

Symposium | Third World Approaches to International Law & Economic Sanctions

Sanctions, Dollar Hegemony, and the Unraveling of Third World Sovereignty[†]

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INTRODUCTION

Political philosopher Jessica Whyte has observed that the past forty years have been marked by an apparent contradiction: on the one hand, neoliberalism, with its overt skepticism toward using economic tools to achieve social goals, has become hegemonic almost at a global level. On the other, these same forty years have witnessed a proliferation of economic sanctions mobilized by Western states to achieve a broad range of foreign policy goals. Whyte argues that this contradiction is only apparent: prominent neoliberal thinkers have actually crafted elaborate defenses of sanctions as market tools, and, on the institutional level, many of the main U.S. architects of sanctions were directly and personally affiliated with these neoliberal thinkers.¹ In practice, the interconnected, yet uneven, global economy that neoliberalism brought about was the ideal background for the increased use of sanctions as tools of statecraft.²

This unevenness of economic integration has many facets, but one stands out: the role of the U.S. dollar (USD) as the unrivaled global currency.³ For the

[†] This article is an expansion of Ntina Tzouvala, *Successful Failures: Economic Sanctions, Humanitarianism, and the Undoing of Post-Colonial Sovereignty*, YALE J. INT'L L. ONLINE (June 26, 2023), <https://www.yjil.yale.edu/successful-failures-economic-sanctions-humanitarianism-and-the-undoing-of-post-colonial-sovereignty/>.

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1. Jessica Whyte, *Economic Coercion and Financial War*, 90 J. AUST. POL. ECON. 5, 7-9 (2022).

2. In their influential analysis of weaponized interdependence, Farrell and Newman emphasized the role of unevenness in global economic networks and critiqued liberal neglect of this elementary fact that allows states, such as the United States, to create “chokepoints.” Henry Farrell & Abraham L. Newman, *Weaponized Interdependence: How Global Economic Networks Shape State Coercion*, 44 INT'L SEC. 42, 54 (2019). See also HENRY FARRELL & ABRAHAM NEWMAN, UNDERGROUND EMPIRE: HOW AMERICA WEAPONIZED THE WORLD ECONOMY (2023).

3. On recent writings about the role of dollar hegemony in augmenting U.S. geopolitical

first time in the history of capitalism, a national currency not linked to any specific commodity came to dominate the global economy.⁴ Even initiatives like the adoption of the Euro by advanced European capitalist economies have not managed to dethrone the USD from the position of the dominant currency of our times.⁵ As central banks around the world discovered during the Global Financial Crisis and in the early months of the COVID-19 pandemic,⁶ the Federal Reserve now acts as a global lender of last resort thanks to its unique ability to provide liquidity to dollar-dependent banks. Indeed, how readily national banks can access USD is a major factor in the construction of the hierarchical global financial order.⁷

As critical political economists and political theorists have noted, this reality has profound consequences for monetary sovereignty. States nominally retain the right to issue their own currency, but they de facto (and at times, de jure) rule over jurisdictions that rely on currencies issued by other sovereigns, and especially the United States, for a broad range of transactions.⁸ This problem has mostly escaped the attention of Third World Approaches to International Law (TWAIL) and other critical international legal scholars.⁹ Indeed, juridical critiques of the international financial system have mostly coalesced around conditionalities attached to loans by international financial

power, see FARRELL & NEWMAN, *supra* note 2, at 17; Mona Ali, *Acute Dollar Dominance*, PHENOMENAL WORLD (Feb. 3, 2022), <https://www.phenomenalworld.org/analysis/acute-dollar-dominance/>.

4. See generally DAVID McNALLY, *BLOOD AND MONEY: WAR, SLAVERY. FINANCE AND EMPIRE* (2020); BENJAMIN J. COHEN, *CURRENCY POWER: UNDERSTANDING MONETARY RIVALRY* (2015).

5. Jens Van't Kloosters has argued that the European Central Bank's reliance on market actors, as opposed to conscious policy, for currency internationalization has impeded the rise of the euro to an international currency of greater reach than the sum of the national currencies that it replaced. Jens Van't Kloosters, *Monetary sovereignty: the euro and strategic internationalization*, in TREADING SOFTLY: HOW CENTRAL BANKS ARE ADDRESSING CURRENT LEGAL CHALLENGES 148-64 (ECB Legal Conference December 2023), <https://www.ecb.europa.eu/pub/pdf/other/ecb-legal-conference-2023-proceedings.en.pdf>.

6. For a concise summary of the establishment of the (baroque) swap line program established between the Federal Reserve and European banks between 2008 and 2009, see Adam Tooze, *"The Big Thing": Global Liquidity*, in CRASHED: HOW A DECADE OF FINANCIAL CRISES CHANGED THE WORLD 202 (2018).

7. This is largely determined by whether a state has access to permanent and unlimited (UK, Eurozone, Japan) or temporary and limited (Australia, South Korea, Brazil) USD swap lines. In the absence of such swap lines, organizations such as the International Monetary Fund (IMF) and the World Bank operate as the most obvious sources of dollars with all the consequences that this engagement entails regarding structural adjustment and austerity.

8. For the purposes of this essay, I have bracketed the question of credit money which raises further challenges for state sovereignty as it has effectively privatized money creation. For the challenges posed to state sovereignty by the interconnected phenomena of dollar hegemony and credit money, see Katharina Pistor, *From Territorial to Monetary Sovereignty*, 18 THEORETICAL INQ. IN L. 491 (2017); Steffen Murau & Jens van't Klooster, *Rethinking Monetary Sovereignty: The Global Credit Money System and the State*, 21 PERSPECTIVES ON POL. 1319 (2023).

9. For a notable exception, see Kangle Zhang, *Not Equal: Toward an International Law of Finance*, (Aug. 17, 2020) (PhD Thesis, on file with the University of Helsinki), <https://helda.helsinki.fi/handle/10138/317378>.

institutions,¹⁰ rather than the fact that both their loans and the global financial system, in general, are dominated by the currency of one sovereign, the United States of America.¹¹

In contrast, the United States has been increasingly proactive in mobilizing the powers afforded to it by dollar hegemony in order to achieve a wide range of foreign policy goals. Modern sanctions, in fact, constitute one of the most important manifestations of the weaponization of dollar hegemony for the furtherance of U.S. interests. Over the past fifteen years, the United States switched the modality of its sanctions from “traditional” trade embargoes, such as those imposed on Cuba, to financial sanctions that target transactions through, or assets held in, the U.S. banking system. Numerous states, including Iran, Venezuela, and Russia, have been targeted with financial sanctions. In particular, the case of Russia has triggered extensive political and legal debates concerning the possibility of confiscating assets of the Russian central bank in order to pay reparations to Ukraine in light of Russia’s aggression.¹² These important debates address questions central to this paper, which focuses on Afghanistan.

Afghan assets held in the United States have been nothing if not controversial. 9/11 victims and their families have engaged in prolonged litigation and obtained judgments against the Taliban amounting to billions of dollars.¹³ These efforts have raised profound questions both about the relationship between the three branches of government domestically and about the U.S. position concerning key international law issues, notably state immunity. Congress has been under (largely successful) pressure to pass legislation that enables this litigation and, especially, execution against the assets of foreign sovereigns who are “sponsors of terrorism.” In contrast, the

10. See, e.g., James Thuo Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 BUFFALO HUM. R. L. REV. 107 (1999); Sundhya Pahuja, *Technologies of Empire: IMF Conditionality and the Reinscription of the North/South Divide*, 13 LEIDEN J. INT’L L. 749 (2000); Ruth Buchanan & Sundhya Pahuja, *Legal Imperialism: Empire’s Invisible Hand?*, in *EMPIRE’S NEW CLOTHES: READING HARDT AND NEGRI 73* (Paul A. Passavant & Jodi Dean eds., 2003).

11. As noted in a 2020 report for the Bank for International Settlements, “The US dollar dominates international finance as a funding and investment currency. Although the United States accounts for one quarter of global economic activity, around half of all cross-border bank loans and international debt securities are denominated in US dollars.” COMM. ON THE GLOB. FIN. SYS., US DOLLAR FUNDING: AN INTERNATIONAL PERSPECTIVE, BANK FOR INTERNATIONAL SETTLEMENTS 1 (June 2020), <https://www.bis.org/publ/cgfs65.pdf>.

12. See Oona A. Hathaway et. al., *War Reparations: The Case for Countermeasures*, 76 STAN. L. REV. (forthcoming 2024); ANTON MOISEIENKO, INT’L LAW. PROJECT & SPOTLIGHT ON CORRUPTION, FROZEN RUSSIAN ASSETS AND THE RECONSTRUCTION OF UKRAINE: LEGAL OPTIONS (July 2022), <https://www.wrncouncil.org/wp-content/uploads/2022/07/Frozen-Russian-Assets-Ukraine-Legal-Options-Report-WRMC-July2022.pdf>; Ingrid Brunk, *Countermeasures and the Confiscation of Russian Central Bank Assets*, LAWFARE (May 3, 2023), <https://www.lawfaremedia.org/article/countermeasures-and-the-confiscation-of-russian-central-bank-assets/>.

13. For an overview of the litigation, see JENNIFER K. ELSEA, CONG. RSCH. SERV., SUITS AGAINST TERRORIST STATES BY VICTIMS OF TERRORISM (Aug. 8, 2008), <https://sgp.fas.org/crs/terror/RL31258.pdf>.

executive has mostly been reluctant to support such efforts, expressing concerns that such precedents would expose the United States to litigation overseas.¹⁴ The return of the Taliban as Afghanistan’s government in 2021 only rendered Afghan assets in the United States more controversial. President Biden issued an executive order that froze \$7 billion of Da Afghanistan Bank (DAB) reserves held at the Federal Reserve Bank of New York.¹⁵ What distinguished this instance of financial sanctions from other similar measures already in place was that in September 2022, the U.S. government transferred half of these frozen funds (\$3.5 billion) to the Fund for the Afghan People. This is a Swiss-based non-profit whose purpose is to “protect, preserve and disburse” these assets in order to achieve macroeconomic goals, including price stability and supporting Afghanistan’s currency.¹⁶ According to the Fund’s statute, the United States has the right to appoint one of the members of the Fund’s Board of Trustees, while one additional member ought to be domiciled in Switzerland.¹⁷

The sanctions against DAB have once again triggered debates about the applicability of state immunity to the assets of foreign central banks.¹⁸ Even though the significance of this question can hardly be overstated, this case raises unique questions that other instances of sanctioning central bank assets do not. The fact that sanctioned assets have been transferred to this Fund, combined with the Fund’s mandate and composition, hints at the lawmaking powers of dollar hegemony that go to the core of the international legal order. As I will show later in the piece, the United States used sanctioned assets to set up a quasi-central bank in exile run by handpicked individuals, with the United States retaining an effective right to veto its decisions. This configuration, I argue, is in profound tension with even the most minimalist conception of

14. For some critical engagements with this litigation and its imprint on U.S. domestic law, see Maryam Jamshidi, *The World of Private Terrorism Litigation*, 27 MICH. J. RACE & L. 203 (2021); Darryl Li, *Comedy of Terrors/National Security Fictions and The Origins of Al-Qa’ Ida*, in CONSPIRACY/THEORY 362, 379-80 (Joseph Masco & Lisa Wedeen eds., 2023); Maryam Jamshidi, *How Private Actors are Impacting U.S. Economic Sanctions*, 15 HARV. NAT’L SEC. J. 119 (2024). In the process, Congress has introduced a highly controversial exception to state immunity concerning “sponsors of terrorism.” This exception is unique to the United States and Canada. For a skeptical discussion, see Keith Sealing, *State Sponsors of Terrorism Is a Question, Not an Answer: The Terrorism Amendment to the FSIA Makes Less Sense Now Than It Did Before 9/11*, 38 TEX. INT’L L. J. 119 (2003).

15. Exec. Order No. 14,064, 87 Fed. Reg. 8,391 (Feb. 11, 2022).

16. Press Release, U.S. Department of the Treasury, Joint Statement by U.S. Treasury and State Department: The United States and Partners Announce Establishment of Fund for the People of Afghanistan, (Sep. 14, 2022), <https://home.treasury.gov/news/press-releases/jy0947>; *The United States Establishes Fund for the Afghan People from Frozen Afghan Central Bank Assets*, 117 AM. J. INT’L L. 139 (2023).

17. Fund for the Afghan People, (Feb. 10, 2023), Art. 12, ¶ 3, <https://afghanfund.ch/files/statutes-af-as-of-june-2023.pdf>.

18. See Daniel Franchini, *State Immunity as a Tool of Foreign Policy: The Unanswered Question of Certain Iranian Assets*, 60 VIRG. J. INT’L L. 433 (2020); Ingrid Wuerth, *Immunity from Execution of Central Bank Assets*, in THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 266 (Tom Ruys et al., eds., 2019); Anton Moiseienko, *Legal: The Freezing of the Russian Central Bank’s Assets*, 34 EUR. J. INT’L L. 1007 (2023).

Afghanistan as a sovereign state. This is not simply a case of competing entities claiming to be the government of a state, a scenario that is hardly novel.¹⁹ Rather, a body that does not claim to be the government of a state was vested with certain governmental functions concerning price and currency stability and granted access to state assets in a way that disaggregates Afghanistan's governmental functions and sovereign authority. In other words, the United States has used its currency power and the rhetoric of humanitarian concerns to reconfigure the governmental structure of a sovereign state in ways that directly contravene even the most minimalist constructions of the rule of non-intervention.²⁰ The idea that a state can slice up another's governmental functions and allocate them to actors of its choosing undermines the very foundation of a binding international legal order.

My analysis proceeds in three steps. First, I will offer a brief overview of the origins and contemporary reality of dollar hegemony and its instrumentalization in the context of financial sanctions. Second, I will present the international legal issues raised by the practice of central bank asset freezing with an emphasis on state immunity and government recognition with a particular reference to the Fund. Finally, I will show the uniquely ambitious nature of sanctions against Afghanistan and the worldmaking implications of the Afghan Fund. My argument is that even though the Fund remains paralyzed due to internal disagreements about its functions, its very existence constitutes a challenge to the concept of Third World sovereignty.

I. DOLLAR HEGEMONY AND THE RISE OF FINANCIAL SANCTIONS

When it comes to money and sovereignty, our world is structured around a defining tension: on the one hand, each sovereign state has the right to issue and regulate its own currency.²¹ On the other, a handful of these national

19. In recent years, government recognition has become relevant to the issue of central bank assets in the case of Venezuela. After a highly contested presidential election in 2018, Nicolas Maduro remained in power as a matter of fact, but the opposition refused to recognize him as a legitimate president. Instead, the leader of the opposition, Juan Guaidó, claimed the role of interim president. Most Latin American and Western states recognized Guaidó as president, while China, Russia, Iran, and others continued recognizing Maduro. The issue acquired practical significance when both self-proclaimed governments attempted to gain control over central bank assets held in the United States and the U.K. See Laura Rees-Evans & Rhys Carvosso, *Legal Consequences of and Approaches to the Question of Recognition of a Government of a State: Disputes involving Venezuela*, 36 ICSID REVIEW-FOREIGN INV. L. J. 563 (2021); Andrew Sanger, *Who Controls Venezuela's Gold? De Jure and De Facto Recognition of a Foreign Head of State*, 80 CAMB. L. J. 11 (2021).

20. Although the Court did not examine anything as ambitious as the Afghan Fund in the *Nicaragua* case, it was alive to the fact that humanitarian goals may be pursued in ways that violate the prohibition of intervention: In the view of the Court, if the provision of "humanitarian assistance" is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely "to prevent and alleviate human suffering" and "to protect life and health and to ensure respect for the human being"; it must also, and above all be given without discrimination to all in need in Nicaragua, not merely to the contras and their dependents. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 243 (June 27).

21. Murau & van't Klooster, *supra* note 8, at 1319 ("Today, the concept of monetary

currencies, with the USD at the lynchpin, predominate in international transactions, operate as stores of value, and even de facto displace national currencies in day-to-day exchanges. Of course, the existence of hegemonic currencies is not a new phenomenon. From the Athens drachma of classical antiquity to the British sterling before World War I, there are many examples of currencies being used beyond the jurisdictions that issued them. Even though the precise moment of transition from the sterling to the dollar is open to debate,²² the greenback came to be the unrivaled international currency, at the latest, by World War II. Indeed, the Bretton Woods system formalized this hegemony by establishing a gold convertibility system with the USD at its center. The USD was convertible to gold at \$35 per ounce, and all other currencies were pegged to the dollar at set but adjustable rates.²³ The International Monetary Fund (IMF) was tasked with overseeing the exchange rates system. This formalized system of dollar hegemony prevailed over alternative visions. Notable among them was the proposal by Lord John Maynard Keynes for the adoption of the *bancor*, an international unit of account that would not be held by private individuals but would only be used to track international flows of assets and liabilities.²⁴

Although the monetary proposals of Keynes were defeated at Bretton Woods, the Keynesian orthodoxy regarding the desirability of capital controls prevailed, limiting the international mobility of capital and enabling domestic policymakers to pursue a number of policy objectives linked to the building and expansion of the welfare state but also to rearmament in light of the Cold War.²⁵ This system came under pressure in the late 1960s, leading to its de facto abandonment in 1971 when President Nixon declared that the United States would no longer exchange dollars for gold.²⁶ In 1978, the IMF Articles

sovereignty is typically used in a Westphalian sense to denote the ability of states to issue and regulate their own currency.”)

22. This is a question of historical significance that also has contemporary resonance as it might help economists understand more precisely the advantages of incumbency when it comes to international currencies. Barry Eichengreen & Marc Flandreau, *The rise and fall of the dollar (or when did the dollar replace sterling as the leading reserve currency?)*, 13 EUR. REV. ECON. HIST. 377 (2009).

23. For an authoritative overview of the Bretton Woods system, see A RETROSPECTIVE ON THE BRETTON WOODS SYSTEM: LESSONS FOR INTERNATIONAL MONETARY REFORM (Michael D. Bordo & Barry Eichengreen eds., 1993).

24. For a contemporaneous account, see John H. Williams, *Currency Stabilization: The Keynes and White Plans*, 21 FOR. AFF. 645 (1943).

25. On the first era of dollar hegemony and welfare capitalism, see Thomas I. Palley, *Theorizing dollar hegemony, Part 1: the political economic foundations of exorbitant privilege* 37-41 (Post-Keynesian Econ. Soc’y, Working Paper No. 2220, Aug. 2022) On the relationship between dollar hegemony and “military Keynesianism,” see McNally, *supra* note 4, at 210-215.

26. The factors that led to the collapse of the Bretton Woods system have been the subject of extensive debates with most commentators focusing on the mounting costs of the Vietnam War and Great Society programs, which forced the United States to issue amounts of debt that far exceeded its gold reserves. McNally, *supra* note 4, at 212-214. For an account that emphasizes pressures to liberalize capital flows as central to the U.S. decision to abandon the gold standard, see Matias Vernengo, *The Consolidation of Dollar Hegemony After the Collapse of Bretton Woods: Bringing Power Back In*, 33 REV. POL. ECON. 529 (2021).

of Agreement were amended to reflect this reality, which brought the era of formalized dollar hegemony to an end. Currencies were allowed to float freely. Crucially, this transition also enabled the abandonment of capital controls and intensified capital mobility and the dramatic expansion of the financial sector.²⁷ In this respect, the persistence of dollar hegemony today does not constitute a simple continuation of the pre-1973 landscape but unfolds within a very different, financialized economic landscape. In Palley's words:

The key to the new pattern is [the] absence of convertibility combined with increased demand for U.S. assets. Bretton Woods dollar hegemony was built on U[.]S[.] industrial might and the ability to run trade surpluses. Neoliberal dollar hegemony is built on the standing of the U.S. as the center of global capitalism.²⁸

The reasons contributing to dollar hegemony's survival, and if anything, its expansion, are fiercely debated amongst (political) economists.²⁹ Some explanations focus on the individual decisions of economic actors. In this telling, hegemonic currencies emerge and are sustained out of the uncoordinated actions of economic actors who opt for different currencies based on perceptions about stability and "safe haven" status, the depth and breadth of financial markets, the advantages of network externalities, the desirability of a state's exports, or the trustworthiness of its financial institutions and legal system.³⁰ All these factors are undeniably part of the explanation. Yet, they are incomplete insofar as they ignore the proactive role of the United States in promoting and expanding the use of the dollar and, in particular, in mobilizing its military supremacy in order to protect the international role of its currency.

A pivotal moment in this process was the 1974 agreement with Saudi Arabia: the United States offered military protection, and in exchange Saudi Arabia committed to denominating its oil sales exclusively in USD and using these petrodollars to purchase large quantities of Treasuries and other dollar-denominated assets.³¹ These recycled petrodollars were subsequently used to

27. On the post-Bretton Woods international monetary system as a motor for financialization, see Jane D' Arista, *The Role of the International Monetary System in Financialization*, in, FINANCIALIZATION AND THE WORLD ECONOMY (Gerald A. Epstein ed., 2005). On a contemporaneous defense of floating exchange rates as essential for a neoliberal economic and legal order, see Harry G. Johnson, *The International Monetary System and the Rule of Law*, 15 J. LAW & ECO. 277 (1972).

28. Palley, *supra* note 25, at 45.

29. See, e.g., Carla Norrlof, *Dollar Hegemony: A Power Analysis*, 21 REV. INT'L POL. ECO. 1042 (2014); Vernengo, *supra* note 26.

30. As John Crawford noted, "[T]he institutions that engender and maintain the trust of both domestic and foreign investors in U.S. financial markets and dollar assets include an open and transparent system of democratic government, along with the institutionalized system of checks and balances." John Crawford, *The Dollar Dilemma: Hegemony, Control, and the Dollar's International Role*, VIRG. BUS. L. REV. 135 (forthcoming in 2023) (quoting Eswar Prasad, *Has the Dollar Lost Ground as the Dominant International Currency?*, BROOKINGS (Sept. 20, 2019), <https://www.brookings.edu/articles/has-the-dollar-lost-ground-as-the-dominant-international-currency/>).

31. For an account of the agreement that pays attention to U.S. military power, see Ducio Basosi, *Oil, Dollars, and US Power in the 1970s: Re-viewing the Connections*, 3 J. ENERGY HIST. 1 (2020). For a journalistic account, see Andrew Wong, *The Untold Story Behind Saudi Arabia's 41-Year*

provide loans to the Global South, especially Latin American states, that needed USD to pay the increased oil prices. This mechanism locked ever-increasing parts of the world into the dollar as greenbacks became central to the purchasing of energy and the repayment of debt.³² Shaffer and Waibel have characterized this new monetary order as a de-legalized one. This is true insofar as dollar hegemony is not explicitly provided for by public international law, as was the case under Bretton Woods.³³ Nevertheless, law played an important role in this reconstruction of dollar hegemony after 1971/1973 through the public and private legal infrastructure of oil, debt, and financial markets.³⁴

Today, despite the relative decline of U.S. economic power,³⁵ the greenback remains the unrivaled hegemonic currency internationally. Approximately 60% of foreign currency reserves are held in USD, a figure that has declined since 2000 (from 70%) but has remained relatively stable over the past fifteen years. These reserves are an important asset given central banks' missions to support the value of a state's currency. When a currency comes under pressure, central banks will sell their reserves held in "hard" currencies and buy their own, thereby stabilizing its price. In addition, with the exception of intra-European transactions, the American dollar remains the most used currency in international trade, ranging from over 95% in the Americas to roughly 74% in Asia-Pacific. This means that even international trade that does not involve U.S. firms or individuals is denominated and settled in USD—a fact of immediate relevance to the question of sanctions. The dollar also dominates the financial sector, which is crucial in the era of financialized capitalism: over 60% of banking liabilities and equities are denominated in USD, which has once again remained largely unchanged since 2010.³⁶ In times

U.S. Debt Secret, BLOOMBERG (Mar. 30, 2016), <https://www.bloomberg.com/news/features/2016-05-30/the-untold-story-behind-saudi-arabia-s-41-year-u-s-debt-secret>.

32. DAVID E. SPIRO, *THE HIDDEN HAND OF AMERICAN HEGEMONY: PETRODOLLAR RECYCLING AND INTERNATIONAL MARKETS* (1999). On the entanglement between the U.S. Dollar and oil before and after 1974 *see generally* TIMOTHY MITCHELL, *CARBON DEMOCRACY: POLITICAL POWER IN THE AGE OF OIL* (2011).

33. Gregory Shaffer & Michael Waibel, *The rise and fall of trade and monetary legal orders: From the interwar period to today's global imbalances*, in, *CONTRACTUAL KNOWLEDGE: ONE HUNDRED YEARS OF LEGAL EXPERIMENTATION IN GLOBAL MARKETS* 289-323. (Gregoire Mallard & Jérôme Sgard eds., 2016).

34. It is impossible to map this nexus exhaustively here. For some pointers, *see* A. Claire Cutler, *The Judicialization of Private Transnational Power and Authority*, 25 *IND. J. GLOB. LEG. STUD.* 61 (2018); ODETTE LIENAU, *RETHINKING SOVEREIGN DEBT: POLITICS, REPUTATION, AND LEGITIMACY IN MODERN FINANCE* (2014).

35. Even scholars who contest the overall argument about a U.S./Western hegemonic decline acknowledge the decline of U.S. economic power: "Either way, with its share of world trade falling, its debt increasing, its economy in slowdown since 2008 and its dependency on foreign purchasers of its debt on the rise, it looks to many analysts at least as if the United States will either 'need to retrench' or, more problematically, pass on the baton to other more capable powers." Michael Cox, *Power Shifts, Economic Change and the Decline of the West?*, 26 *INT. REL.* 369, 373 (2012).

36. These figures are drawn from Carol Bertaut, Bastian von Beschwitz, & Stephanie Curcuru, *"The International Role of the U.S. Dollar" Post-COVID Edition*, FEDS NOTES (June 23, 2023), <https://www.federalreserve.gov/econres/notes/feds-notes/the-international-role-of-the-us-dollar-post->

of crisis, such as the 2008 global financial crisis or the early stages of the COVID-19 pandemic, investors seek dollar-denominated assets, creating liquidity problems for non-U.S. banks. In such times, the U.S. Federal Reserve has operated as a global lender of last resort, establishing swap lines with select foreign central banks and providing them with dollars in exchange for collateral posted in their national currency. The Federal Reserve can choose the jurisdictions that will receive this invaluable liquidity assistance and, thereby, save them the embarrassment and, more importantly, the economic pain associated with an IMF loan, the only other viable option for obtaining liquidity in USD in times of crisis.³⁷

The United States has increasingly weaponized the power of the USD against its geopolitical adversaries—and even against allies, such as the European Union (EU)—when they disagree with its approach to unilateral sanctions. In essence, in the past 15 years, “traditional” trade sanctions have increasingly been replaced by financial sanctions that target the sanctioned entities’ assets and transactions.³⁸ Proponents of financial sanctions argue that they are more precise than trade embargoes and, therefore, they only impede sinister actors without harming the broader population. In 2016, the then-U.S. Secretary of the Treasury proclaimed that:

The sanctions we employ today are different. They are informed by financial intelligence, strategically designed, and implemented with our public and private partners to focus pressure on bad actors and create clear incentives to end malign behavior, while limiting collateral impact.³⁹

Critics of the practice retort that financial sanctions often target indispensable financial services and, in addition, that draconian punishments for violating U.S. sanctions legislation encourage a “zero risk” approach and over-compliance by private actors who opt for scaling back drastically or even

[covid-edition-20230623.html](#).

37. The criteria used by the Federal Reserve have attracted considerable speculation, especially in regard to the role of geopolitics and U.S. commercial interests in the selection of jurisdictions that have been granted swap lines. J. Lawrence Broz, *The Politics of Rescuing the World’s Financial System: The Federal Reserve as a Global Lender of Last Resort*, 13 KOREAN J. INT’L STUD. 323 (2015); Aditi Sahasrabudde, *Drawing the Line: The Politics of Federal Currency Swaps in the Global Financial Crisis*, 26 REV. INT’L POL. ECON. 461 (2019). For an up-to-date tracker of swap lines around the world, see Benn Steil et al., *Central Bank Currency Swaps Tracker*, COUNCIL OF FOREIGN RELATIONS (Feb. 9, 2024), <https://www.cfr.org/article/central-bank-currency-swaps-tracker>.

38. See, e.g., Suzanne Katzenstein, *Dollar Unilateralism: The New Frontline of National Security*, 90 IND. L. J. 293 (2015); Daniel W. Drezner, *Targeted Sanctions in a World of Global Finance*, 41 INT’L INTERACTION 755 (2015); Cameron Rotblat, *Weaponizing the Plumbing: Dollar Diplomacy, Yuan Internationalization, and the Future of Financial Sanctions*, 21 UCLA J. INT’L L. INT’L & FOREIGN AFF. 311 (2017); Joshua P. Zopher, *The Dollar and the United States’ Exorbitant Privilege to Sanction*, 113 AJIL UNBOUND 152 (2019). For a comprehensive list of entities sanctioned by the United States, see *Sanctions Programs and Country Information*, U.S. DEP’T OF THE TREASURY, <https://ofac.treasury.gov/sanctions-programs-and-country-information> (last visited May 16, 2024).

39. Jacob J. Lew, *U.S. Treasury Secretary Jacob J. Lew on the Evolution of Sanctions and Lessons for the Future*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Mar. 20, 2016), <https://carnegieendowment.org/2016/03/30/u.s.-treasury-secretary-jacob-j.-lew-on-evolution-of-sanctions-and-lessons-for-future-event-5191>.

ceasing their transactions with the sanctioned state to avoid prosecution.⁴⁰ As indicated above, financial sanctions weaponize the fact that many economic transactions that do not involve U.S. parties nevertheless use U.S. dollars and that foreign states maintain sizeable reserves in USD.

For these cross-border transactions to take place safely, quickly, and efficiently, different types of financial infrastructure are needed: first, smaller banks that do not hold accounts with each other need correspondent accounts with larger banks and, in particular, banks with branches in the jurisdiction whose currency they use; secondly, one needs a messaging system that communicates the details of each transaction safely and quickly; thirdly, one needs a facility that clears these transactions.⁴¹ Dollar hegemony allows the United States to create chokepoints in all three types of infrastructure. When it comes to correspondent accounts, the United States may forbid U.S. banks from holding correspondent accounts with overseas counterparts that offer banking services to sanctioned entities.⁴² More controversially from a legal perspective, the United States may impose penalties on foreign banks for violating U.S. sanctions because they used an existing correspondent account to carry out a payment for a sanctioned entity.⁴³ In such instances, the global power of the USD compels the hand of private actors, increasing the financial isolation of sanctioned entities. For example, faced with the choice of either losing access to the U.S. financial system and/or being subject to harsh penalties or ceasing transactions with Iran, overseas institutions invariably opted for the latter. In fact, non-U.S. banks often adopt a “zero risk” policy toward sanctioned jurisdictions, leading to the cessation or drastic curtailment of transactions that would probably be lawful under U.S. law.⁴⁴ In essence, this practice of secondary sanctions enlists foreign banks into applying the foreign policy of the United States even when the United States has not managed to turn these preferences into universally binding international legal obligations through a UN Security Council resolution.⁴⁵ This is despite the fact that even

40. Grégoire Mallard et al., *The Humanitarian Gap in the Global Sanctions: Regime Assessing Causes, Effects, and Solutions*, GLOB. GOVERNANCE 121 (2020); Joy Gordon, *Financial Blacklisting and the Return Toward Indiscriminate Sanctions*, in THE ROUTLEDGE HANDBOOK OF THE POLITICAL ECONOMY OF SANCTIONS 91-100 (Ksenia Kirkham ed., 2024).

41. For an overview of this nexus of corresponding accounts, messaging systems, and clearing facilities and its importance for financial sanctions, see DANIEL MCDOWELL, *BUCKING THE BUCK: US FINANCIAL SANCTIONS AND THE INTERNATIONAL BACKLASH AGAINST THE DOLLAR* 21-28 (2023).

42. This practice is relatively uncontroversial from a doctrinal perspective, since it involves denial of entry in a state’s territory, which is considered a lawful exercise of a state’s sovereign powers.

43. The lawfulness of this practice is controversial: the jurisdictional link invoked by the United States, namely the use of the correspondent account establishing territorial jurisdiction, is tenuous. Tom Ruys & Cedric Ryndaert, *Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions*, 89 BRIT. Y.B. INT’L L. 1, 20-23 (2020).

44. This seems to be a common conclusion of scholars who have conducted interviews with high-ranking bank officials. See *Id.* at 16; Grégoire Mallard & Jin Sun, *Viral Governance: How Unilateral U.S. Sanctions Changed the Rules of Financial Capitalism*, 128 AM. J. SOCIO. 144 (2022).

45. Notably, U.S. secondary sanctions compelled Chinese institutions to drastically curtail

actors, such as the EU, who otherwise support the lawfulness of unilateral sanctions, have protested the practice of secondary or extraterritorial sanctions by the United States and enacted blocking statutes in an attempt to curtail their influence.⁴⁶

The United States has used techniques similar to those described above to weaponize the dominant messaging system of the global financial system, the Society for Worldwide Interbank Financial Telecommunications (SWIFT). SWIFT is based in Belgium and, therefore, is governed by Belgian and EU law. Often considered obscure and technical, it attracted global attention in early 2022 when Russian banks were expelled from it in response to the state's full-scale invasion of Ukraine.⁴⁷ However, SWIFT had been used as a tool of geopolitical pressure before 2022. In 2012, the U.S. Senate passed legislation that authorized the executive to sanction SWIFT for its transactions with select Iranian banks even though these transactions complied with EU law and relevant UN Security Council resolutions.⁴⁸ Although these threatened sanctions against SWIFT were not enacted, the authorization was enough to push the EU into action and mandate the expulsion of the relevant Iranian institutions.⁴⁹ Such is the power of the U.S. dollar and of U.S. financial markets that, as Katzenstein has documented, the mere threat of financial sanctions often induces compliance by both public and private actors.⁵⁰ Finally, the United States has weaponized the fact that transactions in USD are cleared through U.S.-based institutions, notably the Clearing House Interbank Payments System (CHIPS) and the Federal Reserve Banks' Fedwire. A bank

trade with Iran beyond the scope of UN Security Council Res. 1929 (2010) that did not prohibit energy investment or trade: S.C. Res. 1929 (June 9, 2010). This was despite the fact that China voted for the resolution only after it had references to energy-related sanctions removed. See Rotblat, *supra* note 38, at 313.

46. In explaining the vote of EU member states in support of the annual resolution condemning the U.S. embargo against Cuba at the UN General Assembly, its representative noted that: "We have firmly and continuously opposed any such measures, due to their extraterritorial application and impact on the European Union, in violation of commonly accepted rules of international trade. We cannot accept that such measures impede our economic and commercial relations with Cuba." Press and Information team of the EU Delegation to the UN in New York, *EU Explanation of Vote: UN General Assembly Resolution on the embargo imposed by the USA against Cuba*, DELEGATION OF THE EUROPEAN UNION TO THE UN IN N.Y.C. (Nov. 3, 2022), https://www.eeas.europa.eu/delegations/un-new-york/eu-explanation-vote-un-general-assembly-resolution-embargo-imposed-usa-against-cuba_en?s=63. On the EU blocking statutes, see Leonardo Borlini, *Case Note: Bank Melli Iran v. Telekom Deutschland GmbH*, 118 AM. J. INT'L L. 160 (2024); Daniel Meagher, *Caught in the Economic Crosshairs: Secondary Sanctions, Blocking Regulations, and the American Sanctions Regime*, 89 FORDHAM L. REV. 999 (2020-2021); Ruys & Ryndaert, *supra* note 43, at 81-93.

47. Fleur Johns & Anastasiya Kotova, *Ukraine: Don't write off the international order – read and rewrite it*, THE INTERPRETER (Mar. 4, 2022), <https://www.lowyinstitute.org/the-interpreter/ukraine-don-t-write-international-order-read-rewrite-it>. See also, Barry Eichengreen, *Sanctions, SWIFT, and China's Cross-Border Interbank Payments System*, THE MARSHALL PAPERS, May 2022, at 1.

48. See Rachele Younglai & Roberta Rampton, *U.S. pushes EU, SWIFT to eject Iran banks*, REUTERS (Feb. 16, 2012), <https://www.reuters.com/article/idUSTRE81F00J/>.

49. *SWIFT instructed to disconnect sanctioned Iranian banks following EU Council decision*, SWIFT (Mar. 15, 2012), <https://www.swift.com/insights/press-releases/swift-instructed-to-disconnect-sanctioned-iranian-banks-following-eu-council-decision>.

50. Katzenstein, *supra* note 38, at 321-7.

can only participate in CHIPS if it has a U.S. branch, subjecting it to U.S. sanctions legislation.⁵¹ As with the above examples, the mere threat of being cut off from CHIPS can induce compliance. All in all, financial sanctions are a typical example of “weaponized interdependence”: the United States takes advantage of the profoundly asymmetric character of the global financial system and, in particular, of dollar hegemony to pursue geopolitical goals.⁵²

The case of Afghanistan is no different. Due to the volatility of the Afghani (AFN), the state’s official currency, and the fact that its economy is cash-based, Afghanistan relied on dollar shipments while under U.S. occupation. Part of foreign aid consisted of the shipment of boxes of dollar bills given to DAB, which were distributed to private banks and from there, trickled down to the rest of the economy.⁵³ Upon the departure of U.S. troops and the return of the Taliban to power, the shipments of cash were radically curtailed due to U.S. concerns about the cash falling into the hands of the Taliban, who are a sanctioned entity under U.S. law.⁵⁴ At the same time, President Biden issued an executive order that froze \$7 billion of DAB assets held at the Federal Reserve Bank of New York.⁵⁵ Being cut off from access to dollars aggravated the already dire economic situation in Afghanistan: inflation rose sharply as the value of the AFN against all major currencies plummeted. The situation only began to stabilize after shipments of cash partially resumed in 2022, although inflation still lingers above 30%.⁵⁶ Even though the dire humanitarian and economic situation cannot be attributed solely to U.S. sanctions or the weaponization of the dollar, the (relative) amelioration of the situation since 2022 indicates that financial sanctions and, more broadly, cutting off a state’s access to the USD have direct and observable effects at the state and population levels that negate the above-mentioned argument that this type of sanctions is more precise and targeted than trade embargoes. However, as I will show in subsequent sections, concerns about the humanitarian impact of U.S. sanctions have resulted in the deepening—rather than the effective

51. The Clearing House Payment Co. [CHIPS], *CHIPS Rules and Administrative Procedures*, Rule 19 (Mar. 1, 2024), https://media.theclearinghouse.org/-/media/New/TCH/Documents/Payment-Systems/CHIPS_Rules_and_Administrative_Procedures_03_01_2024.pdf?rev=2192b9738b3a4775b2f7f13a32bcc321 (“A depository institution may become a Participant if: (A) it carries on the business of a depository institution from an office located in the United States of America, (B) the office in the United States of America is subject to regulation by a federal or state depository-institution regulatory authority.”).

52. Farrell & Newman, *supra* note 2.

53. Peter Beaumont, *Afghans face economic ruin as prices rise and cash runs low*, THE GUARDIAN (Aug. 23, 2021), <https://www.theguardian.com/world/2021/aug/22/afghans-face-economic-ruin-as-prices-rise-and-cash-runs-low>.

54. Lynne O’Donnell, *Afghanistan: The Taliban Are Losing Some of Their Cash Cows*, FOREIGN POL., (Jan. 10, 2023), <https://foreignpolicy.com/2023/01/10/taliban-afghanistan-women-ban-humanitarian-aid/>.

55. Exec. Order No. 14064, *supra* note 15.

56. WORLD BANK, AFGHANISTAN ECONOMIC MONITOR (Apr. 18, 2022), <https://thedocs.worldbank.org/en/doc/e8fe7d3a5364c3e62150649073ca1665-0310062022/original/Afghanistan-Economic-Monitor-19-April-2022.pdf>.

contestation—of the world-making ambitions of dollar hegemony.

II. THE AFGHAN FUND, STATE IMMUNITY, AND THE LAW-MAKING POWER OF DOLLAR HEGEMONY

As Afghanistan descended into a profound humanitarian crisis, critics within and outside the United States highlighted the detrimental effects of the DAB asset freeze.⁵⁷ This strategy reflects a broader trend in international law since the 1990s: even though most Global South states insist that unilateral economic sanctions are *prima facie* unlawful under international law, the Global North insistence on their lawfulness predominated within the discipline.⁵⁸ Once this battle was lost, scholars, activists, and policymakers attempted to tame the worst excesses of the practice by insisting that sanctions needed to comply with a minimum core of human rights obligations or, in less legalistic terms, with humanitarian values.⁵⁹ This emphasis on the human rights of ordinary citizens has done important work in illuminating the suffering caused by sanctions, be it unilateral or collective, but it is not without risk. The pitfalls of this approach are obvious in the case of Afghanistan. In response to these humanitarian pleas,⁶⁰ and under the pressure of domestic litigation outlined above,⁶¹ the United States established in September 2022 an entity called the Fund for the Afghan People (the “Afghan Fund” hereafter) and transferred to it half of the frozen funds. The Afghan Fund is a non-profit headquartered in Geneva, and its purpose is to “protect, preserve and disburse assets for the benefit of the Afghan people,” with a particular emphasis on price stabilization and foreign exchange rate improvement.⁶² It is governed by a Board of Trustees that, according to its statute, ought to have a member

57. Economic Causes of Afghanistan’s Humanitarian Crisis: Questions and Answers on Sanctions and Banking Restrictions on the Taliban, HUM. RTS. WATCH (Aug. 4, 2022), https://www.hrw.org/news/2022/08/04/economic-causes-afghanistans-humanitarian-crisis#_Why_did_the/; Afghanistan: UN experts call on US Government to unblock foreign assets of central bank to ease humanitarian impact, OFF. THE HIGH COMM’R FOR HUM. RTS. (Apr. 25, 2022), <https://www.ohchr.org/en/press-releases/2022/04/afghanistan-un-experts-call-us-government-unblock-foreign-assets-central>.

58. For an overview of the debate that is sympathetic to the Global South position but nevertheless concludes that sanctions are *prima facie* lawful under international law, see Alexandra Hofer, *The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?*, 16 CHINESE J. INT’L L. 175 (2017).

59. See, e.g., George A. Lopez & David Cortright, *Economic sanctions and human rights: Part of the problem or part of the solution?*, 1 INT’L J. HUM. RTS. 1 (1997); Mary Ellen O’Connell, *Debating the Law of Sanctions*, 13 EUR. J. INT’L L. 63 (2002); Alexandra Hofer, *The Proportionality of Unilateral “Targeted” Sanctions: Whose Interests Should Count?*, 89 NORDIC J. INT’L L. 399 (2020); Ntina Tzouvala, *Successful Failures: Economic Sanctions, Humanitarianism, and the Undoing of Post-Colonial Sovereignty*, YALE J. INT’L L. ONLINE, June 26, 2023, <https://www.yjil.yale.edu/successful-failures-economic-sanctions-humanitarianism-and-the-undoing-of-post-colonial-sovereignty/>.

60. See *supra* note 56.

61. See *supra* notes 13-15.

62. Fund for the Afghan People, *supra* note 17, Art. 4. For a very sympathetic account of this measure see Scott R. Anderson, *What’s Happening with Afghanistan’s Assets?*, LAWFARE (Feb. 18, 2022), <https://www.lawfaremedia.org/article/whats-happening-afghanistans-assets>.

domiciled in Switzerland and a member appointed by the United States.⁶³ Given that the Board decides by unanimity,⁶⁴ the United States has effective veto powers over any decision. At the time when this note was drafted, the Board had four members: Dr. Anwar ul-Haq Ahady, an Afghan politician who had previously served as the governor of DAB and Minister of Foreign Affairs; Dr. Shah Mohammed Mehrabi, who is a dual U.S.-Afghan national based in Maryland who previously served as a board member of DAB; Alexandra Baumann, a Swiss diplomat; and Dr. Jay Shambaugh, Under-Secretary for International Affairs at the U.S. Department of the Treasury. To date, the Fund has not disbursed any funds, with its relative inactivity attributed to disagreements amongst its board members.⁶⁵ In late 2023, the Board reached a consensus about using some funds to repay Afghanistan's debts to multilateral development banks. However, no further details have been publicly announced, nor have any payments been made.⁶⁶

Despite this relative inactivity, the sheer existence of the Afghan Fund further complicates ongoing debates about the legality of the increasingly utilized practice of freezing central bank assets. My argument here is that these doctrinal debates need to be situated within the broader context of dollar hegemony. The predominance of the U.S. dollar gives the United States extensive *de facto* (if not necessarily *de jure*) law-making power in certain areas of international law, including the law of state immunity. Put simply, customary international law dictates that states cannot be subjected to the judgment and execution of foreign courts (more on this shortly) provided that the act in question is a manifestation of sovereign power (*acta jure imperii*) and not of commercial nature (*acta jure gestionis*).⁶⁷ Therefore, foreign central bank reserves should be almost entirely protected under this arrangement. However, recent practice shows that the United States—although reluctant to seize these central bank assets outright—has triggered an extensive practice of freezing or redirecting them and, as I will show below, relying on unorthodox international legal arguments to justify its practice.⁶⁸

This brings me to the crux of my argument: TWAIL scholars have placed

63. Fund for the Afghan People, *supra* note 17, Arts. 12.3 & 12.5.

64. *Id.*, Art. 16.1.

65. Catherine Cartier, A Year on, Billions in Afghan Assets Linger in Switzerland, THE DIPLOMAT (Oct. 21, 2023), <https://thediplomat.com/2023/10/a-year-on-billions-in-afghan-assets-linger-in-switzerland/>.

66. Press Statement, Afghan Fund, The Board of Trustees of the Fund for the Afghan People Statement (Oct. 2, 2023), https://afghanfund.ch/files/20231116_press-statement-october-2.pdf.

67. This distinction was resisted for a long time by Russia, China, and India, who adhered to an absolute conception of state immunity. All three states have now amended their position solidifying the rule of relative state immunity. That said, China's approach to what constitutes a sovereign act differs from that adopted by U.S. courts as it emphasizes the purpose of the act rather than its legal form. William S. Dodge, China Adopts Restrictive Theory of Foreign State Immunity, TRANSNAT'L LITIG. BLOG (Sep. 14, 2023), <https://tblog.org/china-adopts-restrictive-theory-of-foreign-state-immunity/>.

68. The most notable case being, of course, the freezing of Russian state assets after the overt invasion of Ukraine in 2022. See *supra* note 12.

the dynamics of imperialism at the core of international law, showing how the function of our field is not (primarily) to create order between equal sovereigns but to manage imperial expansion.⁶⁹ Robert Knox has refined this position by arguing that this centrality of imperialism entails not only the regulation of center-periphery dynamics but also the interactions between different imperial powers themselves. His argument is that in formulating legal arguments and adopting legal practices, imperial powers (and their scholarly outposts) attempt a dual move: first, to subjugate weaker states and secondly, to ensure that their geopolitical rivals cannot use the same arguments and practices to promote their own imperial interests.⁷⁰

The nominal universality of international law means that when using a specific legal argument, the United States needs to either find a way to exclude China or Russia from doing the same or accept the availability of this argument to its rivals. The invocation of “humanitarian intervention” by Russia to justify its use of force in Ukraine from 2014 onwards is an example of the danger that international law arguments might spread beyond their intended sphere of application.⁷¹ Similarly, the reluctance on behalf of some parts of the U.S. state apparatus to cooperate with the International Criminal Court in its pursuit of cases against Vladimir Putin and Maria Alekseyevna Lvova-Belova indicates a concern that this case might (against all odds) set a precedent in regards to the nationals of other third-party states, which notoriously include the United States.⁷² In a nutshell, the existence of plausible imperial rivals places limitations on the legal rights that the United States claims for itself, especially since the end of its undisputed geopolitical and legal hegemony in the immediate aftermath of the Cold War.⁷³

This concern about the potential future invocation of legal arguments by other powers applies in modified ways when it comes to financial sanctions and other forms of dollar weaponization. The unique position of the United States within the global monetary system means that there is simply no reciprocity of exposure here. This is the case not only in regard to the United States’ relationship with Afghanistan or Venezuela but also in its relationship with China and Russia. As a result, the United States enjoys two unique privileges when it comes to law-making regarding state immunity. First, a

69. ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005).

70. Robert Knox, Race, Racialisation and Rivalry in the International Legal Order, in *RACE AND RACISM IN INTERNATIONAL RELATIONS: CONFRONTING THE GLOBAL COLOUR LINE* 185-188 (Alexander Anievas et al., eds., 2015).

71. See Anastasiya Kotova & Ntina Tzouvala, In Defense of Comparisons: Russia and the Transmutations of Imperialism in International Law, 116 *AM. J. INT’L L.* 710 (2022).

72. See Julia Borger, Pentagon accused of blocking effort to hand Russia war crimes evidence to ICC, *THE GUARDIAN* (Mar. 9, 2023), <https://www.theguardian.com/world/2023/mar/08/pentagon-international-criminal-court-russia-war-crimes>.

73. For an outstanding account of the building blocks of the U.S. hegemony in international law in the 1990s, see Samuel L. Aber, *Worldmaking at the End of History: The Gulf Crisis of 1990–91 and International Law*, 117 *AM. J. INT’L L.* 201 (2023).

disproportionate proportion of cases concerning state immunity are adjudicated in U.S. (especially New York) courts, as dollar hegemony pulls both public and private assets into the United States, making execution more likely if a favorable judgment is secured.⁷⁴ As a result, U.S. state practice is uniquely influential, if not as a matter of formal law-making, at least in the real-life operation of the law of state immunity. Second, the United States can advance idiosyncratic arguments when it comes to the laws of state immunity, knowing that it is unlikely (at least for the time being) that it will ever find itself on the receiving end of these arguments, at least insofar as central bank assets are concerned. Despite China's efforts, the ongoing predominance of the USD means that it will be exceedingly rare for U.S. rivals to use these arguments against the United States or its allies. In other words, the law of state immunity, in particular with regard to central bank assets, is perhaps unique as an international legal field where U.S. hegemonic power is exercised with very little restraint or fear of reciprocity. The most effective limit to U.S. decisions on this front does not come from law or reciprocity; it comes from considerations about not raising too many doubts about the reliability of the USD as the global currency.⁷⁵

Within this exceptional material-argumentative landscape, U.S. scholars and practitioners put forward at least two arguments of great consequence for sanctions, central banks, and Global South states. The first argument is that in cases of disagreement about the recognition of a state's government, the laws of state immunity are not engaged at all.⁷⁶ The second argument posits that ongoing freezes of central bank assets do not engage the rules of state immunity either since the prohibition only covers judicial and not executive action, and these freezes have been carried out through executive orders.⁷⁷ If both (or even one of these two) arguments prevail, it is hard to see how the laws of state immunity would survive as meaningful constraints on state behavior. In turn, the potential demise of state immunity rules will heavily affect Global South states since the lack of easy access to USD and the volatility of their currencies compels them to hold large reserves of USD for immediate use if their currencies' value deteriorates.

The first position that focuses on government recognition has been advanced previously in regard to Venezuela's reserves, but its application in

74. For a detailed account of the evolving jurisprudence of U.S. courts on the matter, see Maryam Jamshidi, *The Political Economy of Foreign Sovereign Immunity*, 73 *HASTINGS L. REV.* 585 (2022).

75. That said, Whyte has suggested that the willingness of the United States to wield the power of the USD in order to discipline "rogue" actors may be part of the currency's attractiveness to capitalists: Whyte, *supra* note 1, at 17. Striking a balance between weaponizing the USD and ensuring that it does not become unreliable is, then, one of the main challenges for U.S. administrations and, arguably, influences decisions about the freezing of assets incomparably more than any legal consideration.

76. Ingrid Brunk, *Central Bank Immunity, Sanctions, and Sovereign Wealth Funds*, 91 *GEO. WASH. L. REV.* 1616, 1629-31 (2023).

77. *Id.*, at 1632-43.

the case of Afghanistan is qualitatively different. The argument, at least as it is advanced by scholarship, is that there are no international law obligations in regard to government recognition.⁷⁸ Therefore, when the United States recognizes certain actors as a government and grants them access to their national bank's reserves, the rules of state immunity have not been engaged in the first place.⁷⁹ This argument is stretched even further in the case of Afghanistan. This is because the Afghan Fund does not claim to be Afghanistan's legitimate government, as Juan Guaidó did in the case of Venezuela. The Fund has no other representative functions apart from the preservation, management, and selective release of the state's central bank assets, and none of its members held a governmental position when the Taliban took control of the country. Although the United States has not articulated this argument explicitly, the practical implications of the establishment of the Fund "for the benefit of the Afghan people" is that it is free to create and subsequently recognize any entity (even one comprised of its own nationals) as representatives of a people that is already represented by a state, and transfer to it assets of a state's central bank without violating, or even engaging, the rules of state immunity.⁸⁰ This approach has concerning implications not only for the laws of state immunity and sanctions but also for international law and inter-governmental relations in general. This is a point to which I will return in the next Part.

The second argument is perhaps less ambitious but carries equally important consequences. The argument here is that the freezing of central bank assets by executive order does not engage the rules of state immunity since the rules only preclude a sovereign nation from being subjected to judicial actions.⁸¹ This argument has textual grounding: the United Nations Convention on Jurisdictional Immunities of States and Their Property, which never entered into force but is considered to reflect, at least in part, customary international law, only mentions immunity from adjudicative jurisdiction, and this language appears reflective of the negotiation process.⁸² However, at least some arguments in defense of the legality of the freezing of assets by executive action point at the temporary nature of these measures and raise concerns about

78. *Id.*, at 1630 ("[T]he U.S. decision to designate individuals with control over central bank assets does not violate immunity-related obligations because the actions did not involve an exercise of judicial power or authority.").

79. *Id.* ("The United States has decided not to recognize the Taliban and has instead designated or 'recognized' other people – at least for the limited purposes of disbursing central bank assets. The U.S. government describes the designation of individuals other than the Taliban who now control Afghan central bank assets as 'consistent with past practice.' The 'past practice' was not identified, but similar action was taken with respect to Venezuelan central bank assets.").

80. Fund for the Afghan People, *supra* note 17, Art. 4.2.

81. Brunk, *supra* note 76, at 1632-43; Moiseienko, *supra* note 18, at 1012-1015.

82. Article 1 of the UN Convention reads as follows: "Article 1: Scope of the present Convention - The present Convention applies to the immunity of a State and its property from the jurisdiction of the courts of another State." G.A. Res. 59/38, Art. 1, at 3 (Dec. 16, 2004) (emphasis added).

whether it would be lawful under international law to seize these assets permanently, a measure that would resemble more closely the execution of judicial judgments, even if carried out by the executive.⁸³ In the case of Afghanistan, transferring the funds to an entity with a legal mandate to disburse—and not simply conserve them—involves a change of ownership and is, therefore, closer to a seizure than a mere freeze. Indeed, the case of the Afghan Fund shows the potential problems arising from a delineation of state immunity that only protects states from judicial and not executive acts: the line between the two is a blurred and unstable one.

My goal is not to resolve this doctrinal question but rather to highlight the material underpinning of international lawmaking, be it the formation of customary international law or the interpretation of treaties. Formalist and non-materialist critical understandings of international law-making that insist on state consent and the equal sovereignty of all states miss a crucial truth about political economic power, and, in particular, monetary power and lawmaking when it comes to sovereign state immunities and other matters pertaining to sanctions. TWAIL and scholars sympathetic to the Global South have repeatedly criticized the disproportionate weight given to Western state practice and *opinio juris* by both courts and international legal scholarship.⁸⁴ There is no doubt that there are numerous disciplinary, institutional, and cognitive biases against Global South states (and in favor of Global North states) in international law. However, what is sometimes missed from these debates is an understanding that impactful biases do not exist primarily in the sphere of ideas or the minds of lawyers but that they are grounded in material power: as long as national currencies operate as global currencies, the state(s) that issue these currencies will yield disproportionate power in the lawmaking concerning state immunities and, by implication, in the lawmaking concerning sanctions.⁸⁵ This is not to say that idiosyncratic interpretations of U.S. officials and scholars are correct according to some principled standard of assessment. However, it does mean that dollar hegemony allows the United States to produce a disproportionate amount of state practice when it comes to sanctions and, in the absence of rigorous contestation, legal argumentation that justifies this practice might become entrenched not due to its finesse or logical prowess but because it seeks to rationalize a socially dominant dynamic, namely the weaponization of the dollar.

83. Daniel Franchini, *State Immunity as a Tool of Foreign Policy*, 60 *VIRG. J. INT'L L.* 433 (2020).

84. See, e.g., B. S. Chimni, *Customary International Law: A Third World Perspective*, 112 *AM. J. INT'L L.* 1 (2018); Kevin Jon Heller, *Specially-Affected States and the Formation of Custom*, 112 *AM. J. INT'L L.* 191 (2018).

85. In this respect, my argument is in agreement with, while also seeking to concretize Benton Heath's commitment to thinking about sanctions through the prism of power rather than abstract morality. See generally J. Benton Heath, *The Possible Worlds of Economic Sanctions*, 51 *GA. J. INT'L & COMPAR. L.* 629 (2023).

III. DOLLAR HEGEMONY AND THE UNRAVELING OF THIRD WORLD SOVEREIGNTY

TWAIL scholars have always been ambivalent vis-a-vis state sovereignty.⁸⁶ On the one hand, TWAIL emerged as an intellectual movement during the 1990s,⁸⁷ at a time when critiques of sovereignty were used to justify projects of military and economic interventionism against Global South states.⁸⁸ In this context, pronouncing sovereignty to be obsolete or politically or morally suspicious did not lead to questioning the prerogative of Global North states to maintain and deploy military forces—a sign of old-school sovereignty if there was ever one—but rather, attempted to remove argumentative barriers against the extraterritorial projection of certain states’ sovereign power.⁸⁹ In the realm of economic policy, anti-sovereignty arguments were regularly deployed to curtail states’ abilities to enact redistributive agendas, restrict the flows of capital, and regulate transnational and domestic capital.⁹⁰ In this intellectual climate, it was—and remains—tempting to assert Global South sovereignty, if not as the encapsulation of a comprehensive political program of liberation, at least as a shield against imperialism and neoliberal capitalism. This is not an unprecedented move: as post-colonial states gained independence, the language of sovereignty was indispensable both in asserting themselves in global law and politics and, as Adom Getachew has shown, in attempting to reform international relations along more equitable lines.⁹¹ In Getachew’s telling, the more radical leaders of post-colonial states did not envisage their states’ hard-won sovereignty as the end of the decolonizing process but as a means through which they could question and, eventually, remake international economic

86. Anghie, *supra* note 69; Antony Anghie, Rethinking Sovereignty in International Law, 5 ANN. REV. L. AND SOC. SCI. 291 (2009); Michael Fakhri, Third World Sovereignty, Indigenous Sovereignty, and Food Sovereignty: Living with Sovereignty despite the map, 9 TRANSNAT’L LEGAL THEORY 218 (2018); Michael Fakhri, Markets, Sovereignty, and Racialization, 25 J. INT’L ECON. L. 242 (2022). For a defense of sovereignty that is sympathetic to TWAIL without being squarely within the tradition, see Heike Krieger, Of Zombies, Witches and Wizards – Tales of Sovereignty, 33 EUR. J. INT’L L. 275 (2022).

87. On the importance of liberal triumphalism in the 1990s for the shaping of TWAIL intellectual agenda, see Antony Anghie, Rethinking International Law: A TWAIL Retrospective, 34 EUR. J. INT’L L. 7, 13-31 (2023).

88. For critical engagements with liberal re-conceptualizations of sovereignty in the 1990s and early 2000s, see Anne Orford, The Uses of Sovereignty in the New Imperial Order, 6 AUSTRALIAN FEMINIST L. J. 63 (1996); ANNE ORFORD, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT (2011); Adom Getachew, The limits of Sovereignty as responsibility, 26 CONSTELLATIONS 255 (2019).

89. Antony Anghie, The War on Terror and Iraq in Historical Perspective, 43 OSGOOD HALL L. J. 45 (2005); Susan Marks, State-Centrism, International Law, and the Anxieties of Influence, 19 LEID. J. INT’L L. 339 (2006).

90. On the transformation and negation of sovereignty within neoliberal thought and practice, see WILLIAM DAVIES, THE LIMITS OF NEOLIBERALISM: AUTHORITY, SOVEREIGNTY AND THE LOGIC OF COMPETITION (2014); WENDY BROWN, WALLED STATES, WANING SOVEREIGNTY (2010).

91. ADOM GETACHEW, WORLDMAKING AFTER EMPIRE: THE RISE AND FALL OF SELF-DETERMINATION (2019).

relations against colonial patterns of extraction and exploitation.⁹²

However, critical legal scholars have never been unconditional, let alone enthusiastic, in their endorsement of Third World sovereignty. There are many reasons for this ambivalence. To begin with, the transformative vision of Third World sovereignty that Getachew documents was eventually defeated, and the one that emerged after the 1980s has often been used to shield dictators and reactionaries from scrutiny. In Fakhri's evocative words:

That leaves those of us who are part of the Bandung tradition with very little to build on in international law. If I am not too careful in my scholarship, I might slip and end up supporting the likes of the murderous lot running governments or leading militant rebel groups.⁹³

Even before the 1980s, invocations of state sovereignty were often mobilized to justify authoritarian forms of government, the suppression of minorities, and state-building projects that were hostile towards indigenous peoples and anyone who did not fit into the nationalist-developmental project.⁹⁴ More broadly, TWAIL scholars have been ambivalent about the post-colonial state's attempts to emulate what they consider Eurocentric concepts of sovereignty, with a particular and crucial emphasis on the dangers of thinking of sovereignty as a form of mastery over nature. Scholars such as Natarajan, Pajuja, and Nesiah (perhaps not coincidentally some of the leading women of TWAIL) have noted that in asserting permanent sovereignty over natural resources, Third World states questioned who should assert control over and reap the benefits of resource extraction, while simultaneously affirming the ideas of nature as "natural resources" that ought to be exploited to the maximum and of sovereignty as boundless extraction and expansion.⁹⁵ When it comes to international law in particular, TWAIL and other heterodox scholars have documented that the gradation and conditioning of Third World sovereignty has been anything but aberrational in the history of international law and politics. In this telling, international law itself has been ambivalent toward Southern sovereignty since affirmations of sovereign equality have always co-existed with postponements or conditioning of equal rights, duties, and status.⁹⁶ In addition, affirming state sovereignty is not always an effective

92. *Id.* at 11.

93. Fakhri, *Third World Sovereignty*, *supra* note 86, at 11.

94. For an elaboration of this argument in the context of Myanmar and Bangladesh and the Rohingya refugee crisis, see MOHAMMAD SHAHABUDDIN, *MINORITIES AND THE MAKING OF POSTCOLONIAL STATES IN INTERNATIONAL LAW* (2021).

95. Sundhya Pajuja, *Conserving the World's Resources?*, in *CAMBRIDGE COMPANION TO INTERNATIONAL LAW* 398 (James Crawford & Martti Koskenniemi eds., 2012); Usha Natarajan, *TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring*, 14 *OR. REV. INT'L L.* 177 (2012); Vasuki Nesiah, *Placing International Law: White Spaces on the Map*, 16 *Leid. J. Int'l L.* 1 (2003).

96. Anghie, *supra* note 69; Usha Natarajan, *Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty*, 24 *LEIDEN J. INT'L L.* 799 (2011); Asli Bali & Aziz Rana, *Pax Arabica?: Provisional Sovereignty and Intervention in the Arab Uprisings*, 42 *CAL. WEST. INT'L L. J.* 321 (2012); ROSE PARFITT, *THE PROCESS OF INTERNATIONAL*

shield against imperialism. Modern imperialism often operates through post-colonial state sovereignty rather than in violation of it. For example, as Darryl Li has shown, the U.S. program of extraordinary rendition in the context of the “war on terror” fundamentally relied on the sovereignty of its client states in order to evade legal and political scrutiny.⁹⁷

All this is to say that sovereignty is not a silver bullet for those concerned about imperialism and domestic authoritarianism. Indeed, it is hard to find many examples more illustrative of the dangers of Third World sovereignty being used not to promote global redistribution but to shield from scrutiny reactionary political programs than Afghanistan.⁹⁸ In this context, the turn to human rights as a central legal and rhetorical tool in the struggle against sanctions reflects a real disenchantment with Third World statehood and a commitment to criticizing sanctions not in its name but in reference to the harms inflicted upon peoples. What this approach can miss, though, is what Heath—drawing from Getachew—calls the world-making dimension of sanctions: the potential of the practice to restructure power relations, to reallocate authority and rights, and to (upwardly) redistribute resources.⁹⁹ Centering Afghanistan’s sovereignty, then, does not require alignment with or even acquiescence to the political projects that may unfold in its guise but enables us to identify the political projects that demand its unraveling and the visions of international law that are required for these projects to succeed.

Even though all instances of weaponizing dollar hegemony to sanction geopolitical foes raise these questions of sovereignty, power, and world-making, the Afghan Fund does so in novel and particularly challenging ways. This is for two reasons. First, disagreements about government recognition in international law typically revolve around the tension between effective control and (democratic) legitimacy. The more traditional approach, encapsulated in the Tinoco Claims Arbitration, emphasizes effective control over a state’s territory and acceptance (but not necessarily approval) of one’s authority by the local population as criteria for determining a state’s government.¹⁰⁰ In contrast, more recent theory and, to some extent, state and international organization

LEGAL REPRODUCTION: *INEQUALITY, HISTOGRAPHY, RESISTANCE* (2019); NTINA TZOUVALA, *CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW* (2020).

97. Darryl Li, *From Exception to Empire: Sovereignty, Carceral Circulation, and the “Global War on Terror”*, in *ETHNOGRAPHIES OF U.S. EMPIRE* 456–476 (Carole McGranahan & John Collins eds., 2018).

98. Statement, Office of the High Commissioner for Human Rights, *Afghanistan: Banning women and girls from schools and workplace jeopardises entire country, UN committee condemns* (Dec. 29, 2022), <https://www.ohchr.org/en/statements/2022/12/afghanistan-banning-women-and-girls-schools-and-workplace-jeopardises-entire>.

99. Heath, *supra* note 85, at 641.

100. Tinoco Claims Arbitration (Gr. Br. v. Costa Rica) 1 R.I.A.A. 369, 381 (1923) (“To hold that a government which establishes itself and maintains a peaceful administration, with the acquiescence of the people for a substantial period of time, does not become a de facto government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government cannot establish a new government. This cannot be, and is not, true.”).

practice pay attention to (democratic) legitimacy in refusing recognition to governments that came to power through violent or unconstitutional means, even if they exercise control over the state.¹⁰¹ Without getting into the case's merits, this disagreement was at the heart of government (non)recognition in the case of Venezuela and the saga concerning its central bank assets both in the United States and the United Kingdom (UK).¹⁰²

The case of the Afghan Fund departs from these earlier examples. The Board of the Fund does not claim to be in control of Afghanistan or to have come to power through legitimate, democratic means. None of its members were part of Afghanistan's government when the Taliban took over. Even more curiously, this body is governed partially by non-Afghan nationals with an effective veto over its decisions. What makes this arrangement even more at odds with even the most minimalist understanding of Afghan sovereignty is that the United States, which was an occupying power in Afghanistan for two decades, has a guaranteed position on the board of the Fund. The Fund seems to be aware of its legitimacy problems. In late 2023, it issued a call for applications for an international advisory committee, which will comprise Afghan and non-Afghan experts (emphasizing economic development, law, and finance expertise). Knowledge of Afghanistan's economy and society is a desirable but not essential criterion.¹⁰³

The Afghan Fund's claim to lawful control over DAB's assets rests implicitly on a combination of technocratic expertise and the fact that it was put together by the former occupier, who also happens to be in control of DAB's assets due to the global significance of its currency. This combination of military-monetary power and technocratic expertise is, arguably, at the background of much of international law and international relations. The Afghan Fund turns the subtext into text by transforming these elements into the ground for yielding elements of governmental authority and bypassing claims that rely either on factual control of territory or on democratic legitimacy.

Secondly, it is not uncommon for states to disagree about a state's government but nevertheless accept the unity of such government and, by extension, the sovereign authority of the state understood as a unified entity for the purposes of international law.¹⁰⁴ Indeed, a unified and effective government is a (arguably *the*) precondition for an entity to be a state under international

101. See Sean D. Murphy, Democratic Legitimacy and the Recognition of States and Governments, 48 INT'L & COMPARA. L. Q. 545 (1999); Stefan Talmon, Recognition of Opposition Groups as the Legitimate Representative of a People, 12 CHINESE J. INT'L L. 219 (2013); Erika de Wet, From Free Town to Cairo via Kiev: The Unpredictable Road of Democratic Legitimacy in Governmental Recognition, 108 AJIL UNBOUND 201 (2015).

102. See *supra* note 19.

103. Call for Application: International Advisory Committee, Fund for the Afghan People (Nov. 22, 2023), https://afghanfund.ch/files/20231122_international-advisory-committee.pdf.

104. Although generally supportive of the practice, Brunk indirectly admits to the fact that recognition for an "extremely limited purpose" is highly unorthodox. Brunk, *supra* note 76, at 1632.

law.¹⁰⁵ Admittedly, this idea of a coherent government in control of the state has always been fiction. This is especially the case in the Global South, where legal pluralism and layered forms of political authority continue to prevail, with formal governmental power and state law having varying degrees of effectiveness and legitimacy depending on one's location, profession, gender, religion, etc.¹⁰⁶ This fiction, though, underlies international law as we know it. The Afghan Fund diverges from this conceptualization and general state practice in regard to government recognition. It is not recognized as Afghanistan's government by the United States, nor does it claim to be such a government. Yet, it is considered to act for the benefit of the Afghan people, with the sole purpose of managing and disbursing DAB's frozen assets. In essence, the Fund disaggregates Afghanistan's governmental functions, opening up the possibility of different actors being recognized as representatives of a state/people for different purposes. In this respect, citing Venezuela as a precedent for the practice, as Brunk does, elides its novelty and, crucially, its incompatibility with Afghanistan's sovereignty.¹⁰⁷ If taken to its logical conclusion, the practice is not only incompatible with Third World sovereignty but with the very idea of binding international legal obligations: (powerful) states would be free to recognize virtually any entity as representative of a people/state for the sole purpose of obtaining its consent for the use of force, entering/denouncing treaties, or transferring to it state assets despite state immunity.

The practical implications of the Afghan Fund's existence both for the lives of Afghan people and for actual political authority in Afghanistan remain to be seen. The example of Venezuela shows that foreign recognition and transfer of assets to an entity does not guarantee that it will gain de facto control of a state. More broadly, the fragmentation of political authority in Afghanistan and elsewhere is a deep, complicated process that cannot be solely attributed to this or earlier acts of intervention by the United States or other actors, such as the Soviet Union. My argument, then, is not that this attempt at world-making will necessarily be successful in empirical terms. Rather, I posit that, through financial sanctions enabled by dollar hegemony, the United States has (perhaps unwittingly) embarked on an experiment that both presupposes and enacts a version of international law incompatible with even the most minimalist understandings of Third World sovereignty. Whether this glimpse of an explicitly uneven legal order will stabilize into a comprehensive vision and whether this vision will produce effects "on the ground" cannot be

105. In his canonical work, James Crawford famously equated statehood with effective government over people and territory. JAMES CRAWFORD, *The Criteria for Statehood: Statehood as Effectiveness*, in *THE CREATION OF STATES IN INTERNATIONAL LAW* 37 (2nd ed. 2007).

106. On the importance of informal, non-state law for the regulation of credit in Afghanistan in particular, see Nafay Choudhury, *Order in the Bazaar: The Transformation of Non-state Law in Afghanistan's Premier Money Exchange Market*, 47 *LAW & SOC. INQUIRY* 292 (2022).

107. Brunk calls this practice "unusual" but does not elaborate further. Brunk, *supra* note 76, at 1632.

assumed but, rather, will be determined by the (legal) struggles of the future.

CONCLUSION

In recent years, an increasing number of progressive legal scholars, economists, and activists in the United States have been highlighting the role of money as a democratic medium. These scholars emphasize the origins of money as a state project and its potential to enable democratic self-government.¹⁰⁸ The existence of hegemonic currencies and, notably, the unquestionable international status of the U.S. dollar puts pressure on this approach: whatever the role and potential of the dollar domestically, internationally, it operates as a form of despotic power. This can happen indirectly insofar as dollar dependency can curtail the monetary sovereignty of states. It can also occur directly, as in the case of financial sanctions that allow the United States to exploit dollar hegemony in order to inflict pain on its foes. In this essay, I have argued that dollar hegemony, as exemplified in extreme form by the Afghan Fund, has two major implications for international law. First, it gives the United States the opportunity to put forward bold interpretations of foundational norms of international law that pertain to sanctions, such as state immunity, and to do so with little concern that these arguments can be used against it or its allies. This is an unusual situation since the (nominal) universality of international law means that one's legal arguments can (and will) be used by one's opponents. However, in the absence of a state enjoying monetary power comparable to that of the United States, this concern is not so prominent in regard to central bank assets. Secondly, the case of the Afghan Fund offers a window into the world-making potential of dollar hegemony or, at the very least, its ability to be used in ways that undermine the concept of Third World sovereignty. The ad hoc assembly and provision of control over billions of USD to an entity essentially controlled by the United States have created a de facto foreign-controlled central bank in exile that exists outside the governmental structure of Afghanistan. This practice departs even from the most controversial precedents of contested government recognition as it involves slicing up governmental authority in ways that are ultimately incompatible with state sovereignty. One need not adopt a romanticized view of Third World sovereignty to be concerned about such developments.

It is customary to conclude essays such as this one with practical recommendations for reform. There are good reasons to resist this habit. Writing conventions are often a way to avoid thinking about the actual conclusions of our arguments. When it comes to legal writing, in particular, recommendations for reform are a way of professing one's ultimate

108. In the field of law, in particular, the work of Christine Desan has been pivotal. See generally CHRISTINE DESAN, *MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM* (2014).

commitment to law than to other causes. When it comes to dollar hegemony, there are good reasons to believe that, for as long as this phenomenon persists, the temptation for the United States to weaponize currency power will be hard to resist. For this reason, other aspiring hegemon, notably China, attempt to challenge dollar hegemony, for example, through the issuance of central bank digital currencies.¹⁰⁹ The effectiveness of such initiatives remains to be seen. Therefore, one should be skeptical about whether the weaponization of the dollar can be resisted through international legal means if dollar hegemony persists, especially if one adopts realist or materialist understandings of law that emphasize not abstract rules but the ways in which legal arguments unfold in the social world.¹¹⁰ Nevertheless, the nominally equal and universal character of international law may provide some (limited, imperfect) tools for resistance. If dollar hegemony gives the United States extensive opportunities to produce state practice concerning central banks' assets, nominal sovereignty allows every state to express their *opinio juris* and demand that it be given due weight in the formation and identification of customary rules. Often, states choose to stay silent out of a concern for their own interests or because, as in the case of Afghanistan under Taliban rule, the sanctioned state espouses causes that are (rightly) unpopular. In that regard, the temptation to remain silent in light of experiments such as the Afghan Fund is understandable. However, if my arguments above are correct, initiatives such as the Fund have much broader implications for the international legal order than their immediate effects on this or that sanctioned entity. If this is the case, every state and scholar with an investment in an international legal order that is at least formally equal and post-imperial could do worse than being vocal about the corrosive implications of such currency-fueled legal adventurism.

109. See Joel Slawotsky, *US Financial Hegemony: The Digital Yuan and Risks of Dollar De-Weaponization*, 44 *FORDHAM INT'L L. J.* 39 (2022); Luiza Pefurro et al., *China's Central Bank Digital Currency (CBDC): An Assessment of Money and Power Relations*, 28 *NEW POL. ECON.* 881 (2023).

110. Despite his courts-centric outlook that is not adequate for international law, Holmes has pithily summarized this outlook as follows: "The prophesies of what the courts will do in fact, and nothing more retention, are what I mean by the law." Oliver Wendell Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 461 (1897).