

## A GLOBAL LEVIATHAN EMERGES: THE FEDERAL RESERVE, COVID-19, AND INTERNATIONAL LAW

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### ABSTRACT

*The COVID-19 pandemic highlights the importance of the Federal Reserve as a leading actor in global economic governance. As a creature of U.S. domestic law with an international presence and operational independence, the Fed wields authority without a well-defined international legal status, international legal standards to guide its conduct, or accountability to those around the world affected by its decisions. This Essay explores three conceptual approaches that could be used to develop norms, standards, and principles to address this gap.*

In early March 2020, the world was buffeted by plunging prices in global financial markets caused by fears over the COVID-19 pandemic.<sup>1</sup> Panicked investors reacted by trying to sell their risky assets and seeking refuge in the world's primary safe asset, bonds issued by the U.S. federal government—i.e., Treasuries.<sup>2</sup> However, it soon became clear that liquidity was drying up and that financial markets were not functioning efficiently. Not only were countries and companies facing the most serious pandemic since the Spanish Flu, but credit—the lifeblood of international commerce and essential to the function of the modern nation-state—was becoming dangerously scarce.

One of the primary purposes of the multilateral institutions established after World War II was to enhance the world's ability to avoid or manage these types of global disasters.<sup>3</sup> However, with the international community facing its most serious crisis in generations, it was not these international organizations, the supposed bulwarks of global governance, that led a collective global effort to respond to the economic crisis. Instead, the most powerful response came from central banks.<sup>4</sup> Drawing on policy toolkits built in the aftermath of

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<sup>1</sup> Exacerbating these fears was the failure by Organization of the Petroleum Exporting Countries (OPEC) members to reach agreement on how to deal with declining global oil prices. See Natasha Turak, *Oil Nose-Dives as Saudi Arabia and Russia Set Off "Scorched Earth" Price War*, CNBC (Mar. 8, 2020), at <https://www.cnbc.com/2020/03/08/opec-deal-collapse-sparks-price-war-20-oil-in-2020-is-coming.html>.

<sup>2</sup> Tobias Adrian, *Monetary and Financial Stability During the Coronavirus Outbreak*, IMFBLOG (Mar. 11 2020), at <https://blogs.imf.org/2020/03/11/monetary-and-financial-stability-during-the-coronavirus-outbreak>.

<sup>3</sup> See Harlan Grant Cohen, *Multilateralism's Life Cycle*, 112 AJIL 47, 54 (2018) (noting the legally defined missions of post-World War II multilateral treaties and institutions).

<sup>4</sup> Adam Tooze, *The Death of the Central Bank Myth*, FOR. POL'Y (May 13, 2020), at <https://foreignpolicy.com/2020/05/13/european-central-bank-myth-monetary-policy-german-court-ruling>.

the 2008 financial crisis, central banks throughout the world aggressively cut interest rates, purchased government debt, and created new lending and funding programs that intervened directly in private and foreign financial markets.<sup>5</sup> In March 2020 alone, the G7's central banks bought \$1.4 trillion in assets.<sup>6</sup>

Of particular importance is the Federal Reserve System (the Fed), which stands alone in terms of its financial impact on and policy influence over both the United States and the global financial system. On a scale greater than its central bank counterparts, the Fed has implemented a broad array of lending facilities to enhance the flow of credit to households, companies, commercial banks, and state and municipal governments in the United States.<sup>7</sup> Further, the Fed has established a repurchase agreement facility for foreign central banks and U.S. dollar liquidity swap lines with a select number of other central banks, substantially expanding the Fed's influence over foreign economies.<sup>8</sup> The assertive response by the world's central banks has filled gaps in global economic governance exposed by the pandemic and, in the process, has highlighted the role of the Fed as arguably the single-most important actor in global economic governance.

The Fed's actions in the pandemic raise a range of novel and important domestic legal questions, relating to such issues as the independence and supervision of central banks under domestic banking and constitutional law.<sup>9</sup> They also raise questions about the appropriate role of a central bank in global economic governance and its implications for international law. This Essay addresses three of these questions. First, what is the international legal status of a global governance actor that is a creature of a domestic statute? Second, to what extent is the Fed bound by the international legal obligations of the United States when it operates as a global governance actor? Third, are there other international legal rules, standards, norms, and principles applicable to the Fed as a global governance actor, even if they are not binding on the United States?

Two characteristics of the Fed's relationship with the global financial system highlight the importance of addressing its treatment under international law. The first is a mismatch

<sup>5</sup> Bd. of Governors of the Fed. Reserve Sys., Monetary Policy Report 38–39 (June 12, 2020), available at <https://financialservices.house.gov/uploadedfiles/hhrg-116-ba00-20200617-sd003.pdf> [hereinafter Fed Monetary Policy Report].

<sup>6</sup> Ben Winick, *The World's Major Central Banks Bought \$1.4 Trillion of Assets in March – 5 Times the Last Record Set After the Financial Crisis*, BUS. INSIDER (Apr. 21, 2020), at <https://markets.businessinsider.com/news/stocks/central-banks-buy-trillion-financial-assets-g7-march-federal-reserve-2020-4-1029113160>. This exceeded the International Monetary Fund's total stock of resources of \$1 trillion available to support the institution's 189 member states plus the \$160 billion that the World Bank has pledged to use to support its member states over the next fifteen months. See International Monetary Fund, *The IMF at a Glance*, at <https://www.imf.org/en/About/Factsheets/IMF-at-a-Glance>; World Bank, *The World Bank Group Moves Quickly to Help Countries Respond to COVID-19* (Apr. 2, 2020), at <https://www.worldbank.org/en/news/feature/2020/04/02/the-world-bank-group-moves-quickly-to-help-countries-respond-to-covid-19>.

<sup>7</sup> See Bd. of Governors of the Fed. Reserve Sys., *Coronavirus Disease 2019 (COVID-19) – Funding, Credit, Liquidity, and Loan Facilities*, at <https://www.federalreserve.gov/funding-credit-liquidity-and-loan-facilities.htm>; Fed Monetary Policy Report, *supra* note 5, at 38–39. See also Jeanna Smialek & Jack Ewing, *Central Bankers Have Crossed Bright Lines to Aid Economies*, N.Y. TIMES (June 9, 2020), at <https://www.nytimes.com/2020/06/09/business/economy/central-banks-coronavirus-economies.html> (noting the implementation of similar programs by other central banks such as the European Central Bank (ECB) and the Bank of Japan).

<sup>8</sup> See *The Successes of the Fed's Dollar-Swap Lines*, ECONOMIST (June 18, 2020), at <https://www.economist.com/finance-and-economics/2020/06/20/the-successes-of-the-feds-dollar-swap-lines>.

<sup>9</sup> See Michael Salib & Christina Parajon Skinner, *Executive Override of Central Banks: A Comparison of the Legal Frameworks in the United States and the United Kingdom*, 108 GEO. L.J. 905 (2020); Christine Desan & Nadav Orian Peer, *The Constitution and the Fed After the COVID-19 Crisis*, JUST MONEY (June 10, 2020), at <https://just-money.org/the-constitution-and-the-fed-after-the-covid-19-crisis-2>.

between the domestic scope of the Fed's formal mandate and the international scope of the Fed's de facto role as a powerful actor in global economic governance. The Fed's sweeping exercise of authority over private and public financial markets worldwide suggests that the Fed itself has become the fulcrum in the governance of the global financial system, arguably independent of its sovereign, the United States of America.<sup>10</sup> The Fed has emerged as a leviathan without peer in the international economic system.<sup>11</sup> Regardless of how the COVID-19 pandemic and its economic impacts evolve, it is increasingly evident that the international monetary order now revolves around the U.S. dollar and the Fed.<sup>12</sup>

The second is a mismatch between the clarity of the Fed's obligations under U.S. law and the uncertain nature of its obligations and responsibilities under international law.<sup>13</sup> This uncertainty results in central banks being unable to adequately assess the international legality of their conduct in crisis situations, thereby hindering their ability to collaborate and take decisive action. It also places in doubt the legitimacy of their actions in the global economy.<sup>14</sup>

This Essay briefly documents the actions taken by the Fed and the basis for its unique influence in the global financial system. Then, we discuss the lack of doctrinal clarity under international law for the Fed's authority. We also offer a framework for assessing the conduct of central banks that draws on other models of regulating transnational conduct. We conclude by identifying emerging global challenges confronting central banks that will provide opportunities to test the observations and arguments in this Essay.

## I. THE FED'S RESPONSES TO THE PANDEMIC

The foundations of the international financial architecture that governs the global financial system were laid in the aftermath of World War II. It was built around the international financial institutions (IFIs)—most prominently, the International Monetary Fund (IMF) and the World Bank Group (World Bank)—which were largely shaped by the views of the United States.<sup>15</sup> Initially, this system was based on the Bretton Woods monetary system of fixed exchange rates. This collapsed in 1973 and was replaced by a system of floating exchange rates and international financial regulation developed through cross-border regulatory networks such as the Basel Committee on Banking Supervision.<sup>16</sup> These regulatory networks include IFIs and other international organizations, state-to-state contact groups, bilateral

<sup>10</sup> See Peter Conti-Brown & David Zaring, *The Foreign Affairs of the Federal Reserve*, 44 J. CORP. L. 665, 693 (2019) (noting the Fed's appropriation of regulatory diplomacy during the 2008 financial crisis).

<sup>11</sup> See Trevor Jackson, *The Sovereign Fed*, DISSENT (Apr. 16, 2020), at [https://www.dissentmagazine.org/online\\_articles/the-sovereign-fed](https://www.dissentmagazine.org/online_articles/the-sovereign-fed).

<sup>12</sup> See Eric A. Posner & Alan O. Sykes, *International Law and the Limits of Macroeconomic Cooperation*, 86 S. CAL. L. REV. 1025, 1073 (2013) (arguing that the swap lines used in the 2008 financial crisis were successful due to their narrow scope and limited cost).

<sup>13</sup> This issue is relevant to central banks generally but is most pertinent in the case of the Fed due to its dominant role in the global financial system.

<sup>14</sup> See Stephen Kim Park, *Guarding the Guardians: The Case for Regulating State-Owned Financial Entities in Global Finance*, 16 U. PA. J. BUS. L. 739, 777–80 (2014); see generally PAUL TUCKER, *UNELECTED POWER: THE QUEST FOR LEGITIMACY IN CENTRAL BANKING AND THE REGULATORY STATE* (2018).

<sup>15</sup> See Michael S. Barr, *Who's in Charge of Global Finance*, 45 GEO. J. INT'L L. 971, 976–80 (2014).

<sup>16</sup> Pierre-Hugues Verdier, *The Political Economy of International Financial Regulation*, 88 IND. L.J. 1405, 1416–22 (2013).

and regional networks, and private standards-setting bodies.<sup>17</sup> In this new system, the IMF, the World Bank, and other IFIs have focused primarily on macroeconomic policy, sovereign debt, and development finance.

Notwithstanding the ongoing existence of IFIs and regulatory networks, the Fed plays a singularly influential role in the global financial system. Its power is based on the unique role of the U.S. dollar as the principal reserve currency.<sup>18</sup> Indeed, the global financial system has become a U.S. dollar denominated system. It is noteworthy that both the growing importance of the U.S. dollar and the powerful role of the Fed in the global financial system are inversely correlated with the United States' role in the global economy.<sup>19</sup>

This symbiotic relationship between the Fed, the U.S. dollar, and the functioning of the global financial system has been manifested during the pandemic. As noted above, the Fed responded to the critical developments in global financial markets in March 2020 by launching two measures in coordination with foreign central banks. First, it established the Foreign and International Monetary Authorities (FIMA) Repo Facility, which in essence allows central banks to borrow U.S. dollars against Treasuries that they hold in their foreign exchange reserves.<sup>20</sup> Second, it expanded currency swap arrangements instituted during the 2008 financial crisis that permit a central bank to borrow and repay dollar loans with the Fed at the same rate.<sup>21</sup> The Fed expanded existing swap lines with the Bank of Canada, the Bank of England, the Bank of Japan, the European Central Bank, and the Swiss National Bank,<sup>22</sup> and entered into temporary swap arrangements with the central banks of Australia, Brazil, Denmark, the Republic of Korea, Mexico, New Zealand, Norway, Singapore, and Sweden.<sup>23</sup> By enabling these central banks to swap their own currencies for U.S. dollars, the Fed is essentially engaging in foreign policymaking by delegating its power as the U.S. dollar lender of last resort.<sup>24</sup> While central bank swap lines were initially established in 1962, they largely lay dormant from the

<sup>17</sup> See Eric J. Pan, *Challenge of International Cooperation and Institutional Design in Financial Supervision: Beyond Transgovernmental Networks*, 11 CHI. J. INT'L L. 243 (2010).

<sup>18</sup> See G. JOHN IKENBERRY, *LIBERAL LEVIATHAN: THE ORIGIN, CRISIS AND TRANSFORMATION OF THE AMERICAN WORLD ORDER* 200 (2011).

<sup>19</sup> Since the end of World War II, the United States' share of global gross domestic product (GDP) has declined from over 50% to less than 17%. See Int'l Monetary Fund, *Currency Composition of Official Foreign Exchange Reserves (COFER)*, at <https://data.imf.org/?sk=E6A5F467-C14B-4AA8-9F6D-5A09EC4E62A4>. However, this has not been matched by a decline in the role of the U.S. dollar in the global financial system. As of 2019, it accounted for around 60% of global foreign exchange reserves. Over one-half of international trade is denominated in U.S. dollars, even though the United States itself only accounts for approximately 10% of imports and 17% of exports. See *America's Aggressive Use of Sanctions Endangers the Dollar's Reign*, *ECONOMIST* (Jan. 20, 2020), at <https://www.economist.com/briefing/2020/01/18/americas-aggressive-use-of-sanctions-endangers-the-dollars-reign>. The U.S. dollar also accounts for approximately 66% of securities issuances worldwide and 40% of cross-border lending. *Id.*

<sup>20</sup> See Bd. of Governors of the Fed. Reserve Sys. Press Release, *FIMA Repo Facility FAQs* (Mar. 31, 2020), at <https://www.federalreserve.gov/newsevents/pressreleases/fima-repo-facility-faqs.htm>.

<sup>21</sup> See Conti-Brown & Zaring, *supra* note 10, at 691. The Fed's domestic authority is governed by Section 14 of the Federal Reserve Act. 12 U.S.C. § 353 (2012).

<sup>22</sup> Bd. of Governors of the Fed. Reserve Sys. Press Release, *Coordinated Central Bank Action to Further Enhance the Provision of U.S. Dollar Liquidity* (Mar. 20, 2020), at <https://www.federalreserve.gov/newsevents/pressreleases/monetary20200320a.htm>.

<sup>23</sup> Bd. of Governors of the Fed. Reserve Sys. Press Release, *Federal Reserve Announces the Establishment of Temporary U.S. Dollar Liquidity Arrangements with Other Central Banks* (Mar. 19, 2020), at <https://www.federalreserve.gov/newsevents/pressreleases/monetary20200319b.htm>.

<sup>24</sup> See Colleen Baker, *The Federal Reserve's Use of International Swap Lines*, 55 ARIZ. L. REV. 603, 607 (2013).

1970s until 2008.<sup>25</sup> In the 1960s, swap lines helped central banks support their countries' efforts to comply with commitments under the Bretton Woods system of fixed exchange rates. Today, in contrast, their purpose is to help central banks cope with adverse developments in a market-based, U.S. dollar denominated financial system.

## II. CENTRAL BANK AUTHORITY UNDER INTERNATIONAL LAW

Central banks, as a general rule, are creatures of domestic law.<sup>26</sup> Their mandates and governance arrangements and the scope of their independence are determined by applicable domestic law.<sup>27</sup> In the case of the Fed, the U.S. Congress has the authority to alter its mandate, operating principles and practices, and the scope and nature of its independence from other governmental authority.<sup>28</sup> Internationally, the Fed operates as an agency or instrumentality of the United States and has no independent international legal personality.<sup>29</sup> Consequently, it has no capacity to enter into treaties. As a result, its agreements with other central banks are governed by domestic law and not the Vienna Convention on the Law of Treaties.<sup>30</sup> This lack of international legal status suggests that the Fed's international legal rights and obligations are derived from those that the United States has accepted in the treaties to which it adheres and in the customary international law principles that are binding on it. Moreover, the Fed must defer to the United States' interpretation and application of these binding obligations and in enforcing its rights.<sup>31</sup> This brief description of the Fed's international legal status and obligations, however, does not provide a complete answer to the issue of the Fed's international responsibilities when it operates extraterritorially.

This follows from two factual considerations. First, the role that the Fed is now playing in global governance is unique in modern history. During the era of the gold standard, the Bank of England played an important role in the management of the global economy but subject to the dynamic operation of the gold standard.<sup>32</sup> Under the Bretton Woods system of fixed exchange rates, all states and their central banks were expected to comply with the requirements

<sup>25</sup> See *id.* at 625; see also Robert N. McCauley & Catherine R. Schenk, *Central Bank Liquidity Swap Lines Central Bank Swaps Then and Now: Swaps and Dollar Liquidity in the 1960s* (Bank for Int'l Settlements, BIS Working Papers, No. 851, Apr. 2020), at <https://www.bis.org/publ/work851.htm>.

<sup>26</sup> The most prominent exception to this general statement is the ECB, which was created by international treaty. It is important to note that it is not the only exception. See Rosa M. Lastra, *The Evolution of the European Central Bank*, 35 FORDHAM J. INT'L L. 1260 (2017).

<sup>27</sup> See Park, *supra* note 14, at 760.

<sup>28</sup> See Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 YALE J. REG. 257 (2015) (noting the applications and limits of congressional authority over the Fed); see generally SARAH BINDER & MARK SPINDEL, *THE MYTH OF INDEPENDENCE: HOW CONGRESS GOVERNS THE FEDERAL RESERVE* (2017).

<sup>29</sup> See Paul L. Lee, *Central Banks and Sovereign Immunity*, 41 COLUM. J. TRANSNAT'L L. 327, 350–67 (2003) (analyzing the treatment of central banks under the Foreign Sovereign Immunities Act). *But see* Ingrid B. Wuerth *Immunity from Execution of Central Bank Assets*, in CAMBRIDGE HANDBOOK ON IMMUNITIES AND INTERNATIONAL LAW 266 (Tom Ruys, Nicolas Angelet & Luca Ferro eds., 2019) (noting disputes regarding the classification of central banks as equivalent to states or as agencies and instrumentalities of states for purposes of determining immunity from execution).

<sup>30</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331, *reprinted in* 8 ILM 679 (*entered into force* Jan. 27, 1980).

<sup>31</sup> See Joseph Gold, *Public International Law in the International Monetary System*, 38 SW. L.J. 799, 801 (1984) (stating that agreements between central banks are not seen as treaties).

<sup>32</sup> See generally BARRY EICHENGREEN, *GLOBALIZING CAPITAL: A HISTORY OF THE INTERNATIONAL MONETARY SYSTEM* (3d ed. 2019).

of its par value system.<sup>33</sup> Today, the global monetary system is based on fiat currency. Thus, there is no clear set of international legal rules that constrain the decisions of the system's leading actor—namely, the Fed. Instead, the Fed is free, within the confines of its domestic mandate to determine how to allocate its liquidity support, such as the Fed's swap lines to foreign central banks. The Fed has the sole discretion to decide which central banks will have access to U.S. dollars and whether to impose constraints on their use. It also has the discretion to decide to whom to deny a swap arrangement. Consequently, the Fed, in effect, decides which central banks will have to scramble to find adequate amounts of U.S. dollars to ensure that their countries are able to purchase the imports needed, for example, to provide their citizens with adequate supplies of medicines or personal protective equipment (PPE), thereby affecting their public health capacity.<sup>34</sup> The Fed's decisions also affect these central banks' ability to ensure that their government and corporate borrowers do not default on their financial obligations. By making these decisions, the Fed is also able, albeit indirectly, to influence how financial markets around the world operate. Thus, its decisions are a critical factor in determining whether corporate borrowers in many countries are able to meet their debt commitments or face bankruptcy. In addition, its actions, by affecting the supply of global liquidity and its allocation, have an indirect impact on how effectively IFIs can respond to global economic crises.

The result is that the Fed is influencing the welfare of people around the world in the absence of any clear international standards or principles that people can use to understand how the Fed decides with which central banks to enter into swap arrangements and why some that requested arrangements were denied them. To the contrary, pursuant to its mandate, the Fed is only required to consider the domestic implications of its decisions and actions.<sup>35</sup> To be sure, as evident in the Fed's public justifications for its swap lines, it may account for the extra-territorial effects of its actions if such effects have bearing on the fulfillment of the Fed's domestic objectives.<sup>36</sup> However, it has no express mandate to consider the global impact of its decisions before making decisions or taking actions.<sup>37</sup>

This means that, even though the Fed has become a key global governance actor, it operates in this sphere effectively without any accountability. On the one hand, unlike U.S. citizens, foreign governments, individuals, or institutions adversely affected by the Fed's actions—for example, due to being denied access to Fed swap lines—lack a legal basis on which to hold the Fed accountable. In addition, unlike in the case of international organizations in which their state is a member, there is no forum or legal mechanism that they can use for this purpose. On the other hand, the

<sup>33</sup> See Gold, *supra* note 31.

<sup>34</sup> See, e.g., Margot E. Salomon, *Of Austerity, Human Rights and International Institutions*, 21 *EURO. L.J.* 521, 525–27 (2015) (discussing impact of austerity measures imposed on Greece on health and social welfare).

<sup>35</sup> Under Section 2A of the Federal Reserve Act, the focus of the Fed's monetary policy should be on the operation of the U.S. economy. See 12 U.S.C. § 225a (2012). While the Federal Reserve Act does not preclude the Fed from considering the impact of foreign and international economic developments on the U.S. economy, it does not require the Fed to consider the impact of its actions on other countries.

<sup>36</sup> See Bd. of Governors of the Fed. Reserve Sys. Press Release, Swap Lines FAQs (Mar. 19, 2020), at <https://www.federalreserve.gov/newsevents/pressreleases/swap-lines-faqs.htm> (“By helping to stabilize foreign dollar markets, these swap lines also play a role in supporting foreign economic conditions, which also positively benefit the U.S. economy through many channels, including confidence and trade.”).

<sup>37</sup> See, e.g., Conti-Brown & Zaring, *supra* note 10, at 693 (noting disputes regarding the legality of the Fed's swap lines during the 2008 financial crisis).

Fed's global governance actions do not have direct effects on U.S. citizens, thereby limiting their interest in holding the Fed accountable through domestic political processes.<sup>38</sup>

We posit that this is problematic. It is not sound or sustainable public policy for a global governance actor with the Fed's power and authority to be able to avoid all international responsibility for the impact of its actions.

### III. CONSTRUCTING AN APPROACH TO CENTRAL BANK AUTHORITY

The foregoing concerns suggest that there should be an international legal framework applicable to non-sovereign actors like the Fed when they perform global governance roles. Such a framework would consist of norms, standards, and principles that can guide their decision making and actions and provide for compliance with which they should be accountable.<sup>39</sup> A legal framework should enable central banks to determine how to identify and account for the global governance implications of their decisions and actions and to assess their obligations and responsibilities in this regard. We offer three analogous frameworks that could provide guidance in developing one that could be applicable to the Fed and any other central banks that may play a role in global governance.

First, the global governance decisions and actions of the Fed can be analogized to those of administrative agencies in the sense that it is a non-elected governmental actor whose actions regulate important parts of human activity. Consequently, the perspective of global administrative law could be used to develop an international legal framework applicable to the Fed's global governance activities. This would require the Fed to demonstrate that it is operating in matters pertaining to global economic governance with a realistic degree of transparency, participation, and accountability and that it is providing reasons for its decision and actions.<sup>40</sup>

Alternatively, the Fed's global governance decisions and actions could be viewed as acts undertaken in the global public interest that have the potential to impact, and possibly harm, state and non-state actors that are not subject to its direct control. This suggests that the concepts and principles of international public law could serve as the conceptual framework.<sup>41</sup> This would require the Fed to provide rationales based on the public interest for its actions and a demonstration that it is acting consistently with its international legal responsibilities and obligations in doing so.

<sup>38</sup> It should be noted that U.S. citizens do not often seek to hold the Fed accountable for the impact of its decisions domestically. To the extent that they do, it is more likely to be done through the political rather than the legal process. See generally David T. Zaring, *Law and Custom on the Federal Open Market Committee*, 78 *LAW & CONTEMP. PROBS.* 157 (2015).

<sup>39</sup> See generally *ADVOCATING SOCIAL CHANGE THROUGH INTERNATIONAL LAW* (Daniel D. Bradlow & David B. Hunter eds., 2020) (discussing the importance of both hard and soft international law in determining the international responsibilities of state and non-state actors).

<sup>40</sup> See Park, *supra* note 14, at 783–84 (proposing the use of administrative law procedures by central banks and IFIs). Global administrative law's principles also include requirements for review and liability. However, these may be harder to adapt to the context of the Fed as a global governance actor. For a general overview of global administrative law, see Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROBS.* 15 (2005).

<sup>41</sup> See, e.g., Armin von Bogdandy, Matthias Goldmann & Ingo Venzke, *From Public International to International Public Law: Translating World Public Opinion into International Public Authority*, 28 *EURO. J. INT'L. L.* 115 (2017).

The third approach would be to analogize the Fed's responsibilities to those of the international responsibilities of transnational corporations (TNCs). Despite their lack of international legal status, corporations do have international responsibility. Formal international norms and standards for which TNCs can be held accountable have emerged over the past decade, including the Organisation for Economic Co-operation and Development (OECD) Guidelines on Multinational Conduct and the UN Guiding Principles on Business and Human Rights.<sup>42</sup> These standards stipulate that businesses should have a human rights policy<sup>43</sup> and should conduct adequate human rights due diligence, including doing human rights impact assessments, before and during their decision making and implementation process.<sup>44</sup> The importance of decision makers doing *ex ante* human rights impact assessments before taking decisions or actions is also referenced in the UN Guiding Principles on Economic Reforms and Human Rights Impact Assessments.<sup>45</sup>

While the operations of central banks are not the same as the operations of TNCs, there are similarities. TNCs, like central banks, are creations of national law but operate globally. They also do not have a well-established international legal status and so are not bound by any international legal obligations. Furthermore, they are influential enough to have substantial impacts outside their home states. In addition, their home governments may not, in fact, seek to either establish standards with which they must comply in their international operations or to open domestic forums that can be used to hold them accountable for their actions.

It is noteworthy that all three of these approaches stress the importance of those with both unelected power and the ability to affect the lives of people basing their actions on a clear assessment of the likely impacts of those actions, some degree of transparency and participation in decision making, reasoned explanation of their actions, and some form of accountability. Furthermore, these principles are consistent with the Universal Declaration of Human Rights (UDHR), which states that "every organ of society . . . shall strive . . . to promote respect" for the rights set out in the UDHR and to secure their "universal and effective recognition and observance."<sup>46</sup> Given the importance and high status of the UDHR, central banks, which qualify as "organs of society" that seek to contribute to the governance of the

<sup>42</sup> Organisation for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises*, at <https://www.oecd.org/investment/mne>; United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, available at [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf) [hereinafter *Guiding Principles*].

<sup>43</sup> See *Guiding Principles*, *supra* note 42, Guiding Principle 16 and Commentary. This requirement is usually interpreted to mean that the senior leadership of the business entity should adopt a human rights policy that is publicly available and that should be applied in the operations and decision making of the entity.

<sup>44</sup> See *id.*, Guiding Principle 17 and Commentary. This requirement means that the business entity should conduct human rights impact assessments of its proposed operations. They should also then take steps to avoid or mitigate all adverse human rights impacts.

<sup>45</sup> See Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of Human Rights, Particularly Economic, Social and Cultural Rights, *Guiding Principles on Human Rights Impact Assessments of Economic Reforms*, UN Doc. A/HRC/40/57 (Dec. 19, 2018), at <https://undocs.org/A/HRC/40/57>. For guidance on how to use these principles, see United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Human Rights Impact Assessment of Economic Reforms* (2020), available at [https://www.ohchr.org/Documents/Issues/IEDebt/GuidePrinciples\\_EN.pdf](https://www.ohchr.org/Documents/Issues/IEDebt/GuidePrinciples_EN.pdf).

<sup>46</sup> Universal Declaration of Human Rights, pmbl., GA Res. 217A, UN GAOR, 3d Sess. (1948). The UDHR is widely viewed as the foundation of international human rights law. See United Nations, *The Foundation of International Human Rights Law*, at <https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html>.



international financial order, arguably have a moral responsibility, independent of their sovereign's obligation, to respect human rights.<sup>47</sup>

### III. THE WAY FORWARD

For the first time in modern history, the global financial system is based on one country's currency and, on the basis of the U.S. dollar, the Fed has indisputably become a powerful independent actor in global governance. As this Essay demonstrates, the mismatch between the formal domestic legal mandates governing the Fed and its de facto international responsibilities exposes a significant gap in the international legal order.

Notwithstanding the singular importance and authority of the Fed during the pandemic, the observations in this Essay also raise questions about central banks and international law generally. Increasingly, central banks accept that their monetary and regulatory operations have extraterritorial impacts for which they should play a global governance role in addressing. To cite one important example, central banks are engaging on climate change in an unprecedented manner, as evident in the establishment of the Network for Greening the Financial System, which includes sixty-six central banks as members.<sup>48</sup>

This Essay constitutes an initial attempt to identify and outline the issues raised by central banks as global governance actors and the ways in which they can be addressed. However, given their novelty, our answers are necessarily preliminary, and it is our hope that this Essay can stimulate further research and debate.

<sup>47</sup> *Id.* See also Daniel Bradlow, *Why Central Banks Need to Take Human Rights More Seriously*, OPEN DEMOCRACY (July 9, 2019), at <https://www.opendemocracy.net/en/oureconomy/why-central-banks-need-to-take-human-rights-more-seriously>.

<sup>48</sup> Network for Greening the Financial System, *A Call for Action: Climate Change as a Source of Financial Risk* (Apr. 2019), available at [https://www.ngfs.net/sites/default/files/medias/documents/ngfs\\_first\\_comprehensive\\_report\\_-\\_17042019\\_0.pdf](https://www.ngfs.net/sites/default/files/medias/documents/ngfs_first_comprehensive_report_-_17042019_0.pdf). See also Lael Brainard, Member, Bd. of Governors of the Fed. Reserve Sys., Speech at the Economics of Climate Change, Why Climate Change Matters for Monetary Policy and Financial Stability (Nov. 8, 2019), available at <https://www.bis.org/review/r191111a.pdf>.