusion that states may not freeze foreign assets for humanitarian purposes without furnishing an affirmative legal justification.

One account, which I will call the 'anti-subordination theory', holds that any measures used to subordinate a state's sovereign powers to foreign control – including international asset freezes – constitute acts of wrongful 'intervention'. When host states freeze foreign assets to incapacitate a target state, coerce a target state to change its policies, direct the allocation of a target state's resources, or punish a target state or its nationals for human rights violations abroad, they assert dictatorial control over 'matters which are essentially within [the other state's] domestic jurisdiction.'[27] As Professor Lori Fisler Damrosch has observed,[28] such non-forcible interference arguably transgresses customary principles of external self-determination and non-intervention that are embedded in the UN Charter,[29] affirmed in soft-law instruments such as the UN General Assembly's Declarations on Intervention[30] and Friendly Relations,[31] and endorsed in binding regional agreements in Africa,[32] the Americas,[33] and Europe.[34] The text of the Charter of the Organization of American States captures the spirit of these instruments:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.[35]

While international law has yet to articulate with precision when non-forcible actions rise to the level of 'intervention', asset freezes that are designed to incapacitate, coerce, supplant, or punish a foreign state arguably bear the hallmarks of an objectionable 'interference or attempted threat'. On this reading, the fact that a host state operates exclusively within its own territorial jurisdiction when it freezes foreign assets does not absolve it of international responsibility because the *purpose* and *effect* of its actions

26 See S. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (1996), at 10 ('most writers on the topic of intervention narrow the concept to some form of objectionable or "dictatorial" interference in the affairs of a state').

27 UN Charter, Art. 2(7).

28 See Damrosch, 'Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs', 83 *AJIL* (1989) 1, at 6–13.

29 See UN Charter, Arts 1(2), 2(1), and 55.

30 Declaration on Intervention, *supra* note 2; see also *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 2, at 101–103, paras 191–192, 202–204 (characterizing this principle as customary international law).

31 Friendly Relations Declaration, *supra* note 2.

32 Organization of African Unity, Charter, 25 May 1963, 2 ILM (1963) 766, Art. III.

33 Charter of the Organization of American States, 30 Apr. 1948, 2 UST 2394, TIAS No. 2361, 119 UNTS 3, Arts 18 and 19 (hereinafter the 'OAS Charter').

34 Conference on Security and Co-operation in Europe, Final Act (Helsinki Accord), 1 Aug. 1975, 73 Dep't St. Bull. 323 (1975), reprinted at 14 ILM (1975) 1292, Principle VI (Non-Intervention in Internal Affairs).

35 OAS Charter, *supra* note 33, Art. 18.

are transparently interventionist: to subordinate a foreign state and its assets to the host state's superintendent power.

Some might contend that the anti-subordination theory casts too broad a net. Arguably, the international prohibition against 'intervention' does not preclude states from engaging in otherwise lawful acts of retorsion, such as the withdrawal of foreign aid or the suspension of diplomatic relations, simply because these measures might compromise a target state's sovereign interests. From the perspective of international law, acts of retorsion are wholly unobjectionable when their purpose is to encourage respect for fundamental human rights – an area where states lack legal discretion to chart a different course. On this second account of the prohibition against intervention, which I will call the 'wrongful means theory', only acts that are *prima facie* wrongful under international law (e.g., armed attacks, breaches of trade agreements) constitute wrongful 'intervention'.

Even under the wrongful means theory, international asset freezes qualify as 'intervention'. Discriminatory asset freezes are a form of wrongful 'expropriation' because they deprive investors of the right to manage, use, and effectively control their property. When host states impose such measures on foreign investment, customary international law requires them to satisfy the 'international minimum standard' of 'fair and equitable treatment'.[36] Although the precise content of this customary obligation remains controversial, international tribunals have understood the minimum standard to include respect for due process (e.g., access to justice, non-arbitrariness) and good faith (e.g., consistency, transparency, non-arbitrariness, respecting reasonable expectations).[37]

Over the past decade, a number of states have attracted criticism for failing to comply with these standards when they have frozen the property of alleged terrorist organizations and their alleged supporters. At the same time, but with less fanfare, states also have neglected these safeguards when they have imposed asset freezes against foreign states and foreign nationals for humanitarian purposes. When foreign nationals find their investments targeted for humanitarian asset freezes, they typically have no access to formal procedural mechanisms for challenging their designations and reclaiming their assets. Moreover, states have yet to promulgate formal criteria for selecting targets, raising concerns about inconsistency, inadequate transparency, and the potential for arbitrary decision-making. Aside from these requirements of 'fair and equitable treatment', international asset freezes frequently violate other standards established in bilateral investment treaties such as the requirements of 'national treatment', 'most-favoured-nation treatment', 'full protection and security', and the right to transfer assets. In short, judged against the prevailing standards for the protection of foreign investment, international asset freezes typically constitute *prima facie*



[36] See OECD, 'Fair and Equitable Treatment Standard in International Investment Law', Sept. 2004, available at: www.oecd.org/dataoecd/22/53/33776498.pdf (last visited 22 June 2012) (citing tribunal decisions); Schwebel, 'The Influence of Bilateral Investment Treaties on Customary International Law', 98 *ASIL Proceedings* (2004) 27.

[37] *Ibid.*, at 27–36.

wrongful means – measures that require affirmative justification under international law.[38]

Some international asset freezes do not qualify as 'intervention' under either the anti-subordination theory or the wrongful means theory. Consider, for example, a host state that prevents foreign assets from falling into the hands of a predacious occupying power (e.g., Iraq in Kuwait) or freezes the accounts of a foreign official to return public funds misappropriated through corruption (e.g., former Nigerian dictator Sani Ambacha). In contexts such as these, a host state could justify financial intervention based upon either (1) a foreign state's express consent to protection, where applicable, or (2) a legal presumption that foreign investors tacitly consent to preservative regulatory action when they place their assets within a host state's jurisdiction.[39] On either account, a host state that preserves foreign assets from misappropriation could not be accused of 'dictatorial interference' or 'unfair and inequitable treatment' in any meaningful sense.

Of course, such consent-based asset freezes are relatively rare. More often than not, states that freeze foreign assets to promote human rights abroad do so in the face of a target state's sustained and bitter resistance. The question in most contexts, therefore, is whether the *prima facie* wrongfulness of such measures can be redeemed by the host state's reliance upon superseding norms of international *lex specialis*. The burden of demonstrating that such norms exist and apply to a particular context rests upon the states that undertake humanitarian financial intervention.

## B *Authorizing Humanitarian Financial Intervention*

International law does permit states to use asset freezes to promote human rights abroad, but only under limited circumstances. A state that singles out foreign assets for a targeted freeze without the target state's consent must ground its intervention in one of four distinct international legal regimes: collective-security agreements, the law of countermeasures, the law of armed conflict, or customary law governing the enforcement of judicial decisions. Each of these legal regimes is unique and warrants independent consideration. Analysed collectively, however, they comprise an integrated legal framework for humanitarian financial intervention.

### *1. Collective-security Agreements*

Some international asset freezes derive their legal authority from collective-security agreements that authorize intervention for humanitarian purposes. The pre-eminent example is the UN Charter, which allows the Security Council to



38 Some BITs permit derogation from ordinary investment protections as necessary to fulfil their 'obligations with respect to the maintenance or restoration of international peace or security, or the protection of [their] own essential security interests': see US Model Bilateral Investment Treaty, Art. 18, available at: www.state.gov/documents/organization/117601.pdf.

39 See Responsibility of States for Internationally Wrongful Acts, Art. 20, GA Res. 56/83, UN Doc. A/RES/56/83, Annex (12 Dec. 2001) (hereinafter the 'DARSIWA').

coordinate multilateral asset freezes and other non-forcible sanctions to address 'any threat to the peace, breach of peace, or act of aggression'.[40] Beginning with Iraq's invasion of Kuwait in 1990,[41] the Security Council has imposed financial sanctions against states and non-state actors in many countries – often in an effort to promote human rights observance.[42] Some regional agreements also provide for coordinated intervention. For example, the Constitutive Act of the African Union empowers its Assembly of Heads of State and Government to green-light intervention in response to 'war crimes, genocide and crimes against humanity' or an affirmative request from a member state 'to restore peace and security'.[43] Other instruments such as the Treaty of Guarantee Between the Republic of Cyprus and Greece, the United Kingdom and Turkey (the 'Treaty of Guarantee'),[44] and the 1993 Cotonou Agreement for the resolution of hostilities in Liberia[45] likewise contemplate third-state intervention to address systemic human rights abuses. When states become parties to agreements such as these, they effectively authorize other states to serve as secondary guarantors for the human rights of their own people.

Pursuant to its authority under Chapter VII of the UN Charter, the Security Council has imposed asset freezes for a variety of humanitarian objectives. Although the Security Council rarely articulates its objectives with precision, it has pursued at least five of the six humanitarian objectives identified in this article: preservation, incapacitation, coercion, compensation, and amelioration.[46] Few contemporary observers would dispute that the Security Council possesses the authority to approve international financial intervention for these purposes when such measures are necessary to promote international peace and security.

The one humanitarian objective that the Security Council has disavowed consistently is the use of financial sanctions as punishment.[47] Whether the Charter confers punitive powers on the Security Council has been a subject of considerable academic



40 UN Charter, Arts 39, 41.

41 See SC Res. 661, at para. 4, S/RES/661 (6 Aug. 1990).

42 E.g., SC Res. 1975, at para. 12, S/RES/1975 (30 Mar. 2011) (Côte d'Ivoire).

43 Constitutive Act of the African Union, Arts 4(h), 4(j), 11 July 2000, 2158 UNTS 3; see also *biid.,* Art. 23(2) (discussing regional sanctions). But see OAS Charter, *supra* note 33, Arts 18 and 19 (prohibiting regional economic intervention).

44 Treaty of Guarantee, Cyprus–Greece–UK–Turkey, Arts 2, 3, 16 Aug. 1960, 382 UNTS 4.

45 Cotonou Agreement, Art. 8(3), 25 July 1993, IGNU-NPFL-ULIMO, attached to UN SC, Letter dated 6 Aug. 1993, from the Chargé d'Affaires A.I. of the Permanent Mission of Benin to the UN Addressed to the Secretary-General, UN Doc S/26272 (1993).

46 See, e.g., SC Res. 1532, at para. 1, S/RES/1532 (12 Mar. 2004) (preservation, incapacitation); SC Res. 1343, at para. 2(d), S/RES/1343 (7 Mar. 2001) (incapacitation); SC Res. 1737, *supra* note 16, pmble and paras 3–12 (coercion); SC Res. 674, at para. 9, S/RES/674 (29 Oct. 1990) (compensation); SC Res. 778, *supra* note 19, pmble and para. 5(c)(ii) (amelioration).

47 See, e.g., Letter dated 2 Sept. 2005 from the Chairman of the SC Committee established pursuant to Res. 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the SC, at paras 41–42, UN Doc. S/2005/572 (9 Sept. 2005), available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/407/94/PDFN0540794.pdf?OpenElement; *cf.* Supplement to an Agenda for Peace, *supra* note 7, at para. 66.

debate.[48] Given the Security Council's steadfast refusal to characterize its financial sanctions as punitive, however, states would be wise to apply a strong presumption against construing Security Council resolutions to authorize punitive financial sanctions. According to this presumption, states may not invoke the UN Charter or other collective-security agreements to justify imposing punitive sanctions against foreign states or foreign nationals in the absence of express authorization from the Security Council or a comparable regional organization.

### 2. *The Law of Countermeasures*

Humanitarian financial intervention generally will be most effective when the Security Council requires all UN member states to participate in coordinated financial sanctions.[49] In some contexts, however, the Security Council has been unable to respond to humanitarian crises due to entrenched political opposition or intractable disagreement about the best way to structure multilateral sanctions. Gridlock in the Security Council may undermine the effectiveness of multilateral financial intervention by enabling target states to move their offshore assets to safe havens. In an era of electronic banking, when assets travel across borders at the click of a mouse, even the slightest delay in multilateral coordination may have profound consequences.

Fortunately, collective-security agreements such as the UN Charter are not the only source of legal authorization for international financial sanctions. Even in the absence of authorization from the Security Council or a comparable regional organization, states are free to impose targeted asset freezes in response to human rights abuses abroad, provided that they ground their financial intervention in one of three alternative sources of international law: the law of countermeasures, the law of armed conflict, or customary law governing the enforcement of judicial decisions.

The primary alternative to treaty-based collective-security regimes is the customary international law of countermeasures. The term 'countermeasures' refers to 'the act of non-compliance, by a State, with its obligations owed to another State, decided in response to a prior breach of international law by that other State and aimed at inducing it to respect its obligations'.[50] As the International Law Commission (ILC) has recognized in its Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Draft Articles on State Responsibility) and its Draft Articles on the Responsibility of International Organizations, customary international law permits states and regional organizations to freeze foreign assets, suspend trade agreements,



[48] Some legal scholars have argued that the Charter does not authorize punitive sanctions. See, e.g., E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (1984), at 70. This argument has become less persuasive since the 1990s as the SC has invoked its Charter powers to establish *ad hoc* criminal tribunals such as the ICTY and the ICTR. See SC Res. 827, S/RES/827 (25 May 1993); SC Res. 955, S/RES/955 (8 Nov. 1994). Arguably, the Charter authorizes the SC to impose punitive financial sanctions as necessary 'to maintain or restore international peace and security': UN Charter, Arts 39, 41.

[49] See Bapat and Morgan, 'Multilateral Versus Unilateral Sanctions Reconsidered: A Test Using New Data', 53 *Int'l Stud Q* (2009) 1075.

[50] C.J. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005), at 19–20; see also *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* [1997] ICJ Rep 1, at paras 82–87; *Air Services Agreement Case (France v. United States)*, 18 RIAA (1978) 416, at para. 83.

and impose other non-forcible measures as necessary to address another state's breach of international law.[51] These countermeasures constitute a form of 'permitted self-help' that compensates for the dearth of centralized institutions capable of consistently enforcing states' international legal obligations.[52]

In the past, some courts and publicists have conceptualized countermeasures in exclusively bilateral terms, asserting that states lack standing to impose countermeasures unless they have suffered a direct injury. This bilateral approach would preclude third states from imposing countermeasures in response to human rights abuses against foreign nationals abroad.[53] Support for this approach has eroded over the past several decades, however, in favour of a broader conception of third-state standing.[54] In the celebrated *Barcelona Traction* case, the ICJ appeared to endorse third-state countermeasures when it embraced the concept of obligations *erga omnes*, observing that some international obligations are owed to all members of the international community.[55] Following the ICJ's lead, the ILC accepted the general concept of obligations *erga omnes* in its Draft Articles on State Responsibility,[56] although it ultimately declined to decide whether the concept would support third-state countermeasures.[57]

Recent studies by Martin Dawidowicz and Christian Tams make a persuasive case that state practice and *opinio juris* support third-state countermeasures for violations of *erga omnes* norms.[58] Dawidowicz and Tams demonstrate that states have imposed third-party countermeasures for humanitarian purposes in dozens of incidents over the past several decades.[59] This growing body of state practice has involved states from around the world,[60] and it has elicited scant opposition from disinterested states.[61] Thus, just as financial sanctions have become a standard feature of the Security Council's response to humanitarian crises, third-state countermeasures have become firmly embedded in state practice and *opinio juris* as a lawful mechanism for responding to breaches of obligations *erga omnes*.

When states freeze assets as a humanitarian countermeasure, their discretion is circumscribed by a variety of legal constraints. The law of countermeasures does not authorize

[51] See DARSIWA, *supra* note 39, Arts 49–54; International Law Commission, Draft Articles on Responsibility of International Organizations, Art. 22, 2 Yrbk Int'l L Comm (2011).

[52] Tams, *supra* note 50, at 19.

[53] See *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase [1966] ICJ Rep 6, at paras 40–47 (18 July); H. Lauterpacht, *Oppenheim's International Law* (1955), at 312–323.

[54] See Charney, 'Third State Responsibilities in International Law', 10 *Michigan J Int'l L* (1989) 57, at 59.

[55] *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, Second Phase [1970] ICJ Rep 3, at paras 33–34 (5 Feb.).

[56] See DARSIWA, *supra* note 39, Art. 48(1)(b).

[57] *Ibid.*, at Art. 54 and comments.

[58] Dawidowicz, 'Public Law Enforcement Without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and Their Relationship to the UN Security Council', 77 *British Yrbk Int'l L* (2007) 333; Tams, *supra* note 50.

[59] *Ibid.*, at 231.

[60] *Ibid.*, at 235–237.

[61] Even during the ILC's ultimately inconclusive debates over the customary status of third-state countermeasures, the vast majority of states supported the inclusion of a more robust statement in the Draft Articles on State Responsibility with only a handful (principally, Japan) offering sustained opposition. See Tams, *supra* note 50, at 243–246.

state regulators to appropriate, transfer, or otherwise effect a permanent deprivation of frozen assets.[62] Hence, states may not freeze frozen assets to incapacitate or punish foreign states,[63] nor may they unilaterally divert frozen assets into victim compensation funds (compensation) or the coffers of humanitarian relief organizations (amelioration).[64] States may freeze foreign assets only temporarily to compel a target state to abandon unlawful practices and furnish appropriate remedies (*coercion*).[65] The scope of an asset freeze must be proportional to a state's lawful objectives.[66] In addition, states ordinarily may not freeze frozen assets without first calling upon a target state to satisfy its primary obligations, thereby affording a final opportunity for compliance,[67] and they may not impose countermeasures if the target state has initiated independent dispute-resolution procedures.[68] Finally, customary international law does not necessarily support the use of countermeasures in response to *all* human rights violations; third states may impose countermeasures only when confronting especially grave human rights violations such as genocide, slavery, or crimes against humanity.[69] Thus, the customary law of countermeasures allows states to freeze foreign assets only under limited circumstances and for limited purposes.

While it is generally accepted that a foreign state's *public* property is subject to countermeasures, BIT protections notwithstanding,[70] the same cannot necessarily be

[62] See O.Y. Elegab, *The Legality of Non-forcible Counter-measures in International Law* (1988), at 111.

[63] See D. Shelton, *Remedies in International Human Rights Law* (2nd edn, 2005), at 357; Rosenstock and Kaplan, 'Fifty-Third Session of the International Law Commission', 96 *AJIL* (2002) 412, at 414.

[64] Although states may use countermeasures to compel a target state to provide compensation as required under international law, the customary law of countermeasures does authorize the confiscation of foreign property for direct compensation or amelioration: see Zoller, *supra* note 48, at 51.

[65] See DARSIWA, *supra* note 39, Arts. 35, 36, and 49, comment 1; Alland, 'Countermeasures of General Interest', 13 *EJIL* (2002) 1221, at 1226.

[66] See, e.g., *Gabčikovo-Nagymoros Project, supra* note 50, at para. 85 (27 Sept.); *Air Services Agreement Case, supra* note 50, at paras 83, 90 (1978).

[67] See DARSIWA, *supra* note 39, Art. 52(1)(a); *Gabčíkovo-Nagymaros Project, supra* note 50, at 56, para. 84; *Responsibility of Germany for Damage Caused in the Portuguese Colonies in the South of Africa (Portugal v. Germany) ('Naulilaa')*, 31 July 1928, 2 RIAA 1011, at 1026. The Draft Articles on State Responsibility recognize, however, that states have not adhered to this requirement when 'urgent countermeasures' have been viewed as strictly necessary 'to protect [their] rights' – as, e.g., when a target state would exploit this warning to move extraterritorial assets to positions of safety: DARSIWA, *supra* note 39, Art. 52. David Bederman has explained that this exception reflects a well-founded concern that 'certain kinds of countermeasures (such as the freezing of assets and temporary stay orders) are effective only when the opposing state receives no advance notice of their consideration': Bederman, 'Counterintuiting Countermeasures', 96 *AJIL* (2002) 817, at 825.

[68] DARSIWA, *supra* note 39, Art. 52(3). Some commentators have argued that the mere *availability* of inter-state dispute settlement procedures in the human rights context is enough to preclude countermeasures: see Simma and Pulkoski, 'Of Planets and Universe: Self-Contained Regimes in International Law', 17 *EJIL* (2006) 483, at 526. The Draft Articles on State Responsibility do not endorse this view: see Paparinskis, 'Investment Arbitration and the Law of Countermeasures', 79 *British Yrbk Int'l L* (2008) 264, at 304 and n. 188.

[69] See Dawidowicz, *supra* note 58, at 347 (noting 'overwhelming support among commentators and governments for the view that only a serious breach of an *erga omnes* violation might potentially justify resort to third-party countermeasures').

[70] See Paparinskis, *supra* note 68, at 317–351; see generally Verhoeven, 'The Law of Responsibility and the Law of Treaties', in J. Crawford, A. Pellet, and S. Olleson (eds), *The Law of International Responsibility* (2010), at 105, 111 ('In principle, a derogation to any treaty can be taken by a countermeasure').

said of *private* foreign property. As Martins Paparinskis has shown, the relationship between countermeasures and private investment is complicated by the fact that the rights of investors 'under investment protection treaties can be conceptualized either as being the rights owed to their home States or rights accruing directly from international treaties'.[71] If the former view is correct and investors' rights are merely derivative of state rights under international custom and BITs (as one arbitral tribunal has suggested[72]), then private assets are valid targets for countermeasures. On the other hand, if international custom and BITs grant investors direct rights that are independent of state diplomatic protection (as another tribunal has concluded[73]), then private assets arguably are not a valid target for inter-state countermeasures. At present, it is unclear which of these approaches, the derivate-rights theory or direct-rights theory, will gain the upper hand in the jurisprudence of international investment tribunals.

Recent events suggest, however, that an intermediate approach may be emerging in state practice. Even if states generally may not target private foreign assets when imposing countermeasures, the intermediate approach suggests that states may freeze the private assets of foreign officials who bear direct responsibility for a target state's internationally wrongful conduct. During the 2011 Arab Spring, for example, the EU and the US responded to human rights abuses in Libya, Syria, and Iran by freezing the private assets of public officials who directed or carried out those abuses.[74] In each of these settings, the asset freezes were imposed without Security Council authorization with the stated purpose of coercing a foreign state to respect human rights.[75] At the same time, however, host states took care to emphasize that their countermeasures were designed to have an impact on the target state's governing 'regime, not the civilian population'.[76] In effect, these countermeasures struck a compromise between the derivative-rights theory and the direct-rights theory: they preserved direct-rights-style investment protection for ordinary foreign investors, while treating the private property of regime leaders as constructively 'public assets' that were valid targets for interstate countermeasures. Further study will be necessary to confirm whether this growing body of state practice meets the generality and *opinio juris* requirements for customary international law. Nonetheless, the early returns suggest that the law of countermeasures may be evolving to permit host states to freeze not only the public

71 *Ibid.*, at 334.

72 See *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico*, ICSID AF Case No. ARB/(AF)/04/5, Award, 21 Nov. 2007, at paras 161–180.

73 See *Corn Products Int'l, Inc. v. Mexico*, ICSID AF Case No. ARB/(AF)/04/1, Decision on Responsibility, 15 Jan. 2008, at paras 161–179.

74 See, e.g., 'EU To Impose Sanctions on Syrian Officials; UN To Send Team to Daraa', *Haaretz*, 6 May 2011 (discussing EU asset freezes imposed against '14 Syrian officials for their part in a violent government crackdown against protesters').

75 See, e.g., Council of the EU, Press Release, 'Council Conclusions on Syria', 14 May 2012, available at: www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/130205.pdf (Syria); Council Reg. 204/2011, OJ (2011) L58/1 (Libya); Exec. Order No. 13606, 22 Apr. 2012 (Syria and Iran); Exec. Order No. 13582, 17 Aug. 2011 (Syria); Exec. Order No. 13566, 25 Feb. 2011 (Libya).

76 See Council of the EU, Press Release 9816/12, 'Syria: Council Strengthens EU Sanctions Once More', 14 May 2012 (quoting EU High Representative Catherine Ashton).

assets of rights-abusing states but also, at a minimum, the private assets of public officials who orchestrate or carry out a target state's internationally wrongful conduct.

### *3. The Law of Armed Conflict*

During armed conflict, customary international law affords a broader menu of options for humanitarian financial intervention. As in peacetime, states may use countermeasures to compel a target state to discontinue and remedy its human rights violations (coercion). Additionally, the law of armed conflict authorizes states at war to impose financial measures of a more intrusive and even permanent character; not only may states at war freeze foreign assets to coerce an enemy state, they may also appropriate foreign assets temporarily for their own use ('seizure') or vest foreign assets permanently in their own treasuries ('confiscation')[77] to advance their 'military objectives'.[78] The primary legal constraints on a belligerent state's authority to impose such measures are: (1) the principle of military necessity, which requires that such measures offer 'a definite military advantage',[79] and (2) the principle of proportionality, which requires that the resulting impact on a civilian population not be 'excessive in relation to the concrete and direct military advantage anticipated'.[80]

Historically, the law of armed conflict's principle of distinction also played an important role in regulating belligerent asset freezes. From the 18th century to the early 20th century, customary international law permitted states at war to confiscate an enemy state's *public* assets during wartime, but *private* assets of enemy nationals were not subject to belligerent confiscation. States could seize private enemy assets during armed conflict only on a temporary basis, subject to strict obligations of restitution or compensation.[81]

This customary distinction between public and private enemy assets – long considered an 'impregnable rule' of customary international law – began to erode during World War I as the Allied Powers allowed their nationals to exploit the private investments of enemy nationals for their own gain.[82] The Treaty of Versailles papered over these illegal practices by authorizing the Allies 'to retain and liquidate all the property and interests of German subjects or companies under their control in their territory' pending Germany's payment of war reparations.[83] With the arrival of World War II, the Allied Nations brazenly

[77] See Santerre, 'From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield', 124 *Military L Rev* (1989) 111, at 112.

[78] Protocol I Additional to the Geneva Conventions of 12 Aug. 1949, Relating to the Protection of Victims of International Armed Conflicts Art. 52(2), 8 June 1977, 1125 UNTS 3 (hereinafter 'Protocol I').

[79] *Ibid.*

[80] *Ibid.*, Art. 51(5). Although proportionality features centrally in both the law of countermeasures and the law of armed conflict, the focus of each inquiry is distinct. In the law of countermeasures, the proportionality principle emphasizes the degree of coercion necessary to induce a target state to abandon and remedy its wrongful conduct. In the law of armed conflict, on the other hand, proportionality analysis is generally understood as balancing a state's military objectives against countervailing humanitarian considerations. See Paparinskis, *supra* note 68, at 323.

[81] See Borchard, 'Introduction', in J.A. Gathings, *International Law and American Treatment of Alien Enemy Property* (1940), at vi.

[82] *Ibid.*, at v–vi.

[83] Treaty of Versailles, Art. 297(b) and (e).

resumed the confiscation of public and private enemy assets within their jurisdictions to ensure 'that Germany could never again [use] the external assets of its citizens and corporations' to become an economic superpower on the world stage.[84] Although the Allies would later contribute substantial sums to Germany's post-war reconstruction, they maintained a firm grip on confiscated private assets within their jurisdictions.[85] In light of these developments, some observers concluded in the 1950s that international law no longer prohibited the confiscation of private enemy property during time of war.[86]

The past half-century has seen the pendulum swing back towards broader protection for foreign investment. Beginning in the late 1950s and early 1960s, Germany and Italy (not coincidentally, the targets of World War II confiscations) introduced BIT provisions requiring host states to compensate foreign investors for losses attributable to armed conflicts and civil disturbances. Other influential investor-states such as France, the UK, and the US soon followed suit. By the mid-1980s, such 'armed conflict' provisions had become standard features of BITs throughout the world.[87] Although these provisions did not prevent host states from freezing foreign assets during armed conflict, they did limit states' discretion to confiscate frozen assets.

How these BIT provisions relate to the general law of armed conflict remains unclear. One possibility is that these 'armed conflict' provisions permit states to seize foreign assets during armed conflict but do not permit any form of belligerent confiscation. Another possibility is that these provisions merely reaffirm (and perhaps regenerate) the customary norms that governed foreign investment prior to World War I. If this latter understanding is correct, host states that have adopted BIT 'armed conflict' clauses remain free to confiscate an enemy state's public assets without compensation pursuant to the law of armed conflict, but they may seize private assets only if they provide compensation to foreign investors. One virtue of this latter approach is that it would harmonize international investment law with standards for the treatment of private property under the law of occupation.[88] At present, however, it is impossible to predict with confidence which of these two approaches will prevail.

[84] Reeves, 'Is Confiscation of Enemy Assets in the National Interest of the United States?', 40 *Virginia L Rev* (1954) 1029, at 1043.

[85] *Ibid.*, at 1039–1040, 1044–1045; see also O. Schisgall, *The Enemy Property Issue* (1957), at 4 (observing that each Allied Nation agreed to 'hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control' (quoting the Paris Agreement), and subsequently agreed never to contest the retention of these assets).

[86] See, e.g., McDougal and Feliciano, 'International Coercion and World Public Order: The General Principles of the Law of War', 67 *Yale LJ* (1958) 771, at 840; Schisgall, *supra* note 85, at 8–9; M. Sornarajah, *The Pursuit of Nationalized Property* (1986), at 299.

[87] K.J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (2010), at 311–315.

[88] Both the Hague Regs of 1907 and the Geneva Conventions of 1949 prohibit the confiscation of private property within foreign territory during belligerent occupation: see Convention (IV) Respecting the Laws and Customs of War on Land, Art. 46, 18 Oct. 1907, Annex, 1 Bevans 631 (hereinafter 'Hague Regs IV'); Geneva Convention Relative to the Protection of Civilian Persons in Times of War, Art. 33, 12 Aug. 1949, 1175 UNTS 287 (hereinafter 'Geneva Convention IV'). Occupying powers may seize or requisition private property within foreign territory under some circumstances, but in such cases they must provide restitution or compensation: see Geneva Convention IV, Art. 57; J.S. Pictet (gen. ed.), Int'l Comm. Red Cross, *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War: Commentary* (1960), Arts. 33, 57, at 227, 311–312 (noting that the prohibition against pillage 'leaves intact the right of requisition or seizure').

Some firm conclusions are possible, however, regarding the law of armed conflict's applications to humanitarian financial intervention. Perhaps most important, whenever a state intervenes militarily to promote human rights, international law limits its legitimate 'military objectives' to the humanitarian needs of a foreign people. Hence, states at war may freeze foreign assets to reduce an enemy state's capacity to use force (incapacitation) and compel its capitulation (coercion). They may also confiscate enemy public property and seize private property as necessary to achieve humanitarian objectives such as furnishing food or medical assistance within a target state (amelioration). The law of armed conflict would not permit a host state to confiscate foreign assets for its own benefit, however, because such action would fall outside the scope of a host state's legitimate humanitarian objectives. Thus, a host state may not confiscate the assets of a target state to offset the costs of its own military intervention without express authorization from either the Security Council or the target state itself.

Significantly, the law of armed conflict does not permit states to freeze, seize, or confiscate foreign assets as a form of *punishment* during humanitarian military intervention. For centuries, punitive financial sanctions, like forcible reprisals, were a standard feature of international armed conflict.[89] Over time, however, the international community has gradually retreated from the idea that states may use belligerent confiscation and seizure as tools for meting out punishment against an enemy state.[90] Some theorists have argued that the turn away from punitive sanctions reflects international law's commitment to sovereign equality (*parem non habet imperium*).[91] Alternatively, punitive sanctions may lack international legal authority based on the general principle that no state can be judge and party to the same cause (*nemo iudex in sua causa*),[92] or because such measures effectively direct collective punishment against a foreign people – a practice that is anathema to contemporary international law.[93] While the theoretical foundations for this principle may be controversial, however, the principle itself is not: under the law of armed conflict, states are never authorized to freeze, seize, or confiscate foreign assets for purely punitive purposes.

89 See E. de Vattel, *The Law of Nations: Or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (1758) (trans. 1876), at 176.

90 See Basalou, 'The History of Reprisals up to 1945: Some Lessons Learned and Unlearned for Contemporary International Law', 49 *Military L & L of War Rev* (2010) 335, at 338–341; see generally Blum, 'The Crime and Punishment of States', 38 *Yale J Int'l L* (forthcoming 2013) ('Since World War I, . . . the moral rhetoric of state "crime and punishment" has been excised from the lexicon of international law').

91 See Zoller, *supra* note 48, at 49.

92 See T. Hobbes, *Leviathan* (ed. C.B. Macpherson, 1968) (1651), at 111. By way of comparison, the WTO requires states to obtain authorization before imposing economic retaliation that would otherwise violate their international legal obligations toward target states: see Hathaway and Shapiro, 'Outcasting: Enforcement in Domestic and International Law', 121 *Yale LJ* (2011) 252, at 266.

93 See Luban, 'War as Punishment', 39 *Philosophy & Pub Affairs* (2011) 299, at 328 ('Modern [international] law rightly recoils at the idea of collective punishment').

### *4. Enforcing Judicial Decisions*

A fourth strand of international law that authorizes humanitarian financial intervention is customary law governing the enforcement of judicial decisions.[94] Applying the principle of international comity, states routinely accept the validity of foreign judicial decisions that freeze, confiscate, or transfer foreign assets. Increasingly, national courts have used provisional and plenary remedies such as attachment, garnishment, and sequestration to secure compensation for victims of human rights abuse.[95] State regulators, in turn, have treated the enforcement of judicial decisions calling for financial intervention as a customary exception to international law's default prohibition against discriminatory financial intervention. Under international law, state regulators are not merely *authorized* to enforce decisions of their national courts that call for international financial intervention; in many contexts they are *required* to enforce such decisions. Like the other three strands of international law that authorize humanitarian financial intervention, national enforcement of judicial decisions offers a potent mechanism through which states may promote human rights abroad.

In the past, legal publicists have devoted only cursory attention to states' international legal authority to enforce judicial decisions calling for financial intervention, and they have not explained how this enforcement authority fits within the broader fabric of public international law. One prominent scholar has characterized the enforcement of judicial decisions as a subset of international countermeasures,[96] but this assessment misses the mark. When states conduct financial intervention to enforce judicial decisions, international law permits them to pursue a variety of humanitarian objectives that are not available under the law of countermeasures and the law of armed conflict. For example, states that enforce judicial decisions may provide compensation to successful plaintiffs not only from a defendant state's *public* assets (to the extent consistent with principles of foreign sovereign immunity), but also from the *private* assets of individual foreign defendants. Additionally, states may confiscate the private assets of foreign nationals as a *punitive* sanction[97] – an objective

[94] To the extent that judicial decisions satisfy the standards established by treaty and custom for the lawful expropriation of foreign property, they arguably do not constitute 'intervention' under the wrongful means theory, though in some instances they might still constitute objectionable 'intervention' under the anti-subordination theory.

[95] See, e.g., Center for Justice and Accountability, 'Case Summary: *Jean v. Dorelien*,' available at: www.cja.org/article.php?list=type&type=78; Van Schaack, 'In Defense of Civil Redress: The Domestic Enforcement of Human Rights in the Context of the Proposed Hague Judgments Convention', 42 *Harvard Int'l LJ* (2001) 141, at 145–147; 'SA Court Ruling Deals Blow to Mugabe Land Seizures', *ZimOnline*, 26 Feb. 2011, available at: www.zimonline.co.za/Article.aspx?ArticleId=5770.

[96] See, e.g., Akehurst, 'Reprisals by Third States', 44 *British Yrbk Int'l L* (1970) 1, at 15–16.

[97] Although many countries allow for the punitive confiscation of private assets in criminal proceedings, there is less support for the idea that customary international law would permit punitive financial sanctions in civil or administrative proceedings: see Shelton, *supra* note 63, at 354–367; Janke and Licari, 'Enforcing Punitive Damages in France After *Fountaine Pajot*', *Am J Comp L* (forthcoming); Bowles, *et al.*, 'Economic Analysis of the Removal of Illegal Gains', 20 *Int'l Rev L & Econ* (2000) 537, at 543. Given that the US is virtually alone in permitting punitive damages awards against foreign *states*, it is highly questionable whether customary international law supports such a right.

that is prohibited under the law of countermeasures.[98] Assets confiscated as punishment vest in the host state's treasury and may be used for any purposes the host state chooses – not solely for humanitarian ends such as compensation or amelioration. While these distinctive features of the enforcement of judicial decisions are often taken for granted and merit further study, there is considerable evidence that the enforcement of judicial decisions constitutes an independent and distinctive legal basis for humanitarian financial intervention.

International law limits national courts' authority to freeze foreign assets by requiring courts to accord due process to foreign investors. This principle is reflected in the venerable customary norm that states may not 'deny justice' to foreign nationals within their borders.[99] Elements of due process also feature prominently in leading HRL and IHL instruments such as the ICCPR, which entitles criminal defendants to contest punitive sanctions in a meaningful time and manner before an independent and impartial tribunal.[100] Both HRL and IHL prohibit collective punishment against a group or state by prohibiting courts from punishing defendants without a fair and individualized assessment of culpability.[101] These standards reinforce the international investment regime's customary requirement of fair and equitable treatment, guaranteeing basic procedural fairness to foreign investors subject to international asset freezes.

## C *Toward an Integrated Legal Framework*

The preceding discussion suggests that the international law of humanitarian financial intervention may develop into an integrated legal framework, the details of which will come into sharper focus over time as the international community responds to future humanitarian crises. The table below (Table 1) summarizes the key features of this emerging legal framework.

Although several international legal regimes *authorize* asset freezes under prescribed conditions, they do not all *require* states to freeze foreign assets. The only circumstance in which states are legally bound to freeze foreign assets is when the Security Council or a comparable regional organization imposes mandatory sanctions. Security Council resolutions directing states to freeze foreign assets pre-empt state and regional measures when these regimes conflict; states must implement the Security Council's directives – adopting the Security Council's designated humanitarian objectives as



[98] See DARSIWA, *supra* note 39, Arts 31, 34–39; Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility', 96 *AJIL* (2002) 833, at 844.

[99] See J. Paulsson, *Denial of Justice in International Law* (2005); A.V. Freeman, *The International Responsibility of States for Denial of Justice* (1970).

[100] See ICCPR, Art. 14, 999 UNTS 171; Universal Declaration of Human Rights, GA Res. 217 (III) A, UN Doc. A/RES/217(III), Art. 10 (10 Dec. 1948) (hereinafter the 'UDHR'). Although framed in terms of EC law rather than international law, the CJEU's (then ECJ's) landmark *Kadi* case arguably reflects a trend towards broader recognition of an international right to procedural due process in civil and administrative proceedings. See Joined Cases C–402/05 P & 415/05 P, *Kadi v. Council & Commission* [2008] ECR I–6411.

[101] See Geneva Convention (IV), *supra* note 88, Art. 33; ICCPR, *supra* note 100, Art. 14.

**Table 1:** Which humanitarian objectives may states pursue through financial intervention?

| | Consent | Security agreements | Countermeasures | Armed conflict | Judicial decisions |
|---|---|---|---|---|---|
| Preservation | yes | yes | no | no | yes |
| Incapacitation | n/a | yes | no | yes± | yes |
| Coercion | n/a | yes | yes* | yes± | yes |
| Compensation | yes | yes | no | yes± | yes |
| Amelioration | yes | yes | no | yes± | no |
| Punishment | n/a | no+ | no | no | yes** |

+ Presumption. * May not apply to private assets. ± Confiscation not permitted for private assets. ** May not apply to public assets.

their own – even if this requires them to set aside their own preferred objectives for humanitarian financial intervention.[102]

Some scholars have argued (unpersuasively, in my opinion) that Security Council sanctions preclude states and regional organizations from imposing broader asset freezes as autonomous countermeasures.[103] This thesis is premised on the idea that state and regional countermeasures are 'subsidiary' to the UN Charter's collective security regime, with the implication that states and regional organizations may use countermeasures only if the Security Council has entirely failed to act. Once the Security Council has taken action, these scholars argue, states are no longer free to devise their own solutions; the Security Council's sanctions regime pre-empts further state action.[104]

There are several problems with the field-pre-emption thesis. First, although the Charter clearly authorizes the Security Council to establish mandatory financial sanctions,[105] 'nothing in the Charter's structure or terms suggests that there is an implied limitation on the rights of Member States to take lawful countermeasures where the Security Council has acted'.[106] Secondly, there is little evidence that the Security Council has understood its mandatory sanctions regimes to preclude autonomous bilateral countermeasures. Thirdly, a growing body of state practice – in which the Security Council's permanent members feature prominently – suggests that states do not understand Security Council sanctions to preclude broader countermeasures.[107] Fourthly, the field-pre-emption thesis undermines the Security Council's effectiveness

[102] See, e.g., SC Res. 1483, at paras 22, 23, S/RES/1483 (22 May 2003) (temporarily immunizing Iraqi oil revenues from legal process and directing states to freeze and transfer Iraqi assets to the UN Development Fund for Iraq).

[103] See, e.g., Summary Records of the Meetings of the 44th Session, [1992] 1 Yrbk Int'l L Comm 144, UN Doc. A/CN.4/SER.A/1992 (statement of Alain Pellet); Dupont, 'Countermeasures and Collective Security: The Case of the EU Sanctions Against Iran', 17 *J Conflict & Security L* (2012) 301; Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community', in Crawford, Pellet, and Olleson, *supra* note 70, at 1137, 1138.

[104] *Ibid.*, at 1142.

[105] UN Charter, Art. 39.

[106] See Calamita, 'Sanctions, Countermeasures, and the Iranian Nuclear Issue', 42 *Vanderbilt J Transnat'l L* (2009) 1393, at 1438.

[107] See *ibid.*, at 1439–1440; see generally Dawidowicz, *supra* note 58.

by making it easier for target states to move their extraterritorial assets pre-emptively in anticipation of expanded Security Council sanctions. For all of these reasons, the better view is that Security Council resolutions presumptively have only conflict-pre-emption effect, not field-pre-emption effect.

In the absence of Security Council action, international law does not provide any standards for resolving conflicts between the various legal regimes that authorize humanitarian financial intervention, nor does it prioritize some humanitarian objectives above others. As a result, states that freeze foreign assets for humanitarian purposes often confront difficult choices between competing humanitarian objectives. For example, if a foreign head of state embezzles public funds into a private offshore account, a host state may have to choose whether to freeze the assets to ensure their safe return to the foreign state (preservation) or use the assets as an inducement to convince the corrupt leader to relinquish power (coercion). In other contexts, host states may face a choice between freezing foreign assets to provide remedies to human rights victims (compensation) or using the assets to fund post-conflict reconstruction (amelioration). International law commits these and other decisions to state discretion, and it allows host states to choose *not* to freeze foreign assets when financial intervention would undermine important national priorities.

## D *Humanitarian Constraints*

Of course, states and international organizations do not enjoy *unfettered* discretion to choose between the various humanitarian objectives that are permissible under collective-security agreements, the law of countermeasures, the law of armed conflict, and customary law governing the enforcement of judicial decisions. As recognized in the *Naulilaa* arbitration, the international community's response to violations of international law must always respect 'the requirements of humanity'.[108] Today these requirements are understood to include the basic protections of both HRL and IHL.[109] For example, international asset freezes must not jeopardize foreign nationals' basic human rights to food, housing, and essential medical care.[110] Even during armed conflict, host states must ensure that asset freezes do not cause civilians abroad to suffer harm that is excessive in relation to the host state's humanitarian objectives.[111] Under the UN Charter, the Security Council likewise bears an obligation to tailor financial sanctions narrowly so as to safeguard 'economic and social progress and development';[112] minimize 'social, health, and related problems';[113] and promote 'human rights and fundamental freedoms for all'.[114] Thus, whether states ground humanitarian financial



[108] *Responsibility of Germany for Damage*, *supra* note 67, at 1026; *cf. Kadi*, *supra* note 100.

[109] DARSIWA, *supra* note 39, Art. 50(1); *Prosecutor v. Kupreškič* (Trial Judgment), IT-96-16 (14 Jan. 2000), at para. 534.

[110] See ICCPR, *supra* note 100, Art. 6; ICESCR, Arts 11 and 12, 993 UNTS 3; UDHR, *supra* note 100, Arts. 3, 5, 25.

[111] Protocol I, *supra* note 78, Art. 51(5)(b).

[112] UN Charter, Art. 55(a).

[113] *Ibid.*, Art. 55(b).

[114] *Ibid.*, Art. 55(c); see also Sub-Commission on the Promotion and Protection of Human Rights, 'The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights', at para. 28, UN Doc. E/CN.4/Sub.2/2000/33 (asserting that '[s]anctions regimes that lower economic standards, create

intervention in Security Council authorization or another source they must always honour 'the laws of humanity and the dictates of the public conscience'.[115]

## 4 Humanitarian Financial Intervention During the 2011 Libyan Revolution

Having outlined the international law of humanitarian financial intervention, this section applies this emerging legal framework to the international community's asset freezes against Libya during the 2011 Arab Spring. In many respects, this case study illustrates how confusion about the legal standards governing humanitarian financial intervention has compromised efforts to coordinate multilateral responses to humanitarian crises. Throughout the spring and summer of 2011, states advocated a variety of approaches for responding to crimes against humanity in Libya, including financial sanctions designed to coerce the Qaddafi regime, preserve assets for a future government, and secure funding to ameliorate civilian suffering within Libya. While some of these proposals enjoyed a sound grounding in international law, others clearly exceeded states' legal authority.

### A *Intervention in Libya*

The most recent round of international financial sanctions against Libya arose against the backdrop of the Arab Spring. Inspired by successful protests in Tunisia and Egypt, Libyans staged peaceful demonstrations in several cities in January 2011. The eastern port city of Benghazi soon emerged as the epicentre of popular unrest as thousands of anti-government protesters flooded the streets to express their grievances against the Qaddafi regime.

Colonel Qaddafi's response to these peaceful protests was swift and brutal. Government artillery, helicopter gunships, and snipers fired upon protesters in Benghazi and neighbouring towns, while 'thugs armed with hammers and swords' reportedly 'attacked families in their homes'.[116] Heavy gunfire also greeted peaceful demonstrators in Tripoli.[117] Witnesses reported 'death squads of foreign mercenaries' roving the streets to silence residents who ventured outside their homes.[118]

health problems or are detrimental to the observance of human rights would violate Article 55' of the UN Charter). Over the past decade, the SC has taken care to tailor its financial sanctions narrowly in order to preserve target states' capacity to meet essential 'basic expenses' such as the provision of food, housing, and medical care: see, e.g., SC Res. 1718, at para. 9(a), UN Doc. S/RES/1718 (14 Oct. 2006).

115 Institut de droit international, 'Régime des représailles en temps de paix' (19 Oct. 1934), 38 *Annuaire de l'Institut de droit international* 710, Art. 6(4), quoted in Borelli and Olleson, 'Obligations Relating to Human Rights and Humanitarian Law', in Crawford, Pellet, and Olleson, *supra* note 70, at 1177, 1177.

116 Meo, 'Libya Protests: 140 "Massacred" as Gaddafi Sends in Snipers To Crush Dissent', *Daily Telegraph*, 20 Feb. 2011, available at: www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8335934/Libya-protests-140-massacred-as-Gaddafi-sends-in-snipers-to-crush-dissent.html.

117 'Libya: Worshippers "fired on" after prayers in Tripoli', *BBC News Middle East*, 25 Feb. 2011, available at: www.bbc.co.uk/news/world-middle-east-12586099.

118 Chrisafis and Black, 'After the Air Raids, Gaddafi's Death Squads Keep Blood on Tripoli's Streets', *Guardian*, 22 Feb. 2011, available at: www.guardian.co.uk/world/2011/feb/22/air-raids-gaddafi-tripoli.

Fearing a further escalation of violence against Libyan civilians, the international community imposed asset freezes and other non-forcible sanctions against the Qaddafi regime. On 25 February 2011, the US froze the accounts of select Libyan governmental agencies, instrumentalities, and state-controlled entities, as well as the personal assets of Qaddafi, his immediate family, and other senior government officials.[119] The following day, the UN Security Council unanimously adopted Resolution 1970, condemning 'the gross and systematic violation of human rights' against civilians in Libya and expressing concern that the Qaddafi government's 'widespread and systematic attacks . . . against the civilian population may amount to crimes against humanity'.[120] The Security Council referred the situation in Libya to the Prosecutor of the International Criminal Court[121] and imposed mandatory sanctions, including a targeted asset freeze directed against Qaddafi family members.[122] On 28 February 2011, the Council of the EU reported that it had complied with Resolution 1970 and would impose its own supplemental 'autonomous measures', including asset freezes against 20 Libyan officials whom the EU believed were individually responsible for violence against Libyan civilians.[123] By the end of the summer, states throughout the world had frozen Libyan assets in compliance with the Security Council's directive.[124]

With asset freezes in place and violence in Libya escalating by the hour, it was not long before the international community's focus shifted toward military intervention. When insurgents in Benghazi seized control over territory in eastern Libya, international observers began to fear the prospect of a prolonged and savage civil war. Qaddafi took to the airwaves promising 'a long-drawn-out war with no limits' and declared that his forces would 'fight until the last man'.[125] In response to these threats, the Security Council authorized UN member states 'to take all necessary measures' to enforce a no-fly zone over Libya and 'to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi'.[126] Assisted by NATO airstrikes, insurgents under the direction of the Benghazi-based TNC gradually extended their control westward, capturing one coastal town after another until they reached Tripoli in late August and killed Qaddafi himself two months later.

As the civil war in Libya unfolded, the country's frozen extraterritorial assets grew to staggering proportions. By 25 August 2011, experts estimated that the total value of Libya's frozen assets had reached US$160 billion,[127] including $29 billion sequestered in a single US bank.[128] Libya's sovereign wealth fund, the Libyan Investment Authority



[119] Exec. Order No. 13566, *supra* note 75.

[120] SC Res. 1970, *supra* note 6, preamble.

[121] *Ibid.*, at paras 4–8.

[122] *Ibid.*, at paras 17–21 and Annex II.

[123] Council Dec. 2011/137/CFSP, 28 Feb. 2011, Art. 6(1)(b), Annex IV, OJ (2011) L58/1.

[124] See, e.g. Mansour, 'Algeria Freezes Khadafi Assets', magharebia.com, 8 June 2011, available at: www.magharebia.com/ cocoon/awi/xhtml1/en_GB/features/awi/features/2011/06/08/feature-06.

[125] 'Libya: The Fall of Gaddafi', *BBC News Africa*, 11 Oct. 2011, available at: www.bbc.co.uk/news/world-africa-13860458.

[126] SC Res. 1973, *supra* note 7, at paras 4, 6, 8.

[127] See Meyers & Balefsky, *supra* note 3.

[128] O'Harrow & Grimaldi, *supra* note 15.

(known by its Arabic title as 'the mother of all funds'), accounted for approximately \$70 billion alone.[129] The more state regulators searched, the further Libya's investments were found to extend, including major stakes in Africa's only communications satellite, RASCOM; Africa's only continent-wide radio station, Africa No. 1; influential British publisher Pearson, the parent company of the *Financial Times*; the Italian soccer club Juventus; and a diverse portfolio of luxury hotels, high-rise apartment buildings, farms, banks, mining interests, and petrol stations scattered across the globe.[130] Investigators speculated that they might recover another \$80 billion as they continued to ferret out the previous regime's hidden investments.[131]

As the TNC consolidated its control over Libya and worked toward the formation of a new government, the Security Council gradually narrowed its mandatory sanctions during the late summer and autumn of 2011. In mid-August, the Security Council's Sanctions Committee for Libya began authorizing humanitarian exceptions to allow frozen assets to be used for humanitarian aid, as contemplated in Resolution 1970.[132] By 26 September 2011, these exceptions allowed host states to unfreeze roughly \$16 billion in Libyan assets to address 'basic needs' of the Libyan people.[133] On 16 December 2011, the Sanctions Committee scaled back its asset freeze even further by permitting states to release assets of the Central Bank of Libya (Central Bank) and the Libyan Arab Foreign Bank (LAFB) while maintaining mandatory sanctions over other investment vehicles that were believed to be under the continuing control of the Qaddafi family.[134] Within a matter of days, states throughout the world had pledged to unfreeze the full assets of the Central Bank and LAFB – approximately \$100 billion – and release these funds expeditiously to the TNC.[135] Despite these pledges, the unfreezing and unwinding of Libya's extraterritorial assets proved to be a lengthy process. By mid-Spring 2012, the vast bulk of Libya's extraterritorial assets remained under the control of foreign states.

129 Carste and Leftly, 'Prosecutors Fly to Libya To Freeze Gaddafi's Swiss Assets', *Independent*, 23 Oct. 2011, available at: www.independent.co.uk/news/business/news/prosecutors-fly-to-libya-to-freeze-gaddafis-swiss-assets-2374512.html.

130 See *ibid.*; Faul, 'Libyan Assets in Africa Far-Reaching, Little Known', *ABC News*, 11 June 2011, available at: http://abcnews.go.com/Business/wireStory?id=13818183; Liberto, 'Libya Set To Get Back \$37 Billion from US', *CNNMoney*, 20 Oct. 2011, available at: http://money.cnn.com/2011/10/20/news/economy/Libyan_assets/index.htm.

131 Carste and Leftly, *supra* note 129.

132 See, e.g., 'Netherlands Unfreezes Libyan Assets for Medical Supplies', reliefweb, 16 Aug. 2011, available at: http://reliefweb.int/node/441104; US Draft Resolution (Provisional), S/2011/535, 24 Aug. 2011, available at: www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Libya%20S%202011%20535.pdf.

133 SC Res. 1970, *supra* note 6, at para. 19(a); see generally UN SCOR, 6622nd Meeting, at 5, UN Doc. S/PV.622 (26 Sept. 2011) (statement of Sanctions Committee Chair José Filipe Moraes Cabral).

134 SC Committee Established Pursuant to Res. 1970 (2011) Concerning Libya, List of Individuals Subject to the Measures Imposed by Para. 15 of Res. 1970 (2011) (the Travel Ban) and/or Para. 17 of Res. 1970 (2011) or Para. 19 of Res. 1973 (2011) (the Asset Freeze), at 7–8, 16 Dec. 2011, available at: www.un.org/sc/committees/1970/pdf/List%20of%20Individuals%20and%20Entities.pdf.

135 'Libya: US\$100b Libyan Assets Defrozen, Says Finance Minister', *Libya-Business News*, 20 Dec. 2011, available at: www.libya-businessnews.com/2011/12/20/libya-us100b-libyan-assets-defrozen-says-finance-minister.

## B *Freezing Assets Before Resolution 1970*

From the earliest days of the Libyan revolution, the international community confronted challenging legal issues concerning Libya's extraterritorial assets. An important preliminary question involved the legality of unilateral asset freezes imposed by the US and the EU. While few international lawyers questioned the Security Council's authority to impose mandatory multilateral asset freezes pursuant Chapter VII of the UN Charter, the legality of unilateral third-state asset freezes remained somewhat murky. Did international law authorize the US to freeze Libyan assets before the Security Council issued Resolution 1970? Did the US and the EU satisfy international law when they later extended 'autonomous measures' beyond the scope of Resolutions 1970 and 1973?

The US must have relied upon the customary law of countermeasures when it froze Libyan assets prior to Resolution 1970. Other potential bases for financial intervention – Security Council authorization, the law of armed conflict, and custom governing the enforcement of judicial decisions – were not plausibly in play at the time.[136] Construed as a third-party countermeasure, the US' unilateral asset freeze was a permissible response to the Libyan government's flagrant violation of its *erga omnes* obligations to refrain from war crimes and crimes against humanity.[137] US action may have been justified, as well, to preserve public funds obtained by the Qaddafi family through corruption (under the principle of tacit consent) and to coerce the Qaddafi family to return misappropriated public funds (as a countermeasure).[138] Although the asset freeze did not succeed in convincing the Qaddafi regime to cease violating its obligations *erga omnes*, the US' humanitarian objectives were consistent with international law.

Some might question whether international law would permit the US to freeze the private assets of Qaddafi loyalists rather than limit countermeasures to public assets of the Libyan state. As discussed previously, at least one international arbitral tribunal has construed international investment law to confer direct rights on private investors, precluding host states from freezing private assets under the law of countermeasures.[139] This article has argued, however, that the recent practice of the EU

[136] When international asset freezes commenced in 2011, no BIT was in force between the US and Libya, although the two countries had concluded a general framework agreement to structure future discussion about trade and investment.

[137] See Exec. Order No. 13566, *supra* note 75 (finding that the Qaddafi regime had 'us[ed] weapons of war, mercenaries, and wanton violence against unarmed civilians'); Tams, *supra* note 50, at 144–145 (observing that 'war crimes and crimes against humanity . . . are often considered to give rise to obligations *erga omnes*').

[138] President Obama's executive order authorizing asset freezes against Libya stressed the 'serious risk that Libyan state assets *will be* misappropriated by Qadhafi, members of his government, members of his family, or his close associates': Exec. Order No. 13566, *supra* note 75 (emphasis added). If the US feared that Qaddafi family members would misappropriate state assets at some point in the *future*, the law of countermeasures would not permit intervention until that wrong occurred. See the *Gabčíkovo-Nagymaros Project*, *supra* note 50, at 55, para. 83; DARSIWA, *supra* note 39, Art. 49(1). Countermeasures arguably would be permissible, however, to compel Qaddafi loyalists to return state assets obtained previously through public corruption.

[139] See *Corn Products*, *supra* note 73, Decision on Responsibility, 15 Jan. 2008, at paras 161–179. On this theory, the US would have to show that frozen assets were, in fact, state assets misappropriated from the Libyan people.

and the US (including asset freezes against the Qaddafi regime) may reflect the emergence of a new customary norm, one that would allow host states to freeze the private assets of foreign officials who contribute directly to their state's international wrongs. Assuming that this suggestion is correct, the US was free to freeze the private assets of Libyan officials as necessary to compel the Qaddafi regime to abandon its crimes against humanity.

## C *Freezing Assets After Resolution 1970*

The day after the US imposed its preliminary asset freeze, some of the legal issues raised by unilateral US action were mooted by Resolution 1970, which approved the US' list of targets and appointed an international sanctions committee to make further designations pursuant to Chapter VII of the UN Charter. The Security Council's financial intervention raised another important question, however: did Resolution 1970 pre-empt autonomous measures by individual states and regional organizations (field-pre-emption) or did it merely impose minimum requirements that states and regional organizations could supplement with more robust measures of their own (conflict-pre-emption)? If field-pre-emption applied, the US would have to await further Security Council authorization before it could expand its asset freeze. Field-pre-emption would also call into question subsequent autonomous measures by Canada and the EU – asset freezes that exceeded the scope of Resolutions 1970 and 1973.[140]

The better view is that the Security Council's mandatory sanctions did not preclude Canada, the EU, and the US from imposing broader asset freezes under the law of countermeasures. As discussed previously, neither the text of the UN Charter nor state practice suggests that Security Council sanctions automatically pre-empt autonomous state or regional countermeasures. Moreover, the broader asset freezes imposed by Canada, the EU, and the US supported the Security Council's coercive humanitarian objectives and prevented the Qaddafi regime from moving assets to evade future Security Council sanctions. Given the scale of the Qaddafi regime's human rights abuses, it would be difficult to argue that those measures were disproportionate. Thus, there are good reasons to believe that international law permitted Canada, the EU, and the US to impose asset freezes against Libya that were broader than the Security Council's mandatory sanctions regime.

## D *Unfreezing Assets without Security Council Authorization*

Once asset freezes had been imposed against Libya, it was not long before states began to consider whether they could unfreeze and transfer Libyan assets to the TNC without Security Council authorization. Beginning in March 2011, TNC representatives urged the international community to allow them to access Libya's frozen assets or



[140] See, e.g., Council Reg. 204/2011, *supra* note 75; Council Implementing Reg. 272/2011, OJ (2011) L76/32; Council Implementing Reg. 288/2011, OJ (2011) L78/13; Council Reg. 572/2011, OJ (2011) L159/2; Exec. Order No. 13566, *supra* note 75, at paras 1–2; Statement by the Prime Minister of Canada on Implementing Sanctions Against Libya, 27 Feb. 2011, available at: www.pm.gc.ca/eng/media.asp?id=3997.

use those assets as collateral for loans or lines of credit.[141] The TNC argued that it needed a prompt infusion of cash to sustain its military campaign against forces loyal to Colonel Qaddafi.[142] Further, it insisted that civilians would be without food, medical care, and essential public services if the international community did not release Libya's frozen assets immediately.[143]

By late summer, several states had answered the TNC's plea for assistance. France, Italy, and Turkey recognized the TNC as Libya's legitimate government and took steps to lift restrictions on Libya's frozen assets. Italy extended a line of credit to the TNC using frozen Libyan funds as collateral.[144] France and Turkey released frozen assets to the TNC in early August.[145]

The trouble with these measures was that the Security Council had yet to lift its mandatory sanctions.[146] Although other states expressed sympathy for the TNC's grave financial situation, and some publicly considered taking steps similar to those of France, Italy, and Turkey,[147] most concluded in the end that their 'hands were tied by United Nations sanctions'.[148] Among these more restrained states, Russia was

141 See Johnson *et al*., 'US, Libyan Rebels Discuss Aid', *Wall St J*, 25 May 2011, available at: http://online.wsj.com/article/SB10001424052748704681904576317482124716992.html.

142 See Wan and Booth, 'United States Recognizes Libyan Rebels as Legitimate Government', *Washington Post*, 15 July 2011, available at: articles.washingtonpost.com/2011-07-15/world/35237622_1_rebel-council-libyan-rebel-mahmoud-shammam; Raghavan and Grimaldi, 'Libyans "Robbed Our Own Bank" To Fund Uprising', *Washington Post*, 24 May 2011, available at: articles.washingtonpost.com/2011-05-24/world/35233273_1_ali-tarhouni-libyan-assets-rebel-leaders.

143 See Squires, 'Libyan Rebels Receive £1.8 Billion Trust Fund', *Daily Telegraph*, 4 May 2011, available at: www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8492745/Libyan-rebels-to-receive-1.8-billion-trust-fund.html.

144 Press Release, Ministry of Foreign Affairs, 'Focus Libya: Frattini in Benghazi, memorandum of understanding with the TNC', 31 May 2011, available at: www.esteri.it/MAE/EN/Sala_Stampa/ArchivioNotizie/Approfondimenti/2011/05/20110531_FocusLibia_memorandum.htm (hereinafter 'Frattini in Benghazi').

145 Vesnovskaya, 'UN – No Authority for Paris', *Voice of Russia*, 2 Aug. 2011, available at: http://english.ruvr.ru/2011/08/02/54098751.html; Nawar, 'France Passes $259 Million Frozen Libyan Assets to Opposition Forces', *YallaFinance*, 4 Aug. 2011, available at: http://yallafinance.com/2011/08/04/france-passes-259-million-frozen-libyan-assets-to-opposition-forces/; 'Turkey, France Unfreeze Libyan Assets', *Magharebia*, 2 Aug. 2011, available at: www.magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/newsbriefs/general/2011/08/02/newsbrief-02.

146 The SC did create a humanitarian safety-valve by providing an institutional mechanism whereby Libya's frozen funds could be unlocked to address shortages in food, medical treatment, and housing: SC Res. 1970, *supra* note 6, at para. 19(a). Res. 1970 allowed for such action, however, only 'after notification by the relevant State to the [Sanctions] Committee' and 'in the absence of a negative decision by the Committee within five working days': *ibid.* Persistent opposition from South Africa (a veto-wielding member of the Sanctions Committee) rendered this humanitarian exception inoperative until mid-Aug. 2011.

147 See Clark, 'Canada Mulls Ways To Fund Libyan Rebels with Frozen Gadhafi Assets', *Globe & Mail*, 15 July 2011; 'Brüderle Wants Libya's Assets for Relief Aid', *Local*, 16 Apr. 2011, available at: www.thelocal.de/national/20110416-34437.html(Germany); Mackenzie and Noueihed, 'Anti-Gaddafi Allies Offers Rebels Cash Lifeline', *Reuters*, 5 June 2011, available at: http://uk.reuters.com/article/2011/05/05/uk-libya-idUKLDE71Q0MP20110505 (US).

148 See, e.g., Fitzpatrick, 'Canada Unfreezing $2.2B in Libyan Assets', *CBC News*, 13 Sept. 2011, available at: www.cbc.ca/news/canada/ottawa/story/2011/09/13/pol-baird-libya-update.html.

the most outspoken critic of unilateral action, stridently condemning the release of Libyan assets to the TNC as 'absolutely illegal'.[149]

Even with the benefit of hindsight, it remains unclear whether France, Italy, and Turkey satisfied international law when they unfroze Libyan assets without Security Council authorization. Contrary to Russia's protestations, Resolutions 1970 and 1973 did not, in fact, declare that any efforts to thaw Libyan assets for the TNC's benefit would be 'absolutely illegal'. On the other hand, these resolutions did not give host states a blank checque to unfreeze any Libyan assets they wished for humanitarian purposes, as some diplomats suggested at the time.[150] Properly understood, the scope of a state's discretion to unfreeze Libyan assets turned upon which legal regime – Security Council sanctions or the law of countermeasures – governed particular frozen assets. To the extent that Resolutions 1970 and 1973 applied, states that released or collateralized Libyan assets without express authorization from the Security Council's sanctions committee violated their obligations under the UN Charter.[151] Conversely, states were free to dissolve their autonomous asset freezes as soon as they determined that the coercive objectives of these measures had been achieved.[152] Thus, if it turns out that the assets unfrozen by France, Italy, and Turkey were not subject to mandatory Security Council resolutions, these assets could be released to the TNC as the recognized 'legitimate government' of Libya without further Security Council action.[153]

Unfortunately, press accounts do not indicate whether the specific assets involved in these incidents were covered by Resolutions 1970 and 1973. If the assets did, indeed, fall within the ambit of the Security Council's mandatory financial sanctions, any attempt to thaw these assets would have been 'absolutely illegal' from the perspective of international law. On the other hand, if the assets under consideration were subject only to autonomous countermeasures at the time, customary international law would have permitted France, Italy, and Turkey to release or collateralize those assets for the benefit of the Libyan people.

### E *Using Frozen Assets for Other Purposes*

When the Security Council loosened its mandatory financial sanctions towards the end of 2011, states gradually made Libyan assets available to the TNC. This process

[149] Vesnovskaya, *supra* note 145 (Russia). Turkey condemned France's unilateral unfreezing of Libyan assets in July, then took similar measures less than a month later: see Küçükkoşum, 'Libyan Rebels Ask Turkey for Access to Frozen Assets', *Hurriyet Daily News*, 6 July 2011, available at: www.hurriyetdailynews.com/default.aspx?pageid=438&n=libyan-rebels-ask-turkey-for-access-to-frozen-assets-2011-07-06.

[150] See 'Brüderle Wants Libya's Assets for Relief Aid', *supra* note 147.

[151] The fact that France, Italy, and Turkey had recognized the TNC previously as the 'legitimate government' of Libya was irrelevant for these purposes because Res. 1970 and 1973 did not provide for the SC's sanctions to be lifted by unilateral state action under such circumstances.

[152] See, e.g., Office of Foreign Asset Control, General License No. 7a, General License with Respect to the Libyan Oil Company and its Subsidiaries, 31 CFR 570, 19 Sept. 2011, available at: www.treasury.gov/resource-center/sanctions/Programs/Documents/libya2_gl7a.pdf.

[153] As Stefan Talmon has observed, prior to the TNC achieving recognition as the *de jure* 'government' of Libya, the Qaddafi government remained 'the only authority' with a valid legal claim to access and 'legally dispose of Libyan State assets abroad' once the assets were unfrozen: Talmon, 'Recognition of the Libyan Transitional National Council', 15 *ASIL Insight*, 16 June 2011, available at: www.asil.org/insights110616.cfm.

was preceded, however, by months of political wrangling over proposals to dispose of the assets in other ways. Some states considered using frozen assets to purchase arms and supplies for Libyan insurgents.[154] In the US, members of Congress debated confiscating Libyan assets to offset the costs of American military action.[155] Other policymakers advocated linking the release of 'frozen assets to Libyan cooperation with investigations into Gadhafi-era terrorist attacks'.[156] While none of these proposals was ultimately put into practice, they reflect the uncertain fate of Libya's frozen assets at the height of the Libyan revolution.

Many of the proposals that circulated during this period were inconsistent with Resolution 1970, which anticipated that frozen Libyan assets should be preserved to ensure that they would, 'at a later stage, as soon as possible be made available to and for the benefit of the people of [Libya]'.[157] Had the Security Council not required the return of frozen assets to Libya, international law would have permitted host states to continue to freeze Libyan assets for other purposes, such as to compel Libya to investigate and provide remedies for past acts of state-sponsored terrorism (under the law of countermeasures)[158] or to satisfy civil or criminal judgments against the Libyan government or designated Libyan officials. Such measures would have been permissible as long as they satisfied the general humanitarian standards of HRL and IHL. On the other hand, states would have lacked authority to confiscate Libyan assets for their own use without authorization from the Security Council, an appropriate court, or the Libyan government. Under no circumstances would the law of countermeasures have allowed host states to confiscate and vest Libyan assets in their own treasuries. While it might be tempting to conclude that the law of armed conflict would authorize coalition states to confiscate Libyan assets, the facts on the ground do not support this thesis. At the Security Council's direction, coalition forces played a narrowly defined role during the Libyan revolution, providing only air support and intelligence to insurgent forces.[159] Given the grave humanitarian needs of the Libyan people and the limited engagement of coalition forces, confiscating frozen Libyan assets to offset the costs of coalition intervention could not reasonably be considered necessary and proportional under the law of armed conflict. To be sure, had the Security Council not directed that states return frozen assets to the TNC, states that recognized the TNC as the legitimate government of Libya could have used frozen assets to purchase arms for insurgents or fuel for their own aircraft with the TNC's freely bestowed consent. Absent such consent from the TNC or the Security Council, however, states that supplied arms and air support to the TNC would have lacked legal authority to confiscate Libyan assets to offset the costs of their military intervention.



[154] See Global Civilians for Peace in Libya, *supra* note 4 (citing Russia's concerns that France would take this action).

[155] See Liberto, *supra* note 130.

[156] *Ibid.* (citing a Congressional Research Report dated 29 Sept. 2011).

[157] SC Res. 1970, *supra* note 6, at para. 20.

[158] DARSIWA, *supra* note 39, Arts. 35–37.

[159] See SC Res. 1973, *supra* note 7, at para. 4.

### F *Delaying the Release of Frozen Assets*

By the end of December 2011, most of Libya's offshore assets were no longer subject to mandatory Security Council sanctions, and states had announced plans to release over US$100 billion dollars to the TNC. Despite these developments, the thawing and delivery of frozen assets to the TNC proceeded slowly.[160] Publicly, some states expressed concern that unfrozen assets might not reach the TNC securely. Privately, states probably questioned whether Libya's new transitional government could be trusted to husband the country's resources prudently for the benefit of the Libyan people. As time progressed, continuing delays in the release of frozen assets became a point of friction in relations between the TNC and foreign governments.

As a matter of international law, a strong case can be made that host states were entitled to maintain their asset freezes until the TNC provided adequate assurances that it would respect, protect, and fulfil human rights for the Libyan people. Throughout the spring of 2012, Libya had yet to install a permanent national government capable of guaranteeing stability within the country, and sporadic violence continued to arise between Qaddafi loyalists, local militias, and security forces under the TNC's command. Although the Security Council stressed that Libyan assets should return 'as soon as possible,' it also emphasized the 'importance of making these assets available in a transparent and responsible manner in conformity with the needs and wishes of the Libyan people', and it underscored the TNC's obligations to 'protect Libya's population, restore government services, and allocate Libya's funds openly and transparently'.[161] Given Libya's history of authoritarianism and corruption, host states had good reason to proceed with caution, as directed by the Security Council. Indeed, even TNC leaders expressed concern that thawing assets too rapidly could enable Qaddafi loyalists to access and liquidate frozen accounts.[162] Thus, international law permitted host states to proceed cautiously with the unfreezing of Libyan assets, taking care to ensure that all frozen assets would return to the people of Libya in an orderly manner through a credible and rights-respecting Libyan government.

## 5 Conclusion

If there is one lesson to be drawn from recent debates over the international community's financial intervention in Libya, it is that the legal standards governing humanitarian financial intervention remain poorly understood. Although the international community uses asset freezes regularly as a mechanism for promoting human rights



[160] See Quinton, 'Obama to Congress: Sanctions on Libya Will Continue', *National J*, 23 Feb. 2012, available at: www.nationaljournal.com/nationalsecurity/obama-to-congress-sanctions-on-libya-will-continue-20120223#.T0aF2XNo-tw.twitter; 'Libya Given $20 Bln of Freed Assets', *Libya-Business News*, 10 Jan. 2012, available at: www.libya-businessnews.com/2012/01/10/libya-given-20-bln-of-freed-assets.

[161] SC Res. 2009, pmbl and para. 5, S/RES/2009 (16 Sept. 2011).

[162] See Richter, 'Western Allies Move Cautiously on Libyan Assets', *LA Times*, 2 Aug. 2011, available at: http://articles.latimes.com/2011/aug/02/world/la-fg-libya-money-20110802 (noting that the TNC's envoy to the US and an unnamed seniorUSofficialshared these concerns).

around the world, states and international organizations rarely define their humanitarian objectives with precision. Equally troubling, the legal standards that govern international asset freezes have developed in a fragmented and piecemeal fashion, with scant attention being paid to the integrity and coherence of this field of international law as a whole.

To address these concerns, this article has endeavoured to illuminate the humanitarian objectives and legal standards that govern international financial intervention. The legal framework developed in this article should prove useful as host states consider whether international law would permit them to freeze foreign assets in response to human rights abuses abroad. Equally important, the typology of humanitarian objectives outlined in this article should enable host states and international organizations to articulate their objectives more clearly when they freeze foreign assets to promote human rights. International asset freezes will often serve coercive purposes, compelling states to honour their international human rights obligations. But when coercion fails (as was the case in Libya), asset freezes may still advance important humanitarian objectives such as incapacitation, compensation, or amelioration. Whether host states may pursue any particular humanitarian objective in a given context depends upon the interplay between several distinct international legal regimes: international investment law, customary principles of non-intervention, collective-security agreements such as the UN Charter, the customary law of countermeasures, the law of armed conflict, and international custom governing the enforcement of judicial decisions. Whenever states impose asset freezes to promote human rights abroad, they must take care to pursue only those discrete humanitarian objectives that are consistent with international law.