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## Standing for Human Rights Abroad

Evan J. Criddle

*William & Mary Law School*, [ejcriddle@wm.edu](mailto:ejcriddle@wm.edu)

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# STANDING FOR HUMAN RIGHTS ABROAD

*Evan J. Criddle*†

*When may states impose coercive measures such as asset freezes, trade embargos, and investment restrictions to protect the human rights of foreign nationals abroad? Drawing inspiration from Hugo Grotius’s guardianship account of humanitarian intervention, this Article offers a new theory of states’ standing to enforce human rights abroad: under some circumstances, international law authorizes states to impose countermeasures as fiduciary representatives, asserting the human rights of oppressed foreign peoples for the benefit of those peoples. The fiduciary theory explains why all states may use countermeasures to vindicate the human rights of foreign nationals abroad despite the fact that they do not suffer any injury to their own independent legal interests when another state violates the human rights of its own people. But the fiduciary theory also constrains foreign intervention by prescribing a robust set of legal duties that respect the self-determination and human rights of foreign peoples.*

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† Professor of Law and Tazewell Taylor Research Professor, William & Mary Law School. The author owes a debt of gratitude to Nancy Combs, Ian Dahlman, Evan Fox-Decent, Stephen Galoob, Laurence Helfer, Arthur Laby, Ethan Leib, Paul Miller, Donna Nagy, Teddy Rave, Gordon Smith, Lionel Smith, Christian Tams, Cora True-Frost, and participants in the American Society of International Law’s Annual Midyear Research Forum at NYU Law School and the Fiduciary Law Workshop at McGill University for generous comments on previous drafts. Special thanks also to Greg Donaldson, Jayne Olm-Shipman, Leonard Simmons, and Drucilla Tigner for exceptional research assistance.

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INTRODUCTION

Over the past several decades, states around the world have used coercive measures such as trade embargos, asset freezes, and travel restrictions to protect human rights abroad. For example:

- In response to recurrent human rights abuses by Burma’s military between 1990 and 2012, states such as Australia, Canada, New Zealand, the United States, and members of the European Union imposed asset freezes, visa restrictions, and limits on foreign investment.<sup>1</sup>
- African states levied a trade embargo and travel ban against Burundi in 1996 after the leaders of a successful military coup suppressed political rights by banning opposition parties.<sup>2</sup>
- In 1998, the European Union, Russia, and the United States responded to human rights violations against ethnic Albanians in Kosovo by imposing a trade embargo, asset freeze, travel ban, and investment restrictions against the former Yugoslavia.<sup>3</sup>
- The Arab League, the European Union, and the United States imposed asset freezes and trade restrictions to coerce the gov-

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<sup>1</sup> See MICHAEL F. MARTIN, CONG. RESEARCH SERV., U.S. SANCTIONS ON BURMA 1–3 (2012), available at <http://www.fas.org/sgp/crs/row/R41336.pdf> (providing an overview of the measures imposed by the United States between 1990 and 2012); *Overview of Burma Sanctions*, BBC NEWS (Dec. 18, 2009, 1:21 PM), <http://news.bbc.co.uk/2/hi/asia-pacific/8195956.stm> (providing an overview of the measures imposed by, inter alia, Australia, Canada, New Zealand, and the United States).

<sup>2</sup> See CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW 221–22 (2005).

<sup>3</sup> See MARY ELLEN O’CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT 245 (2008) (“The EU and the United States imposed economic sanctions on Yugoslavia for violations of the human rights of Kosovo’s Albanians, even before the Security Council mandated sanctions.”); see also *EU Imposes New Arms Sanctions on Yugoslavia*, CNN (Apr. 27, 1998, 3:48 PM), <http://www.cnn.com/WORLD/europe/9804/27/kosovo.folos/index.html> (discussing sanctions imposed by the European Union and Russia); Norman Kempster, *Yugoslavia Facing New Sanctions over Kosovo*, L.A. TIMES (June 9, 1998), <http://articles.latimes.com/1998/jun/09/news/mn-58126> (detailing sanctions imposed by the United States and European Union).

ernment of Syria to end its violent suppression of peaceful political demonstrations during the 2011 Arab Spring.<sup>4</sup>

- In May 2014, the United States ordered asset freezes and travel bans against individuals responsible for atrocities in South Sudan that resulted in thousands of deaths and the displacement of more than a million people.<sup>5</sup>

Although these incidents are each unique in a variety of respects, they share a number of common features. First, in each case, states temporarily suspended their own legal obligations—including those enshrined in international trade agreements, aviation agreements, investment treaties, military assistance agreements, and the customary prohibition against foreign intervention—to coerce another state to respect international human rights law. Second, states intervened on behalf of foreign nationals abroad rather than their own people. Third, states acted pursuant to the customary law of countermeasures—without authorization from the U.N. Security Council—in an effort to “restore the legal relationship” between a target state and its people, “which ha[d] been ruptured by” human rights violations.<sup>6</sup>

Since the end of the Cold War, this paradigm for decentralized international law enforcement, which I will refer to as “humanitarian countermeasures,”<sup>7</sup> has become an increasingly powerful mechanism for addressing human rights crises around the world. Yet the rise of humanitarian countermeasures has not escaped controversy. For centuries, leading publicists have debated the legitimacy of decentralized international law enforcement, and these debates have grown increasingly intense over the past two decades.<sup>8</sup> Although the United States, members of the European Union, and a number of other states routinely employ humanitarian countermeasures to promote human

<sup>4</sup> See Zachary Laub & Jonathan Masters, *Syria's Crisis and the Global Response*, COUNCIL ON FOREIGN REL. (Sept. 11, 2013), <http://www.cfr.org/syria/syrias-crisis-global-response/p28402> (detailing the sanctions imposed by, inter alia, the Arab League, European Union, and the United States).

<sup>5</sup> See Michael R. Gordon, *U.S. Imposes First Sanctions in South Sudan Conflict*, N.Y. TIMES (May 6, 2014), <http://www.nytimes.com/2014/05/07/world/africa/us-imposes-first-sanctions-in-south-sudan-conflict.html> (describing the sanctions ordered on two individuals, “one on each side of the conflict”).

<sup>6</sup> JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES* ch. II, cmt. 1 (2002) (discussing the purpose of interstate countermeasures).

<sup>7</sup> A variety of terms have been used elsewhere to describe these measures, including “solidarity measures,” “unilateral sanctions,” “unilateral coercive measures,” and simply “lawful measures.” See, e.g., CRAWFORD, *supra* note 6, art. 48, cmt. 8; *id.* art. 54, cmt. 7; Martti Koskeniemi, *Solidarity Measures: State Responsibility as a New International Order?*, 72 BRIT. Y.B. INT'L L. 337, 339 (2002) (defining “solidarity measures” to be “countermeasures by States claiming to act in the interests of the beneficiaries of the obligation or ‘the international community as a whole’”).

<sup>8</sup> See TAMS, *supra* note 2, at 48–49 (“A brief look into the classic treatises of international law shows that debates about standing in the general interest have a long history.”).

rights abroad,<sup>9</sup> developing states and international organizations such as the U.N. General Assembly, the U.N. Human Rights Council, and the World Health Organization have denounced many of these initiatives in strident terms.<sup>10</sup>

Hovering over this controversy are unanswered questions about the legal basis for humanitarian countermeasures under public international law. Traditionally, the international community has understood countermeasures to constitute “an act of self-help by the injured state” that is firmly rooted in customary international law.<sup>11</sup> Yet it remains unclear precisely why states may claim an “injury” that would justify “self-help” when a target state violates the human rights of its own nationals on its own soil. Although a growing body of state practice bears witness to the international community’s acceptance of humanitarian countermeasures as a legally valid mechanism for protecting international human rights,<sup>12</sup> a more robust juridical theory is sorely needed to clarify the nature and scope of states’ authority to use these measures under international law.

Over time, legal scholars have developed two juridical theories to explain states’ standing to use humanitarian countermeasures. Both theories draw their inspiration from the International Court of Justice’s (ICJ) oft-cited dictum in *Barcelona Traction*, which states that “all States” may assert “a legal interest” in other states’ respect for “the basic rights of the human person, including protection from slavery and racial discrimination.”<sup>13</sup> The first theory, which I will call the “state-interest theory,” posits that whenever a state violates “basic rights of the human person,” every other state suffers an individualized legal injury and has standing (*jus standi*) under international law

<sup>9</sup> See *supra* notes 1–5 and accompanying text.

<sup>10</sup> See, e.g., G.A. Res. 66/186, at 2, U.N. Doc. A/RES/66/186 (Dec. 22, 2011) (“*Ungfingl* the international community . . . to eliminate the use of unilateral coercive economic measures against developing countries that are not authorized by relevant organs of the United Nations or are inconsistent with the principles of international law as set forth in the Charter of the United Nations.”); Comm’n on Human Rights, Sub-Comm’n on the Promotion & Prot. of Human Rights, Working Paper, The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights, 52nd Sess., June 21, 2000, U.N. Doc. E/CN.4/Sub.2/2000/33, ¶¶ 58–100 [hereinafter Sub-Commission Report] (condemning various coercive economic measures for exacerbating conditions of famine and disease in developing countries); Human Rights Council Res. 9/4, Human Rights and Unilateral Coercive Measures, 9th Sess., A/HRC/RES/9/4, ¶ 9 (Sept. 17, 2008) (rejecting “all attempts to introduce unilateral coercive measures” as contrary to international law).

<sup>11</sup> See Reps. of Int’l Arbitral Awards, Responsabilité de l’Allemagne à raison des dommages causés dans les colonies portugaises du sud de l’Afrique (sentence sur le principe de la responsabilité), (Portugal contre Allemagne), Lausanne, July 31, 1928, *reprinted in* 2 RECUEIL DES SENTENCES ARBITRALES 1026 (translated from the French and German by the author from “un acte de propre justice (Selbsthilfehandlung) de l’État lésé”).

<sup>12</sup> See *supra* notes 1–5 and accompanying text.

<sup>13</sup> *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, ¶¶ 33–34 (Feb. 5).

to seek appropriate remedies through interstate countermeasures.<sup>14</sup> A second theory, which I will call the “community-interest theory,” conceives of international human rights as legal obligations that run vertically from states to the international community as a whole.<sup>15</sup> According to the community-interest theory, states that impose humanitarian countermeasures act as deputized agents of the international community to enforce the community’s collective interests in human rights observance.

Unfortunately, neither the state-interest theory nor the community-interest theory offers a satisfying justification for humanitarian countermeasures. As I will explain in Part I, both theories rest upon dubious accounts of the juridical structure of international human rights.<sup>16</sup> International human rights obligations are best understood not as contracts that confer independent legal entitlements on states but rather as nonreciprocal commitments that constitute legally binding undertakings for the benefit of human rights holders. Because human rights are designed to address the particular vulnerabilities that arise within the institutional relationship between states and persons subject to their power,<sup>17</sup> they vest legal entitlements in human beings, not other states individually or collectively. Contrary to the ICJ’s assertions in *Barcelona Traction*,<sup>18</sup> therefore, the better view is that intervening states lack a primary legal interest of their own that would confer standing to impose countermeasures in response to human rights abuse abroad.

In Part II, I develop an alternative theory of state standing to enforce the human rights of foreign nationals abroad. The theory I propose trades on the insight that human beings—not states or the international community as a whole—are the designated “beneficiaries” of state human rights commitments.<sup>19</sup> Drawing upon Hugo Grotius’s guardianship theory of humanitarian intervention,<sup>20</sup> I argue that under some circumstances customary international law authorizes states to employ countermeasures as fiduciary representatives for foreign peoples. Rather than assert their own legal interests, states derive their standing to contest human rights violations abroad from the legal injuries that foreign nationals suffer at the hands of their

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<sup>14</sup> See *infra* Part I.D.1.

<sup>15</sup> See *infra* Part I.D.2.

<sup>16</sup> I use the term “juridical” throughout this Article to capture the formal legal character, definition, or internal structure of certain norms and relationships.

<sup>17</sup> See generally Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 LEGAL THEORY 301, 302 (2009) (developing a theory of human rights that reframes them “as legal entitlements grounded in the state-subject fiduciary relationship”).

<sup>18</sup> *Barcelona Traction*, 1970 I.C.J. 3.

<sup>19</sup> CRAWFORD, *supra* note 6, at 1, 43.

<sup>20</sup> See 2 HUGO GROTIUS, ON THE LAW OF WAR AND PEACE ch. XXV, pt. I (A.C. Campbell trans., 2001) (1625).

own state. States' authority to impose humanitarian countermeasures under contemporary international law is akin to the authority that guardians, agents, trustees, corporate directors, doctors, and attorneys exercise in municipal private law: it is held and exercised in a fiduciary capacity for the exclusive benefit of a foreign people. This Article suggests, therefore, that the international community should decouple humanitarian countermeasures from dubious notions of "state interests" and "collective interests," and recognize instead that states' standing to protect the human rights of foreign nationals abroad rests ultimately upon the legally protected interests of human rights holders.

The fiduciary theory developed in this Article has several advantages over previous theories of human rights as "obligations *erga omnes*." First, unlike previous accounts of humanitarian countermeasures, the fiduciary theory explains how the nonreciprocal character of international human rights commitments can be reconciled with the reciprocal structure of interstate countermeasures. Second, the fiduciary theory takes seriously the agency problems that arise whenever states undertake to act in the interest of foreign peoples, and it offers constructive solutions for addressing these problems. Third, the fiduciary theory clarifies the scope of states' authority to use humanitarian countermeasures: states have standing to enforce the human rights of foreign nationals abroad only when the fiduciary relationship between another state and its people has been incontrovertibly compromised—either because the other state has violated peremptory norms of general international law or because an authoritative international body has determined that the state has transgressed its nonperemptory human rights obligations. Fourth, in contrast to previous theories of humanitarian countermeasures, which are coldly indifferent to the actual desires of human rights holders, the fiduciary theory honors the principle of self-determination by prohibiting states from treating human rights victims as mere passive objects of state concern. Under the fiduciary theory, states must respect the dignity and autonomy of their designated beneficiaries by consulting with and honoring the legitimate preferences of foreign nationals whose human rights they seek to protect. In each of these respects, the fiduciary theory corrects distortions introduced by *Barcelona Traction's* misguided suggestion that all states may claim an independent legal interest in other states' human rights compliance.

By illuminating the juridical structure of humanitarian countermeasures, the fiduciary theory explains why powerful states such as the United States and members of the European Union have standing to enforce the human rights of foreign nationals abroad. But the theory does not merely offer a legal justification for foreign intervention; it

also furnishes a rich body of legal principles that developing states and international organizations may use to contest humanitarian countermeasures that are insufficiently attentive to the legitimate interests and desires of human rights holders. The fiduciary theory thus places the developing practice of humanitarian countermeasures on a more firm legal footing, while also clarifying the limits of states' coercive authority.

## I

### DEBATING HUMANITARIAN COUNTERMEASURES

Although international law enforcement today takes a variety of forms, the international system has always relied heavily upon decentralized peer enforcement to guarantee respect for international law.<sup>21</sup> This Article focuses on one important subset of state peer enforcement: nonforcible measures such as trade embargos, asset freezes, investment restrictions, and travel bans. Although such measures are often loosely described as “sanctions” in the political arena and the media, international law does not permit states to use these measures for punitive purposes without Security Council authorization.<sup>22</sup> Instead, decentralized coercive measures are best understood as “countermeasures”: acts “of non-compliance, by a State, with its obligations owed to another State, decided upon in response to a prior breach of international law by that other State and aimed at inducing it to respect its obligations.”<sup>23</sup> As the International Law Commission (ILC) recognized in its *Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries (Articles on State Responsibility)*, customary international law permits states to impose countermeasures under a variety of circumstances as a “self-help” mechanism for coerc-

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<sup>21</sup> See Jutta Brunnée, *Enforcement Mechanisms in International Law and International Environmental Law*, in ENSURING COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS 1, 4 (Ulrich Beyerlin et al. eds., 2006) (acknowledging this historical tradition and recognizing that “contemporary international law is still state-centered in fundamental respects”); see also Torsten Stein, *Decentralized International Law Enforcement: The Changing Role of the State as Law Enforcement Agent*, in ALLOCATION OF LAW ENFORCEMENT AUTHORITY IN THE INTERNATIONAL SYSTEM 107, 107–26 (Jost Delbrück et al. eds., 1994) (describing the United Nations' deference to its member states in enforcing international law).

<sup>22</sup> See *infra* note 37 and accompanying text.

<sup>23</sup> TAMS, *supra* note 2, at 19–20; see also Gabčíkovo-Nagymaros Project (Hung./Slovk.), 1997 I.C.J. 7, ¶¶ 82–87 (Sept. 25) (discussing the lawfulness of a countermeasure in response to an internationally wrongful act); Air Services Agreement (Fr. v. U.S.), 18 R.I.A.A. 416, ¶ 83 (1978) (discussing and applying the customary law of countermeasures); James Crawford, *The Relationship Between Sanctions and Countermeasures*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 57 (Vera Gowlland-Debbas ed., 2001) (clarifying the notion of a “sanction” in international law and qualifying that the Security Council's powers in the U.N. Charter are described as responses to threats or breaches of the peace, not to internationally wrongful acts).



ing other states to comply with international law.<sup>24</sup> What remains unclear is whether, or to what extent, states may use countermeasures not as a tool for “self-help” but rather to compel an oppressive state to respect the human rights of its own citizens.

This Part briefly chronicles the international community’s past efforts to clarify when, if ever, states may use countermeasures to protect the human rights of foreign nationals abroad. The story recounted here has roots in Enlightenment-era debates over humanitarian military intervention, with principles of natural right and sovereign equality playing key roles. By the end of the twentieth century, however, the focus of these debates had shifted as legal scholars sought to make sense of the ICJ’s assertion in *Barcelona Traction* that at least some human rights norms qualify as “obligations *erga omnes*.” Contemporary legal scholars continue to vigorously debate whether, and under what circumstances, states may assert standing to employ humanitarian countermeasures.<sup>25</sup> Yet for all of the attention that legal scholars have lavished upon these issues, the international community has made remarkably little progress in clarifying the metes and bounds of state authority to use humanitarian countermeasures.

#### A. The Road to *South West Africa*

The idea that states may come to the aid of oppressed foreign peoples can be traced back to the dawn of international law. Writing in the early seventeenth century, Hugo Grotius defended the view that all states were bound by natural law obligations that extended between all states. According to Grotius, states could compel their peers to comply with natural law, irrespective of where and against whom violations might occur.<sup>26</sup> This enforcement authority did not derive from any legal capacity associated with state sovereignty *per se*, but

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<sup>24</sup> See Rep. of the Int’l Law Comm’n, 61st Sess., May 4–June 5, July 6–Aug. 7, 2009, art. 22, U.N. Doc. A/64/10 (2009); CRAWFORD, *supra* note 6, pt. 3, ch. II, cmt. 2 & arts. 49–54. In the seminal 1978 *Air Services Agreement*, for example, an arbitral tribunal concluded that the United States did not violate international law when it cancelled Air France’s Paris–Los Angeles route in response to France’s prior refusal to permit Pan-American Airlines to use a smaller aircraft (“change of gauge”) for its London–Paris flight. See *Air Services Agreement*, 18 R.I.A.A. 416. The tribunal questioned whether the United States’ action was facially “contrary to international law” and even if so, whether this step was nonetheless “justified” as a proportional response to France’s prior violation of its treaty obligations to the United States. *Id.* ¶ 84. It concluded that under the circumstances, the measures were justified. *Id.* ¶ 98.

<sup>25</sup> See *infra* Part I.D–E.

<sup>26</sup> See HARRY D. GOULD, *THE LEGACY OF PUNISHMENT IN INTERNATIONAL LAW* 17 (2010) (“Borrowing heavily from classical Roman jurisprudence, Hugo Grotius asserted that any violation of Natural Law entailed a right to punish.”); TAMS, *supra* note 2, at 48–49 (identifying Grotius’s claim that kings have the right to punish for injuries against natural law, even if the alleged act was not committed against themselves) (citing 2 GROTIUS, *supra* note 20, ch. XX).

rather from a natural right held equally by all members of international society to ensure that grave violations of the law of nature did not go uncorrected.<sup>27</sup> Core features of Grotius's account would resurface later in John Locke's *Second Treatise on Civil Government*,<sup>28</sup> as well as the writings of influential eighteenth- and nineteenth-century publicists such as Cornelius van Bynkershoek, Johann Caspar Bluntschli, and August Wilhelm Heffter.<sup>29</sup> Although these scholars did not all subscribe to Grotius's natural law theory, they agreed that some international obligations ran between all states, such that all states could enforce these obligations—irrespective of whether they or their nationals had suffered a direct injury.

Other publicists endeavored to narrow the scope of international peer enforcement. Samuel Pufendorf and Emerich de Vattel argued that punishment was permissible only within a hierarchical relationship between subject and sovereign.<sup>30</sup> International law, on the other hand, was built on an entirely different premise: the formal legal equality of sovereign states.<sup>31</sup> According to these publicists, one implication of the principle of sovereign equality was that states could claim only limited rights of intervention: the right to retaliate in response to an injury to themselves or their own nationals (a form of self-defense) and the right to respond to pleas for assistance from foreign peoples to address claims that “they themselves can rightfully advance, for taking up arms to protect themselves against the barbarous savagery of their superiors.”<sup>32</sup> Other publicists categorically rejected decentral-

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<sup>27</sup> See 2 GROTIUS, *supra* note 20, ch. XX; see also GOULD, *supra* note 26, at 18–21 (observing that under Grotius's conception of international legal order, natural law required that: “Evil deeds must be corrected”). See generally Benjamin Straumann, *The Right to Punish as a Just Cause of War in Hugo Grotius' Natural Law*, 2 STUD. HIST. ETHICS 5 (2006) (discussing the various natural rights postulated by Grotius).

<sup>28</sup> See JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* bk. 2, ch. II, § 8 (C.B. Macpherson ed., 1980) (1690) (arguing that an “offender” against natural law works “a trespass against the whole species,” so that every person—and, by implication, every state—“hath a right to punish the offender, and be executioner of the law of nature” (emphasis omitted)).

<sup>29</sup> See TAMS, *supra* note 2, at 48–49 (discussing the contributions of Bynkershoek, Bluntschli, and Heffter, among others).

<sup>30</sup> See RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* 158–59 (1999) (discussing Pufendorf's view that punishment could only be administered by “someone who had agreed political authority over other men”); 2 EMER DE VATTEL, *THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* ch. IV, § 55 (Joseph Chitty trans., 1867) (1758) (“It does not, then, belong to any foreign power to take cognisance of the administration of that sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it.”).

<sup>31</sup> See TUCK, *supra* note 30, at 158–59; VATTEL, *supra* note 30, § 55.

<sup>32</sup> 2 SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* bk. VIII, ch. 6, § 14 (C.H. Oldfather & W.A. Oldfather trans., 1934) (1688); see also VATTEL, *supra* note 30, ch. IV, § 56 (arguing that any foreign state can take up the right of oppressed peoples wronged by their own state).

ized enforcement of states' humanitarian obligations. For example, Christian Wolff argued that only the international community as a whole, operating as a collective superstate (*civitas maxima*), could claim authority to enforce international law against states.<sup>33</sup> In Wolff's view, "the decision does not rest with foreign nations as to matters arising between subjects and ruler of any state, inasmuch as they ought not to intrude themselves in the affairs of others."<sup>34</sup> Concerns about sovereign equality prompted many later scholars such as Robert Phillimore and August von Bulmerincq to reject the idea that international law would permit states to use coercive measures to protect foreign nationals abroad.<sup>35</sup>

By the mid-twentieth century, this restrictivist tradition had gained the upper hand. The United Nations Charter, which affirmed "faith in fundamental human rights,"<sup>36</sup> simultaneously enshrined the prohibition against intervention as a foundational principle of international law.<sup>37</sup> During the same period when states were putting the finishing touches on the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), they also took pains to condemn all forms of foreign intervention. In declarations devoted to "intervention"<sup>38</sup> and principles of "friendly relations,"<sup>39</sup> the General Assembly stressed that "[n]o State has the right to intervene, directly or indi-

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<sup>33</sup> See 2 CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* §§ 13, 16, 258, 1011 (Joseph H. Drake trans., 1934) (1749) (objecting to the decentralized nature of individual state enforcement).

<sup>34</sup> *Id.* § 1011.

<sup>35</sup> See 1 ROBERT PHILLIMORE, *COMMENTARIES UPON INTERNATIONAL LAW* 320 (1854) ("Intervention, urged on behalf of the general interests of humanity, has been frequently put forward . . . . [B]ut as a substantive and solitary justification of Intervention in the affairs of another country, it can scarcely be admitted into the code of International Law . . . ."); TAMS, *supra* note 2, at 49 (commenting that "Phillimore and von Bulmerincq warned against intervention in the name of a greater good"); August von Bulmerincq, *Die Staatsstreitigkeiten und ihre Entscheidung ohne Krieg*, in *HANDBUCH DES VÖLKERRECHTS* 84–85 (1889) (suggesting that if use of reprisals was expanded to third states, this would allow a "bellum omnium contra omnes").

<sup>36</sup> U.N. Charter pmbl.

<sup>37</sup> See *id.* art. 2(7) (exempting the Security Council's "enforcement measures under Chapter VII" from the prohibition against intervention but cautioning that states should not construe other provisions to abrogate this customary norm).

<sup>38</sup> See Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131 (XX), ¶ 1, U.N. Doc. A/RES/20/2131 (Dec. 21, 1965) [hereinafter Declaration on Intervention]; see also Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 101–03, ¶¶ 191–92, 202–04 (June 27) (characterizing this principle as customary international law).

<sup>39</sup> See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (Oct. 24, 1970) [hereinafter Friendly Relations Declaration].

rectly, for any reason whatsoever, in the internal or external affairs of any other State.”<sup>40</sup> Regional agreements in Africa, the Americas, and Europe likewise condemned foreign “intervention” in the broadest possible terms.<sup>41</sup> Although these prohibitions against “intervention” and “interference” were subject to conflicting interpretations, many states clearly accepted the idea that international law would not permit states to intercede unilaterally in the domestic affairs of their peers for any reason—not even to safeguard human rights.<sup>42</sup>

### B. The *South West Africa* Judgment

In 1962, and again in 1966, the ICJ weighed in on these matters in the *South West Africa Cases (Ethiopia v. South Africa and Liberia v. South Africa)*.<sup>43</sup> Ethiopia and Liberia had instituted proceedings against South Africa, arguing that South Africa had violated its obligations under the Covenant of the League of Nations and the Mandate for South West Africa by imposing apartheid upon the people of South West Africa (present-day Namibia).<sup>44</sup> Before the court could reach the merits of these claims, however, it had to address South Africa’s preliminary objection that Ethiopia and Liberia lacked standing because “no material interests of the Governments of Ethiopia and/or Liberia or of their nationals [were] involved therein or af-

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<sup>40</sup> Declaration on Intervention, *supra* note 38, ¶ 1; *see also id.* ¶ 2 (“No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind.”); Friendly Relations Declaration, *supra* note 39, pmb. (declaring “that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State”).

<sup>41</sup> *See* Conference on Security and Co-operation in Europe, Final Act (Helsinki Accords), princ. VI, Aug. 1, 1975, 14 ILM 1292 (discussing the principles of “Non-Intervention in Internal Affairs”: “The participating States will refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations”); Charter of the Organization of African Unity art. III, May 25, 1963, 2 ILM 766, 767–68 (“The Member States, in pursuit of the purposes stated in Article II, solemnly affirm and declare their adherence to the following principles: . . . non-interference in the internal affairs of States.”); Charter of the Organization of American States art. 19, Apr. 30, 1948, 2 U.S.T. 2394 (“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.”).

<sup>42</sup> *But see* Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT’L L. 1, 5–10 (1989) (suggesting that certain political activities are not prohibited by the nonintervention norms).

<sup>43</sup> *See* *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Judgment, 1962 I.C.J. 319, 377–79 (Dec. 21); *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Judgment, 1966 I.C.J. 6, 28–31 ¶¶ 33–36, 34–36 ¶¶ 49–54 (July 18).

<sup>44</sup> *See* *South West Africa*, 1962 I.C.J. at 322–24 (quoting the party submissions of Ethiopia and Liberia).

fectured thereby.”<sup>45</sup> The court dismissed this objection in its initial decision on the preliminary objections, holding that the case could proceed to the merits because the mandate was “an institution in which all the Member States are interested as such.”<sup>46</sup> Several judges dissented, including the court’s president, Bohdan Winiarski. Judge Winiarski argued that allowing states to initiate proceedings as an “*actio popularis*” for the international community as a whole “would have been such a novelty in international relations, going far beyond the novelty of the Mandates system itself in its implications, that, if the drafters of these instruments had all agreed on the self-imposition of such a responsibility, they would not have failed to say so explicitly.”<sup>47</sup>

When the ICJ revisited the *South West Africa Cases* four years later, it reversed course and embraced Judge Winiarski’s approach, holding by the narrowest of margins that neither Ethiopia nor Liberia had standing to challenge apartheid in South West Africa.<sup>48</sup> The court noted that the Covenant of the League of Nations and the mandate agreement entrusted authority to South Africa as “agent[ ]” or “trustee[ ]” for the League collectively, not member-states individually.<sup>49</sup> While the League had standing to enforce the mandate through its various organs, the Covenant and mandate agreement reflected “no similar recognition of any right as being additionally and independently vested in any other entity, such as a State, or as existing outside or independently of the League as an institution.”<sup>50</sup> In particular, the court discerned in the Covenant no “right for every member of the League separately and individually to require from the mandatories the due performance of their mandates, or creating a liability for each mandatory to be answerable to them individually.”<sup>51</sup> Although the court resisted the view that a state must always establish “prejudice of a material kind” to claim a legal interest in the observance of international law, it stressed that “such rights or interests, in order to exist, must be clearly vested in those who claim them, by some text or instru-

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<sup>45</sup> *Id.* at 326–27 (quoting the party submissions of South Africa).

<sup>46</sup> *Id.* at 332, 343–44; *see also id.* at 425–26 (Jessup, J., separate opinion) (asserting a general interest in enforcing observance of the law); International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. 128, 158 (July 11) (“Every State which was a Member of the League at the time of its dissolution still has a legal interest in the proper exercise of the Mandate.”).

<sup>47</sup> *South West Africa*, 1962 I.C.J. at 452–53 (Winiarski, C.J., dissenting).

<sup>48</sup> The court divided evenly, with the president casting the decisive vote against the claims of Ethiopia and Liberia. *South West Africa*, 1966 I.C.J. at 51 ¶ 100.

<sup>49</sup> *Id.* at 24 ¶ 20.

<sup>50</sup> *Id.* at 24 ¶ 21.

<sup>51</sup> *Id.* at 24 ¶ 24. *But see id.* at 373 (Jessup, J., dissenting) (“States may have a general interest—cognizable in the International Court—in the maintenance of an international regime adopted for the common benefit of the international society.”).

ment, or rule of law.”<sup>52</sup> Because the court concluded that Ethiopia and Liberia could not demonstrate any such interest in South Africa’s treatment of the people of South West Africa, the states lacked standing to seek relief from the ICJ.<sup>53</sup>

Lest its decision be construed narrowly as addressing only the Mandate for South West Africa, the court went on to reject the idea that Ethiopia and Liberia might have standing based upon the “humanitarian” character of South Africa’s obligations.<sup>54</sup> The court noted that “[h]umanitarian considerations may constitute the inspirational basis for rules of law,” but they “do not . . . in themselves amount to rules of law. All states are interested—have an interest—in such matters. But the existence of an ‘interest’ does not of itself entail that this interest is specifically juridical in character.”<sup>55</sup> Any effort to broaden state standing to protect the human rights of foreign nationals abroad would constitute “an essentially legislative task, in the service of political ends the promotion of which, however desirable in itself, lies outside the function of a court-of-law.”<sup>56</sup> Moreover, although the court observed that some municipal legal systems recognize “an ‘*actio popularis*,’ or right resident in any member of a community to take legal action in vindication of a public interest,” it found that such a right “is not known to international law as it stands at present” and would not qualify as a “general principle of law” under article 38 of the ICJ Statute.<sup>57</sup> The court thus concluded that no treaty, custom, or general principle of law conferred standing on other states to challenge South Africa’s racially discriminatory policies in South West Africa.<sup>58</sup>

### C. The *Barcelona Traction* Dictum

A few years later, the ICJ seized an opportunity to provide further guidance in the *Barcelona Traction Case*.<sup>59</sup> The case involved a dispute between Spain and the Barcelona Traction, Light & Power Company, Ltd., a holding company headquartered and incorporated in Ca-

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<sup>52</sup> *Id.* at 32 ¶ 44. The court noted in passing the parties’ assertion that “the provisions of certain treaties and other international instruments of a humanitarian character” authorized state standing even without prejudice to “their own material interests.” *Id.*

<sup>53</sup> *Id.* at 32–33 ¶ 44 (“The Court simply holds that such rights or interests, in order to exist, must be clearly vested in those who claim them, by some text or instrument, or rule of law;—and that in the present case, none were ever vested in individual members of the League under any of the relevant instruments, or as a constituent part of the mandates system as a whole, or otherwise.”).

<sup>54</sup> *Id.* at 34 ¶ 49.

<sup>55</sup> *Id.* at 34 ¶ 50.

<sup>56</sup> *Id.* at 36 ¶ 57.

<sup>57</sup> *Id.* at 47 ¶ 88.

<sup>58</sup> *Id.* at 35 ¶ 54, 51 ¶ 99.

<sup>59</sup> *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5).

nada.<sup>60</sup> Belgium sought reparations from Spain for the company's shareholders, many of whom were allegedly Belgian nationals.<sup>61</sup> Belgium asserted that Spain had violated international law by, *inter alia*, preventing the company from servicing its debt obligations.<sup>62</sup>

The ICJ ultimately dismissed the case, holding that Belgium lacked standing to pursue reparations for injuries to a Canadian corporation.<sup>63</sup> The court explained that before a state could enforce a right to performance of an obligation under the law of diplomatic protection, it "must first establish its right to do so," taking into account two basic "suppositions: 'The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach.'"<sup>64</sup> Belgium was unable to satisfy the first criterion, the court held, because Spain owed obligations to the Canadian company, not to its shareholders *per se*: "Not a mere interest affected, but solely a right infringed," triggers international "responsibility," the court reasoned.<sup>65</sup> Since Spain had not infringed any right of Barcelona Traction's shareholders, Belgium lacked standing to challenge Spain's allegedly unlawful conduct.<sup>66</sup>

This analysis was sufficient to dispose of Belgium's claims against Spain. In the course of its judgment, however, the ICJ ventured beyond the field of diplomatic protection to reflect briefly on a question outside the scope of the instant dispute: whether states owe obligations "toward the international community as a whole."<sup>67</sup> The court answered this question in the affirmative. "By their very nature," the court reasoned, some international obligations "are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obliga-

<sup>60</sup> *Id.* at 7.

<sup>61</sup> *Id.* at 12.

<sup>62</sup> *Id.* at 3, 8–11 ¶¶ 10–24.

<sup>63</sup> *Id.* at 50 ¶ 101.

<sup>64</sup> *Id.* at 32 ¶ 35 (quoting *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 181–82 (Apr. 11)); *see also* *Panevezys-Saldutiskis Railway (Est. v. Lith.)*, 1939 P.C.I.J. (ser. A/B) No. 76, at 16 (Feb. 28) ("[I]t is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection . . ."); EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS* 352 (1915) ("[T]he state in prosecuting the offense committed against its citizen is presumed to avenge and seek compensation for the injury to its national welfare and dignity, an injury quite independent of that sustained by its citizen.")

<sup>65</sup> *Barcelona Traction*, 1970 I.C.J. at 36 ¶ 46.

<sup>66</sup> *Id.* at 47 ¶¶ 87–88.

<sup>67</sup> *Id.* at 32 ¶ 33.

tions *erga omnes*.”<sup>68</sup> The court proceeded to identify some international norms that would qualify as obligations *erga omnes*:

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character.<sup>69</sup>

By taking pains to single out “racial discrimination” as an “obligation *erga omnes*,” the ICJ pointedly repudiated its narrow approach to standing in the *South West Africa Cases*. Henceforth, the court suggested, all states could claim a genuine legal interest in universal respect for “the basic rights of the human person.”<sup>70</sup>

Although *Barcelona Traction* focused primarily on state standing to initiate judicial proceedings, the ICJ’s controversial dictum on “obligations *erga omnes*” had groundbreaking implications for the law of countermeasures. In the years immediately preceding *Barcelona Traction*, few publicists believed that international law would permit a state to impose countermeasures without demonstrating harm to its own nationals.<sup>71</sup> *Barcelona Traction* upended this conventional wisdom; if all states could assert a legal interest in universal respect for “basic rights of the human person,” as *Barcelona Traction* suggested, then it would seem to follow that states could also claim a legal injury justifying countermeasures whenever any state violated the “basic rights” of any individuals anywhere in the world.<sup>72</sup> By characterizing norms such as the prohibitions against genocide, slavery, and racial discrimination as obligations *erga omnes*,<sup>73</sup> *Barcelona Traction* appeared to open the door

<sup>68</sup> *Id.* (emphasis added).

<sup>69</sup> *Id.* at 32 ¶ 34 (citation omitted).

<sup>70</sup> *See id.* Although *Barcelona Traction* liberalized state standing for “obligations *erga omnes*,” the ICJ concluded that leading human rights conventions such as the ICCPR and the ICESCR do not authorize states to initiate proceedings in an international court. According to the ICJ, international human rights conventions “do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality.” *See id.* at 47 ¶ 91. *But see, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination pt. II, art. 11, Mar. 7, 1966, 660 U.N.T.S. 195; Convention on the Prevention and Punishment of the Crime of Genocide art. IX, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. The court suggested, therefore, that states must seek redress at “the regional level,” where instruments such as the European Convention on Human Rights (ECHR) allow states to bring complaints “irrespective of the nationality of the victim.” *Barcelona Traction*, 1970 I.C.J. at 47 ¶ 91.

<sup>71</sup> *See TAMS, supra* note 2, at 94 (“[I]t was a matter of controversy whether States, prior to the *Barcelona Traction case*, in the absence of individual injury, could enforce basic humanitarian standards.”).

<sup>72</sup> *Barcelona Traction*, 1970 I.C.J. at 32 ¶ 34.

<sup>73</sup> *Id.* at 32 ¶¶ 33–34.



wide for decentralized state enforcement of international human rights.

#### D. Two Theories of Humanitarian Countermeasures

Before *Barcelona Traction* could be put into practice successfully, however, further effort was needed to explain precisely why, and under what circumstances, states could claim a legal injury when another state commits human rights violations abroad. Although the ICJ had clearly embraced the idea that some international obligations would support universal state standing, its brief and somewhat conclusory dictum was amenable to conflicting interpretations. In the wake of *Barcelona Traction*, some scholars have argued that all states may claim an individualized legal interest in global human rights compliance, while others have argued that states may enforce the human rights of foreign nationals abroad only as representatives of the international community as a whole. Although both of these theories reflect plausible interpretations of *Barcelona Traction's* enigmatic dictum, neither provides an entirely satisfying account of the legal basis and permissible scope of humanitarian countermeasures.

##### 1. *The State-Interest Theory*

Following *Barcelona Traction*, some scholars have accepted *Barcelona Traction's* suggestion that “all States can be held to have a legal interest in” protecting “the basic rights of the human person.”<sup>74</sup> These scholars contend that states covenant with one another to respect, protect, and fulfill human rights, with the consequence that every state may claim a legal interest in other states’ compliance with their shared obligations. Whenever any state violates its human rights obligations, the theory goes, other states that have made the same commitments may claim a legal injury and use countermeasures as a form of “self-help” to vindicate their own individualized interest in

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<sup>74</sup> *Id.*; see, e.g., IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 470 (7th ed. 2008) (“States may have a legal interest in vindicating a principle of international law, even though they have, in the given case, suffered no material prejudice . . . .” (quoting *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Judgment, 1966 I.C.J. 6, 32 ¶ 44 (July 18)); Oscar Schachter, INTERNATIONAL LAW IN THEORY AND PRACTICE: GENERAL COURSE IN PUBLIC INTERNATIONAL LAW 182 (offprt. 1982) (noting that “all States have a legal interest in the observance of some fundamental norms of international law and that infringements of such norms are violations *erga omnes*”); James R. Crawford, *Responsibility to the International Community as a Whole*, 8 IND. J. GLOBAL LEGAL STUDS. 303, 319 (2001) (“[A]ny State is injured by a breach of human rights if it is a party to the human rights standard in question.”); Giorgio Gaja, *States Having an Interest in Compliance with the Obligation Breached*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 957, 957 (James Crawford et al. eds., 2010) (arguing that individual state interests are “implicit in the indication that ‘the obligation breached is owed to the international community as a whole’” (quoting *Barcelona Traction*, 1970 I.C.J. at 32 ¶ 33)).

global respect for human rights. This theory has received sympathetic treatment in the jurisprudence of the ICJ<sup>75</sup> and the International Criminal Tribunal for the former Yugoslavia,<sup>76</sup> and the *Restatement on Foreign Relations of the United States*.<sup>77</sup>

Despite its popularity, the state-interest theory rests upon contestable jurisprudential foundations, and it lacks the resources necessary to answer key questions about the scope of states' authority to use humanitarian countermeasures. For example, there are good reasons to question the state-interest theory's vision of international human rights conventions as reciprocal (synallagmatic) contracts that entitle states to claim an individualized legal injury when other states violate human rights abroad.<sup>78</sup> Although the content of human rights agreements may be fiercely negotiated, states' legal obligations under these agreements are best understood as parallel unilateral (gratuitous) undertakings; states pledge to respect human rights for the benefit of human beings without conditioning their own performance in any way on other states' performance of the same obligations.<sup>79</sup> Human rights conventions generate legal entitlements, but these entitlements take the form of "rights and freedoms" that human beings may claim against states rather than contractual rights that states may assert against one another in pursuit of their respective national interests. To be sure, some treaties such as the Genocide Convention permit states to initiate enforcement proceedings before international tribunals.<sup>80</sup> The more natural reading of these provisions, however, is that

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<sup>75</sup> See *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90, 202 (June 30) (Weeramantry, J., dissenting).

<sup>76</sup> See *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶ 151 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

<sup>77</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 211 cmt. b, 701 n.3, 703 cmt. b, 902 cmt. a (1987).

<sup>78</sup> See BLACK'S LAW DICTIONARY 374 (9th ed. 2010) (defining a "synallagmatic contract" as "[a] contract in which the parties obligate themselves reciprocally, so that the obligation of each party is correlative to the obligation of the other" and explaining that "[t]he term synallagmatic contract is essentially the civil-law equivalent of the common law's bilateral contract" (emphasis omitted)).

<sup>79</sup> Cf. Louis Henkin, *Human Rights and "Domestic Jurisdiction,"* in HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 21, 30–31 (Thomas Buergenthal ed., 1977) (characterizing human rights treaties as "mutual undertakings . . . for the benefit of third parties").

<sup>80</sup> See, e.g., Genocide Convention, *supra* note 70, art. IX ("Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention . . . shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."); Convention for the Protection of Human Rights and Fundamental Freedoms art. 24, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention] ("Any High Contracting Party may refer to the Commission, through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party."); American Convention on Human Rights art. 61, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention] ("[T]he States Parties . . . shall have the right to submit a case to the Court."); Slavery Convention art. 8, Sept.

they permit states to enforce human rights for the benefit of oppressed foreign peoples *despite the fact* that their own legal interests are not prejudiced by a target state's conduct.<sup>81</sup> Indeed, the ICJ appeared to concede this point when it stated in the *Genocide Convention Reservations Case* that with respect to human rights norms such as the prohibition against genocide "one cannot speak of individual advantages or disadvantages to States."<sup>82</sup> There are therefore good reasons to question the idea that states may claim an injury to their legal interests when other states violate the human rights of their own nationals abroad.<sup>83</sup>

Even if states could claim an abstract interest in other states' respect for human rights, international law arguably prohibits states from using countermeasures to advance this national interest rather than the concrete entitlements of foreign human rights victims. As Giorgio Gaja has observed, "[i]t would be inconceivable that [a] State would be entitled to claim compensation for its own benefit to make reparation for damage that it has not suffered."<sup>84</sup> Nor may an intervening state reasonably use humanitarian countermeasures to pursue an ideological agenda of its own that is divorced from the actual needs

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25, 1926, 212 U.N.T.S. 17 (as amended in 1953) ("The High Contracting Parties agree that disputes arising between them relating to the interpretation or application of this Convention shall, if they cannot be settled by direct negotiation, be referred for decision to the International Court of Justice.").

<sup>81</sup> See CRAWFORD, *supra* note 6, arts. 48 & 54 (characterizing humanitarian countermeasures as involving action by a State "*other than an injured State*" (emphasis added)); cf. Vienna Convention on the Law of Treaties art. 60(2), May 23, 1969, 1155 U.N.T.S. 331 (providing that a state may suspend its treaty obligations (in the absence of an agreement between the contracting parties) only if a material breach has "specially affected" that state or has "radically change[d] the position of every party with respect to the further performance of its obligations"). In recognition of the fact that states enforcing human rights cannot claim any injury from human rights abuse abroad, the ILC ultimately declined to characterize such responsive measures as "countermeasures." CRAWFORD, *supra* note 6, art. 54, cmt. 7; see also Nigel White & Ademola Abass, *Countermeasures and Sanctions*, in INTERNATIONAL LAW 531, 544 (Malcolm D. Evans ed., 3d ed. 2010) (arguing for these reasons that humanitarian countermeasures should be understood as "a modern form of non-forcible measure or sanction that are outside the narrowly defined countermeasures regime").

<sup>82</sup> Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

<sup>83</sup> See Christian Hillgruber, *The Right of Third States to Take Countermeasures*, in THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER 265, 268 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006) ("In principle, it is beyond doubt even today that, in general, only a subject of international law conventionally understood to be directly affected by a violation of international law may resort to reprisals against an offending State."); THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 238-39 (1989) ("Conceptually, countermeasures are based on the principle of interstate reciprocity, which, generally speaking, is foreign to human rights." (citation omitted)). But see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 703, n.3 (1987) ("The customary law of human rights, however, protects individuals subject to each state's jurisdiction, and the international obligation runs equally to all other states, with no state a victim of the violation more than any other.").

<sup>84</sup> Gaja, *supra* note 74, at 961.

or desires of foreign human rights victims.<sup>85</sup> By all accounts, the proper question when evaluating the proportionality of humanitarian countermeasures is whether the particular coercive measures employed are necessary to address the harm that a foreign state has visited upon its own people, not whether the measures are necessary to satisfy the intervening state's own abstract interest in universal respect for human dignity or compliance with international law.<sup>86</sup> Hence, to the extent that the state-interest theory grounds humanitarian countermeasures in state interests rather than the rights of human beings, it is out of step with international law's insistence that intervening states must use humanitarian countermeasures exclusively to further the interests of oppressed peoples.

To be fair, most proponents of the state-interest theory do not dispute that international human rights law vests legal interests primarily in human beings; they simply contend that the law *also* gives states a secondary legal interest in the enforcement of human rights abroad.<sup>87</sup> The precise scope of this secondary enforcement interest and its relationship with the primary legal interests of human rights holders remains obscure, however, under the state-interest theory. For example, the state-interest theory offers no limiting principles to explain when states may use countermeasures to enforce human rights abroad. If states may claim an enforceable legal interest in all human rights of a "universal or quasi-universal" character, as the ICJ intimated in *Barcelona Traction*, then in theory states could use countermeasures to enforce any human rights norms that have "entered into . . . general international law."<sup>88</sup> Yet this approach arguably cuts too deeply into the customary prohibition against foreign intervention. If every human rights norm qualifies as an obligation *erga omnes*, then states would enjoy a roving commission to impose countermeasures in response to any perceived human rights violation abroad,

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<sup>85</sup> See Special Rapporteur on State Responsibility, *Third Rep. on State Responsibility*, Int'l Law Comm'n, ¶ 376, U.N. Doc. A/CN.4/507 & Add. 1-4 (Mar. 15, 2000) (by James Crawford) [hereinafter *Third Crawford Report*].

<sup>86</sup> See *id.* ("[P]rovisions for the invocation of responsibility on behalf of the international community need to acknowledge the primacy of the interests of the actual victims.").

<sup>87</sup> See, e.g., Yoram Dinstein, *The Erga Omnes Applicability of Human Rights*, 30 ARCHIV DES VÖLKERRECHTS 16, 17-18 (1992).

<sup>88</sup> *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 ¶¶ 33-34 (Feb. 5). Indeed, as Sir Ian Sinclair noted during the ILC's deliberations over the *Articles on State Responsibility*, "in the broadest of all possible senses, it could be said that every State ha[s] an interest in all rules of international law being observed." *Summary Records of the Meetings of the Thirty-fifth Session*, [1984] 1 Y.B. Int'l L. Comm'n 130 ¶ 27, U.N. Doc. A/CN.4/SER.A/1983. To their credit, some scholars have embraced this implication of the state-interest theory. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 703 (describing various remedies for violation of human rights obligations); Juan-Antonio Carrillo-Salcedo, *Book Reviews and Notes, The Concept of International Obligations Erga Omnes*, 92 AM. J. INT'L L. 791, 793 (1998); Dinstein, *supra* note 87, at 17.

irrespective of the scale or relative gravity of the violation.<sup>89</sup> There is little evidence that either state practice or *opinio juris* supports such an expansive approach to humanitarian countermeasures. While such concerns do not, in and of themselves, prove that the state-interest theory cannot succeed, they do suggest, at a minimum, that the state-interest theory requires further refinement before it can serve as a juridical theory of humanitarian countermeasures.

## 2. *The Community-Interest Theory*

As an alternative to the state-interest theory, some scholars have construed *Barcelona Traction* to stand for the proposition that certain human rights commitments are so important or fundamental to international society that they vest legal interests in the international community collectively.<sup>90</sup> According to this theory, states undertake human rights obligations for the purpose of constituting an international public order that respects human dignity.<sup>91</sup> Customary international law, in turn, deputizes all states to enforce obligations *erga omnes* on behalf of the international community as a whole. What distinguishes obligations *erga omnes* from other norms, under this theory, is not the “universal or quasi-universal” character of these obligations per se but rather “the importance of the rights involved” to the integrity of international legal order generally.<sup>92</sup>

<sup>89</sup> See *Third Crawford Report*, *supra* note 85, at 30 ¶ 86 (“[O]n the face of it every State is considered as injured even by an individual and comparatively minor breach of the fundamental right of one person . . .”).

<sup>90</sup> See, e.g., Jost Delbrück, *Laws in the Public Interest – Some Observations on the Foundations and Identification of Erga Omnes Norms in International Law*, in LIBER AMICORUM GUNTHER JAENICKE 17, 18 (1988); D.N. Hutchinson, *Solidarity and Breaches of Multilateral Treaties*, 59 BRIT. Y.B. INT’L L. 151, 151–215 (1988); SANTIAGO VILLALPANDO, L’EMERGENCE DE LA COMMUNAUTÉ INTERNATIONALE DANS LA RESPONSABILITÉ DES ÉTATS (2005) [hereinafter VILLALPANDO, L’EMERGENCE]; Denis Alland, *Countermeasures of General Interest*, 13 EUR. J. INT’L L. 1221, 1222 (2002) (conceptualizing the actions to protect these rights “countermeasures of general interest”); Carrillo-Salcedo, *supra* note 88, at 793 (describing how the concept of obligations *erga omnes* creates a community interest); Peter D. Coffman, *Obligations Erga Omnes and the Absent Third State*, 39 GERMAN Y.B. INT’L L. 285, 299–301 (1996) (defining *erga omnes* more narrowly than just those rights that are important to the international community); Santiago Villalpando, *The Legal Dimension of the International Community: How Community Interests are Protected in International Law*, 21 EUR. J. INT’L L. 387, 401–02 (2010) [hereinafter Villalpando, *Legal Dimension*] (detailing how community interests are defined and protected).

<sup>91</sup> See Anne-Laure Vaurs-Chaumette, *The International Community as a Whole*, in THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 74, at 1023, 1024–25 (“Thus State responsibility towards the international community translates into legal form the will to safeguard collective goods and values, including human rights, humanitarian law, self-determination of peoples, the prohibition of genocide, respect for international peace, and protection of the environment.”); VILLALPANDO, L’EMERGENCE, *supra* note 90, at 308–09; Villalpando, *Legal Dimension*, *supra* note 90, at 391–92.

<sup>92</sup> *Barcelona Traction*, 1970 I.C.J. at 32 ¶ 33; see also Christian J. Tams, *Individual States as Guardians of Community Interests*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 379, 380 (Ulrich Fastenrath et al. eds., 2011) (defining

Although the community-interest theory is attractive in many respects, the case for viewing human rights as universally enforceable community interests is hardly watertight. International human rights conventions such as the ICCPR and the ICESCR do not purport to confer any legal interests on the “international community as a whole.”<sup>93</sup> Moreover, even if the international community as a whole may claim a collective legal interest in human rights compliance in some sense, it is doubtful that states may enforce this collective interest at their own discretion. If international law authorized states to use countermeasures to enforce the international community’s collective interest in respect for human rights standards, we might reasonably expect to find support not only for coercive measures designed to make human rights holders whole but also for broader sanctions designed to uphold the international rule of law by deterring future violations or delivering retribution for past violations. The fact that punitive measures are widely understood to be beyond the scope of legitimate humanitarian countermeasures strongly suggests that international law commits the enforcement of any such “community interests” exclusively to international institutions such as the Security Council.<sup>94</sup> Individual states arguably lack authority to enforce the international community’s collective interests unless the Security Council or some other international institution expressly delegates enforcement authority.<sup>95</sup> Whatever the ICJ might have meant by char-

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“community interests” as encompassing “fundamental values as well as interests shared by groups of States collectively”). A particularly lucid expression of the community-interest theory appears in the European Court of Human Rights’ judgment in the *Pfunders Case*. *Austria v. It.* (Pfunders Case), App. No. 788/60, 4 Y.B. Eur. Conv. on H.R. 3, 18 (Eur. Ct. H.R. 1961). The court reasoned that

the purpose of the High Contracting Parties in concluding the [European Convention on Human Rights] was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but . . . to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law.

*Id.*

<sup>93</sup> *Barcelona Traction*, 1970 I.C.J. at 32 ¶ 33.

<sup>94</sup> See Alexis Blane & Benedict Kingsbury, *Punishment and the Ius Post Bellum*, in *THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS: ALBERICO GENTILI AND THE JUSTICE OF EMPIRE* 241–43 (Benedict Kingsbury & Benjamin Straumann eds., 2010) (observing that states no longer formally justify countermeasures and other enforcement measures in punitive terms).

<sup>95</sup> See Rep. of the Int’l Law Comm’n, 35th Sess., May 14–Aug. 3, 1979, ¶ 12, U.N. Doc. A/34/10, Supp. No. 10 (1979) (arguing that the rise of obligations *erga omnes* “has led the international community to turn towards a system which vests in international institutions other than States exclusive responsibility, first, for determining the existence of a breach of an obligation of basic importance to the international community as a whole, and, thereafter, for deciding what measures are to be taken in response and how they are to be implemented”). *But see* Tams, *supra* note 92, at 398 (suggesting that in some contexts “international legal rules accept that a particular State could/should act as trustee of the

acterizing human rights as obligations “toward the international community as a whole,”<sup>96</sup> there are good reasons to question the idea that international law currently permits any individual state, in Prosper Weil’s words, to “appoint itself the avenger of the international community.”<sup>97</sup>

Setting aside such questions about state authority to enforce collective interests, the community-interest theory also struggles to specify which human rights norms qualify as obligations *erga omnes*. Advocates of the community-interest theory tend to argue that only “fundamental”<sup>98</sup> or “important”<sup>99</sup> international norms qualify as obligations *erga omnes*. But disagreement persists as to which human rights meet these standards.<sup>100</sup> Some scholars have interpreted *Barcelona Traction* to permit humanitarian countermeasures only in response to violations of international *jus cogens*.<sup>101</sup> Others have espoused the view that all international human rights are now accepted as “fundamental” to international legal order.<sup>102</sup> Under the logic of the community-interest theory, however, it remains unclear why norms must be “fundamental” to qualify as “community interests” in the first place, let alone how the international community should decide whether a norm is sufficiently “fundamental.” Equally uncertain is whether community interests may be triggered by isolated human rights violations or only “systematic breaches of human rights.”<sup>103</sup> Because it is unable to answer these questions, the commu-

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international community simply because it is in the best position to protect the community’s interest”).

<sup>96</sup> *Barcelona Traction*, 1970 I.C.J. at 32 ¶ 33.

<sup>97</sup> Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 432 (1983); see also Monica Hakimi, *Unfriendly Unilateralism*, 55 HARV. INT’L L.J. 105, 107–08 (2014) (raising similar concerns).

<sup>98</sup> ANDRÉ DE HOOGH, OBLIGATIONS *ERGA OMNES* AND INTERNATIONAL CRIMES: A THEORETICAL INQUIRY INTO THE IMPLEMENTATION AND ENFORCEMENT OF THE INTERNATIONAL RESPONSIBILITY OF STATES 56 (1996).

<sup>99</sup> TAMS, *supra* note 2, at 130–31, 153.

<sup>100</sup> See *Barcelona Traction*, 1970 I.C.J. at 32 ¶ 34 (noting the differing definitions of obligations *erga omnes*); see also MERON, *supra* note 83, at 194–96 (noting that *erga omnes* rights are broader than *jus cogens*); TAMS, *supra* note 2, at 153 (acknowledging the question of distinction is “difficult to answer in the abstract”).

<sup>101</sup> E.g., TAMS, *supra* note 2, at 145 (suggesting that assessing *erga omnes* through a *jus cogens* view “might be fruitful”); cf. *Third Crawford Report*, *supra* note 85, ¶ 106 (asserting that obligations *erga omnes* are “virtually coextensive with peremptory obligations”); *id.* ¶¶ 374, 406 (suggesting that “the category [of obligations *erga omnes*] includes only a small number of universally accepted norms” and that violations of these norms must be “well-attested”).

<sup>102</sup> See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 703(2) (1987) (“Any state may pursue international remedies against any other state for a violation of the customary international law of human rights.” (citation omitted)); MERON, *supra* note 83, at 199 (“The distinction between basic human rights and human rights *tout court*, as regards their *erga omnes* character, can no longer be regarded as settled law.”); Dinstein, *supra* note 87, at 17 (noting the Institut de Droit International’s support for this thesis).

<sup>103</sup> *Third Crawford Report*, *supra* note 85, ¶ 87.

nity-interest theory has proven to be only marginally helpful in clarifying the scope of state authority to enforce the human rights of foreign nationals abroad. In sum, the meaning of *Barcelona Traction's* enigmatic dictum on “obligations *erga omnes*” remains deeply contested, with scholars divided over whether these obligations should be understood in terms of state interests, community interests, or both. Although the state-interest and community-interest theories are both plausible interpretations of *Barcelona Traction*, both struggle to reconcile the nonreciprocal character of international human rights with the reciprocal character of countermeasures, and neither theory provides clear criteria for identifying which international human rights qualify as obligations *erga omnes*.

### E. The ILC's Inconclusive Debate

The ILC grappled with *Barcelona Traction's* implications for the law of countermeasures as it labored over what would become the *Articles on State Responsibility*.<sup>104</sup> For three decades, ILC members debated whether obligations *erga omnes* should be conceptualized in terms of state interests, community interests, or some other account of state standing, and they struggled to reach consensus on the question whether states could enforce these obligations through countermeasures.<sup>105</sup> Although the ILC ultimately accepted the idea that all states could assert standing to contest the violation of some international human rights, it shied away from taking a firm position on the legality of humanitarian countermeasures.<sup>106</sup>

Throughout the ILC's deliberations, some ILC members argued that the character of obligations *erga omnes* as “community interests” would preclude state peer enforcement. For example, in the years immediately following *Barcelona Traction*, the ILC's special rapporteur on state responsibility, Roberto Ago, asserted that international law “vests in international institutions other than States exclusive responsibility, first, for determining the existence of a breach of an obligation of basic importance to the international community as a whole, and, thereafter, for deciding what measures are to be taken in response and how they are to be implemented.”<sup>107</sup> The next special rapporteur, Willem Riphagen, agreed with Ago's assessment:

The precise determination of the acts permitted or allowed—what measures are available and practicable, which of them should be selected, what scope they should be given and by whom they should

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<sup>104</sup> See generally CRAWFORD, *supra* note 6, at 124–33 (discussing the abstracts of what constitutes the breach of an international obligation).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Rep. of the Int'l Law Comm'n, *supra* note 95, at 118–19.



be applied—is a matter which lies within the competence of the appropriate political organs of the United Nations acting within their authority under the Charter.<sup>108</sup>

Riphagen discerned “little evidence” of any other “accepted legal consequences of serious breaches.”<sup>109</sup> States might have a collective interest in respect for human rights abroad, but only international institutions such as the Security Council could undertake enforcement action to protect this collective interest.<sup>110</sup>

Other members of the ILC were more sympathetic to humanitarian countermeasures. Gaetano Arangio-Ruiz, who succeeded Riphagen as special rapporteur on state responsibility, accepted aspects of both the state-interest theory and the community-interest theory. Arangio-Ruiz argued not only that all states have a legal interest in human rights compliance but that a state “indirectly injured” by human rights violations abroad could claim “the same kind of rights and *facultés* as those to which it would be entitled within the framework of any bilateral . . . relationship.”<sup>111</sup> Arangio-Ruiz also accepted the idea that human rights constituted collective interests of the international community and that individual states could enforce these interests on behalf of the international community as a whole: “In the predominately inorganic condition of the inter-State system, even the [enforcement] . . . of fundamental interests of the international community . . . seems to remain in principle, under general international law, in the hands of States.”<sup>112</sup>

When James Crawford succeeded Arangio-Ruiz in 1995, he endeavored to resolve these debates within the ILC.<sup>113</sup> This objective

<sup>108</sup> Special Rapporteur on State Responsibility, *Preliminary Rep. on the Content, Forms and Degrees of International Responsibility*, U.N. Doc. A/CN.4/330 (Apr. 1, 1980) (by Willem Riphagen), reprinted in [1980] 2 Y.B. INT'L L. COMM'N 107, 121 ¶ 70, U.N. Doc. A/CN.4/SER.A/1980/Add.1 [hereinafter *Preliminary Report*]; see also *id.* at 119 ¶ 64 (arguing that when states breach obligations *erga omnes*, “the response in the first instance can only be a collective one”).

<sup>109</sup> Special Rapporteur on State Responsibility, *Fourth Rep. on the Content, Forms and Degrees of International Responsibility*, ¶ 58, U.N. Doc. A/CN.4/366 & Add. 1 (Apr. 14–15, 1983) (by Willem Riphagen); see also *Third Crawford Report*, *supra* note 85, at 26 ¶ 71 (noting that ILC members Sir Ian Sinclair and Nikolai Ushakov were not prepared to accept the legality of humanitarian countermeasures).

<sup>110</sup> *Preliminary Report*, *supra* note 108, at 121 ¶ 70.

<sup>111</sup> See Special Rapporteur on State Responsibility, *Fourth Rep. on State Responsibility*, Int'l Law Comm'n, 46–47 ¶ 143 U.N. Doc. A/CN.4/444 & Adds. 1–3 (1992) (by Gaetano Arangio-Ruiz); Special Rapporteur on State Responsibility, *Third Rep. on State Responsibility*, Int'l Law Comm'n, 28 ¶ 95 U.N. Doc. A/CN.4/440 & Add. 1 (1991) (by Gaetano Arangio-Ruiz).

<sup>112</sup> Special Rapporteur on State Responsibility, *Seventh Rep. on State Responsibility*, Int'l Law Comm'n, at 17 ¶ 71, U.N. Doc. A/CN.4/469 (1995) (by Gaetano Arangio-Ruiz).

<sup>113</sup> See Crawford, *supra* note 23, at 64–68 (discussing the complications of attaining appropriate collective countermeasures to protect injured states).

proved to be elusive.<sup>114</sup> Although few ILC members advocated prohibiting humanitarian countermeasures entirely, there was a sharp divergence of views on the best way to address the subject in the *Articles on State Responsibility*. Some ILC members argued that the *Articles* should sidestep the question of humanitarian countermeasures entirely because it “raises highly controversial issues about the balance between law enforcement and intervention, in a field already controversial enough.”<sup>115</sup> Others argued that the ILC should stay the course and provide at least some general guidance regarding the legal principles that govern humanitarian countermeasures.<sup>116</sup>

Under Crawford’s leadership, the ILC proposed for state comment a draft article that would have allowed any state to impose countermeasures if another state breached an obligation “to the international community as a whole (*erga omnes*)” that was “established for the protection of the collective interests of a group of States, including that State.”<sup>117</sup> One reasonable implication of this position, the ILC suggested, was that states could use countermeasures to enforce the human rights of foreign nationals abroad.<sup>118</sup>

Most states indicated that they were prepared to accept the legal validity of humanitarian countermeasures,<sup>119</sup> but several expressed concerns. For example, the United Kingdom questioned whether customary international law supported a right to impose countermeasures in response to violations of obligations *erga omnes*, and it advised the ILC that recognizing such a right prematurely might “disrupt the established frameworks for the enforcement of human rights.”<sup>120</sup> China argued that decentralized human rights enforcement “could become one more pretext for power politics in international relations, for only powerful States and blocs of States are in a position to take countermeasures against weaker States.”<sup>121</sup> These expressions of concern underscored some ILC members’ lingering misgivings that international law might not permit states to use countermeasures to

<sup>114</sup> See *id.* at 67–68.

<sup>115</sup> Special Rapporteur on State Responsibility, *Fourth Rep. on State Responsibility*, Int’l Law Comm’n, 18 ¶ 71 U.N. Doc. A/CN.4/517 (Apr. 2, 2001) (by James Crawford) [hereinafter *Fourth Crawford Report*].

<sup>116</sup> See *id.* at 18 ¶¶ 72–74.

<sup>117</sup> *Third Crawford Report*, *supra* note 85, at 39.

<sup>118</sup> See *id.* at 106 ¶¶ 403–06 (“[It] is difficult to envisage that, faced with obvious, gross and persistent violations of community obligations, third States should have no entitlement to act.”).

<sup>119</sup> TAMS, *supra* note 2, at 246–47 (“[A] large [ ] number of governments did not share that view but, expressly or by implication, accepted that in the case of serious breaches of obligations *erga omnes*, all States could resort to countermeasures.”).

<sup>120</sup> State Comments, U.N. Doc. A/CN.4/515 & Adds. 1–3 (Mar. 19, Apr. 3, May 1, June 28, 2001), at 82 ¶ 4.

<sup>121</sup> *Id.*

enforce collective interests of the international community as a whole.<sup>122</sup>

In the end, the ILC decided to scale back its proposal. Although the final *Articles on State Responsibility* asserted that some international obligations such as the prohibitions against slavery and racial discrimination are “owed to the international community as a whole,”<sup>123</sup> the ILC declined to embrace the idea that states could enforce these interests without Security Council authorization, stating that “there appears to be no clearly recognized entitlement of States [not directly injured] to take countermeasures in the collective interest.”<sup>124</sup> The ILC acknowledged that states had employed countermeasures to protect human rights on some occasions in the past, but it characterized the relevant state practice as “sparse” and “embryonic.”<sup>125</sup> The ILC therefore inserted a savings clause in the *Articles* that merely preserved this issue for future consideration in anticipation of the “further development of international law.”<sup>126</sup> Article 54, entitled “Measures taken by States other than an injured State,” reads: “This chapter does not prejudice the right of any State, entitled . . . to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.”<sup>127</sup> By bracketing the question of state peer enforcement in this manner, the ILC ensured that the international community would continue to debate the legal validity and permissible scope of humanitarian countermeasures.

## F. The Costs of Incomplete Theorization

Although the ILC declined to give its imprimatur to humanitarian countermeasures, this did not deter states from using these measures. Since the ILC completed its work on the *Articles on State Responsibility*, states have employed countermeasures with increasing

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<sup>122</sup> See *Fourth Crawford Report*, *supra* note 115, at 18 ¶ 71–74 (“The thrust of Government comments is that article 54, and especially paragraph 2, has no basis in international law and would be destabilizing.”).

<sup>123</sup> CRAWFORD, *supra* note 6, at 127, art. 48, cmt. 9.

<sup>124</sup> See *id.* at 139, art. 54, cmt. 6.

<sup>125</sup> *Id.* pt. 3, ch. II, cmt. 8 & art. 54, cmts. 3 & 6.

<sup>126</sup> *Id.* art. 54, cmt. 6.

<sup>127</sup> *Id.* at 137, art. 54; see also *id.* art. 48, cmt. 8 (“This chapter does not purport to regulate the taking of countermeasures by States other than the injured State. It is, however, without prejudice to the right of any State identified in article 48, paragraph 1, to take lawful measures against a responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached (art. 54).”).

frequency to protect the human rights of foreign nationals abroad.<sup>128</sup> Western powers such as the United States and the European Union have been most aggressive in their use of humanitarian countermeasures, but they have been joined on occasion by states in Africa, Asia, and the Middle East as well.<sup>129</sup> These developments have prompted the U.N. High Commissioner for Human Rights<sup>130</sup> and a number of legal scholars<sup>131</sup> to conclude that humanitarian countermeasures are now firmly ensconced in state practice as a lawful mechanism for international law enforcement.

Despite these developments, even scholars sympathetic to humanitarian countermeasures have been forced to concede that the legal basis for these measures remains “very mysterious indeed.”<sup>132</sup> Neither the state-interest theory nor the community-interest theory of obligations *erga omnes* has earned the unalloyed confidence of the international community, and for good reason. Ultimately, neither theory offers a satisfactory solution for reconciling the nonreciprocal character of international human rights with the reciprocal character of interstate countermeasures. Although the ICJ has reaffirmed the concept of obligations *erga omnes* on several occasions since *Barcelona*

<sup>128</sup> See Martin 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 BRIT. Y.B. INT'L L. 333 (2007).

<sup>129</sup> See TAMS, *supra* note 2, at 235–39 (“[A]lthough in the clear majority of cases, only western States have taken countermeasures, there is some practice by non-western States. By supporting the armed struggle against apartheid, African States violated their obligations *vis-à-vis* South Africa.”); Dawidowicz, *supra* note 128; Tams, *supra* note 92, at 390–91 (listing the use by Western and non-Western powers); *supra* note 4 and accompanying text. For example, many states have responded to recent human rights violations in Syria by imposing trade embargos, asset freezes, and other coercive measures without obtaining permission in advance from the Security Council. See *EU to Impose Sanctions on Syrian Officials; UN to Send Team to Daraa*, REUTERS (May 6, 2011, 7:25 PM), <http://www.haaretz.com/news/world/eu-to-impose-sanctions-on-syrian-officials-un-to-send-team-to-daraa-1.360276>; *Syria Unrest: Arab League Adopts Sanctions in Cairo*, BBC NEWS (Nov. 27, 2011, 5:51 PM), <http://www.bbc.co.uk/news/world-middle-east-15901360>.

<sup>130</sup> See U.N. High Commissioner for Human Rights, *Thematic Study of the Office of the United Nations High Commissioner for Human Rights on the Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, Including Recommendations Aimed at Ending Such Measures*, 7–8 ¶ 22, U.N. Doc. A/HRC/19/33 (Jan. 11, 2012), available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-33\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-33_en.pdf) (“Where human rights or other obligations owed to the international community as a whole (obligations *erga omnes*) are concerned, any State may take lawful measures against the State that breached the said *erga omnes* obligation . . .”).

<sup>131</sup> See, e.g., O’CONNELL, *supra* note 3, at 245 (contending “the weight of opinion supports the right of states to take countermeasures in cases of *erga omnes* obligations with a *jus cogens* character”); TAMS, *supra* note 2, at 249–51 (suggesting that “individual States are entitled to take countermeasures in response to systematic or large-scale breaches of obligations *erga omnes*”); Dawidowicz, *supra* note 128.

<sup>132</sup> MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS *ERGA OMNES*, at xi (1997) (quoting Ian Brownlie, *Presentation, To What Extent Are the Traditional Categories of Lex Lata and Lex Ferenda Still Viable?*, in CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING 71 (Antonio Cassese & Joseph Weiler eds., 1988)).

*Traction*, giving ammunition to supporters of humanitarian countermeasures, its piecemeal contributions have scarcely begun to resolve these debates.<sup>133</sup> The legal basis and scope of state authority to use humanitarian countermeasures thus remain deeply controversial.

The fog of uncertainty that surrounds humanitarian countermeasures has real-world costs, undermining international solidarity and compromising the enforcement of international human rights. Some states have taken a page from Ago and Riphagen, refusing to enforce the human rights of foreign peoples without Security Council authorization based on professed concerns that international law does not permit individual states to enforce collective interests of the international community.<sup>134</sup> Other states have imposed countermeasures to advance their own national interests, despite the fact that their coercive measures greatly aggravated human rights deprivations within target states.<sup>135</sup> Meanwhile, skepticism about the legal validity of humanitarian countermeasures has been intensifying throughout the developing world, as reflected in a steady stream of General Assembly resolutions calling for an end to “unilateral economic” coercion.<sup>136</sup>

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<sup>133</sup> See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 199 ¶ 155 (July 9) (finding that Israel violated certain obligations *erga omnes*); East Timor (Port. v. Austl.), 1995 I.C.J. 90, 102 ¶ 29 (June 30) (supporting Portugal’s assertion of the right to self-determination, which “has an *erga omnes* character”).

<sup>134</sup> See, e.g., *China: U.S. Has No Right to Impose Unilateral Sanctions Against Iran*, PRESS TV (Mar. 31, 2012; 12:35 PM), <http://www.presstv.com/detail/233960.html> (quoting China’s Foreign Ministry statement: “The Chinese side always opposes one country unilaterally imposing sanctions against another according to [its] domestic law. Furthermore, it does not accept the unilateral imposition of those sanctions on a third country”); *Russia, Belarus Call Unilateral Sanctions ‘Counterproductive,’* PEOPLE’S DAILY ONLINE (Oct. 31, 2012; 8:58 AM), <http://english.peopledaily.com.cn/90777/7998219.html> (quoting Russian Foreign Minister Sergei Lavrov: “Only the U.N. Security Council is authorized to take coercive measures against countries that violate the international law”). That Russia has used this argument opportunistically is underscored by its recent use of countermeasures against the United States after the United States employed economic countermeasures in response to Russia’s annexation of Crimea. See Wesley Lowery & Ed O’Keefe, *Reacting to Sanctions, Russians Ban Reid, Boehner and Four Other Senators*, WASH. POST (Mar. 20, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/03/20/reacting-to-sanctions-russians-ban-reid-boehner-and-7-other-lawmakers/>.

<sup>135</sup> Studies suggest, for example, that economic coercion in Haiti and Iraq during the early 1990s contributed to the death of hundreds of thousands from hunger and disease. See, e.g., Sub-Commission Report, *supra* note 10, ¶¶ 58–100 (noting that the U.N. Security Council’s multilateral economic sanctions on Iraq in 1990 and 1991 led to “half a million to a million and a half” deaths); Alberto Ascherio et al., *Effect of the Gulf War on Infant and Child Mortality in Iraq*, 327 NEW ENG. J. MED. 931, 931 (1992) (estimating that “the Gulf war and trade sanctions caused a threefold increase in mortality among Iraqi children under five years of age”).

<sup>136</sup> See, e.g., G.A. Res. 66/186, *supra* note 10 (resolving, inter alia, that “no State may use or encourage the use of unilateral economic . . . measures to coerce another State”); G.A. Res. 62/162, pmbi., U.N. Doc. A/RES/62/162 (Mar. 13, 2008) (reaffirming that no state may use economic coercion against another state to interfere with that state’s exercise of sovereign rights); G.A. Res. 62/183, ¶ 2, U.N. Doc. A/RES/62/183 (Jan. 31, 2008)

Whether the law of humanitarian countermeasures can rise above this tide of deepening skepticism will depend, at least in part, on whether the international community succeeds in developing a more coherent and intelligible legal theory of state standing to enforce the human rights of foreign peoples.

These dynamics suggest an urgent need for fresh thinking about the jurisprudential foundations of humanitarian countermeasures. To be useful in practice, a theory of humanitarian countermeasures must be capable of providing principled answers to three questions. First, what is the legal basis for states' standing to contest human rights violations abroad? Second, how should the international community determine whether humanitarian countermeasures are proportional? Third, may states impose countermeasures in response to any human rights violations abroad or only a limited subset (e.g., massive and systematic abuses, or violations of *jus cogens*)? The remainder of this Article furnishes answers to these questions.

## II

### A FIDUCIARY THEORY OF HUMANITARIAN COUNTERMEASURES

In the discussion that follows, I propose a new theory of humanitarian countermeasures that clarifies both the legal basis and the limits of state standing to protect the human rights of foreign nationals abroad. Drawing inspiration from Grotius's guardianship theory of humanitarian intervention, I argue that in some settings international law authorizes states to serve as fiduciaries on behalf of foreign peoples for the purpose of imposing countermeasures to protect their international human rights.

Fiduciary relationships arise in contexts where one party (the fiduciary) exercises discretionary power over the practical interests of another party (the beneficiary).<sup>137</sup> In many such relationships, the fiduciary exercises a beneficiary's legal rights on the beneficiary's behalf. For example, guardians commonly buy and sell property on behalf of their wards, agents enter contracts on behalf of their princi-

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(same); G.A. Res. 51/17, U.N. Doc A/Res/51/17 (Nov. 12, 1996) (urging the United States to repeal its embargo of Cuba). The most recent of these resolutions passed by a vote of 122 in favor to 2 opposed (the United States and Israel), with 53 abstaining. *See also* Meetings Coverage, General Assembly, Effects of Global Crises on Poor Countries, Sustainable Development Conference Feature as General Assembly Considers Reports of Second Committee, U.N. Meetings Coverage GA/11200 (Dec. 22, 2011), <http://www.un.org/Press/EN/2011/ga11200.doc.htm> ("The Assembly adopted a draft resolution urging the international community to eliminate unilateral coercive economic measures against developing countries . . ."); TAMS, *supra* note 2, at 14 ("Whether States can take countermeasures in response to *erga omnes* breaches is one of the most controversial issues in the law of State responsibility.")

<sup>137</sup> *See* Paul B. Miller, *Justifying Fiduciary Remedies*, 63 U. TORONTO L.J. 570, 602 (2013) (discussing the formal judicial structure of fiduciary relationships).

pals, and lawyers file pleadings and negotiate settlements on behalf of their clients. In each of these settings, the fiduciary derives their authority to act from the legal personality of their beneficiary.<sup>138</sup>

To protect beneficiaries from abuse, fiduciary law dictates that a fiduciary may not unilaterally set the terms of their relationship with their beneficiary.<sup>139</sup> Instead, the law intercedes to set those terms by imposing duties of loyalty and care, which honor the beneficiary's autonomy and safeguard the beneficiary from exploitation.<sup>140</sup> Fiduciary law thus obligates a fiduciary to exercise entrusted powers in a manner that respects the beneficiary's legitimate interests.

Viewing humanitarian countermeasures through the lens of fiduciary obligation brings into focus both the privileged status of human beings as the exclusive bearers of human rights and the derivative character of state standing to challenge human rights violations abroad. When states impose humanitarian countermeasures, the legal entitlements they seek to vindicate are those of foreign nationals abroad. In effect, states that use countermeasures to protect the human rights of foreign peoples serve as fiduciary representatives, asserting the legal interests of foreign nationals on their behalf. Their standing to enforce the human rights of foreign peoples is not based on their own independent legal interests, individual or collective. Just as a successor trustee has standing to enforce an errant trustee's fiduciary obligations on behalf of trust beneficiaries,<sup>141</sup> under some circumstances all states have standing to enforce international human rights obligations on behalf of oppressed peoples abroad.

This reframing of the formal legal basis for humanitarian countermeasures has far-reaching theoretical and practical implications. One important lesson of the fiduciary theory is that states bear a fiduciary duty to use humanitarian countermeasures solely to advance the interests of their beneficiaries abroad, not their own respective sovereign interests. The fiduciary theory also clarifies which types of human rights violations qualify for decentralized enforcement, and it supplies a rich set of substantive principles to guide proportionality analysis. Lastly, the fiduciary theory dictates that states must respect the self-determination of human rights holders by endeavoring to consult with and respect the views of those whose rights they undertake to protect. In each of these respects, the fiduciary theory signifi-

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<sup>138</sup> See *id.* at 623.

<sup>139</sup> See generally TAMAR FRANKEL, *FIDUCIARY LAW* 106–07 (2010).

<sup>140</sup> See *id.* at 106–20, 169–76 (2010) (discussing the fiduciary duties of loyalty and care).

<sup>141</sup> See RESTATEMENT (SECOND) OF TRUSTS § 177 cmt. a (1959) (“The trustee is under a duty to the beneficiary to take reasonable steps to enforce any claim which he holds as trustee against predecessor trustees . . .”).

cantly strengthens the international legal regime for humanitarian countermeasures.

### A. Human Rights as Human Interests

To fully appreciate the fiduciary theory's contribution, it will be helpful to set the stage by examining briefly the juridical structure of international human rights.

International human rights law is premised on a conception of human rights as legal entitlements that safeguard the "inherent dignity" and "equal and inalienable rights of all members of the human family."<sup>142</sup> The distinguishing feature of international human rights, in contrast to other international obligations, is that they are "specifically formulated in terms of the rights of [human beings]" rather than states.<sup>143</sup> Although international law charges states with protecting the human rights of their people, it is doubtful that international law gives states an independent legal interest in human rights observance. As Crawford observed during the ILC's deliberations over the *Articles on State Responsibility*, "the language of human rights in the Charter of the United Nations and in human rights texts since 1948" speaks exclusively of human beings as rights holders; it "provides no reason for treating human rights obligations as 'allocatable' to States 'in the first instance.'"<sup>144</sup> While international human rights are clearly matters of international concern in a general sense, the legal formulation of these rights focuses on affirming the universal status of humans as rights bearers rather than on generating rights for states *inter se*. The better view today, therefore, is that international human rights are vested exclusively in, and hence can only be waived by, human rights bearers.<sup>145</sup>

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<sup>142</sup> Universal Declaration of Human Rights pmb., G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); *see also* International Covenant on Civil and Political Rights pmb., Dec. 19, 1966, 999 U.N.T.S. 171 (1976) [hereinafter ICCPR] (asserting that human rights "derive from the inherent dignity of the human person").

<sup>143</sup> *Third Crawford Report*, *supra* note 85, at 30 ¶ 89.

<sup>144</sup> *Id.* at 30–31 ¶ 89. Crawford contrasted human rights with "rules relating to the treatment of aliens in the field of diplomatic protection," which "were deliberately articulated as involving the rights of States, as [the Permanent Court of International Justice] stressed in *Mavrommatis [Palestine Concessions]*." *Id.* at 30 ¶ 89.

<sup>145</sup> Contemporary international human rights law thus marks a paradigm shift from earlier conceptions of international law, which characterized all individual rights under international law as state rights. *Cf.* 1 LASSA OPPENHEIM, INTERNATIONAL LAW 458 (3d ed. 1920) (suggesting that "where States stipulate by international treaties certain favours for individuals . . . these individuals do not acquire any international rights under these treaties, but the State whose subjects they are has an obligation towards the other States"). For discussion of the philosophical challenges facing state-centric (or, as he puts it, "human concern") approaches to human rights theory, see generally Jeremy Waldron, Human Rights: A Critique of the Raz/Rawls Approach (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 13-32, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2272745](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2272745).



These features distinguish international human rights from other international norms that are widely described as obligations *erga omnes*. For example, atmospheric and oceanic pollution violate obligations *erga omnes* because every state suffers harm to its sovereign interests whenever any state degrades resources that constitute the shared patrimony of all mankind.<sup>146</sup> Similarly, the prohibition against aggression arguably qualifies as an obligation *erga omnes* because each state owes this obligation to each of its peers to safeguard international peace and security for all.<sup>147</sup> According to Judge Stephen Schwebel's dissent in the ICJ's *Nicaragua* case, states may also bear an obligation *erga omnes* to publicize the location of minefields that may endanger foreign nationals, such that any state whose nationals are injured by undisclosed mines may demand reparations.<sup>148</sup> In each of these examples, states bear legal obligations toward every member of the international community (*erga omnes*) to refrain from activities that may cause legal injury to all others. Any state that suffers legal injury within one of these regimes of correlative rights and obligations is entitled, therefore, to seek remedies through reciprocal countermeasures.

If human rights can be characterized meaningfully as "obligations *erga omnes*," it must be in a very different sense. Unlike ordinary obligations *erga omnes*, a state's human rights violations against its own people do not injure other states' individualized legal interests. To quote from the *Genocide Convention Reservations Case* once again, where human rights are concerned, "States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention."<sup>149</sup> The universal character of international human rights that qualify as obligations *erga omnes* is not that they are *owed to all states* (as the term "obligations *erga omnes*" implies), but rather that they are (1) *owed by all states* subject to these norms (2) *to all human beings* within their territory and subject to their jurisdiction, and that they (3) may be *enforced by all other states* for the protection of human rights holders.<sup>150</sup>

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<sup>146</sup> See Gabčíkovo-Nagymaros Project (Hung./Slov.), 1997 I.C.J. 7, 88, 117-19 (Sept. 25) (Weeramantry, J.).

<sup>147</sup> See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v U.S.), 1986 I.C.J. 14, 116 ¶ 223 (June 27).

<sup>148</sup> See *id.* ¶ 269 (Schwebel, J., dissenting).

<sup>149</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

<sup>150</sup> In recognition of this fact, a leading monograph on obligations *erga omnes* argues that the "essential idea is not that the obligations are owed to all States, but that in case of the breach of such an obligation the corresponding rights of protection are in possession of each and every State." HOOCH, *supra* note 98, at 53.

To be sure, by conferring authority on states to enforce the human rights of foreign peoples, customary international law arguably gives all states an “interest” of sorts in human rights observance abroad. Yet this secondary enforcement interest, such as it is, cannot be equated with human beings’ primary interest in human rights compliance. As René Provost has explained, international law permits states to use humanitarian countermeasures “only because of the non-existence of effective mechanisms at the international level permitting individuals to act on their own behalf. If effective remedies were put at the disposal of individuals—a regime admittedly far from reality at present—the justification for corresponding State rights would be largely eliminated.”<sup>151</sup> Just as children and incompetents who lack legal capacity depend upon others to assert claims on their behalf, human rights holders depend upon states to bring countermeasures to enforce their human rights.

The remarkable feature of humanitarian countermeasures, in short, is that states enforce human rights despite the fact that they lack an independent legal interest of their own in another state’s treatment of its people. But if humanitarian countermeasures are not designed for “self-help,” it is questionable whether they can be properly described as “countermeasures” at all. Crawford suggested during the ILC’s deliberations that this mismatch between the collective rights of the international community and the disaggregated character of state peer enforcement represents an “apparent paradox” for “unilateral collective action.”<sup>152</sup> Unable to resolve this paradox, the ILC ultimately refused to characterize such measures as “countermeasures,” preferring the ambiguous term “lawful measures.”<sup>153</sup>

In the sections that follow, I defend the idea that humanitarian countermeasures may be properly understood as a form of interstate countermeasures, and I explain why states may impose countermeasures to protect the human rights of foreign nationals abroad despite the fact that the legal interests they seek to protect are not their own. I argue that the key to solving this puzzle can be found in Grotius’s theory of humanitarian intervention as a form of fiduciary representation. The fiduciary conception of humanitarian intervention offers a theoretical framework that is capable of bridging the gap between international human rights and the law of countermeasures, clarifying both the legal basis and the limits of states’ authority to use coercion on behalf of oppressed foreign peoples.

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<sup>151</sup> René Provost, *Reciprocity in Human Rights and Humanitarian Law*, 65 BRIT. Y.B. INT’L L. 383, 431 (1995).

<sup>152</sup> *Fourth Crawford Report*, *supra* note 115, at 19 ¶ 76.

<sup>153</sup> CRAWFORD, *supra* note 6, art. 54, cmt. 7; *see also id.* (using the generic term “lawful measures” instead of “countermeasures”); White & Abass, *supra* note 81, at 531 (arguing that these measures are better characterized as “sanctions”).

## B. Hugo Grotius's Theory of Humanitarian Intervention

Grotius devotes a chapter of his seminal treatise *On the Law of War and Peace* to the "Causes of Undertaking War for Others."<sup>154</sup> He begins by comparing the relationship between states and their subjects to the relationship between parents and children. According to Grotius, both of these relationships involve the assumption of similar duties: "whether any one presides over an household, or a state, the first and most necessary care is the support of his dependents or subjects."<sup>155</sup> Just as parents are responsible to provide for their dependent children, the law of nature obligates states to care for their own people, protecting subjects from external threats.

But suppose a state abuses its power by flagrantly oppressing its own people? Grotius observes that in such circumstances states may be tempted to invoke their sovereign prerogative to preside undisturbed over their own household:

Though it is a rule established by the laws of nature and of social order, and a rule confirmed by all the records of history, that every sovereign is supreme judge in his own kingdom and over his own subjects, in whose disputes no foreign power can justly interfere. Yet where a Busiris, a Phalaris or a Thracian Diomede provoke their people to despair and resistance by unheard of cruelties, having themselves abandoned all the laws of nature, they lose the rights of independent sovereigns, and can no longer claim the privilege of the law of nations. Thus Constantine took up arms against Maxentius and Licinius, and other Roman emperors either took, or threatened to take them against the Persians, if they did not desist from persecuting the Christians.<sup>156</sup>

Grotius's parent-child analogy provides the legal structure for this argument, with the tyrannical ruler standing in the position of an abusive parent. Although both states and parents are entrusted with legal authority to govern "by the laws of nature and of social order," both may forsake this authority by engaging in acts of intolerable cruelty. Thus, a state that "provokes [its] people to despair" in this manner—even if just a small minority, such as Christians in Persia—will no longer enjoy "the rights" associated with sovereignty under the law of nations, including "the privilege" of independence from foreign intervention.<sup>157</sup>

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<sup>154</sup> Grotius, *supra* note 20, ch. XXV, pt. I.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* ch. XXV, pt. VIII(1).

<sup>157</sup> Cf. Locke, *supra* note 28, § 65 (arguing that parental "power so little belongs to the father by any peculiar right of nature, but only as he is guardian of his children, that when he quits his care of them, he loses his power over them, which goes along with their nourishment and education").

Grotius's parent-child analogy helps to explain why states lack authority to oppress their people, but it does not fully explain why other states may claim authority to intervene on their own initiative to protect foreign peoples. Grotius adverts to the legal basis for humanitarian intervention in the following passage:

Admitting that it would be fraught with the greatest dangers if subjects were allowed to redress grievances by force of arms, it does not necessarily follow that other powers are prohibited from giving them assistance when labouring under grievous oppressions. For whenever the impediment to any action is of a personal nature, and not inherent in the action itself, one person may perform for another, what he cannot do for himself, provided it is an action by which some kind service may be rendered. Thus a guardian or any other friend may undertake an action for a ward, which he is incapacitated from doing for himself.

The impediment, which prohibits a subject from making resistance, does not depend upon the nature of the occasion, which would operate equally upon the feelings of men, whether they were subjects or not, but upon the character of the persons, who cannot transfer their natural allegiance from their own sovereign to another. But this principle does not bind those, who are not the liege-subjects of that sovereign or power. Their opposition to him or the state may sometimes be connected with the defence of the oppressed, and can never be construed into an act of treason.<sup>158</sup>

To understand the implications of Grotius's theory for current debates over humanitarian countermeasures, it may be helpful to examine some of the key moves in his argument. Like other international lawyers of his generation, Grotius conceived of international law as being based, in part, on the application to international relations of principles of universal "right reason, shewing the moral turpitude, or moral necessity, of any act from its agreement or disagreement with a rational nature."<sup>159</sup> Alongside this rationalistic natural law, the law of nations (*jus gentium*) provided a system of positive rights applicable to the relations among sovereign states, and between sovereign states and their people, "deriving its authority from the consent of all, or at least of many nations."<sup>160</sup>

Under Grotius's vision of the law of nations, subjects lacked authority to rise up in rebellion against their own sovereign, except in exceptional circumstances such as where a right to resist was explicitly

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<sup>158</sup> See GROTIUS, *supra* note 20, ch. XXV, pt. VIII(2)–(3).

<sup>159</sup> 1 *id.* ch. I, pt. X(1).

<sup>160</sup> 1 *id.* ch. I, pt. XIV(1). But see H. Lauterpacht, *The Grotian Tradition in International Law*, 1946 BRIT. Y.B. INT'L L. 1, 6–9 (observing that Grotius's conception of the law of nature is notoriously slippery).

reserved to the people by contract.<sup>161</sup> Just as minor children lacked legal capacity to disavow the authority of their parents, once subjects ceded authority to the state they generally lacked legal capacity to recall this authority. This legal “impediment” was of “a personal nature,” because it reflected the “character” (i.e., juridical status) of human beings; it did not, however, call into question a people’s undisputed right to humane treatment under the law of nature. Indeed, Grotius took pains to acknowledge that “the nature of the occasion” that sparked a rebellion (e.g., the atrocities of a Busiris, Phalaris, or Diomedes) might well be so sinister as to “operate equally upon the feelings of [all] men, whether they be subjects or not.” Nonetheless, the fact that subjects had been exposed to “grievous oppressions” in violation of the law of nature could not give them the legal capacity to challenge their sovereign’s authority or transfer their allegiance en masse to a new sovereign.

According to Grotius, the intercession of a foreign sovereign solved this incapacity problem.<sup>162</sup> Unlike subjects, foreign states indisputably possessed the requisite capacity to contest violations of the law of nature by other states.<sup>163</sup> But this solution to the problem of legal capacity raised a new theoretical problem: From what source would intervening states derive their authority to protect the rights of foreign nationals?

To establish the requisite connection between an intervening state’s capacity to use force and an oppressed people’s rights to humane treatment under natural law, Grotius invoked the concept of legal guardianship.<sup>164</sup> In private law, Grotius noted, legal guardians routinely undertake to care for minors or incompetents who have been denied familial care through a parent’s death, disappearance, incapacitation, or abusive or neglectful behavior. The guardian, being a person of mature age, has the requisite legal capacity to exercise power on behalf of their ward to protect the ward’s rights. Hence, while a ward could not initiate legal proceedings acting alone, a guardian could initiate legal proceedings to obtain remedies on the ward’s behalf. Thus, the appointment of a legal guardian in private law enables a ward to vindicate rights that the ward could not enforce independently.

According to Grotius, similar principles of fiduciary representation govern humanitarian intervention. When a tyrannical state

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<sup>161</sup> See 1 GROTIUS, *supra* note 20, ch. IV, pt. II; 1 *id.*, ch. IV, pt. I(3); Straumann, *supra* note 27. Grotius made allowance for individuals to exercise a limited right of resistance for self-preservation. See 1 GROTIUS, *supra* note 20, ch. IV, pt. VII.

<sup>162</sup> 2 GROTIUS, *supra* note 20, ch. XXV, pt. VIII.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

subjects its people to particularly “grievous oppressions,” natural law would permit other states to serve as temporary guardians for the purpose of protecting the oppressed people’s rights.<sup>165</sup> According to Grotius, states are not “bound to risk their own safety” by assuming the burden of guardianship—“even when the aggrieved or oppressed party cannot be relieved but by the destruction of the invader or oppressor.”<sup>166</sup> The choice to serve as a guardian for foreign peoples is committed to the discretionary judgment of each state.<sup>167</sup> Once a state has voluntarily undertaken this responsibility, however, the state may represent an oppressed people as guardian for the purpose of protecting their right to humane treatment.<sup>168</sup>

Grotius was not the first theorist, nor would he be the last, to characterize humanitarian intervention as a form of other-regarding guardianship. Nearly a century before Grotius penned *On the Law of War and Peace*, the great Spanish scholar Francisco de Vitoria argued that natural law authorized European nations to intervene as guardians for indigenous peoples of the New World whose rulers engaged in “tyrannical and oppressive acts” such as human sacrifice and cannibalism.<sup>169</sup> Alberico Gentili sought to justify foreign intervention in defense of oppressed foreign peoples by analogizing the practice to the protection of children from an abusive parent.<sup>170</sup> Pufendorf also embraced Grotius’s argument that states could represent oppressed foreign nationals for purposes of vindicating their right to resist “barbarous savagery.”<sup>171</sup> Vattel would later concur that whenever a state severs “the bands of the political society” by engaging in tyrannical acts that spark a rebellion, “every foreign power has a right to succour an oppressed people who implore their assistance.”<sup>172</sup> Al-

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.* pt. VII.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* pt. VIII.

<sup>169</sup> FRANCISCUS DE VITORIA, *On the Indians Lately Discovered*, in DE INDIS ET DE IVRE BELLI RELECTIONES 115, 159 (Ernest Nys ed., John Pawley Bate trans., Gibson Brothers 1917) (1696). That Vitoria’s guardianship theory was exploited as a pretext for colonial domination has been well documented. See, e.g., ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 28–30 (2005); Evan J. Criddle, *A Sacred Trust of Civilization: Fiduciary Foundations of International Law*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 404, 406–08 (Andrew Gold & Paul B. Miller eds., 2014) [hereinafter PHILOSOPHICAL FOUNDATIONS]; ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 167–69 (1990). In Part II, I consider whether the guardianship tradition can be rehabilitated for humanitarian countermeasures in a manner that would overcome this grim historical legacy.

<sup>170</sup> 2 ALBERICO GENTILI, DE IURE BELLI LIBRI TRES bk. 1, ch. 16, at 74–76 (John C. Rolphe trans., 1933) (1612).

<sup>171</sup> PUFENDORF, *supra* note 32, § 14 (citing Grotius).

<sup>172</sup> VATTEL, *supra* note 30, § 56, ¶ 1. In contrast to Grotius, Vattel argued that states could not intervene until an oppressed people had taken up arms against a tyrannical ruler.

though Vattel resisted the idea that intervening states could dictate the domestic policy of a foreign state, he concluded (with a nod to Grotius) that the law would permit any state to deliver “the world from an Antæas, a Busiris, [or] a Diomede”—“monsters who, under the title of sovereigns, render themselves the scourges and horror of the human race.”<sup>173</sup> The fiduciary conception of international intervention developed by these early pioneers of international law would continue to influence international legal theory for generations, furnishing a legal framework for League of Nations mandates, U.N. trusteeships, and even the law of belligerent occupation.<sup>174</sup>

Grotius’s guardianship theory of humanitarian intervention proved to be influential over time because it explained why states, while formally equal to one another and lacking a direct legal interest in others’ treatment of their own citizens, could nonetheless assert standing to protect foreign nationals from grave abuse. Once a state had ruptured its own fiduciary relationship with its people through monstrous acts of oppression, the law of nature entrusted other states with authority to serve as temporary guardians for the purpose of protecting an oppressed people’s natural rights. Intervening states thus employed their own legal capacity to use force while deriving their legal standing from the abuses visited upon an oppressed people abroad.

Grotius’s guardianship theory of foreign intervention continues to repay close attention because it offers an attractive alternative to Grotius’s own preferred account of the legal basis for decentralized international law enforcement. Elsewhere in *On the Law of War and Peace*, Grotius suggests that natural law would permit “any one of competent judgment” and clean hands to punish inhumane acts unilaterally, irrespective of where or against whom they occur.<sup>175</sup> Grotius’s guardianship theory, in contrast, does not rely on this dubious notion of a universal, unilateral natural right to punish. By grounding humanitarian intervention in a fiduciary conception of foreign guardianship, Grotius offers a vision of foreign intervention that removes the sting of “unilateralism” from decentralized international law enforcement. On Grotius’s guardianship account, intervening states exercise

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<sup>173</sup> *Id.* ¶¶ 3–4.

<sup>174</sup> See Criddle, *supra* note 169, at 407, 411–12; Ralph Wilde, *From Trusteeship to Self-Determination and Back Again: The Role of the Hague Regulations in the Evolution of International Trusteeship, and the Framework of Rights and Duties of Occupying Powers*, 31 *LOY. L.A. INT’L & COMP. L. REV.* 85, 94 n.13 (2009).

<sup>175</sup> See GROTIUS, *supra* note 20, ch. XX, pt. VII; *see id.* pt. XL (asserting that states “have a right to exact punishment not only for injuries affecting immediately themselves or their own subjects, but for gross violations of the law of nature and of nations, done to other states and subjects”). *But see* Hakimi, *supra* note 97, at 144–45 (challenging the view that unilateral or disobedient exercises of power must be antithetical to law).

rights of resistance that belong ultimately to the oppressed people whom they seek to protect.<sup>176</sup> The law of nature entrusts this responsibility to any worthy intervening state that volunteers for this assignment, and it mediates the relationship between the intervening state and its foreign beneficiaries, ensuring that the intervening state cannot unilaterally set the terms of its interaction with a foreign people. The “guardian” state bears fiduciary duties of loyalty and care toward its foreign “wards,” such that it may use force solely for their benefit. If the intervening state fails to satisfy these fiduciary obligations, its actions are subject to review and collective accountability before the rest of the international community. Thus, despite Grotius’s well-earned reputation as a proponent of unilateral law enforcement, his argument for humanitarian intervention ultimately rests on the normatively anti-unilateralist foundation of fiduciary obligation.

### C. The Juridical Structure of Fiduciary Representation

Over time, Grotius’s guardianship theory of humanitarian intervention has receded into the mists of history.<sup>177</sup> No contemporary scholar, to my knowledge, has addressed how Grotius’s theory might apply to humanitarian countermeasures. This is unfortunate, because Grotius’s fiduciary account of foreign intervention offers a powerful framework for conceptualizing the juridical structure of humanitarian countermeasures under contemporary international law.<sup>178</sup> The core features of Grotius’s theory provide a fresh and compelling solution to the “apparent paradox” of “unilateral collective action.”<sup>179</sup> Grotius’s theory also furnishes the resources that are necessary to answer the three questions about humanitarian countermeasures that were posed at the close of Part I.

We are now prepared to consider each of these questions in turn. The first asks: *What is the legal basis for state standing to protect the human rights of foreign nationals abroad?* This question is crucially important

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<sup>176</sup> See GROTIUS, *supra* note 20, ch. XXV, pt. VIII; see also PUFENDORF, *supra* note 32, § 14.

<sup>177</sup> Passing references to Grotius’s fiduciary conception of humanitarian intervention can be found in Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT’L L. 99, 111 (2007), and Barry M. Benjamin, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM INT’L L.J. 120, 127 (1992). Many other works discuss Grotius’s theory of humanitarian intervention without focusing on the fiduciary structure of his argument. See, e.g., CHARLES S. EDWARDS, HUGO GROTIUS: THE MIRACLE OF HOLLAND 129–38 (1981); R.J. Vincent, *Grotius, Human Rights, and Intervention*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 241, 241–56 (Hedley Bull et al. eds., 1990).

<sup>178</sup> For purposes of this Article, I take no position on whether customary international law supports decentralized humanitarian military intervention, the primary focus of Grotius’s guardianship theory.

<sup>179</sup> *Fourth Crawford Report*, *supra* note 115, ¶ 76.



because the law of countermeasures ordinarily requires states to establish an individualized legal injury before they may use coercive measures against a state that has engaged in internationally wrongful conduct.<sup>180</sup>

As we have seen, legal scholars have argued in the past that states may assert standing to use humanitarian countermeasures because at least some, if not all, human rights commitments are owed to every other state either individually (the state-interest theory) or collectively (the community-interest theory).<sup>181</sup> In contrast, the fiduciary theory takes human rights on their own terms as rights that international law vests exclusively in human beings.<sup>182</sup> States bear obligations under international law that are correlative to these human rights.<sup>183</sup> When intervening states bring countermeasures to protect the human rights of foreign nationals abroad, international law authorizes them to do so only as representatives for foreign human rights holders.<sup>184</sup> As Riphagen recognized during the ILC's deliberations, the legal interest that intervening states protect in such instances is one that states are "given, so to speak, 'in trust,' for the benefit of [human beings]."<sup>185</sup> When states use countermeasures to enforce the international human rights of foreign peoples, they serve as fiduciary representatives and bear fiduciary duties to exercise their coercive powers in the best interests of foreign nationals.

This account of the juridical basis for humanitarian countermeasures resonates with Eyal Benvenisti's vision of "sovereigns as trustees of humanity."<sup>186</sup> Benvenisti argues that "sovereigns can and should be viewed as organs of a global system that allocates competences and responsibilities for promoting the rights of all human beings and their interest in sustainable utilization of global resources."<sup>187</sup> Within this global system, all states serve as fiduciaries for human beings, with each state individually bearing a special responsibility to guarantee fundamental security under the rule of law for people within its own sovereign jurisdiction. Extending Benvenisti's account, this Article suggests that when any state violates the human rights of its own peo-

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<sup>180</sup> See CRAWFORD, *supra* note 6, art. 49, cmt. 2.

<sup>181</sup> See *supra* Part I.D.1–2.

<sup>182</sup> See *supra* notes 143–45 and accompanying text.

<sup>183</sup> See *supra* note 150 and accompanying text.

<sup>184</sup> See *supra* notes 149–51 and accompanying text.

<sup>185</sup> Special Rapporteur on State Responsibility, *Second Rep. on the Content, Forms and Degrees of International Responsibility*, ¶ 61, U.N. Doc. A/CN.4/344 (May 1, 1981) (by Willem Riphagen); 3 PHILLIMORE, *supra* note 35, at 10 (arguing that the states' authority to use reprisals on behalf of their subjects reflects the idea "that individuals have committed the defense of themselves to the State of which they are members").

<sup>186</sup> Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295, 308 (2013).

<sup>187</sup> *Id.* (paraphrasing Max Huber).

ple, international law allows other states to exercise authority to enforce states' obligations under international human rights law as fiduciaries of necessity for the benefit of foreign nationals.

In this respect, the representative role of intervening states bears important similarities to a variety of fiduciary relationships in private law. Like a successor trustee or agent of necessity, intervening states are authorized to step in as surrogate fiduciaries in situations where the primary fiduciary (the host state) is unable or unwilling to satisfy its own fiduciary obligations.<sup>188</sup> Similar to class action lawyers in American civil litigation, the law permits (but does not require) states to take steps to establish a representative relationship with vulnerable individuals who would be unable to assert their rights effectively without assistance.<sup>189</sup> Shareholder derivative litigation offers another illuminating reference point: because corporations are incapable of vindicating their own rights without representation, the law authorizes fiduciaries of necessity (shareholders) to vindicate a corporation's rights when the primary fiduciary who would ordinarily discharge this responsibility (the corporate board) is implicated in wrongdoing.<sup>190</sup> Humanitarian countermeasures bear a similar juridical structure. When states step in to assert the human rights of foreign nationals on their behalf as authorized under customary international law, states serve as fiduciaries of necessity to vindicate the rights of oppressed peoples abroad who lack the legal and practical capacity to protect their own legal interests. States' standing to enforce international human rights abroad thus constitutes a secondary right of enforcement that is derived from, and is entirely dependent upon, the primary legal entitlements of human rights holders. Although the international community has not expressly defined humanitarian countermeasures as a form of fiduciary representation, the fiduciary theory best explains the juridical structure of the relationship established under customary international law between intervening states and human rights holders.

Why does international law entrust intervening states with authority to represent oppressed foreign peoples for the purpose of bringing

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<sup>188</sup> See EVAN FOX-DECENT, *SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY* 132 (2011) (explaining that when shipmasters "find themselves in an emergency situation that places the cargo they are carrying in imminent peril" they "may act without prior authority as an agent of the cargo's owner in order to protect the goods or their value"); JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 587, 653 (9th ed. 2013) (observing that when a "trust instrument explicitly divides the functions of trusteeship among . . . co-trustees, each trustee remains under a continuing duty to take reasonable steps to prevent a breach of trust by a co-trustee" and "has standing to sue the trustee for breach of duty").

<sup>189</sup> See 42 U.S.C. § 5106a(a)(2)(B)(ii) (2012) (establishing a grant to states for the appointment of an individual to represent children in child-abuse proceedings).

<sup>190</sup> See Ann M. Scarlett, *Shareholder Derivative Litigation's Historical and Normative Foundations*, 61 *BUFF. L. REV.* 837, 892–93 (2013).

countermeasures? Grotius's guardianship theory suggests that this feature of contemporary international law responds to human beings' legal and practical incapacity to access the protection of countermeasures without state assistance. Although contemporary international law respects the rights of human beings to contest state oppression in a variety of ways, only states have the formal juridical capacity to use countermeasures in response to international wrongs. Without representation from a foreign state, therefore, human rights victims would be deprived of a powerful mechanism for protecting their rights from continuing abuse at the hands of their state. By authorizing all states to enforce human rights as fiduciary representatives, international law today provides a mechanism whereby human rights holders may access effective international remedies for violations to their human rights.<sup>191</sup>

The universal character of state standing reflects international law's presumption that all states are well positioned to represent oppressed peoples for purposes of imposing humanitarian countermeasures. Although the fiduciary theory resists the idea that states may claim a direct *legal* interest in human rights abroad, the shared *moral* interests of the international community play a crucial role in constituting the fiduciary relationship between states and foreign peoples. As proponents of the community-interest theory have observed, universal respect for human rights has become a foundational principle of international public order. All states, to be legal orders rather than merely coercive orders, must at least purport to be concerned about universal respect for human rights. In an era when international law requires all states to embrace a common commitment to respect, protect, and fulfill human rights for the benefit of humanity, all states may plausibly claim a legitimate moral interest in universal respect for human rights. Precisely for this reason—because all states under international law share a “common tie” to the “[c]ommon [n]ature” of humanity, as Grotius puts it<sup>192</sup>—international law entrusts all states with authority to represent human rights holders abroad.

The fiduciary theory thus clarifies how state and community interests are relevant to humanitarian countermeasures: rather than constituting distinct legal interests that may be “injured” by human rights abuse abroad (as the state-interest and community-interest theories, respectively, posit), states' formal commitment to common legal standards qualify all states to serve as representatives for the limited

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<sup>191</sup> As Benvenisti has observed, “the principle of (individual and collective) self-determination *itself* entails limitations on the exclusive rights of [sovereign states].” Benvenisti, *supra* note 186, at 313. Self-determination would be frustrated if states could deny their own nationals and others within their borders the full protection of international human rights.

<sup>192</sup> See GROTIUS, *supra* note 20, ch. XXV, pt. VI.

purpose of imposing countermeasures to protect human rights.<sup>193</sup> All states may assert a genuine legal interest in human observance abroad under the fiduciary theory, but this interest is derived from, and entirely dependent upon, their role as authorized representatives for the primary legal interests of human beings.

Although the *Articles on State Responsibility* endorse the community-interest theory,<sup>194</sup> there is some evidence that ILC members anticipated core elements of the fiduciary theory. For example, in commentary preceding the final *Articles*, Crawford observed:

Even in the case of well-attested, gross or systematic violations of human rights, it is suggested that a distinction should still be drawn between the rights of the victims and the responses of States. Otherwise the effect . . . is to translate human rights into States' rights, and this seems no more justified when one is dealing with systematic violations than with individual ones . . . . The States concerned may be representing the victims, but they are not to be identified with them, and they do not become the rights-holders because they are recognized as having a legal interest in the author State's compliance with its human rights obligations.<sup>195</sup>

Where humanitarian countermeasures are concerned, Crawford recognized, the primary legal interests are those of human rights holders, not states. Although the ILC would later take the position that international human rights norms are “established for the protection of a collective interest” and are “owed to the international community as a whole,”<sup>196</sup> it stopped short of characterizing the international community’s “collective interest” as sufficient to qualify all states to claim an “injury” from human rights violations abroad.<sup>197</sup> Instead, the ILC focused on the idea that all states were plausibly “entitled . . . to take

<sup>193</sup> Most legal scholars agree that international law does not authorize states to engage in *military* intervention for humanitarian purposes without either Security Council authorization or the host state's consent. See Oona A. Hathaway et al., *Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign*, 46 CORNELL INT'L L.J. 499, 521–35 (2013); Saira Mohammed, *Restructuring the Debate on Unauthorized Humanitarian Intervention*, 88 N.C. L. REV. 1275, 1285–89 (2010); Bruno Simma, *NATO, the UN, and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 3–4 (1999). In settings where states have received valid authorization for humanitarian military intervention, however, there are good reasons to believe that this authority also entails fiduciary responsibilities. See Evan J. Cridle, *Reclaiming the Grotian Theory of Humanitarian Intervention* 2 (Dec. 9, 2014) (unpublished manuscript) (on file with author) (“When the Security Council green-lights humanitarian intervention, it entrusts states with discretionary power over the legal and practical interests of foreign nationals, and intervening states bear a concomitant fiduciary obligation to exercise this power exclusively for the benefit of their designated beneficiaries—foreign nationals whose human rights are at risk.”).

<sup>194</sup> See CRAWFORD, *supra* note 6, art. 48(1)(a)–(b) & art. 48, cmts. 7, 9.

<sup>195</sup> *Third Crawford Report*, *supra* note 85, at 30–39 ¶ 87.

<sup>196</sup> CRAWFORD, *supra* note 6, art. 48(1)(a)–(b) & art. 48, cmts. 7, 9.

<sup>197</sup> See *id.* arts. 48 & 54 (speaking of measures taken by “States other than the injured State”).

lawful measures against the responsible State . . . in the interest of . . . the beneficiaries of the obligation breached.”<sup>198</sup> The *Articles* can be read, therefore, as incorporating the fiduciary theory’s core insight that the international community may enforce human rights abroad only as fiduciary representatives for human rights holders.<sup>199</sup>

In sum, the fiduciary theory resolves the “apparent paradox” of “unilateral collective action” by explaining how coercive measures undertaken by states to protect human rights abroad can reasonably be characterized as “countermeasures”—albeit in a novel sense.<sup>200</sup> International law entrusts all states with authority to enforce prohibitions against grave human rights abuse as fiduciary representatives for human rights holders abroad. Although these coercive measures are a form of decentralized international law enforcement, they are not “unilateral” in a normative sense. Under the fiduciary theory, international law regulates when states may intervene as fiduciary representatives, and it sets the terms of the relationship between an intervening state and human rights holders abroad. In particular, an intervening state’s authority to use humanitarian countermeasures is circumscribed by fiduciary duties that safeguard the legitimate interests of foreign peoples. The exercise of this entrusted authority, moreover, is subject to the continuous review of the international community as a whole. Thus, far from asserting a Lockean right of unilateral enforcement, the fiduciary theory suggests that states that use countermeasures to enforce the human rights of foreign peoples operate within a fiduciary relationship that is mediated by the rule of international law.<sup>201</sup>

#### D. The Duties of Fiduciary Representation

Having established the legal foundation for humanitarian countermeasures, we are prepared now to take up the second question posed in Part I: *How should the international community determine whether humanitarian countermeasures are proportional?* The *Articles on State Responsibility* dictate that countermeasures “must be commensurate with the injury suffered, taking into account the gravity of the internation-

<sup>198</sup> *Id.* art. 54, cmt. 7.

<sup>199</sup> *See id.* (asserting that states are “entitled . . . to take lawful measures against the responsible State . . . in the interest of . . . the beneficiaries of the obligation breached”).  
<sup>200</sup> *Fourth Crawford Report*, *supra* note 115, at 19 ¶ 76.

<sup>201</sup> Of course, when states enforce human rights in a manner that exceeds the scope of their authority under international law, such actions may justly be described as “unilateralism” or, more provocatively, “international vigilantism.” Hutchinson, *supra* note 90, at 202. This may be the best reading of General Assembly resolutions that broadly condemn “unilateral economic . . . coercion.” *E.g.*, G.A. Res. 62/183, *supra* note 136, ¶ 2 (urging the international community to “eliminate the use of unilateral coercive economic measures . . . that are not authorized by relevant organs of the United Nations or are inconsistent with the principles of international law”).

ally wrongful act and the rights in question.”<sup>202</sup> Under the state-interest and community-interest theories, the “injury suffered” by intervening states or the international community as a whole would be wholly metaphysical: the abstract interest in mutual adherence to shared legal commitments, enhanced perhaps by the threat that non-compliance poses to international order generally.<sup>203</sup> In practice, however, advocates of both theories have tended to ask whether countermeasures are narrowly tailored to ensure respect for the concrete human rights of human beings, not whether countermeasures succeed in ensuring respect for international commitments or public order in the abstract.<sup>204</sup> The fiduciary theory explains why this focus on individual interests is entirely appropriate. Because the injury to be remediated is an injury to *human* rights (not the rights of states or the international community as a whole), intervening states must ask whether countermeasures are reasonably calculated to induce a target state to provide remedies to human rights holders (not states or the international community as a whole).

The fiduciary theory situates this proportionality inquiry within a robust juridical framework that clarifies the metes and bounds of state discretion. Under the classic fiduciary duty of loyalty, fiduciaries in private law are obligated to exercise their entrusted discretionary powers to advance the interests of their beneficiaries.<sup>205</sup> By the same token, when states undertake to impose countermeasures on behalf of human rights victims abroad, they are duty bound to exercise their coercive powers in a manner that honors the fiduciary character of their relationship with human rights holders abroad. Several discrete principles flow from this fiduciary relationship.<sup>206</sup>

First, the principle of *integrity* dictates that intervening states must use countermeasures to pursue the good of their beneficiaries—human rights holders—rather than their own private interests. Under the principle of integrity, states may not exploit human rights crises as a pretext to dominate another state. To satisfy the principle of

<sup>202</sup> CRAWFORD, *supra* note 6, art. 51; *see also* Gabčíkovo-Nagymaros Project (Hung./Slovk.), 1997 I.C.J. 7, ¶¶ 78, 85, 87 (Sept. 25) (finding that Czechoslovakia’s countermeasure of unilaterally assuming control of the Danube was not commensurate with Hungary’s internationally wrongful act of withdrawing its consent to joint operations in the Danube).

<sup>203</sup> *See, e.g.*, MERON, *supra* note 83, at 200 (recognizing that the ability of states to bring claims against human rights abuses highlights “deeply rooted community values attached to the universal protection of human rights”); Villalpando, *Legal Dimension*, *supra* note 90, 392 (asserting that states have become aware of a need to protect “common goods or values, such as peace, humanity, or the environment”).

<sup>204</sup> *Cf.* MERON, *supra* note 83, at 239–40 (asserting that a state’s countermeasures which suspended its own human rights obligations would be “clearly unacceptable”).

<sup>205</sup> *See* Lionel Smith, *Can We Be Obligated to Be Selfless?*, in PHILOSOPHICAL FOUNDATIONS 141 (2014) (discussing the constitutive features of the duty of loyalty).

<sup>206</sup> Evan Fox-Decent and I discuss some of these principles in Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT’L L. 331, 363–66 (2009).

integrity and prevailing norms of customary international law, states that freeze foreign assets must administer asset freezes for a foreign people's benefit, preserving the frozen funds and allowing them to continue to accrue interest until a freeze has been lifted.<sup>207</sup>

Second, under the principle of *solicitude*, an intervening state as fiduciary representative must give due and sensitive regard to the legitimate interests of its foreign beneficiaries. Humanitarian countermeasures are prohibited under the principle of *solicitude* if they may be expected to generate an injury to economic or other human rights that is disproportionate to an intervening state's palliative objectives. One implication of this principle is that intervening states may not impose harsh economic measures that would substantially exacerbate human suffering within a target state.<sup>208</sup>

To the extent that states use countermeasures to protect some foreign nationals from abuse to the possible detriment of other foreign nationals, two other fiduciary principles derived from the duty of loyalty have special salience. Under the principle of *impartiality*, intervening states must give "due regard" to the respective interests of foreign nationals with competing interests, seeking a sense of balance between these interests to ensure that all people of a target state are respected as cobeneficiaries.<sup>209</sup> Paired with the principle of *impartiality* is a fiduciary principle of *minority protection*, which dictates that in seeking to advance the interests of their beneficiaries, intervening states must devote special consideration to the special vulnerabilities of particular groups or individuals. In the corporate law context, this means that corporate directors bear heightened fiduciary duties toward minority shareholders who may be vulnerable to exploitation by controlling shareholders.<sup>210</sup> Translated for the law of humanitarian countermeasures, this principle dictates that intervening states may

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<sup>207</sup> See PAUL CONLON, UNITED NATIONS SANCTIONS MANAGEMENT: A CASE STUDY OF THE IRAQ SANCTIONS COMMITTEE, 1990–1994, at 5 (2000) (observing that during an international asset freeze, an intervening state must conserve frozen assets and allow them "to accrue interest that ultimately belongs to the target state, although [the interest] may not be paid while the sanctions are in force," and characterizing this obligation as one "of stewardship"). During World War I, for example, the United States transferred frozen enemy assets to an alien property custodian to administer the assets as a "trustee . . . charged with the duty of protecting and caring for the property until the end of the war," all the while giving "no thought [to] the confiscation or dissipation of the property thus held in trust." Otto C. Sommerich, *A Brief Against Confiscation*, 11 LAW & CONTEMP. PROBS. 152, 160 (1945) (quoting the U.S. Alien Property Custodian in Bulletin No. 159).

<sup>208</sup> See CRAWFORD, *supra* note 6, art. 50(1)(b) & cmts.

<sup>209</sup> See DUKEMINIER & SITKOFF, *supra* note 188, at 657–58 (observing that the "duty of impartiality" in trust law is inaptly named because it does not require impartiality in the sense of equality, but rather a balancing by giving *due regard* to the beneficiaries' respective interests); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 651 (2004) ("[B]alance is the overarching directive of the duty of impartiality.").

<sup>210</sup> See generally Anupam Chander, *Minorities, Shareholder and Otherwise*, 113 YALE L.J. 119 (2003) (reviewing these duties and drawing lessons for public representation).

justifiably impose some coercive burdens on a foreign people generally as necessary to protect the human rights of particularly vulnerable groups such as political prisoners held in arbitrary detention or minorities subject to racial discrimination. Both the principle of impartiality and the principle of minority protection reflect the foundational principle that fiduciaries must treat all beneficiaries as formal moral equals.

Another principle of fiduciary relationships is that fiduciary power is *purposive*, in the sense that it is held or conferred for limited purposes, such as furthering exclusively the equitable interests of a trust's beneficiary. In the international context, states are permitted to use countermeasures only to advance the humanity-centric purposes of sovereignty in international legal order: guaranteeing fundamental human security under the rule of law. Proportionality analysis, in this sense, is not just about minimizing unnecessary interference in the domestic affairs of a target state but about determining whether foreign intervention will, in the end, promote or undermine fundamental human security under the rule of law within a target state. For example, a trade embargo that weakens an autocrat's appetite for torturing religious dissidents might satisfy the *Articles on State Responsibility's* requirement that countermeasures be "commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question."<sup>211</sup> Nonetheless, such intervention will not qualify as "proportional" under the fiduciary theory if it could be expected to trigger a severe economic crisis or lead to famine conditions that would endanger human security throughout the target country. When multiple states undertake humanitarian countermeasures, fiduciary principles dictate that they must cooperate with one another to ensure that the aggregated impact of their measures is proportional under these standards. Simply put, intervening states may exercise their coercive powers only in a manner that is consistent with their overarching mission to promote fundamental human security under the rule of law. These principles provide greater definition to proportionality analysis, clarifying how proportionality applies to the unique concerns that arise when states use humanitarian countermeasures.

In sum, under the fiduciary theory, the legal structure of humanitarian countermeasures is revealed as having both horizontal and vertical dimensions. States represent human rights victims abroad for the purpose of bringing countermeasures against oppressive states. But their authority to represent foreign peoples is conferred by international law, and it is governed by general fiduciary principles that

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<sup>211</sup> CRAWFORD, *supra* note 6, art. 51.



mitigate the agency problems associated with foreign intervention. Thus, although humanitarian countermeasures constitute a form of international peer enforcement, these measures are consistent with the rule of international law to the extent that they are authorized under customary international law, are governed by robust legal principles of fiduciary obligation, and are subject to the possibility of continuous monitoring and review by the international community as a whole.<sup>212</sup>

One advantage of the fiduciary theory's approach to proportionality is that it offers a fresh vantage point from which to engage the international community's disenchantment with "unilateral economic coercion."<sup>213</sup> Over the past twenty years, international organizations have joined developing nations in expressing grave reservations about the use of coercive economic measures such as trade embargos, asset freezes, and investment restrictions that impede the delivery of food and medical care and the provision of essential social services.<sup>214</sup> Experts have argued, as well, that coercive economic measures tend to exacerbate economic inequality, encourage public corruption, spawn black markets, and stoke nationalist sentiments that strengthen the hand of oppressive regimes.<sup>215</sup> The United States' longstanding "embargo" against Cuba, which includes an asset freeze, travel ban, trade restrictions, and constraints on new investment, vividly illustrates this problem.<sup>216</sup> Over a half-century after they were first imposed, U.S. countermeasures have had scant impact in persuading the Cuban government to release political prisoners and take other steps toward full compliance with international human rights law, but they have significantly burdened economic development and have limited Cubans' ac-

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<sup>212</sup> See Evan Fox-Decent, *Unseating Unilateralism*, in PRIVATE LAW AND THE RULE OF LAW (Lisa Austin & Dennis Klimchuk eds., forthcoming 2014), available at <http://ssrn.com/abstract=2175588> (arguing that private enforcement may be consistent with the rule of law when it is subject to legal principles and ex post review).

<sup>213</sup> See, e.g., G.A. Res. 66/186, *supra* note 10, at 2.

<sup>214</sup> See, e.g., Comm'n on Human Rights Res. 2004/22, Rep. on its 60th Sess., Mar. 15–Apr. 23, 2004, U.N. Doc. E/2004/23-E/CN.4/2004/127, at 89 (Apr. 16, 2004) (stressing that "essential goods such as food and medicines should not be used as tools for political coercion"); World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 31, U.N. Doc. A/CONF.157/23 (Jul. 12, 1993) ("[C]all[ing] upon States to refrain from any unilateral measure not in accordance with international law and the Charter of the United Nations that creates obstacles to trade relations among States and impedes the full realization of the human rights . . . , in particular the rights of everyone to . . . food and medical care, housing and the necessary social services.").

<sup>215</sup> See Sub-Commission Report, *supra* note 10, at 1, 13–14.

<sup>216</sup> See *id.* at 22; see also AMNESTY INT'L, THE U.S. EMBARGO AGAINST CUBA: ITS IMPACT ON ECONOMIC AND SOCIAL RIGHTS 13–19 (2009), available at <http://www.amnesty.org/en/library/info/AMR25/007/2009> (discussing the deleterious effects of the United States' trade restrictions against Cuba).

cess to effective medical care.<sup>217</sup> Small wonder that the U.N. General Assembly has condemned the United States' countermeasures against Cuba every year for the past two decades—most recently by a vote of 188 in favor to 3 against, with 2 abstentions.<sup>218</sup> The devastating humanitarian impact of sweeping collective sanctions against other states such as Iraq,<sup>219</sup> Haiti,<sup>220</sup> and Burundi<sup>221</sup> during the 1990s have further fueled skepticism about whether international economic coercion can be reconciled with human rights. States that contemplate using coercive economic measures to enforce the human rights of foreign peoples must be prepared, therefore, for the criticism that such measures are “inconsistent with the principles of international law as set forth in the Charter of the United Nations” because they have a disproportionately negative impact on human rights, economic development, and the exercise of self-determination.<sup>222</sup>

The fiduciary theory of humanitarian countermeasures is uniquely responsive to these concerns. Fiduciary principles of integrity and solicitude would preclude states from imposing or maintaining countermeasures in a manner that would disproportionately burden human rights. A state that used countermeasures in this way could not claim to act in the interests of a foreign people.

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<sup>217</sup> See Sub-Commission Report, *supra* note 10, at 22–23; AMNESTY INT'L, *supra* note 216, at 13–19.

<sup>218</sup> See, e.g., *General Assembly Renews Call for End to US Embargo Against Cuba*, UN NEWS CENTRE (Nov. 13, 2012), <http://www.un.org/apps/news/story.asp?NewsID=43482&Cr=cuba> (reporting that the U.N. General Assembly adopted the twenty-first resolution calling for an end to the United States' “economic, commercial and financial blockade” against Cuba: “By a vote of 188 in favour to three against (Israel, Palau and the United States) with two abstentions (Marshall Islands and the Federated States of Micronesia), the Assembly reiterated its call to all States to refrain from promulgating and applying laws and measures not conforming with their obligations to reaffirm freedom of trade and navigation”); see also U.N. Secretary-General, *Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States Against Cuba*, U.N. Doc. A/67/118 (Aug. 16, 2012) (reproducing statements of 145 states and 26 international organizations expressing criticism of U.S. economic coercion against Cuba).

<sup>219</sup> See Sub-Commission Report, *supra* note 10, at 16–19 (suggesting that at least 500,000 children perished in Iraq as indirect casualties of international economic sanctions); Under-Secretary-General for Admin. & Mgmt., *Report to the Secretary-General on Humanitarian Needs in Kuwait and Iraq in the Immediate Post-Crisis Environment*, at 5, U.N. Doc. S/22366 (Mar. 20, 1991) (describing the impact of financial sanctions as “near-apocalyptic”).

<sup>220</sup> See Felicia Swindells, *U.N. Sanctions in Haiti: A Contradiction Under Articles 41 and 55 of the U.N. Charter*, 20 FORDHAM INT'L L.J. 1870, 1940 (1996) (observing that unemployment in Haiti rose to eighty percent during international sanctions).

<sup>221</sup> See ERIC HOSKINS & SAMANTHA NUTT, *THE HUMANITARIAN IMPACTS OF ECONOMIC SANCTIONS ON BURUNDI*, at xiii, 39 (1997) (observing that economic sanctions limited access to vaccines in Burundi, leading to outbreaks of meningitis, typhoid, dysentery, and cholera).

<sup>222</sup> See, e.g., G.A. Res. 66/186, *supra* note 10, at 2; see also Sub-Commission Report, *supra* note 10, at 4 (noting that economic sanctions “most seriously affect the innocent population”).

The fiduciary theory affirms, however, that economic countermeasures will not always be antithetical to international human rights. In some settings, humanitarian countermeasures may satisfy the proportionality requirement if they are narrowly “targeted” to maximize their coercive impact on state decisionmakers while minimizing collateral harm to social and economic human rights generally. For example, a state may freeze the personal bank accounts of foreign regime leaders who engage in crimes against humanity, as the United States did against the Qaddafi regime during the 2011 Libyan Revolution.<sup>223</sup> Although countermeasures that encroach significantly upon social and economic human rights throughout a target state will rarely be proportional under the fiduciary theory, they are more likely to satisfy proportionality analysis if they respond to correspondingly wide-ranging human rights violations such as apartheid, genocide, or crimes against humanity.<sup>224</sup> As a fiduciary of necessity for human rights holders, states may use countermeasures in a manner that places some temporary constraints on the enjoyment of social and economic rights within a target state, provided that these constraints are consistent with principles of fiduciary obligation, including the requirement to respect nonderogable human rights.<sup>225</sup> Indeed, the international community’s turn to targeted economic coercion in the first decade of the twenty-first century—following the disastrous experiments in Iraq, Haiti, and Burundi during the 1990s—arguably reflects an enhanced appreciation of the special fiduciary obligations associated with nonforcible humanitarian action.<sup>226</sup> The fiduciary theory thus shows that it is possible to endorse the position of the U.N. High Commissioner for Human Rights—that international law permits states to use countermeasures to protect the human rights of foreign nationals abroad—while at the same time sharing the view of developing nations that states may not use humanitarian countermeasures in a manner that exacerbates human rights crises.

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<sup>223</sup> See Evan J. Criddle, *Humanitarian Financial Intervention*, 24 EUR. J. INT’L L. 583, 606–07 (2013).

<sup>224</sup> See, e.g., TAMS, *supra* note 2, at 210–25 (discussing coercive measures against, inter alia, Liberia, Nigeria, Uganda, and South Africa).

<sup>225</sup> See CRAWFORD, *supra* note 6, at 333–34, art. 50 & cmts. 6–7 (asserting that countermeasures “shall not affect . . . obligations for the protection of fundamental human rights”); see also Criddle & Fox-Decent, *supra* note 206, at 347–60 (developing a fiduciary theory of *jus cogens*).

<sup>226</sup> See THOMAS J. WATSON JR. INST. FOR INT’L STUDIES, *Preface to TARGETED FINANCIAL SANCTIONS: A MANUAL FOR DESIGN AND IMPLEMENTATION*, at vi (2001) (reporting an international consensus among experts on the need for “targeted sanctions” to avoid “excessive suffering to civilian populations”).

### E. Preconditions for Humanitarian Countermeasures

This brings us to our third question: *May states impose countermeasures in response to any human rights violations abroad or only a limited subset—for example, massive and systematic abuses, or violations of jus cogens?* As shown in Part I, some legal scholars have argued that all human rights qualify as obligations *erga omnes*, while others have argued that only a limited subset such as *jus cogens* norms fall within this category.<sup>227</sup> Some commentators believe that human rights violations must be massive and systematic, imperiling the lives of large numbers of people, before they qualify for humanitarian countermeasures.<sup>228</sup> Others contend that even isolated human rights violations against individuals may be sufficient to justify countermeasures.<sup>229</sup>

The fiduciary theory provides a novel perspective on these debates. Rather than focus on whether individual states or the international community as a whole have a sufficiently “fundamental” interest in particular human rights norms in the abstract, the fiduciary theory follows Grotius and Vattel in asking whether a target state has, in effect, ruptured its bonds of fidelity to its people by treating some of its nationals as mere objects that it may dominate, instrumentalize, or destroy at will.<sup>230</sup> Only when this threshold has been crossed may other states assume responsibility for representing oppressed peoples.<sup>231</sup>

At first glance, this formulation might appear to authorize states to use humanitarian countermeasures whenever they determine that a state has violated the human rights of its nationals, irrespective of the character of the rights violated. After all, every human rights violation arguably represents a rupture in the state-subject fiduciary relationship for those individuals or groups whose rights have been violated. Deeper reflection suggests, however, that states may use humanitarian countermeasures to vindicate nonperemptory human rights only under limited circumstances.

The problem with imposing humanitarian countermeasures in response to violations of nonperemptory human rights such as freedom of expression and association is *not* that these violations do not constitute ruptures in the state-fiduciary relationship (they surely do). Nor is it that other states lack standing to assert claims as fiduciaries of necessity on behalf of foreign nationals whose nonperemptory human

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<sup>227</sup> See *supra* Part I.D.2 and notes 101–02.

<sup>228</sup> See *infra* note 248.

<sup>229</sup> See *infra* note 251.

<sup>230</sup> See *supra* Part II.B.

<sup>231</sup> States arguably may not use humanitarian countermeasures unless human rights victims have exhausted alternative avenues for relief that are available within their own state.

rights have been violated (they do not). Rather, the problem is that human rights treaties clearly entrust each state individually with discretion to determine how best to respect, protect, and fulfill nonperemptory human rights within their borders. States bear primary responsibility for deciding whether, or to what extent, a public emergency within their jurisdiction necessitates derogation from their human rights commitments.<sup>232</sup> They are also charged with deciding whether limitations on certain human rights such as freedom of expression, freedom of assembly, and freedom of religion are necessary to protect other compelling interests such as “the fundamental rights and freedoms of others.”<sup>233</sup> This formal allocation of decisional responsibility to states reflects a presumption, in Benvenisti’s words, that other states and international institutions lack the “competence to make better judgment calls than the reviewed sovereigns.”<sup>234</sup> It also reflects a recognition that allowing third parties to override these context-sensitive judgments could have a disproportionately “stifling impact” on a people’s exercise of self-determination through “domestic democratic processes.”<sup>235</sup> In contrast, states contemplating humanitarian countermeasures lack legal authority to enforce their own unilateral judgments that another state has exceeded its authority to derogate from or limit the exercise of nonperemptory human rights.

This does not mean that states may never use countermeasures to enforce nonperemptory human rights abroad. Just as private-law fiduciaries such as guardians, trustees, and corporate directors are always subject to the residual fiduciary supervision of courts, so too states are subject to the residual fiduciary supervision of regional and international tribunals such as the U.N. Human Rights Council, the European Court of Human Rights, and the Inter-American Commission on Human Rights. These treaty bodies tend to review state judgments regarding the need for human rights derogations and limitations with a heavy measure of deference, recognizing states’ privileged role as the primary fiduciaries for their own people.<sup>236</sup> Yet despite this deferential approach, human rights tribunals often conclude that states have abused their discretionary power to derogate from their human rights commitments or to limit the exercise of human rights within their borders. Once a tribunal has authoritatively established the violation of nonperemptory human rights, the fiduciary theory suggests

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<sup>232</sup> See, e.g., ICCPR, *supra* note 142, art. 4.

<sup>233</sup> See, e.g., *id.* arts. 18, 19, 21, 22.

<sup>234</sup> Benvenisti, *supra* note 186, at 332.

<sup>235</sup> *Id.*

<sup>236</sup> See, e.g., Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) ¶ 207 (1978) (introducing the “margin of appreciation” principle).

that states may intervene as fiduciaries of necessity to impose humanitarian countermeasures on behalf of human rights holders abroad.<sup>237</sup>

In contrast, states need not await the determination of an international body before enforcing peremptory human rights such as the prohibitions against torture and slavery. Where such norms are concerned, there is no scope under international law for states to contend that they may derogate from or limit the exercise of human rights based on national security, self-determination or other important public values. The international community has already determined in advance that peremptory norms, by definition, are never subject to derogation or limitation under any circumstances.<sup>238</sup> A state that transgresses peremptory human rights therefore indisputably ruptures its fiduciary relationship with its people.<sup>239</sup> Under such circumstances, other states are free to intervene as successor trustees or fiduciaries of necessity on behalf of foreign peoples for the limited purpose of imposing humanitarian countermeasures.

Denis Alland has questioned whether countermeasures are an appropriate vehicle for enforcing peremptory norms based on the concern that “countermeasures grow in the soil of equivalent and contradictory assertions. Admitting here that *jus cogens* is to be placed in this interplay of subjective claims and interpretations would mean denying what characterizes it.”<sup>240</sup> In contrast, the fiduciary theory suggests that it is precisely *because* peremptory norms stand outside the “interplay of subjective claims and interpretations” that their violation lays the groundwork for other states to intercede as fiduciaries of necessity for foreign nationals abroad.<sup>241</sup> When a state has manifestly violated peremptory human rights such as the prohibitions against torture or slavery, other states may respond with humanitarian countermeasures without awaiting further clarification from an international tribunal or authorization from the Security Council.

The United States’ recent coercive measures against Iran and Syria illustrate how this distinction between peremptory and nonper-

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<sup>237</sup> Cf. CRAWFORD, *supra* note 6, art. 52(3)(b) (providing that countermeasures may not be taken if “the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties”).

<sup>238</sup> See, e.g., ICCPR, *supra* note 142, arts. 4, 7, 8; Genocide Convention, *supra* note 70, arts. I, IV.

<sup>239</sup> See Criddle & Fox-Decent, *supra* note 206, at 368–70.

<sup>240</sup> Alland, *supra* note 90, at 1237.

<sup>241</sup> Although considerable debate surrounds the legal basis and scope of international *jus cogens*, these norms are widely accepted to include, at a minimum, the prohibitions against genocide; slavery or slave trade; murder or disappearance of individuals; torture or other cruel, inhuman or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and “the principles of the United Nations Charter prohibiting the use of force.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, cmts. d–i, § 102, cmt. k (1987).

emptory norms would apply in practice.<sup>242</sup> During the height of the Arab Spring in April and May 2011, the Obama administration imposed asset freezes against Syrian officials after the regime of President Bashar al-Assad began a campaign of “violence and torture against, and arbitrary arrests and detentions of, peaceful protestors.”<sup>243</sup> When these asset freezes failed to stem the tide of violence, the White House expanded its countermeasures to include additional prohibitions against new investment in Syria and provisions banning the purchase, sale, or transportation of Syrian oil.<sup>244</sup> Under the fiduciary theory, the United States could lawfully impose such measures without Security Council authorization on behalf of the Syrian people, because the Assad regime had unquestionably broken its bonds of mutual fidelity with its people by violating the peremptory prohibitions against torture, prolonged arbitrary detention, and crimes against humanity.

In contrast, the fiduciary theory of humanitarian countermeasures would not support the United States’ decision a year later to intensify its countermeasures against both Iran and Syria based on these states’ efforts to quash political dissent by jamming telecommunications signals and blocking public access to the Internet.<sup>245</sup> Although U.S. officials expressed outrage at these constraints on freedom of expression, the fiduciary theory suggests that the United States could not reasonably invoke these actions as a basis for supplanting the target states as fiduciary representatives for their people. Unlike the prohibitions against torture, prolonged arbitrary detention, and crimes against humanity, the human right to freedom of expression is not a peremptory norm; it is one from which states are permitted to derogate during public emergencies.<sup>246</sup> As no authorita-

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<sup>242</sup> See Peter Baker, *U.S. Sets New Sanctions Against Technology for Syria and Iran*, N.Y. TIMES, Apr. 23, 2012, at A8; Steven L. Myers & Anthony Shadid, *U.S. Imposes Sanctions on Syrian Leader and 6 Aides*, N.Y. TIMES, May 18, 2011, at A10.

<sup>243</sup> Exec. Order No. 13,572, *Blocking Property of Certain Persons with Respect to Human Rights Abuses in Syria*, 76 Fed. Reg. 24,787, pmb. (Apr. 29, 2011); see also Exec. Order No. 13,573, *Blocking Property of Senior Officials of the Government of Syria*, 76 Fed. Reg. 29,143, 29,143–44 (May 18, 2011).

<sup>244</sup> See Exec. Order No. 13,582, *Blocking Property of the Government of Syria and Prohibiting Certain Transactions with Respect to Syria*, 76 Fed. Reg. 52,209, 52,209 (Aug. 18, 2011).

<sup>245</sup> See *Iran Threat Reduction and Syria Human Rights Act of 2012*, Pub. L. No. 112-158, §§ 401–415, 126 Stat. 1214 (2012) (expanding U.S. sanctions related to human rights abuses in Iran); *Iran Freedom and Counter-Proliferation Act*, Pub. L. No. 112-239, § 1243(b)(3)–(4), 126 Stat. 1632 (2012) (imposing countermeasures to “help the people of Iran produce, access, and share information freely and safely via the Internet and through other media; and . . . defeat all attempts by the Government of Iran to jam or otherwise obstruct international satellite broadcast signals”).

<sup>246</sup> ICCPR, *supra* note 142, art. 4(1). Even under the United States’ domestic law, the scope of state authority to block access to communications signals remains deeply controversial. See, e.g., Terry Collins, *BART Cell Phone Shutdown: Safety Issue or Free Speech Violation?*,

tive international body had found Iran and Syria to have violated the international human right to freedom of expression by temporarily disrupting communications technologies within their borders, the United States could not reasonably intercede to enforce its own independent assessment of the situation.<sup>247</sup>

On the other hand, the fiduciary theory does not require human rights violations to be “massive” or “widespread” to justify countermeasures, as some commentators have suggested.<sup>248</sup> Whenever a state violates peremptory norms on any scale—even if it subjects a single individual to torture or prolonged arbitrary detention—it effectively forfeits its claim to serve as a fiduciary for the affected human rights holder, laying the groundwork for other states to use humanitarian countermeasures. For example, an oppressive state that singles out a political opposition leader such as an Aung San Suu Kyi<sup>249</sup> or a Nelson Mandela<sup>250</sup> for prolonged arbitrary detention or cruel, inhuman, and degrading treatment cannot evade international accountability based on the argument that its actions do not involve “widespread” or “systematic” harm to human rights. The violation of a peremptory norm would provide an adequate legal basis for other states to pierce the veil of sovereignty and assume responsibility for the welfare of a victim of human rights abuse. To be sure, the proportionality principle dictates that intervening states would bear a heightened burden to use narrowly targeted countermeasures when a target state engages in only isolated violations of peremptory human rights. Nonetheless, the

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HUFFINGTON POST (Aug. 15, 2011, 1:48 PM), [http://www.huffingtonpost.com/2011/08/15/bart-cell-phone-shutdown-free-speech\\_n\\_927294.html](http://www.huffingtonpost.com/2011/08/15/bart-cell-phone-shutdown-free-speech_n_927294.html) (discussing public debates over whether the state may shut down Internet access in the interest of public safety).

<sup>247</sup> To be sure, even in the absence of an official pronouncement from an authorized international institution, the suppression of expressive freedoms might justify humanitarian countermeasures when such practices are enforced through *jus cogens* violations such as summary execution, prolonged arbitrary detention, torture, or forced disappearance. See, e.g., Iran Freedom and Counter-Proliferation Act § 1243(b)(1) (emphasizing the U.S. government’s intent to “deny the Government of Iran the ability to continue to oppress the people of Iran and to use violence and executions against pro-democracy protestors and regime opponents”). Nonetheless, the United States could not justifiably rely upon censorship of cell phone and Internet communications alone as a basis for imposing or expanding humanitarian countermeasures against Iran and Syria. See *id.* § 1243(b)(3)–(4).

<sup>248</sup> See Jochen A. Frowein, *Reactions by Not Directly Affected States to Breaches of Public International Law*, 248 RECUEIL DE COURS 345, 400 (1994); Stefan Kadelbach, *Jus Cogens, Obligations Erga Omnes and Other Rules—The Identification of Fundamental Norms*, in THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: *JUS COGENS AND OBLIGATIONS ERGA OMNES* 21, 25–26 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006).

<sup>249</sup> See Hannah Beech, *The First Lady of Freedom*, TIME, Jan. 10, 2011, at 30 (discussing the house arrest of Aung San Suu Kyi, the elected president of Burma, between 1989 and 2010).

<sup>250</sup> See Nelson Mandela & Richard Stengel, *Long Walk to Freedom*, TIME, Nov. 28, 1994, at 52 (discussing Nelson Mandela’s twenty-seven-year imprisonment on South Africa’s Robben Island).



limited scale of the abuses perpetrated by an oppressive state would not itself preclude other states from using countermeasures to protect human rights abroad.

In sum, the fiduciary theory clarifies the scope of state authority in several critical respects. First, it supports the conclusion that humanitarian countermeasures are permissible in response to the violation of peremptory norms of general international law.<sup>251</sup> Second, states may also use countermeasures to enforce nonperemptory human rights when the violation of these norms has been confirmed by an authorized tribunal. Third, the fiduciary theory challenges the notion that human rights violations must surpass a certain scale of harm or cross some artificial threshold of “importance” to the international community as a whole before states may employ humanitarian countermeasures. The distinction between permissible and impermissible peer enforcement is thus cast into sharper relief by the fiduciary theory.

#### F. Fiduciary Representation and the Principle of Self-Determination

Critics might object that the fiduciary theory revives the paternalistic rhetoric that colonial powers employed for centuries to rationalize their exploitation of first nations.<sup>252</sup> Grotius’s guardianship analogy can be justly criticized for infantilizing a state’s subjects, treating them as mere passive objects of state concern rather than as self-determining agents whose views are entitled to consideration and respect.<sup>253</sup> Given that humanitarian countermeasures are rarely subject to meaningful review in any international tribunal, there is a serious risk that foreign “guardians” may exploit controversies abroad for their own purposes, pursuing idiosyncratic political agendas in the name of “universal” rights.<sup>254</sup> In an era when the self-determination of peoples has become a cornerstone of international legal order, the idea that humanitarian countermeasures generate a fiduciary relationship between intervening states and foreign peoples might therefore

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<sup>251</sup> See CRAWFORD, *supra* note 6, art. 40, cmt. 2; TAMS, *supra* note 2, at 151.

<sup>252</sup> See WILLIAMS, *supra* note 169, at 97–107; Criddle, *supra* note 169, at 408–09.

<sup>253</sup> See Lauterpacht, *supra* note 160, at 14 (characterizing ON THE LAW OF WAR AND PEACE as a “servile and reactionary instrument [for the] justification of established authority”).

<sup>254</sup> Special Rapporteur on State Responsibility, *Fifth Rep. on State Responsibility*, Int’l Law Comm’n, 40 ¶ 156, UN Doc. A/CN.4/453 & Add. 1–3 (June 24, 1993) (by Gaetano Arangio-Ruiz); see also Linda Alcoff, *The Problem of Speaking for Others*, 20 CULTURAL CRITIQUE 5, 7 (1991) (noting that “the practice of privileged persons speaking for or on behalf of less privileged persons has actually resulted (in many cases) in increasing or reinforcing the oppression of the group spoken for”).

appear on first impression to represent a counterintuitive and perhaps even regressive move.<sup>255</sup>

Such concerns seem to have caused the ILC to overlook the fiduciary character of humanitarian countermeasures. In comments leading up to the final *Articles on State Responsibility*, Crawford argued that the “great difficulties” involved “in securing legitimate representation [of] human groups or individuals . . . in the absence of a valid expression of the wishes of the victim or victims” would counsel against basing humanitarian countermeasures on a theory of foreign interest representation.<sup>256</sup> Instead, Crawford insisted that: “States may be properly concerned as to the issues of international legality, without necessarily identifying with the victims or seeking to represent them.”<sup>257</sup>

Properly understood, the fiduciary theory is preferable to Crawford’s account because it provides a legal framework for reconciling foreign intervention with the principle of self-determination. Much of the resistance that fiduciary conceptions of foreign intervention encounter can be traced to the troubling legacy of colonial “guardianship,” a governance model that enabled Western states to rationalize paternalistic policies in flagrant disregard of indigenous self-determination.<sup>258</sup> The disastrous legacy of international sanctions and countermeasures against Iraq, Haiti, Burundi, and Cuba underscore the dangers of employing a “civilizing” guardianship model or Burkean trusteeship model that would allow intervening states to impose their own conceptions of the good without regard to the views of the oppressed people they purport to serve. But legal guardianship is not the only fiduciary model for humanitarian countermeasures; private law offers a variety of alternative models in which fiduciaries are obligated to respect the decision-making authority of their beneficiaries. For example, in agent-principal, lawyer-client, and doctor-patient relationships, fiduciaries perform services on behalf of their beneficiaries, but they also bear obligations to consult, deliberate with, and respect their beneficiaries’ preferences.<sup>259</sup> Unlike guardi-

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<sup>255</sup> See RICHARD FALK, *HUMAN RIGHTS AND STATE SOVEREIGNTY* 2 (1981) (“The historical record of so-called humanitarian intervention bears out [a] skeptical response to those governments who currently proclaim themselves the global guardians of human rights.”).

<sup>256</sup> *Third Crawford Report*, *supra* note 85, at 8 ¶ 378.

<sup>257</sup> *Id.*

<sup>258</sup> See Criddle, *supra* note 169, at 407, 420–21.

<sup>259</sup> See, e.g., *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 483 (Cal. 1990) (observing that doctors bear a fiduciary duty to disclose facts necessary to obtain the informed consent of their patients); 1 RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. f(1) (2006) (“An essential element of agency is the principal’s right to control the agent’s actions.”); Carol A. Needham, *Advance Consent to Aggregate Settlements: Reflections on Attorneys’ Fiduciary Obligations and Professional Responsibility Duties*, 44 LOY. U. CHI. L.J. 511, 514 (2012) (observing that a lawyer’s duty of loyalty includes obligations to “communicate effectively with the

ans who serve incompetent wards, fiduciaries in agent-principal, lawyer-client, and doctor-patient relationships are not entitled to substitute their own assessment of the best interests of their beneficiaries for their beneficiaries' actual preferences; instead, they are entrusted with legal authority to enable beneficiaries to advance their own preferences more effectively. If beneficiaries in one of these relationships are dissatisfied with their representative, they are entitled to opt out. These fiduciary relationships, which seek to maximize beneficiaries' capacity for self-determination, provide a better model for humanitarian countermeasures than Grotius's guardianship analogy. When states use countermeasures in a manner that is appropriately solicitous of the actual values and desires of foreign peoples, foreign intervention may facilitate the effective self-determination and emancipation of oppressed peoples.

Recent developments in the international law of indigenous rights illustrate how the fiduciary model can be deployed to enhance the self-determination of foreign peoples. Rather than treat indigenous peoples as incompetent subjects of state guardianship, the U.N. General Assembly's Declaration on the Rights of Indigenous Peoples provides that states must "consult and cooperate in good faith with . . . indigenous peoples . . . through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."<sup>260</sup> Similar requirements of good faith consultation and consent-based action now feature in the jurisprudence of the Inter-American Court of Human Rights<sup>261</sup> and in the

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client regarding the representation, and consult with the client regarding the matters essential to the representation" (citation omitted)); cf. Ethan J. Leib & David L. Ponet, *Fiduciary Representation and Deliberative Engagement with Children*, 20 J. POL. PHIL. 178, 188–92 (2012) (arguing that public fiduciaries bear robust obligations for inclusive public deliberation).

<sup>260</sup> Declaration on the Rights of Indigenous Peoples art. 19, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); cf. Convention Concerning Indigenous and Tribal Peoples in Independent Countries arts. 5–6, June 27, 1989, 28 I.L.M. 1382 (providing that states must honor "the social, cultural, religious and spiritual values and practices of [indigenous] peoples"; "consult the peoples concerned . . . whenever consideration is being given to . . . measures which may affect them directly"; and conduct these consultations "in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures").

<sup>261</sup> See, e.g., Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, at 5 (June 27, 2012) ("The Court establishes that one of the fundamental guarantees to ensure the participation of the indigenous people and communities in the decisions relating to measures that affect their rights . . . is the recognition of their right to consultation, which is particularly recognized in ILO Convention No. 169, among other complementary international instruments."); Case of the Saramaka People v. Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 133 (Nov. 28, 2007) ("[T]he Court has stated that in ensuring the effective participation of members of the Saramaka people in development or investment plans within their territory, the State has a

decisions of municipal courts in a number of jurisdictions.<sup>262</sup> Collectively, these developments suggest that a state's fiduciary relationship with indigenous peoples entails a duty to treat indigenous peoples as self-determining agents whose preferences are entitled to respect.<sup>263</sup>

By the same token, when states impose humanitarian countermeasures on behalf of foreign peoples abroad, they bear a similar fiduciary duty to consider foreign values and preferences in good faith. Respect for local values does not mean that violations of preemptory norms such as slavery, genocide, or torture may be excused on grounds of cultural relativism and national self-determination. Rather, it means that states contemplating humanitarian countermeasures must consider whether the particular coercive measures they adopt in response to human rights violations (e.g., trade embargoes, asset freezes, or travel bans) are appropriately sensitive to local values and concerns. Where possible, intervening states should also consult in good faith with oppressed groups and individual victims of human rights abuse and seek consensus on the best approach for restoring human rights observance within a target state.<sup>264</sup> On the one hand, the fiduciary principle of minority protection may justify humanitarian countermeasures for the benefit of an oppressed group in some settings even if a majority of the population approves of the group's oppression. On the other hand, when representatives for an oppressed group request the easing or elimination of humanitarian countermeasures undertaken on their behalf, intervening states should make every effort to respect these requests.<sup>265</sup>

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duty to actively consult with said community according to their customs and traditions." (citation omitted)).

<sup>262</sup> See, e.g., *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *Haida Nation v. B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511, 513 (Can.); *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1077 (Can.); *N.Z. Maori Council v. Att'y Gen.*, [1987] 1 NZLR 641 (HC) (N.Z.).

<sup>263</sup> See generally Evan Fox-Decent & Ian Dahlman, *Sovereignty as Trusteeship and Indigenous Peoples*, 16 THEORETICAL INQUIRIES IN LAW (forthcoming 2015), available at <http://ssrn.com/abstract=2516141>.

<sup>264</sup> Cf. Declaration on the Rights of Indigenous Peoples, *supra* note 260, art. 32 ("States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories . . ."); *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 131–37 (emphasizing the need for good faith consultation with indigenous peoples and, for large-scale projects, informed consent); Draft Articles on Diplomatic Protection with Commentaries art. 19(b), Rep. of the Int'l Law Comm'n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, U.N. Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10 (2006) (recommending that states asserting diplomatic protection claims "[t]ake into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought").

<sup>265</sup> See, e.g., Anne Gearan, *Aung San Suu Kyi Urges Easing of U.S. Sanctions on Burma*, WASH. POST (Sept. 19, 2012), [http://articles.washingtonpost.com/2012-09-19/world/35496923\\_1\\_suu-kyi-burma-burmese-government](http://articles.washingtonpost.com/2012-09-19/world/35496923_1_suu-kyi-burma-burmese-government) (discussing the Burmese opposition leader's request for the easing of sanctions because "their usefulness has run its course"). But see David Mephram, *Burma: The EU Has Been Too Quick to Lift Sanctions*, THE GUARDIAN (Apr. 23,

Far from undermining self-determination, therefore, the fiduciary theory advances respect for self-determination by enhancing international attention to the needs and preferences of foreign peoples. This is not to deny Crawford's observation that foreign representation raises significant legitimacy concerns "in the absence of a valid expression of the wishes of the victim or victims."<sup>266</sup> The best response to these concerns, however, is not simply to turn a blind eye to the agency problems associated with humanitarian countermeasures by artificially recharacterizing human rights as state rights or community rights. Instead, the international community should embrace the representational character of humanitarian countermeasures and insist that states consult with and, where possible, obtain informed consent from their foreign beneficiaries to ensure that humanitarian countermeasures respect the values and interests of human rights holders abroad. When such deliberative engagement is not practicable, fiduciary law offers principled safeguards in the form of fiduciary duties to practice integrity, solicitude, impartiality, and minority protection, while seeking to advance fundamental human security under the rule of law. Some might protest that foreign representation without informed consent smacks of neocolonialism,<sup>267</sup> but this critique has less force when grave human rights abuse are imminent and engaged deliberation is impossible. In these settings, the fiduciary obligations associated with humanitarian countermeasures mediate the relationship between an intervening state and its foreign beneficiaries to categorically prohibit the kinds of domination that are associated with neocolonialism.

Of course, the fiduciary theory of humanitarian countermeasures raises a host of challenging questions for the future development of international law. For example, how should the international community enforce the fiduciary duties of intervening states? In the private-law realm, fiduciary duties lay the groundwork for ex post judicial review of fiduciary performance, holding out the threat of disgorgement and other potent remedies.<sup>268</sup> Formal enforcement in the international realm is far more diffuse, consisting of a patchwork system of reports and resolutions from international institutions such as the

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2013), <http://www.guardian.co.uk/commentisfree/2013/apr/23/burma-eu-too-quick-lift-sanctions> (observing that despite some progress, human rights violations continue in some regions of Burma, including crimes against humanity and ethnic cleansing).

<sup>266</sup> *Third Crawford Report*, *supra* note 85, at 8 ¶ 378.

<sup>267</sup> *Cf.* Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1198 (2014) (raising concerns about whether a fiduciary model of government can be implemented successfully in practice).

<sup>268</sup> *See* Miller, *supra* note 137, at 572 ("[B]oth the duty of loyalty and disgorgement as a remedy for disloyalty may be understood as vindicating the exclusive claim beneficiaries hold over fiduciary power as a means derived from their legal personality or that of their benefactors.").

U.N. General Assembly, the U.N. Secretary-General, and the U.N. Human Rights Council. As the longstanding stalemate between the United States and the international community over Cuba demonstrates, these supranational review mechanisms are inadequate to ensure that powerful states will always use humanitarian countermeasures in a manner that comports with their fiduciary obligations.<sup>269</sup>

In an ideal world, a more fully developed international regime for enforcing the fiduciary duties of intervening states might provide for judicial review or some other robust institutional check on abusive intervention at the international level. Until such international institutions take shape, however, the international community will have to make due with decentralized solutions. Here the customary law of humanitarian countermeasures itself offers a useful template. As this Article has shown, humanitarian countermeasures can be understood as a second-best solution for a nonideal world in which international institutions such as the Security Council are unable or unwilling to protect international human rights in many parts of the globe. Just as the international community has used decentralized tools such as humanitarian countermeasures to enforce states' human rights obligations to their own people, such tools may also play an important role in the enforcement of intervening states' fiduciary obligations to foreign nationals abroad.<sup>270</sup>

### G. Reframing Humanitarian Countermeasures

Most legal scholars today accept the ICJ's assertion that at least some international human rights qualify as obligations *erga omnes*. The fiduciary theory, in contrast, suggests that this characterization is deeply misleading. States owe human rights obligations to human rights holders, not states individually or collectively. While all international human rights are matters of legitimate concern to the international community, this does not mean that states may claim an independent legal entitlement to human rights compliance abroad, as *Barcelona Traction* suggests.<sup>271</sup> Human rights obligations are not *owed* to states, even if it is the case that some human rights—namely, peremptory norms—are *enforceable* by all states because international law entrusts states to bring humanitarian countermeasures on behalf of

<sup>269</sup> See AMNESTY INT'L, *supra* note 216, at 13–19 (noting that “[f]or the past 14 years, the UN Secretary-General has documented the negative impact of the US embargo on Cuba”); *General Assembly Renews Call for End to US Embargo Against Cuba*, *supra* note 218 (noting that the current prohibitions prevent Cuba from thriving).

<sup>270</sup> Although this Article will not undertake to specify the full features of an effective regime for enforcing intervening states' fiduciary obligations to foreign peoples, it lays the groundwork for such a regime by clarifying the nature and scope of states' authority to use humanitarian countermeasures.

<sup>271</sup> *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 ¶¶ 33–34.

human rights holders abroad.<sup>272</sup> These observations reveal the need for more nuanced understanding of the diverse ways in which international norms may claim universal applicability.

To be sure, some international norms are universal in the sense contemplated in *Barcelona Traction*, because all states are entitled to claim a legal injury whenever any state violates these norms anywhere. These norms prohibit conduct that injures all states. For example, the prohibitions against massive pollution of the atmosphere and oceans extend to all states (*erga omnes*) because they protect common resources in which all states have an independent legal interest.<sup>273</sup> International norms that safeguard international peace and security such as the prohibition against aggression arguably have an *erga omnes* structure as well, because they prevent hostilities that could erupt into global conflicts that may adversely impact all states.<sup>274</sup> Such obligations are properly characterized as obligations *erga omnes* because they protect the legal interests of all states.

Not all international norms that have universal applicability qualify as obligations *erga omnes* in this sense.<sup>275</sup> International human rights have a universal scope not because states owe these obligations to all other states, but rather because all states are *bound by* these obligations.<sup>276</sup> The principle of self-determination operates similarly.

<sup>272</sup> To the extent that particular human rights treaties authorize states to initiate enforcement proceedings based on human rights violations abroad (*e.g.*, American Convention, *supra* note 80, art. 61; European Convention, *supra* note 80, art. 24; Genocide Convention, *supra* note 70, art. IX), these instruments do not transform human rights into state rights. Rather, these instruments authorize state parties to initiate enforcement proceedings as fiduciary representatives for human rights holders.

<sup>273</sup> See Delbrück, *supra* note 90, at 26–27 (“The *ratio legis* is that the common interest in protecting the ozone layer [and other central features of the global environment] . . . is so overwhelming that no State may be permitted not to comply with the protective regimes regardless of whether or not it has consented to the creation of the regime[s].”).

<sup>274</sup> See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 104 ¶ 196 (June 27) (Schwebel, J., dissenting) (citing article 27 of the Charter of the Organization of American States for the proposition that “[e]very act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States”); *Barcelona Traction*, 1970 I.C.J. at 32 ¶ 34 (asserting that some obligations *erga omnes* “derive . . . , in contemporary international law, from the outlawing of acts of aggression”).

<sup>275</sup> See Bruno Simma, *Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations Erga Omnes?*, in *THE FUTURE OF INTERNATIONAL LAW ENFORCEMENT: NEW SCENARIOS – NEW LAW?* 125, 134 (Jost Delbrück ed., 1992) (distinguishing obligations “whose violation directly and materially ‘injures’ another or certain other states in the more or less traditional, tangible mode, like the prohibition of aggression or of large-scale international damage to the environment (as in the case of the burning of the Kuwaiti oil fields by Iraq),” from human rights obligations and other norms that do not injure particular states).

<sup>276</sup> Human rights that qualify as *jus cogens* such as the prohibitions against slavery, genocide, and torture are universal in other respects as well, because states must comply with these norms at all times, in all places, and with respect to all persons.

Under the U.N. Charter and customary international law, all states bear an obligation to respect the “principle of equal rights and self-determination of peoples.”<sup>277</sup> But contrary to the ICJ’s assertion in the *Palestinian Wall* case, states owe this obligation to peoples of the world (including their own), not to other states *per se*.<sup>278</sup> Human rights and the principle of self-determination are analytically distinct from traditional obligations *erga omnes* because they “do not protect states but rather human beings or groups directly.”<sup>279</sup> When international law authorizes states to enforce these obligations against other states, they may do so only as fiduciary representatives for the individuals and groups who hold these rights under international law. The better reading of *Barcelona Traction*, therefore, is that customary international law authorizes all states, acting as fiduciary representatives, to call an oppressive state to account for its human rights violations against its own people.

The international community has little to lose, and a great deal to gain, by setting aside the idea that human rights are obligations *erga omnes* in favor of the fiduciary conception of humanitarian countermeasures. The fiduciary theory affirms the core message of previous theories that states are “entitled to uphold some [international legal obligations] even though the particular contravention . . . has not affected their own material interests.”<sup>280</sup> But it offers a superior account of the juridical structure of humanitarian countermeasures: states derive their standing to enforce the human rights of foreign peoples from the fiduciary character of their representative role. Those who have endorsed the state-interest theory in the past should welcome the fiduciary theory, because it offers a sound account of the relationship between human beings’ primary legal interests in human rights observance and states’ secondary (derivative) legal interests in the enforcement of human rights abroad, strengthening the argument that states may assert authority *ut singuli* to protect the human rights of foreign nationals.<sup>281</sup> Proponents of the community-interest theory should also welcome the fiduciary theory because it affirms the fundamental importance of human rights to international public order while circumventing the “apparent paradox” of “unilateral collective action.”<sup>282</sup> In addition, the fiduciary theory offers principled

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<sup>277</sup> U.N. Charter art. 1(2); *see also* East Timor (Port. v. Austl.), 1995 I.C.J. 90, 102 ¶ 29 (June 30) (asserting that “the right of peoples to self-determination . . . has an *erga omnes* character”).

<sup>278</sup> *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136, 199 ¶ 155 (July 9).

<sup>279</sup> Simma, *supra* note 275, at 134.

<sup>280</sup> BROWNIE, *supra* note 74, at 470.

<sup>281</sup> *Fourth Crawford Report*, *supra* note 115.

<sup>282</sup> *Id.* at 18–19 ¶ 76.



criteria for distinguishing which human rights violations are enforceable through humanitarian countermeasures. And unlike the state-interest and community-interest theories, the fiduciary theory is uniquely responsive to developing states' concerns that coercive economic measures must respect the human rights and self-determination of peoples within target states. At a time when debates over "unilateral coercive measures" continue to divide the international community, the fiduciary theory of humanitarian countermeasures offers a roadmap for finding new common ground.

### CONCLUSION

In this Article, I have argued that states derive their standing to contest human rights violations abroad from the principle that they *stand for* human rights holders. Contrary to the ICJ's assertion in *Barcelona Traction*, international human rights are not state rights, nor are they rights of the international community as a whole. International human rights are precisely what they purport to be: legal rights that international law vests in human beings *tout court*. In appropriate cases, all states may represent human rights victims beyond their borders for the purpose of bringing countermeasures on behalf of those foreign nationals. But this authority to represent foreign nationals abroad is entrusted to states in a fiduciary capacity, and states that employ humanitarian countermeasures bear fiduciary obligations to pursue the interests of foreign nationals rather than their own national interests. This fiduciary conception of foreign intervention, which earned the endorsement of early publicists such as Vitoria, Grotius, Pufendorf, and Vattel, provides a sound foundation for the international law of humanitarian countermeasures today.

Viewed through a wider lens, the fiduciary theory developed in this Article forges a link between the law of humanitarian countermeasures and other regimes that govern foreign intervention, including the U.N. trusteeship system and the law of belligerent occupation. In each of these regimes, international law authorizes states to exercise public powers abroad as a "sacred trust" for the purpose of guaranteeing fundamental human security under the rule of law for oppressed peoples who are unable to obtain effective representation from their own state.<sup>283</sup> International law thus ties the exercise of

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<sup>283</sup> League of Nations Covenant art. 22. As such, fiduciary principles may also furnish a template for other forms of decentralized international law enforcement that find support in customary international law but fall outside the scope of this Article, including the use of countermeasures to combat public corruption abroad. *See, e.g.*, Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations, SOR/2011-78 (Can.) (establishing that internal turmoil and corruption in Tunisia and Egypt warrant the use of countermeasures by Canada); Exec. Order No. 13,566, Blocking and Prohibiting Certain Transactions Related to Libya, 76 Fed. Reg. 11,315, 11,315–16 (Feb. 25, 2011) (establishing

public powers to fiduciary obligations, which prohibit intervening states from exploiting their power over a foreign people for their own gain. Whenever states enforce the legal interests of foreign nationals abroad, they must use their coercive powers solely for the benefit of their designated beneficiaries and in a manner that respects the principle of self-determination.

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that violence against unarmed civilians in Libya warrants the use of countermeasures by the United States); Exec. Order No. 13,469, Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe, 73 Fed. Reg. 43,841, 43,841–42 (July 25, 2008) (establishing that public corruption and human rights abuses in Zimbabwe warrant the use of countermeasures by the United States); Richard Spencer & Nick Meo, *Hosni Mubarak Resigns: Switzerland to Freeze Assets of Ousted Ruler*, TELEGRAPH (Feb. 11, 2011), available at [http://www.telegraph.co.uk/news/worldnews/africaandindian\\_ocean/egypt/8319821/Hosni-Mubarak-resigns-Switzerland-to-freeze-assets-of-ousted-ruler.html](http://www.telegraph.co.uk/news/worldnews/africaandindian_ocean/egypt/8319821/Hosni-Mubarak-resigns-Switzerland-to-freeze-assets-of-ousted-ruler.html) (establishing that corruption and instability in Egypt warrant the use of humanitarian countermeasures by Switzerland).