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Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?

Sara L. Seck, *Dalhousie University Schulich School of Law*

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By Sara L. Seck, Assistant Professor, Faculty of Law,
University of Western Ontario sseck@uwo.ca

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ABSTRACT

Home state reluctance to engage in the regulation of international corporate activities in the human rights context is sometimes expressed as a concern that it would constitute an imperialistic infringement of host state sovereignty. This concern may be explicit, or it may be implicit in an expressed desire to avoid conflict with the sovereignty of foreign states. Yet, in the absence of a multilateral treaty directly addressing business and human rights, a role for home states in regulating so as to prevent and remedy human rights harms is increasingly being suggested. The purpose of this paper is to explore theoretical perspectives that lend support to unilateral home state regulation. Having established that unilateral home state regulation could serve as a catalyst for international norm creation, the paper will explore whether, despite its potential benefits, such regulation is inevitably imperialistic. In order to answer this question, customary international law process will be critiqued, by drawing upon the work of TWAIL scholars (Third World Approaches to International Law).

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Introduction

The state duty to protect against human rights abuses by third parties, such as transnational corporations (TNCs), has been identified as one of the fundamental pillars of a recently proposed framework for addressing the problems of business and human rights.[1] Yet, experts "disagree on whether international law requires home States to help

[1] *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, UN HRC, 8th Sess. UN. Doc.

prevent human rights abuses abroad by corporations based within their territory."[2] There is greater consensus that home states are not prohibited from regulating TNCs "where a recognized basis of jurisdiction exists",[3] provided that the home state conduct meets an "overall reasonableness test, which includes non-intervention in the internal affairs of other States."[4]

Home state reluctance to engage in the regulation of international corporate activities in the human rights and environment context is sometimes expressed as a concern that it would constitute an imperialistic infringement of host state sovereignty.[5] This imperialism concern may be explicit,[6] or it may be implicit in an expression of concern to avoid conflict with the sovereignty of foreign states.[7] Despite these concerns, and in the absence of a multilateral treaty directly addressing business and human rights,[8] a role for home states in regulating so as to prevent and remedy human rights and environmental harms is increasingly being suggested.[9]

A/HRC/8/5 (2008) [SRSG Report]. The other two pillars are the corporate responsibility to respect human rights, and access to remedies.

[2] *Ibid.* at para. 19.

[3] *Ibid.*

[4] *Ibid.* See further Sara L. Seck, "Home State Responsibility and Local Communities: The Case of Global Mining" (2008) 11 Yale Hum. Rts. & Dev. L. J. 1.

[5] Imperialism is defined loosely here as the imposition of the desires of powerful states on less powerful states.

[6] See e.g., Austl., Commonwealth, *Report on the Corporate Code of Conduct Bill 2000* (2001) at paras. 4.47-4.49, online: http://www.aph.gov.au/senate/committee/corporations_ctte/completed_inquiries/1999-02/corp_code/report/report.pdf, rejecting the proposed legislation because it would be viewed overseas as "arrogant, patronising, paternalistic and racist".

[7] See e.g., Department of Foreign Affairs and International Trade, *Mining in Developing Countries – Corporate Social Responsibility: The Government's Response to the Report of the Standing Committee on Foreign Affairs and International Trade* (October 2005) at 9, stating that the application of Canadian law extraterritorially could raise several problems, including "conflict with the sovereignty of foreign states; conflicts where states have legislation that differs from that of Canada; and difficulties with Canadian officials taking enforcement action in foreign states."

[8] See *ibid.* at 4-5, noting that the international community is still in the early stages of defining and measuring corporate social responsibility with regard to human rights, and supporting the work of the SRSG on this issue.

[9] SRSG Report, *supra* note 1 at para. 19, noting that UN human rights treaty bodies are increasingly encouraging home states to "take regulatory action to prevent abuse by their companies overseas."

The purpose of this paper is to explore theoretical perspectives that lend support to unilateral home state regulation in the business and human rights context. Part I will begin by examining two pieces of United States (U.S.) legislation in order to determine whether unilateral home state action could play an important role as an international norm creator contributing to the process of customary international law. The first example, the *Foreign Corrupt Practices Act (FCPA),*[10] illustrates how unilateral regulation can serve as a necessary first step to multilateral agreement on what may in time come to be an accepted international policy goal. The *FCPA* was designed to address the problems of international bribery and corruption associated with U.S. firms operating abroad. The second example, the *Helms-Burton Act (HBA),*[11] illustrates how regulation can fail to promote an international policy goal if the structure and content of the legislation is resisted by other states. While the goal of the *HBA* was ostensibly to promote democracy in Cuba, it sought to achieve this goal by penalising foreign companies while simultaneously providing a benefit to many U.S. domestic firms.

Having established that unilateral home state regulation could serve as a catalyst for international norm creation contributing to the process of customary international law, Part I will next explore whether, despite its potential benefits, such regulation is inevitably imperialistic. In order to answer this question, the process of customary international law will be critiqued in light of the work of TWAIL (Third World Approaches to International Law) scholars and the broader claim that international law itself is imperialistic. This Part will conclude with the observation that one of the central problems with the claim that unilateral home state regulation could contribute to the

[10] *Foreign Corrupt Practices Act* 15 U.S.C. §78dd *et seq.* [*FCPA*].
[11] *1996 Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (Helms-Burton Act),* Pub. L. No. 104-114, 110 Stat. 785 (1996) [*HBA*].

development of customary international law, is that as a state-based system, customary international law silences the voices of local communities impacted by transnational corporate conduct.

Part II will examine the link between sovereignty, territory and democracy that informs the international economic system and underpins the international law of jurisdiction. Drawing again upon the work of TWAIL scholars, this Part will first reveal that the emerging norm of democratic governance and human rights more generally serve to give a human face to neo-liberal globalisation without challenging the underlying structure of the system. This raises the question of whether international law has any emancipatory potential that could be harnessed in support of host state local communities. To answer this question requires delving into the theory of the international legal form. Here, TWAIL reveals the importance of recognising the agency of third world social movements in order to write resistance into international law. Ultimately, this article argues that Susan Marks' principle of democratic inclusion could serve as a counter-hegemonic tool for redefining the foundational international law principles of sovereign equality and non-interference. The legitimacy of home state regulation will thus depend upon the extent to which it gives voice to host state local communities.

I. Home State Unilateralism: Imperialism or International Norm Creator?

A. Unilateral Regulation as Imperialism

Canada's reluctance to exercise "extraterritorial" jurisdiction as a matter of policy can be attributed in part to its dislike of the fact that the United States frequently

exercises jurisdiction over business conduct outside its borders, including Canadian business conduct.[12] This section will examine examples of U.S. regulation that are ostensibly concerned with addressing harm in other states, with the United States serving as a legislator of international policy goals. The first example, the US *Foreign Corrupt Practices Act (FCPA),*[13] is often cited as a good model for extraterritorial home state legislation.[14] The second example, the US *Helms-Burton Act (HBA),*[15] has been almost universally condemned.

The U.S. passed the *FCPA* in 1977 in an effort to stem international bribery and corruption by American corporations operating abroad. The *FCPA* prohibits the payment or offer of payment or gifts to a foreign official with corrupt intent in order to obtain or retain business.[16] These anti-bribery provisions apply to issuers of U.S. securities, domestic concerns, and their officers, directors, employees and agents.[17] The accounting provisions of the *FCPA* require all corporations with securities listed in the U.S. to keep accurate books and records that fairly reflect transactions, and to maintain an adequate system of internal accounting controls.[18] While the *FCPA* has never applied directly to

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[12] Cynthia Day Wallace, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization*, 2d ed. (The Hague: Matrinus Nijhoff, 2002) at 76-78.
[13] *FCPA, supra* note 10.
[14] See e.g. International Council on Human Rights Policy, *Beyond Voluntarism: Human rights and the developing legal obligations of companies* (Switzerland, February 2002) at 153, online: http://www.ichrp.org/files/reports/7/107_-_Business_and_Human_Rights_-_Main_Report.pdf#search='beyond%20voluntarism'; Georgette Gagnon, Audrey Macklin & Penelope Simons, *Deconstructing Engagement: Corporate Self-Regulation in Conflict Zones – Implications for Human Rights and Canadian Public Policy*, (January 2003), University of Toronto Public Law Research Paper No. 04-07, online: http://ssrn.com/abstract=557002.
[15] *HBA, supra* note 11. See also *Cuban Democracy Act of 1992*, 22 U.S.C. ss. 6001-6010 and related regulations, e.g. *U.S. Cuban Assets Control Regulations*, 31 C.F.R. 515.
[16] *FCPA, supra* note 10 at §§ 78dd-1, 78dd-2, 78dd-3.
[17] *Ibid.* §§ 78dd-1, 78dd-2. See H. Lowell Brown, "The Extraterritorial Reach of the U.S. Government's Campaign Against International Bribery" (1999) 22 Hastings Int'l & Comp. L. Rev. 407 at 417-470, examining extraterritoriality considerations.
[18] The *FCPA* accounting provisions were enacted as a new Section 13A of the *Securities Exchange Act* 15 §78m(b)(2). Foreign companies (issuers) that trade securities on U.S. exchanges are thus included.

foreign subsidiaries, it is structured so as to require U.S. based parent companies to maintain substantial involvement in the management of foreign subsidiaries or face liability under the *FCPA* for the subsidiary's conduct even while the subsidiary remains immune from prosecution.[19] The *FCPA* was amended in 1998 in order to more aggressively address foreign bribery, by asserting jurisdiction over foreign nationals where a nexus exists between activity within the territory of the United States and the furtherance of a violation of the statute.[20] In addition, U.S. nationals are now prohibited from committing any act of bribery outside the United States in furtherance of a violation of the anti-bribery provisions.[21]

The *FCPA* was criticised for harming the competitive advantage of U.S. firms.[22] As recently as 1997, many European countries not only did not prohibit bribery of foreign officials, but considered them a legitimate tax deductible business expense.[23] Yet over time anti-bribery legislation has gained global acceptance, gradually being implemented in both home and host state legislation. While host state anti-bribery laws have been enforced against home state companies, the difficulties facing host states in

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[19] H. Lowell Brown, "Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act" (1998) 50 Baylor L. Rev. 1 at 2.

[20] H. Lowell Brown, "Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed its Grasp?" (2001) 26 N. C. J. Int'l L. & Com. Reg. 239 at 303 [Brown, "Extraterritorial Jurisdiction"]. See *FCPA*, *supra* note 10 at §78dd-3(a).

[21] Brown, "Extraterritorial Jurisdiction", *ibid.* at 317. The 1998 amendments were implemented following the adoption of the *OECD Anti-Bribery Convention*, *infra* note 25 in 1997. However, Lowell Brown criticises them for extending U.S. extraterritorial jurisdictional reach too far. *Ibid.* at 358-360.

[22] Steven R. Salbu, "Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act" (1997) 54 Wash. & Lee L. Rev. 229 at 261-271 [Salbu, "Global Market"]. Some scholars have argued that the *FCPA* was ineffective at changing the behaviour of American companies. William Woof & Wesley Cragg, "The US Foreign Corrupt Practices Act: The Role of Ethics, Law and Self-Regulation in Global Markets" in Wesley Cragg, ed., *Ethics Codes, Corporations and the Challenge of Globalization* (Cheltenham, UK: Edward Elgar, 2005) 112. However, Woof & Cragg do not account for the role that the *FCPA* almost certainly played in bringing about global consensus on bribery and corruption, which the authors' concede provides "a more optimistic view of the future effectiveness of the FCPA". Woof & Cragg, *ibid.* at 143.

[23] Brown, "Extraterritorial Jurisdiction", *supra* note 20 at 260, n.61.

addressing corruption problems has made it clear that host state prosecutions alone are not the solution.[24]

Significantly, in 1997 the Organisation for Economic Cooperation and Development (OECD) adopted the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Bribery Convention)*, modelled on the *FCPA*.[25] The *OECD Bribery Convention*, which came into force in 1999, requires state parties to both criminally prohibit bribery of foreign public officials and to implement greater accounting and internal controls.[26] It also requires states to aggressively assert both territorial and nationality jurisdiction in order to address international bribery.[27] Similar anti-bribery regional agreements were initiated in Europe, Latin America and Africa in the late 1990s.[28] In 2003, the *United Nations Convention*

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[24] Open Society Justice Initiative, *Legal Remedies for the Resource Curse: A Digest of Experience in Using Law to Combat Natural Resource Corruption* (New York: Open Society Institute, 2006) at 29-30, online: http://www.justiceinitiative.org/db/resource2/fs/?file_id=16376 [*OSJI Report*]; John Hatchard, "Combating Transnational Crime in Africa: Problems and Perspectives" (2006) 50 J. Afr. L. 145; P.M. Nichols, "Regulating Transnational Bribery in Times of Globalization and Fragmentation" (1999) 24 Yale J. Int'l L. 257 at 279-283. Global civil society initiatives have also been active in the fight against international corruption. See e.g., Transparency International, online: http://www.transparency.org/. Multi-stakeholder initiatives are also increasingly playing a role. See e.g., Extractive Industries Transparency Initiative (EITI), online: http://eitransparency.org/.

[25] *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 21 November 1997, OECD Doc. DAFFE/IME/BR(97)20, 37 I.L.M. 1 (1998), (entered into force 15 February 1999) [OECD Bribery Convention]. See *OSJI Report*, *ibid.* at 20, 22. For a history of the U.S. role in the development of the *OECD Bribery Convention*, see Brown, "Extraterritorial Jurisdiction", *supra* note 20 at 259-268; David A. Gantz, "Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus" (1998) 18 Nw. J. Int'l L. & Bus. 457.

[26] *OSJI Report*, *ibid.* at 24; Brown "Extraterritorial Jurisdiction", *ibid.* at 267-8.

[27] Brown, "Extraterritorial Jurisdiction", *ibid.* at 268, 278-80. Canada has been criticised for non-compliance with the *OECD Bribery Convention* as it is the only party not to exert jurisdiction over bribery offences on the basis of nationality. See OECD, Working Group on Bribery in International Business Transactions, *Canada: Phase 2: Follow-up Report on the Implementation of the Phase 2 Recommendations on the Application of the Convention and the 1997 Recommendation on Combating Bribery in International Business Transactions*, (June 21, 2006) at 5, online: http://www.oecd.org/dataoecd/5/6/36984779.pdf.

[28] *OSJI Report*, *supra* note 24 at 14, 20, 28. See also Stuart H. Deming, *The Foreign Corrupt Practices Act and the New International Norms* (Chicago: American Bar Association, 2005).

Against Corruption (UN Corruption Convention) was adopted, with anti-bribery measures modeled on the *OECD Bribery Convention*.[29]

Some scholars assert that, regardless of international agreement, any extraterritorial restrictions of bribery are problematic in light of the pluralist cultural meanings of bribery and gift-giving around the world.[30] The wording of the *FCPA* prohibits bribery outright, but it also provides an exemption for payments that are lawful under host state law.[31] Accordingly, these scholars claim that the *FCPA* should be reworded so that an affirmative statement that the action at issue is allowed is not required in host state legislation, in light of the fact that most statutes are worded so as to prohibit violating conduct rather than to affirm permitted conduct.[32] An alternate view would be to consider the current structure of the *FCPA* as a good example of cooperative or interactive jurisdiction that puts the onus upon host states to explicitly list culturally acceptable practices.[33] On either view, it is possible to conceive of the *FCPA* as helping to enforce the national anticorruption laws of foreign countries in furtherance of international policy goals. Notably, there appears to have been little if any objection to the *FCPA* from host states whose foreign officials have been the recipients of bribes.[34]

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[29] *United Nations Convention Against Corruption*, 31 October 2003, 43 I.L.M. 37 (2004) (entered into force 14 December 2005).

[30] See especially Steven R. Salbu, "Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village" (1999) 24 Yale J. Int'l L. 223 [Salbu, "Restriction"]; *contra* Nichols, *supra* note 22 at 291-303. See also Marie M. Dalton, "Efficiency v. Morality: The Codification of Cultural Norms in the Foreign Corrupt Practices Act" (2006) 2 N.Y.U. J. L. & Bus. 583; Christopher J. Duncan, "The Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism?" (2000) 1 Asian Pac. L. & Pol'y J. 16.

[31] *FCPA*, *supra* note 11 at §78dd-1(c).

[32] Nichols, *supra* note 24 at 288; Dalton, *supra* note 30 at 629-631.

[33] (This is my view.) In the bribery context this could be justified as the host state officials and elites most likely in a position to influence the content of the legislation are also the people most likely to benefit from the bribes. Forcing them to be explicit about what they consider acceptable would provide citizens of the host state with transparent information about their government.

[34] This comment is based upon the surprising observation that academic commentary unfavourable to the *FCPA* and in particular commentary that views it as "moral imperialism" does not make any specific

In contrast to the *FCPA*, the *Helms-Burton Act (HBA)* has failed to transform international norms. Under the precursor statute, the *1992 Cuban Democracy Act (CDA)*, foreign subsidiaries owned or controlled by U.S. parent companies were prohibited from trading with Cuba, irrespective of whether or not the trade were lawful under the laws of the host country.[35] The stated aim of the *CDA* was to achieve international solidarity on the establishment of democracy in Cuba.[36] However, the *CDA* was denounced by the United Nations General Assembly as a violation of international law,[37] and some of the United States' closest trading partners, including Canada, opposed the legislation and enacted blocking legislation.[38]

In 1996, Congress passed the *HBA* with the combined aim of speeding the replacement of the Castro government with a democratic government, and protecting the rights of U.S. nationals whose property had been expropriated by the Cuban government.[39] Title III, the "most innovative and most controversial provisions",[40] permits any U.S. national with a claim for property confiscated by Cuba since 1959 to sue in U.S. courts any natural or legal person who "traffics" in such property.[41] Title IV

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reference to objections by host states. See e.g. Salbu, "Global Market", *supra* note 22 at 282-285. See also Duncan, *supra* note 30; Dalton, *supra* note 30; and Salbu, "Restriction", *supra* note 30.

[35] Wallace, *supra* note 10 at 615.

[36] *Ibid.* at 616.

[37] *Ibid.* at 615. The United Nations denunciation took the form of two Cuba-initiated General Assembly resolutions.

[38] *Ibid.* Indeed, Canada was the first to pass blocking legislation in the form of a 1992 Blocking Order (SOR/92-584, 1992 Can. Gaz., Pt II, Vol. 26), issued pursuant to the *Foreign Extraterritorial Measures Act* (*FEMA*) R.S.C., c. F-29 (1990).

[39] *HBA*, *supra* note 13 at §3 (1)-(6), §301(6). See generally William S. Dodge, "The Helms-Burton Act and Transnational Legal Process" (1997) 20 Hastings Int'l & Comp. L. Rev. 713 [Dodge, "Legal Process"]; Andreas F. Lowenfeld & Brice M. Clagett, "The Cuban Liberty and Democratic Solidarity (Libertad) Act" (Agora), (1996) 90 A.J.I.L. 419; 641. Lowenfeld notes that the structure of some of the *Helms-Burton Act* was motivated by Congress' lack of trust in President Clinton and thus a desire to limit the discretion of the executive branch.

[40] Wallace, *supra* note 12 at 616.

[41] Dodge, "Legal Process", *supra* note 39 at 716; *HBA*, *supra* note 11 at §302(a). "Trafficking" is defined broadly to include buying, leasing, managing, using and even "benefiting from" confiscated property, and the trafficker is liable for the entire amount of the claim and may even be liable for treble damages. Dodge,

denies entry to the United States to officers and controlling shareholders of foreign companies that traffic in confiscated property, as well as their spouses and minor children.[42]

Predictably, the *HBA* was resisted by foreign states due to its perceived extraterritorial reach over foreign subsidiaries of American companies as well as over totally foreign companies "subject to the jurisdiction of the United States".[43] Blocking legislation was adopted by the European Union (EU) as well as Canada prohibiting compliance with the *HBA*.[44] The Inter-American Juridical Committee of the Organization of American States examined the *HBA* and concluded that it violated international law.[45] The right of action under Title III was ultimately suspended.[46]

While some scholars believe the *HBA* demonstrates "the essence of the principle of territorial sovereignty",[47] states whose nationals were implicated by the legislation view it as an "unlawful over-extension of jurisdictional reach and thus a breach of …

"Legal Process", *ibid.* at 716. Furthermore, the Act of State doctrine is unavailable. August Reinisch, "Widening the US Embargo Against Cuba Extraterritorially: A Few Public International Law Comments on the *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act* of 1996", (1996) 7 E.J.I.L. 545 at 549 [Reinisch, "Widening"]; Lowenfeld, *supra* note 39 at 427-428; *HBA*, *ibid.* §302(a)(6). Lowenfeld attributes the rejection of the Act of State doctrine to Congress' lack of trust in the judicial branch, and thus reluctance to let the courts determine the ground rules for the scope of jurisdiction. Lowenfeld, *ibid.* at 428.

[42] Dodge, "Legal Process", *ibid.* at 717; *HBA*, *ibid.* §401(a).

[43] Wallace, *supra* note 12 at 617. See also Vaughan Lowe, "U.S. Extraterritorial Jurisdiction: the Helms-Burton and D'Amato Acts" (1997) 46 Int'l & Comp. L. Q. 378-390.

[44] Wallace, *ibid.* at 617-619.

[45] *Organization of American States: Inter-American Juridical Committee Opinion Examining the U.S. Helms-Burton Act* (Aug. 27, 1996) (1996) 35 I.L.M. 1322. See Dodge, "Legal Process", *supra* note 39 at 718.

[46] Dodge, "Legal Process", *ibid.* at 719. After the EU filed a complaint under the WTO, a formal agreement was reached exempting EU companies from the *HBA*. Wallace, *supra* note 12 at 622-624.

[47] Wallace, *ibid.* at 620 citing Wilkey, "Helms-Burton: Its Fundamental Basis, Validity, and Practical Effect", 26 *International Law News* [American Bar Association] (Spring 1997) at 17; and Giesze, "Helms-Burton in Light of Common Law and Civil Law Legal Traditions: Is Legal Analysis Alone Sufficient to Settle Controversies Arising under International Law?", 26 *International Law News* [American Bar Association] (Spring 1997) at 17.

customary international law."[48] A more complete understanding may be that while the scope of enforcement jurisdiction under the *HBA* is within territorial limitations, and the scope of adjudicative jurisdiction has not been enlarged,[49] the exercise of prescriptive jurisdiction under the statute remains impermissibly extraterritorial as it seeks to regulate conduct entirely outside the U.S.[50] In other words, while the *HBA* imposes sanctions on the territory of the U.S. that are likely to be effective, this does not "conceal or erase the fact that the prescription is extraterritorial, and thus the entire law remains illegal."[51] This analysis presumes that the creation of a private law liability claim enforceable in U.S. courts is in substance an exercise of the jurisdiction to prescribe, as it represents an alternative to a public law prohibition against investment in Cuba.[52]

While Title III of the *HBA* could be justified under the effects doctrine as the regulation of conduct with no physical link to U.S. territory that is intended to produce economic effects within the U.S., this is not convincing due to Cuba's ongoing international law obligation to compensate.[53] It is also difficult to justify Title III as the enforcement of an international wrong in the unlawful taking of property from U.S. citizens, due to the controversial nature of the legal rules governing compensation for

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[48] Wallace, *ibid.* at 622. See Christian Franken, "The Helms-Burton Act: Force or Folly of the World's Leader", (1998) 7 Minn. J. Global Trade 157; Lowenfeld & Clagett, *supra* note 39; Reinisch, "Widening", *supra* note 41.

[49] Reinisch, "Widening", *ibid.* at 551.

[50] Brigitte Stern, "How to Regulate Globalization?" in Michael Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000) 247 at 258, 255-261.

[51] *Ibid.* at 258. Stern states: "The adoption of an extraterritorial rule or decision is not always contrary to international law, it is only contrary to international law *when it does not have a reasonable link* with the State enacting such a rule or making such a decision." [emphasis in original] *Ibid.* at 257.

[52] Reinisch, "Widening", *supra* note 41 at 550-551.

[53] *Ibid.* at 552-553. See further on the effects doctrine in Seck, *supra* note 4 at 12-13. The effects doctrine is relied upon to justify jurisdiction over companies with securities listing on U.S. exchanges for the purposes of the *FCPA*. See Brown, "Extraterritorial Jurisdiction", *supra* note 20 at 330-331. For the argument that Title III of the *HBA* is designed to prevent the clouding of title that might make restitution impossible, see Clagett, *supra* note 39 at 435.

expropriation.[54] A more plausible interpretation is to view *HBA* as akin to export control legislation that is suspect because it is really designed to further U.S. foreign policy.[55]

B. Unilateralism and the Process of Customary International Law

According to the above analysis, while the exercise of home state jurisdiction may often be resisted by other states, such legislation can sometimes serve as a precursor to multilateral agreement furthering international policy goals. As a multilateral agreement specifically addressing business and human rights is unlikely to be negotiated in the near future,[56] this section will focus on how unilateral home state regulation could further the process of customary international law formation. An important preliminary point is that even a state as powerful as the United States cannot create a rule of customary international law through its unilateral practice alone. This is because custom is traditionally understood to require both consistent state practice and *opinio juris* – the belief by states that their practice is in accordance with the law.[57]

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[54] Reinisch, "Widening", *supra* note 41 at 557-558. Accordingly, these cannot be characterised as constituting a common interest for all states. But see *contra* Clagett, *supra* note 39 at 436-438. See also August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston, ed. *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 37 at 56-61 [Reinisch, "Changing Framework"]. Reinisch explores the question of whether shared international interests can justify extraterritorial laws. A further problem with the *HBA* is that by compensating Cubans who are now American citizens, it violates the nationality of claims principle of public international law. Robert L. Muse, "The Nationality of Claims Principle of Public International Law and the Helms-Burton Act" (1997) 20 Hastings Int'l & Comp. L. Rev. 777-798.

[55] Dodge, "Legal Process", *supra* note 39 at 720-722; Wallace, *supra* note 12 at Chapter XII, 589-613. This accords with Reinisch, who observes that while in the human rights sphere, a common rationale of defence of shared substantive interests in protecting human rights can be used to justify extraterritorial legislation, "behind such a model always lurks the danger of an unilateral assessment of what human rights are, which types of human rights deserve extraterritorial protection, etc." Reinisch, "Changing Framework, *ibid.* at 60.

[56] John Ruggie, "Business and human rights – Treaty road not travelled" *Ethical Corporation* (6 May 2008), online: Ethicalcorporation.com <http://www.ethicalcorp.com/content.asp?contentid=5887>.

[57] Michael Byers, *Custom, Power and the Power of Rules* (Cambridge: Cambridge University Press, 1999) at 130. *But see* Christiana Ochoa, "The Individual and Customary International Law Formation" (2007) 48 Virg. J. Int'l L. 119, exploring in detail literature, doctrine and practical challenges of including individuals in the formation of customary international law.

According to Michael Byers, the international law principles of jurisdiction, personality, reciprocity and legitimate expectations qualify the application of power within the process of customary international law.[58] These principles constitute a "firmly established framework within which other, more precise customary rules may develop, exist and change".[59] They affect how states may participate in the customary process "both in terms of how they may apply non-legal power, and in terms of their effectiveness in doing so."[60] For example, blocking statutes, such as those instituted in response to U.S. *HBA*, are "assertions of the power advantage that is conferred by jurisdiction over territory".[61] Thus, the principle of jurisdiction provides host states with a territorial advantage that can serve to qualify the application of home state power, rendering "weak and ineffective" states which, in other contexts, are very powerful.[62]

Under the personality principle, large numbers of less powerful states behaving in unison may be able to engage in enough state practice to alter customary rules even if more powerful states are opposed.[63] TNCs, despite being powerful actors with limited international legal personality, are not entitled to participate fully in the process of customary international law.[64] However, the vehicle of diplomatic protection assimilates

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[58] Byers, *ibid.* at 10. On the relationship between U.S. power and customary international law, see generally Michael Byers & Georg Nolte, eds. *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003), especially Stephen Toope, "Powerful but unpersuasive? The role of the United States in the evolution of customary international law" 287 [Toope, "Powerful"]; and Achilles Skordas, "Hegemonic custom?" 317.

[59] Byers, *ibid.* For Byers, state consent may "take the form of a general consent to the process of customary international law … rather than a specific consent to individual rules. In other words, by accepting some rules of customary international law States may also be accepting the process through which those rules are developed, maintained or changed, and thus other rules of a similar character." *Ibid.* at 7-8.

[60] *Ibid.* at 10-11.

[61] *Ibid.* at 67.

[62] *Ibid.* at 68.

[63] *Ibid.* at 76. All states regardless of power are considered formally equal, thus have an equal entitlement to participate in the process of customary international law. *Ibid.* at 75.

[64] *Ibid.* at 78-79.

the rights of individuals and corporations to the rights of their national state.[65] As a result, states with nationals involved in a given area of activity such as foreign investment (home states) are entitled to "participate in the process of customary international law in a way, or to an extent, that might otherwise be precluded."[66]

The principle of reciprocity provides that any state that claims a right under international law must accord that same right to all other states.[67] A claim that is inconsistent with international law may quickly lead to changes in custom if the claim offers an obvious advantage to most states with little associated disadvantage.[68] A claim that by itself or by extension fails to offer any benefit to more than a few states may still serve to apply pressure in treaty negotiations.[69] Thus, reciprocity can explain the success of the *FCPA* as a unilateral claim that, while offering no economic benefit to implementing states like the U.S., served to apply pressure to treaty negotiations and the development of customary international anti-bribery norms. The *HBA* could not play a similar role, as it hurt the economic interests of other states while being designed to further a policy goal strongly opposed by many states. However, state practice in response to the *HBA* added weight to or clarified existing rules.[70]

The principle of legitimate expectation is at the heart of customary international law process because it gives legal significance to patterns of state behaviour.[71] Some customary rules are more resistant to change than others as a result of differing degrees of

[65] *Ibid.* at 79-80.
[66] *Ibid.* at 80. The personality principle also serves to exclude NGO participation, as most NGOs do not have international legal personality. Where states allow them to participate, their role is merely to influence state behaviour. *Ibid.* at 86.
[67] *Ibid.* at 90.
[68] *Ibid.* at 92, 99-100.
[69] *Ibid.* at 99, 100-101.
[70] *Ibid.* at 101-102.
[71] *Ibid.* at 106-109.

"supporting, ambivalent and opposing State practice".[72] As legitimate expectation is a measure of what states believe to be the weight of a rule rather than what the weight of a rule might actually be, situations may exist where states believe that a rule of customary international law exists when in fact there is no such rule.[73] This mistaken belief in a pre-existing rule may prevent or retard the development of new rules, as the threshold for the creation of a new rule may be higher where an old rule exists than where there is no such pre-existing rule.[74] The principle of legitimate expectation may be at play in home state perceptions of the illegitimacy of extraterritorial regulation in the human rights and environment context.

The significance of conduct that furthers international policy goals is also addressed by Byers. From the international relations perspective, the customary process can be understood as a regime or institution which determines the common interests of most if not all states, then "protects and promotes those common interests with rules."[75] While the interests of states would usually become clear only after weighing "relative amounts of supporting as compared to ambivalent or opposing state practice", in some contexts, such as human rights, the interests of states may be so conspicuous as to not require a careful examination of state practice.[76] In these cases, less supporting practice may be necessary for rules to develop, continue or change.[77]

In conclusion, then, the Byers analysis confirms that, depending upon its structure, unilateral home state regulation could play a significant role in the development

[72] *Ibid.* at 109.
[73] *Ibid.* at 110.
[74] *Ibid.* at 118.
[75] *Ibid.* at 163, 162-165.
[76] *Ibid.* at 163.
[77] *Ibid.*

of customary international law. Despite this, it is difficult to convince home states to act as regulators of international corporate conduct due to their mistaken belief that this type of regulatory action is impermissible. Scholars also disagree as to the merits of unilateralism,[78] with some arguing that unilateralism threatens the entire international system by undermining the general obligation of cooperation that is a basic principle of the U.N. Charter.[79] However, a better interpretation may be that states are under an obligation to first exhaust opportunities for international negotiation and cooperation before choosing to implement unilateral measures.[80]

Notably, Third World scholars like B.S. Chimni have critiqued the exercise of unilateral extraterritorial jurisdiction by advanced capitalist states, even after satisfying a criterion of good faith dialogue with other states.[81] Chimni is critical of U.S. unilateralism through both certification mechanisms and "substantivism" by U.S. courts that choose to apply the "better law" in economic conflicts.[82] According to Chimni, such unilateralism cannot be justified on the basis of a reasonable link with the state enacting the rule or making the decision, because "in the era of globalization a

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[78] See generally *Unilateralism in International Law: A United States – European Symposium* in (2000) 11 E.J.I.L. 1-186; 249-412. For an analytical distinction between judicial unilateralism, judicial multilateralism and political unilateralism, see William S. Dodge, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism" (1998) 39 Harv. Int'l L. J. 101. See also William S. Dodge, "Breaking the Public Law Taboo" (2002) 43 Harv. Int'l L. J. 161.

[79] Pierre-Marie Dupuy, "The Place and Role of Unilateralism in Contemporary International Law" (2000) 11 E.J.I.L. 19.

[80] *Ibid.* at 25. Dupuy cites the *Shrimp/Turtle cases* for support. See especially WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products: Report of the Appellate Body*, WTO Doc. WT/DS58/AB/R, (12 Oct. 1998); and WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, WTO Doc. WT/DS58/AB/RW, (22 Oct. 2001). See also Philippe Sands, "'Unilateralism', Values and International Law" (2000) 11 E.J.I.L. 291 at 299; and Daniel Bodansky, "What's So Bad about Unilateral Action to Protect the Environment?" (2000) 11 E.J.I.L. 339.

[81] B.S. Chimni, "An Outline of a Marxist Course on Public International Law" (2004) 17 Leiden J. Int'l L. 1 at 20 [Chimni, "Outline"]. Chimni specifically critiques the *Shrimp/Turtle* decisions. See further B.S. Chimni, "WTO and Environment: The Legitimization of Unilateral Trade Sanctions" *Economic and Political Weekly*, (12-18 January 2002) at 133.

[82] Chimni, "Outline", *ibid.* at 19.

'reasonable link' is not always difficult to establish for imperial states, especially when it is backed by power."[83] However, he is equally critical of the denial of what he calls "justice jurisdiction" by advanced capitalist state courts in the context of mass torts committed by TNCs in third world states.[84] This suggests that more attention must be given to imperialism concerns associated with home state unilateralism, but from the perspective of the Third World.

C. Imperialism, International Law, and Local Communities

According to Antony Anghie, international legal doctrines, including the sovereignty doctrine, were formulated as part of the colonial encounter.[85] A "dynamic of difference" is evident in the very beginning of the discipline of international law, and "precedes, even generates, the concepts and dichotomies – for example, between public and private, between sovereign and non-sovereign – which are traditionally seen as the foundations of the international legal order."[86] This dynamic of difference and the accompanying "civilizing mission" have been reproduced throughout the history of international law and continue to play a decisive role in contemporary international relations through divisions between "developed and developing, the pre-modern and the

[83] *Ibid.* at 19, n.76. Chimni is also cautious of the evolving realm of universal jurisdiction over international crimes due to the danger that it may be exercised mainly by Western powers against Third World persons. *Ibid.* at 20-21.
[84] *Ibid.* at 20. Chimni cites the use of *forum non conveniens* to deny U.S. jurisdiction in the Bhopal case as an example.
[85] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005) at 6. Anghie defines colonialism as the practice of settling territories, while imperialism refers to the practices of an empire. *Ibid.* at 11. See also Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003) [Rajagopal, *From Below*].
[86] Anghie, *ibid.* at 9.

post-modern".[87] Indeed, Anghie argues that the basic structures of colonialism are "reproduced in all the major schools of international jurisprudence."[88]

Anghie traces this dynamic of difference from the writings of the sixteenth century Spanish jurist Vitoria through the work of positivist jurists in the nineteenth century to the Mandate System of the League of Nations.[89] The Mandate System was established in opposition to the type of colonialism practiced in the nineteenth century, ostensibly serving to transform colonial territories into the sovereign states essential for international law's claim to universality, yet, in practice, the Mandate System transferred "only sovereignty to mandate peoples, not the powers associated with 'government' in the form of control over the political economy".[90] Cultural difference was transformed from the distinction between the civilized and the uncivilized into the distinction between the economically backward and the economically advanced, replacing nineteenth century racist vocabulary with concepts that give the illusion of neutrality.[91] The management technologies of the international law and international institutions of the Mandate System put in motion relations of domination, "relations that almost render irrelevant the formal sovereignty for which these societies ostensibly were being prepared".[92]

According to Anghie, the practices of powerful Western states in the period following the establishment of the United Nations and continuing today may be best

[87] *Ibid.* at 311.
[88] *Ibid.* at 195.
[89] See *ibid.*, Chapter 1 "Francisco de Vitoria and the colonial origins of international law"; Chapter 2 "Finding the peripheries: colonialism in nineteenth-century international law"; and Chapter 3 "Colonialism and the birth of international institutions: the Mandate System of the League of Nations".
[90] *Ibid.* at 117, 179-180. Anghie draws upon Michel Foucault, "Governmentality" in Graham Burchell *et al.* eds., *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991) 87.
[91] *Ibid.* at 189.
[92] *Ibid.* at 190.

understood as the "continuation, consolidation and elaboration of imperialism."[93] In strictly legal terms, the Mandate System was succeeded by the Trusteeship System of the United Nations. Yet, for Anghie, the management technologies of the Mandate System were succeeded by the Bretton Woods Institutions of the World Bank and the International Monetary Fund, universalised to apply to all developing states under theories of modernisation.[94]

Thus, Third World sovereignty today is not the sovereign equality of the First World or that posited as a foundational principle of international law, but rather an impoverished sovereignty in which Third World states continue to be denied the ability to govern in the economic realm. This suggests that any claim that Third World sovereignty will be infringed by First World home state regulation is suspect to the extent that it denies the ongoing history of infringement that dates from the colonial encounter to the neo-colonialism of today's economic order. This includes not only the policies of the Bretton Woods institutions, but also those of home state institutions that engage in Third World economic development. Anghie notes that, if he is correct that "an understanding of the distinctive character of non-European sovereignty can support a claim that all states are not equally sovereign and that this is because of international law and institutions rather than despite international law and institutions", then "it may become important to reassess the relationship between international law and Third World sovereignty.[95]

Anghie examines the post-colonial efforts of newly sovereign Third World states to construct an anti-colonial international law by attempting to revise old doctrines that

[93] *Ibid.* at 11-12.
[94] *Ibid.* at 191-192, 207-208.
[95] Anghie, *supra* note 85 at 117-118.

they had played no role in formulating.[96] For example, the elaboration of a new "transnational law of international contracts"[97] by the West expanded the power of TNCs by granting them the necessary international legal personality to pursue claims in the international realm.[98] The result was that while Third World states asserted the primacy of their national laws over TNCs operating within their territory, an "incontrovertible and classic principle" of sovereignty and jurisdiction,[99] concession agreements were instead characterised both as a "quasi-treaty between a sovereign and a quasi-sovereign" and as a "contract between two private parties".[100] Under either characterisation, there was a "real reduction in the powers of the sovereign Third World state with respect to the Western corporation."[101]

If Anghie's analysis is applied to Byers' framework principles, then the principle of personality reveals the imperialism of international law by extending home state and thus corporate power through the diplomatic protection doctrine of espousal of claims, weakening Third World power. The concept of international legal personality has been identified by many scholars as in need of rethinking, often as part of a larger project seeking to make international law more democratic.[102] Anghie's work suggests that

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[96] *Ibid.* at 198. See generally Anghie, *ibid.*, Chapter 4 "Sovereignty and the post-colonial state". But see Rajagopal, *From Below*, *supra* note 85 at Chapter 4 "Radicalizing institutions and/or institutionalizing radicalism? UNCTAD and the NIEO debate." Rajagopal notes that the critiques put forward were not "aimed at challenging the categories of western modernity and rationality that were inherent in the economic and political systems that international law supported." *Ibid.* at 73-74.
[97] Anghie, *ibid.* at 229-230, 235.
[98] *Ibid.* at 235-236.
[99] *Ibid.* at 224-225.
[100] *Ibid.* at 235.
[101] *Ibid.* at 235.
[102] See e.g. Janneke Nijman, "Sovereignty and Personality: A Process of Inclusion" in Gerard Kreijen, ed. *State, Sovereignty, and International Governance* (Oxford: Oxford University Press, 2002) 109; Eric Suy, "New Players in International Relations" in Kreijen *ibid.* 373; Menno T. Kamminga, "The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?" in Philip Alston, ed., *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 93; and Robert Howse, "Transatlantic regulatory cooperation and the problem of democracy" in George A. Berman, Matthias Herdegen, & Peter

increased recognition of non-state actors, whether TNCs or NGOs, as participants in international law-making processes must be carefully scrutinised to ensure that this does not contribute to the further undermining of Third World sovereignty.[103]

Byers' three other principles also appear less convincing in light of Anghie's work. While the power advantage of territorial jurisdiction is undeniable, Third World states may be less able to exercise this power in the face of pressures from international institutions that restrict Third World economic sovereignty. Reciprocity similarly presumes equality among states, yet diminished Third World sovereignty may deny Third World states' equal participation in the customary process. The principle of legitimate expectations presumes that those who engage in the process of customary international law speak a common language, yet the language is one of a western-educated elite.

While Byers does not address concerns about imperialism in customary international legal process, he does note that his analysis is problematic in that it assumes states are the only actors on the international stage.[104] Questioning the state-centric nature of international law brings to light the exclusion of local community perspectives from customary international legal process, of significance to the analysis of home state regulation in many contexts, including for example that of global mining.[105] According to Anghie, the relationship between the state and minorities as characterised by international law reproduces the dynamic of difference, with the minority as the primitive that "must be managed and controlled in the interests of preserving the modern and

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L. Lindseth, eds. *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects* (Oxford: Oxford University Press, 2001) 471.

[103] On the increased likelihood that international law would recognise First World NGOs than Third World NGOs, see Karen Knop, "Re/Statements: Feminism and State Sovereignty in International Law" (1993) 3 Transnat'l L. & Contemp. Probs. 293 at 315-316.

[104] Byers, *supra* note 57 at 13, 218.

[105] See further Seck, *supra* note 4.

universal state."[106] This suggests that state-based processes like customary international law are particularly problematic when the issues at hand are those that directly impact disempowered local communities within the state, whether rich or poor. The law of self-determination has developed to recognise that indigenous and minority communities have interests that diverge from that of the nation-state to which they are attached. However, self-determination in its classic decolonisation context presumes that those engaged in resistance seek to become states themselves, rather than acknowledging that other goals may be more important than the achievement of state sovereignty.[107]

The work of Balakrishnan Rajagopal on international law, third world resistance and social movements takes the analysis further. Rajagopal's claims that dominant approaches to international law are deficient because they ignore both the fact that the development discourse is centrally important for the "very formation of international law and institutions", and the fact that social movements play an important role in the evolution of international law.[108] Rajagopal argues that mainstream international law functions "within specific paradigms of western modernity and rationality that predetermine the actors for whom international law exists".[109] These actors include political, economic, and cultural actors such as state officials, corporations and the "atomized individual who is the subject of rights" who interact in privileged institutional

[106] Anghie, *supra* note 85 at 205-207. He continues: "These were the interests that were subordinated by the Third World state to assert and consolidate itself." *Ibid.* at 207. See further Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (New York: Oxford University Press, 1994).

[107] Rajagopal, *From Below*, *supra* note 85 at 11. In the global mining context, this is illustrated by the emergence of the principle of free, prior and informed consent (FPIC), yet FPIC continues to be marginalised as at most an expression of soft law due to the state-centric nature of international law. See further Seck, *supra* note 4.

[108] Rajagopal, *From Below*, *ibid.* at 1.

[109] *Ibid.* at 2.

spaces.[110] At the same time, international law ignores the non-institutional spaces where most people in the Third World live and interact.[111] As international law in both its statist realist version and its cosmopolitan liberal version do not provide a visible framework for considering these perspectives, a fundamental rethinking of international law is required.[112] Critically, there is a need to displace development as a "progressive Third World narrative" due to its contribution to the nation-building project, in light of:

> "the realization among social movements and progressive intellectuals that it is not the lack of development that caused poverty, inflicted violence, and engaged in destruction of nature and livelihoods; rather it is the very process of bringing development that has caused them in the first place."[113]

This observation suggests that if First World engagement in Third World development is acknowledged as the real starting point, home state concern to avoid infringement of host state sovereignty is revealed as an excuse – or worse – a denial of responsibility.[114]

D. Conclusions

This Part began by asking whether unilateral home state regulation could serve as an international norm creator by contributing to the process of customary international law. The history of the *FCPA* revealed that this was indeed possible. By contrast, the history of the *HBA* revealed that unilateral regulation, even by a state as powerful as the United States, does not always lead to a change in customary international norms. The subsequent TWAIL analysis illuminated a key problem with proposing that home state

[110] *Ibid.*
[111] *Ibid.*
[112] *Ibid.*
[113] *Ibid.* at 3.
[114] On this point in the Canadian mining context, see Joan Kuyek in "Legitimating Plunder: Canadian Mining Companies and Corporate Social Responsibility" in Liisa North, Timothy David Clark & Viviana Patroni, eds., *Community Rights and Corporate Responsibility: Canadian Mining and Oil Companies in Latin America* (Between the Lines: Toronto, 2006) at 213-214. In relation to international law more generally, see Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003) at 49-50.

unilateral regulation in the human rights and environmental context is a good idea because it could contribute to the formation of customary international law: this underscores the imperialistic nature of international law itself. International law is imperialistic in two different ways. First, the power of developed states may render formal interstate law processes unequal in practice. Second, due to the state-based nature of international law, the elites in both developed and developing states can ignore the realities of communities within the state. While state power can, and often is, tamed by the nature of the process of custom formation, the fact remains that customary international law, as a state-based process, renders silent the voices of local communities. The challenge, then, is to take up Rajagopal's call to "write resistance into international law" by making international law recognise the voices of the subaltern.[115]

II. Sovereignty, Territory and Democracy

A. Imperialism and the Norm of Democratic Governance

According to Saskia Sassen, despite corporate practices of geographic dispersal that disproportionately concentrate centralised top-level control in national territories of highly developed countries, sovereignty and territory remain key features of the international system.[116] However, this reconfiguration of the "intersection of territoriality and sovereignty" does have "profoundly disturbing" repercussions for distributive justice

[115] Rajagopal, *From Below*, *supra* note 85 at 1.
[116] Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalisation* (New York: Columbia University Press, 1996) at 10, 30 [Sassen, *Losing Control*]. These top-level financial, legal, accounting, managerial, executive, and planning functions necessary to run a corporate entity operating in several countries takes place in part at corporate headquarters, and in part as specialised firms of corporate services complexes, both disproportionately concentrated in highly developed countries. *Ibid.* at 10-11. See also Saskia Sassen, *Territory Authority Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006) [Sassen *Territory*].

and equity.[117] Sassen concludes that there may be a "countervailing power to the ascendance of global financial markets" in the emergence of a new trend in international legal discourse which "conditions the international status of the state on the particular political rights central to classical liberal democracy".[118] Thus, "democratic government becomes a criterion for recognition of the state, for protection of its territorial sovereignty, or for its full participation in the relations among states."[119]

The norm of democratic government has indeed become a mantra of international law and global governance.[120] However, Third World scholars consider it suspect in light of the neo-liberal agenda of economic globalisation.[121] For example, Anghie claims that neo-liberal economic policies were forcefully advanced in the 1990s by the international economic institutions of the World Trade Organisation, the World Bank and the International Monetary Fund, and accompanied by "good governance" initiatives in the form of specific programs designed to promote "democratic" and "legitimate" governance.[122] As a result, the view is now commonplace that "a lack of development may be attributed to the absence of 'good governance'."[123] For Anghie, the "good governance" project "merely replicates the 'civilizing mission' that has been such a

[117] Sassen, *Losing Control, ibid.* at 30.
[118] *Ibid.* at 61.
[119] *Ibid.*
[120] See e.g. James Crawford, *Democracy in International Law* (Cambridge: Cambridge University Press, 1994); Thomas Franck, "The Emerging Right to Democratic Governance", (1992) 86 A.J.I.L. 46; and Gregory H. Fox & Brad R. Roth, eds., *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000).
[121] Balakrishnan Rajagopal, "From Modernization to Democratization: The Political Economy of the "New" International Law" in Richard Falk *et al.*, eds. *Reframing the International: Law, Culture, Politics* (New York: Routledge, 2002) 136 [Rajagopal, "Political Economy"]; Rajagopal, *From Below*, *supra* note 85 at Chapter 5 "From resistance to renewal: Bretton Woods institutions and the emergence of the 'new' development agenda" and Chapter 6 "Completing a full circle: democracy and the discontent of development"; Anghie, *supra* note 85 at Chapter 5 "Governance and globalization, civilization and commerce" 245-272.
[122] Anghie, *ibid.* at 245- 246.
[123] *Ibid.* at 249.

prominent feature of the international relations system", despite the fact that it claims to be a new initiative "intimately connected with the emergence of international human rights law."[124] While the World Bank, indifferent to human rights in the past, has now assimilated human rights into development by linking governance, development and human rights,[125] these efforts continue to focus on the reform of the backward developing country, as opposed to recognising the need to reform the fundamental structures of the international economy itself.[126] Thus, the "powerful discourse of human rights" has been used through the "rhetoric of governance" to advance the interests of the West.[127]

Similarly, Rajagopal claims that democratisation has replaced modernisation as the key theme dominating both the political and legal landscape of the post-Cold War era.[128] Development, peace and democracy have been linked in a "holy trinity" that have had a "defining impact on the production and reproduction of social reality in the Third World."[129] As a "culture of democracy" is seen as fostering a "culture of development", technical assistance once provided only in the context of economic and social development is now available for democratisation.[130] While the "rhetoric of participation, empowerment, human rights, and democracy" are considered "essential aspects of supposedly authentic "development"",[131] the possibility that "after full "participation", the people may prefer the "traditional" over the "modern" is "not

[124] *Ibid.* at 249-250.
[125] *Ibid.* at 260-261.
[126] *Ibid.* at 268.
[127] *Ibid.* at 269.
[128] Rajagopal, *From Below*, *supra* note 85 at 136.
[129] Rajagopal, "Political Economy", *supra* note 121 at 142. See also Rajagopal *From Below*, *supra* note 85 at 143.
[130] Rajagopal, "Political Economy", *ibid.* at 143.
[131] *Ibid.* at 144. See also Rajagopal, *From Below*, *supra* note 85 at 146.

entertained".[132] The discourse of democracy is interpreted mostly in human rights terms, and serves as the sole "'approved' discourse of liberation and resistance".[133]

Rajagopal argues that the proliferation of international institutional actors engaged in the promotion of democracy has emerged as a consequence of the emergence of mass democratic movements in the Third World.[134] Rajagopal's thesis is that international law and institutions "renew and grow more" as "social movements resist more", and this "resistance-renewal" is a "central aspect of 'modern' international law".[135] However, the power to "select the voices that constitute "legitimate" democratic ones in the Third World" has the effect of both "containing and de-radicalizing mass resistance in the Third World."[136] In essence, Rajagopal charts how the resistance of the less powerful can be, and is, appropriated by the powerful, including by being reformulated into updated modes of dominance.

Rajagopal and Anghie demonstrate in different ways that the emerging norm of democratic governance, and indeed human rights generally, may be viewed as mass resistance feeding international law and institutions with a new agenda that, while giving a human face to neo-liberal globalisation, does not challenge the underlying structure of the system. This raises the question of whether there is an emancipatory potential within international law.

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[132] Rajagopal, "Political Economy", *ibid.* at 144, 147. See also Balakrishnan Rajagopal, "Counter-hegemonic International Law: rethinking human rights and development as a Third World Strategy" (2006) 27 Third World Quarterly 767 at 776 [Rajagopal, "Counterhegemonic"]. Rajagopal identifies home state development agencies among the proliferation of institutional actors engaged in democratization. Rajagopal, *From Below*, *ibid.* at 153.

[133] Rajagopal, *From Below*, *ibid.* at 137. See also Rajagopal, "Counterhegemonic", *supra* note 132 at 768.

[134] Rajagopal, "Political Economy", *supra* note 121 at 150, 149-151. For example, the Bretton Woods Institutions "*acquired* their present agenda of sustainable human development, with its focus on poverty alleviation and environmental protection, *as a result* of their attempts to come to grips with grassroots resistance from the Third World in the 1960s and 1970s." Rajagopal, *From Below*, *ibid.* at 49 [emphasis added].

[135] Rajagopal, "Political Economy", *ibid.* at 155; Rajagopal, *From Below*, *ibid.* at 161, 133-134.

[136] Rajagopal, "Political Economy", *ibid.* at 150-151; Rajagopal *From Below*, *ibid.* at 155.

B. The Emancipatory Potential of International Law

One of the most pessimistic international law scholars today is Marxist theorist China Miéville.[137] Drawing upon the work of Bolshevik legal theorist Evgenii Pashukanis, Miéville locates the legal form in the economic relationship of commodity exchange, "rather than in the superstructure of political power".[138] According to Miéville, the commodity-form theory of law as well as mainstream international law since Grotius have conceptualised the relationship between sovereign states in the same way that relationships between private property owners are envisioned.[139] Sovereign equality, a foundational if not definitional concept to modern international law, involves recognition that each power has the right internally to decide its own policies, and is thus a theory of formal independence, not substantive legal equality.[140] For Miéville, coercive violence is central to the commodity exchange relationship between individuals and thus the private law of property and contract. Accordingly, coercive violence is also central to

[137] China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Leiden: Brill, 2005) at 17, 25-26 [Miéville, *Theory*]. China Miéville carefully distinguishes between three forms of "denial" about international law. The first group of deniers are those who do not believe international law is really law; the second group are those who claim that international law is not ultimately determinative of state policies (not effective); and the third group are those who are sceptical about whether international law can be used to systematically improve the world (it is effective and cannot further a just world order). Miéville places himself in the third category, and notes that very few writers take this position in part because most "have some stake in such law". *Ibid.* at 27. See also China Miéville, "The Commodity-Form Theory of International Law: An Introduction" (2004) 17 Leiden J. Int'l L. 271 [Miéville, "Commodity"].
[138] Miéville, "Commodity", *ibid.* at 283. Miéville then links Pashukanis' commodity form theory with the New Haven school's conception of international law as a process. Miéville *Theory*, *ibid.* at 74. See Michael Reisman, "The View from the New Haven School of International Law" (1992) 86 Am. Soc. Int'l L. Proc. 118; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994).
[139] Miéville, *Theory*, *ibid.* at 141-142.
[140] *Ibid.* at 184-185.

the relationship between states under international law, as the state that has coercive violence to use to back up its interpretation of international law prevails.[141]

Miéville distinguishes the commodity form theory of law from mainstream theories of international law that treat disputes moderated by coercion as "pathological to law" rather than as "inextricable elements of the legal fabric".[142] For Miéville, the social content of international law is found in the struggle among capitalist states for domination over the rest of the world in order to provide resources for capital.[143] Indeed, imperialism "outlasts the transition to universalized juridical sovereignty … not because postcolonial sovereignty is incomplete", but because "the power dynamics of political imperialism are embedded within the very juridical equality of sovereignty."[144] Miéville concludes that he sees "no prospect of any systematic progressive political project or emancipatory dynamic coming out of international law", as "the very social problems which liberal-cosmopolitan writers want to end are the result of the international system, which is the international legal system."[145] Indeed, any attempts to "reform law can only ever tinker with the surface of institutions"[146] as a world that is "structured around international law cannot but be one of imperialist violence".[147]

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[141] *Ibid.* at 141-142 & 150-151, and at Chapter 4 "Coercion and the Legal Form: Politics, (International) Law and the State".
[142] Miéville, "Commodity", *supra* note 137 at 290.
[143] *Ibid.* at 291-292. Imperialist actions are framed in juridical terms because "imperialism and international law are part of the same system." *Ibid.* at 293.
[144] *Ibid.* at 297. As "juridical sovereignty and the edifice of international law embed relations of imperialist domination", the "triumph of national self-determination" is a "Poisoned Gift". Miéville, *Theory, supra* note 135 at 271.
[145] Miéville, "Commodity", *ibid.* at 301.
[146] *Ibid.*
[147] *Ibid.* at 302. Miéville concludes: "The chaotic and bloody world around us *is the rule of law*." [emphasis in original]

Some TWAIL scholars, like B. S. Chimni, have been drawn to a Marxist theory of international law.[148] However, Chimni also critiques those who condemn international law for failing to recognise that "*contemporary* international law offers a protective shield, however fragile, to the less powerful states in the international system".[149] Moreover, offering a critique without a construction "amounts to an empty gesture" when compared to seeking imaginative solutions that exploit the contradictions of the international system.[150]

Miéville's theory of the international legal form is contested. For example, many feminist international legal theorists are critical of the way in which theories of private property, autonomy and state sovereignty guide the understanding of the relationship between states and thus international legal form.[151] According to Karen Knop, two theories about states and individuals are prevalent in international legal theory.[152] The first is the analogy that states are like individuals.[153] The second is a theory about the ultimate bearer of rights, thus states are composed of individuals.[154] Feminist versions of the first theory "see the self as connected to others through a web of relationships, instead of separate and surrounded by solid boundaries that protect autonomy."[155] Depending on the version of the analogy adopted, feminists would either prefer to see the state

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[148] See e.g. Chimni, "Outline", *supra* note 81; B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (New Delhi: Sage Publications, 1993).
[149] B.S. Chimni, "Third World Approaches to International Law: A Manifesto" in A. Anghie *et al*., eds., *The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff, 2003) 47 at 72 [Chimni, "TWAIL Manifesto"].
[150] *Ibid*.
[151] See *e.g.* Knop, *supra* note 103; Hilary Charlesworth & Christine Chinkin, *The Boundaries of International Law: A feminist analysis* (Manchester: Manchester University Press, 2000), especially Chapter 5 "The idea of the state".
[152] Knop, *ibid.* at 319-320.
[153] *Ibid.* at 320.
[154] *Ibid.*
[155] *Ibid.* at 321. See generally Jennifer Nedelsky, "Law, Boundaries, and the Bounded Self" in Robert Post, ed. *Law and the Order of Culture* (Berkeley: University of California Press, 1991) 162; Jennifer Nedelsky, "Reconceiving Autonomy" (1989) 1 Yale J. L. & Feminism 7.

conceptualised as surrounded by permeable boundaries, or by no boundaries at all.[156] However, while criticising the premise that the state is bounded, this analogy does not question the premise that the state is unified.[157] The weakness of the analogy theory is that even its feminist versions do not account for dissimilarities between states and individuals, as states are neither "unified beings", nor "irreducible units of analysis."[158] The analogy thus "renders problematic any consideration of the status of individuals and groups in international law, other than as part of a monolithic state."[159]

As the state encompasses a variety of groups and performs a variety of functions which do not necessarily serve the interests of all groups, Knop notes that international law has given peoples the rights of self-determination, most often realised as statehood. Meanwhile, international human rights law takes into account the interests of different groups through a limited notion of minority rights within the state.[160] Yet these developments create a new problem for sovereignty by raising the question of what sovereignty should be, and why there should be a single sovereign as opposed to "overlapping sovereignties, fragmented sovereignties, [and/or] layered sovereignties".[161]

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[156] Knop, *ibid.* at 321. According to one version of the analogy, the territory of the state is equated with the physical body of the individual. According to another, the territory of the state is viewed as the individual's private property. Each understanding captures contested imagery in feminist thought, and only captures certain aspects of how sovereign states function. *Ibid.* at 322. Knop notes that the focus of some scholars on relationships and connectedness "implies that fixed, rigid boundaries between States fail – both conceptually and physically, as the example of international environmental law illustrates – to reflect patterns of interaction and responsibility, or, worse, prevent the formation of patterns that are seen as desirable." *Ibid.* at 325.
[157] *Ibid.* at 332.
[158] *Ibid.* at 320.
[159] *Ibid.*
[160] *Ibid.* at 333. Knop notes that the line between these two concepts is becoming increasingly blurred.
[161] *Ibid*.

Miéville's assumption that force ultimately decides both the form and content of international legal doctrine is also contested.[162] Moreover, it is inconsistent with Byers' analysis of customary international legal process for Byers establishes that the "power of rules" sometimes affects the behaviour of even the most powerful states, and what these states "are able to accomplish, when they seek to develop, maintain or change rules of customary international law."[163] Having said this, Byers concludes that one of the consequences of adopting an interdisciplinary approach to customary international law is that it "undermines the 'realist' assumptions" adopted as analytical aids,[164] such as the statist character of the international legal system.[165]

Miéville also identifies the problematic nature of state-centric international law, as for Miéville, "every international legal decision represents the triumph of (at least) one national ruling class – it is they after all who have had recourse to the legal form – rather than of any exploited classes or oppressed groups at all."[166] The importance of "exploited classes or oppressed groups" is also highlighted by Chimni, who notes that for a critique of dominant ideology to safeguard the interests of Third World peoples, it must go hand in hand with a theory of resistance that "avoids the pitfalls of *liberal optimism* on

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[162] An early example is Gerhart Niemeyer, *Law Without Force: The Function of Politics in International Law* with a new introduction by Michael Henry (New Brunswick, U.S.A.: Transaction Publishers, 2001), originally published in 1941 by Princeton University Press. See also the interactional theory of law proposed by Brunnée and Toope, as discussed by Toope, "Powerful", *supra* note 58 at 314:

> "Law depends for its power on congruence with social practice matched with perceptions of legitimacy. … It is only the failure of law, its pathology, that demands an external application of force ('enforcement'). … pathology should not be allowed to become the very definition of law."

[163] Byers, *supra* note 57 at 206.

[164] *Ibid.* at 217. For a critique of Byers, see S.J. Toope, "Review of *Custom, Power and the Power of Rules: International Relations and Customary International Law* by Michael Byers" (1999) Can. Y.B. Int'l L. 480.

[165] Byers, *ibid.* at 217-219. Byers notes that states have created the international legal system for themselves, and highlights Philip Allott's insight that the "international system is whatever human beings think it is", therefore "it, or any part of it, is capable of being changed". *Ibid.* at 218-219; 220-221. See Philip Allott, *Eunomia: New Order for A New World* (New York: Oxford University Press, 1990).

[166] Miéville, "Commodity", *supra* note 137 at 301.

the one hand, and *left wing pessimism* on the other."[167] Chimni concludes that a third view is possible which neither assumes that humankind is moving inevitably toward a just world order, nor that resistance to domination is an "empty historical act".[168] Key to a theory of resistance is the recognition of the agency of third world social movements.[169]

Rajagopal explicitly advocates the need to recognise the agency of third world social movements as part of the project of writing resistance into international law. He claims that the "bureaucratization of democratic resistance" has been "actively resisted through counter-hegemonic coalitions in the Third World that he describes as a "new cosmopolitanism" of "selective anti-internationalism".[170] This new cosmopolitanism is "highly critical of the economic and institutional dimensions of the international project", yet is "supportive of the political and emancipatory ideals inherent in its liberal tendencies".[171] It differs from old cosmopolitanism in "preferring local democracy and decentralization-based strategies rather than rights-based ones".[172] According to Rajagopal, the Third World's reliance upon traditional sources of cosmopolitan discourses in international law, in particular the discourses of human rights and development, needs to be seriously rethought to ensure that they are not used to reinforce the "existing imperial tendencies in world politics" and thus hegemonic international

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[167] Chimni, "TWAIL Manifesto", *supra* note 149 at 65.
[168] *Ibid.* at 65.
[169] *Ibid.* See also B. Rajagopal, "International Law and Third World Resistance: A Theoretical Inquiry" in Anghie et al., eds., *The Third World and International Order*, *supra* note 149, 145, especially at 155, speaking of the need to go beyond liberalism and Marxism and toward a cultural politics. See also Boaventura de Sousa Santos & César A. Rodríguez-Garavito, "Law, politics, and the subaltern in counter-hegemonic globalization" in Boaventura de Sousa Santos & César A. Rodríguez-Garavito, eds., *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005) 1; and Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (London: Butterworths, 2002).
[170] Rajagopal, "Political Economy", *supra* note 121 at 151. See also Rajagopal *From Below*, *supra* note 85 at 155.
[171] Rajagopal *From Below*, *ibid.* at 156.
[172] *Ibid.*

law.[173] However, rather than dismissing human rights, he proposes that this calls for a "search for the radical democratic potential in human rights that can be appreciated only by paying attention to the pluriverse of human rights, enacted in many counter-hegemonic cognitive frames."[174] Similarly, rather than dismissing the discourse of development, Rajagopal argues that its "radical democratic possibilities" could "strengthen a new global politics that leads to a reformulation of existing international law along cosmopolitan lines."[175] Counter-hegemonic power may thus encompass various tools of resistance, including the use of international law, although international law is only a "small (though important) part" of counter-hegemonic power today.[176]

Rajagopal links human rights theory with the colonial origins of the doctrine of sovereignty, as the state is given a predominant role as the source and implementer of the normative framework. Thus, despite its "nominal anti-sovereignty posture", human rights remains a "state-centred" discourse, and protest or resistance movements inside societies are ignored,[177] while private forms of violence committed in the name of development remain invisible to human rights discourse.[178] Rajagopal proposes that international law needs to "decenter itself from the unitary conception of the political sphere on which it is based, which takes the state or the individual as the principal

[173] Rajagopal, "Counterhegemonic", *supra* note 132 at 768. See also Rajagopal *From Below*, *ibid.* at Chapter 7 "Human rights and the Third World: constituting the discourse of resistance". Rajagopal notes that while human rights is presented as an emancipatory discourse that will not reproduce any of the power structures of colonialism, this is a questionable given that human rights discourses presume the moral possibilities of the state as the primary duty-holder against primary rights-holders who are citizens. Rajagopal *From Below*, *ibid.* at 176, 186.
[174] *Ibid.*, "Counterhegemonic". He continues: "In this new approach, official and sanctioned human rights discourse becomes one of many languages of resistance, enacting a cultural politics at many scalar levels."
[175] *Ibid.* at 769.
[176] *Ibid.* at 772, 780.
[177] Rajagopal *From Below*, *supra* note 85 at 187.
[178] *Ibid.* at 194-195.

political actor".[179] He argues that the liberal theory of international politics is challenged by social movements that adopt a cultural politics that seeks "alternative visions of modernity and development by emphasizing rights to identity, territory, and autonomy".[180] Moreover, engaging with the theory and practice of social movements reveals much social movement resistance that human rights discourse is unable to see due to its state-centred, elitist nature.[181] Alternative conceptions of property are offered by social movements that emphasize the autonomy of communities, thus challenging the "nexus between property and sovereignty in law by showing how to realise autonomy without being imprisoned by the language of sovereignty."[182] According to Rajagopal, civil society must be reconceived as "subaltern counterpublics" in order to reinvigorate democracy, necessary due to the "NGOization" of civil society that has rendered many social movements invisible.[183] Finally, Rajagopal suggests that social movements contradict the claims that globalization leads to a reduction in importance of the local, as, "paradoxically, globalization has led to more, not less, emphasis on the local, but also

[179] *Ibid.* at 236.
[180] *Ibid.* at 271. By adopting a liberal conception of rights based upon the unity of the social actor and a sharp public/private divide, human rights discourse is incapable of recognising the agitations of social movements that articulate alternate conceptions of "territory, autonomy, rights, or identity." *Ibid.* at 166-167. See further *ibid.* at 240-245 on cultural politics as an alternative to liberalism and Marxism. For a good example of successful coupling of collective action with legal mobilisation through a "radial redefinition of rights", see César A. Rodríguez-Garavito and Luis Carlos Arenas, "Indigenous Rights, Transnational Activism, and Legal Mobilization: The Struggle of the U'was People in Columbia" in Santos & Rodríguez-Garavito, *supra* note 169, 241. The authors note that the U'wa's "uncompromising vindication of the *collective* character of their right to land" went hand in hand with legal action, contrary to the concern of critical legal scholars who speak of the individualising effect of rights talk. *Ibid.* at 263.
[181] Rajagopal *From Below*, *ibid.* at 271, 245-258.
[182] *Ibid.* at 271. Rajagopal notes that this reveals the importance of putting the "promotion of absolute property rights" in the 1980 and 1990s by "western donors and multilaterals" in historical context, as the promotion of individual property rights weakened the "ability of collectivities to exercise control over individual and corporate ownership of resources." *Ibid.* at 264.
[183] *Ibid.* at 271, 262, citing the language of Nancy Fraser. See Nancy Fraser, "Rethinking the Public Sphere: a Contribution to the Critique of Actually Existing Democracy" in Henry Giroux & Peter McLaren, eds., *Between Borders: Pedagogy and the Politics of Cultural Studies* (New York: Routledge, 1994) 74.

resistance to globalization manifests itself extraterritorially through globalization itself."[184]

Thus, the emancipatory potential of international law is not self-evident, but may be uncovered by carefully scrutinising the discourses of development and human rights to reveal their potential as tools of counter-hegemonic subaltern resistance. The implications of this observation for the imperial tendencies of unilateral home state regulation will be revealed through an examination of the work of Susan Marks.

C. Cosmopolitan Democracy and the Principle of Democratic Inclusion

The risk of neo-imperialism associated with the emerging norm of democratic governance has been the subject of analysis by Susan Marks, drawing upon David Held's work on cosmopolitan democracy.[185] Marks seeks to rethink, rather than renounce the project of democratic governance, and highlights the problematic nature of the ideology of pan-national democracy, or the assumption that global democracy can be built through the accumulation of national democracies.[186] She notes that the conventional approach to democratic theory is to view the nation-state as a site of democracy with state boundaries as its limit. Under this conception, the people or demos are conceived as the nation, and legitimacy is defined in terms of consent by and accountability to the national

[184] Rajagopal *From Below*, *ibid.* at 271. In this context, Rajagopal notes Richard Falk's description of the internally contradictory phenomenon of globalisation as "globalisation from below", and Peter Evan's description of it as "counter-hegemonic globalisation." *Ibid.* at 267.
[185] Susan Marks, *The Riddle of All Constitutions* (Oxford: Oxford University Press, 2000) [Marks, *Riddle*]. See especially David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge: Polity, 1995). See also Susan Marks, "International Judicial Activism and the Commodity-Form Theory of International Law" (2007) 18 E.J.I.L. 199 at 209 and 202, endorsing the need for systematic theory in the study of international law, while disagreeing with Miéville's contention that international law has no emancipatory potential.
[186] Marks, *Riddle, ibid.* at 1, 81.

citizenry.[187] Underpinning this view is an assumption that "democratic polities are territorially bounded communities."[188] Accordingly:

> "a symmetrical or congruent relationship has been presumed to exist between those experiencing outcomes and those taking decisions. This relationship has been held to exist above all between national electorates and their elected representatives, and between those subject to national jurisdiction and national authorities."[189]

However, the challenge of globalisation suggests that the "nation-state cannot remain democracy's container"[190] and consideration must be given to the democratisation of global governance. This implies that "decision-making with global or transboundary impact – whether undertaken by governments … multinational corporations, or other actors – must be brought within the scope of democratic concern."[191]

Marks cites Held's use of the term cosmopolitan to "indicate a model of political organization in which citizens, wherever they are located in the world, have voice, input and political representation in international affairs, in parallel with and independently of their own governments."[192] A central claim of Held is that "if democracy is to flourish in conditions of intensifying global interconnectedness, it must become a transnational affair, linked to an expanding framework of democratic institutions and procedures."[193] However, this does not mean that democracy should become tied to the international arena, or that the local and national arenas are insignificant.[194] Instead, the "notion of a

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[187] *Ibid.* at 81.
[188] *Ibid.*
[189] *Ibid.* at 82.
[190] *Ibid.* at 83.
[191] *Ibid.*
[192] *Ibid.* at 84, citing D. Archibugi & D. Held, "Editors' Introduction" in D. Archibugi & D. Held, eds. *Cosmopolitan Democracy: An Agenda for a New World Order* (Cambridge: Polity Press, 1995) 1 at 13.
[193] Marks *Riddle, ibid.* at 85.
[194] *Ibid.*

democratic political community should be untied from the whole 'idea of locality and place'."[195]

Marks critiques proponents of the democratic norm who conceive of democratic global governance in pan-national terms as the universalising of national democracy, rather than adopting the cosmopolitan vision.[196] The aim of her project is to see democratic ideas as providing a "framework for emancipatory claims", with the central question being how to redirect the norm of democratic governance to emancipatory ends.[197] Accordingly, Marks proposes that a principle of democratic inclusion serve to guide the elaboration, application and invocation of international law.[198] She is very clear that what she is proposing is a principle, not a right to a right.[199] Furthermore, while it is a new principle, Marks sees it as a principle that can be used to reinforce existing trends in international law.[200] Ultimately, Marks proposes that the principle of democratic inclusion "might serve to reshape such established international legal norms as the principle of sovereign equality of states and the principle of non-interference in domestic affairs."[201] She defines the principle of democratic inclusion as:

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[195] *Ibid.* citing David Held, "Democracy and the Global Order" in Archibugi & Held, eds., *Cosmopolitan Democracy*, *supra* note 195 at 278.
[196] See critique of Anne-Marie Slaughter in Marks, *Riddle*, *ibid.* at 87-92; and critique of Thomas Franck, *ibid.* at 92-96.
[197] *Ibid.* at 103-109.
[198] *Ibid.* at 109-118. On the significance of principles to legal change, see Jutta Brunnée & Stephen J. Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000-2001) 39 Colum. J. Transnat'l L. 19 at 65-66, stating in part: "Law reasons by analogy from principles (interstitial norms) as well as from rules. These principles may actually drive legal change more powerfully than traditional rules."
[199] The principle of democratic inclusion could be seen as an international law principle like the principle of sovereign equality and the principle of non-interference. Marks, *Riddle*, *ibid.* at 110-111.
[200] Marks, *Riddle*, *ibid.* at 111. Marks envisions the principle as "weaving into the fabric of international law a kind of bias in favour of popular self-rule and equal citizenship, that is to say, a bias in favour of inclusory political communities."
[201] *Ibid.* Marks notes that both the principle of sovereign equality and the principle of non-interference have "operated as a reference point in international legal argument, moulding the agenda of international law-making, shaping the interpretation of international legal norms, and influencing the procedures for asserting international legal rights and enforcing international legal duties. In the process, each has itself

> "the notion that democratic politics is less a matter of forms and events than an affair of relationships and processes, an open-ended and continually re-contextualized agenda of enhancing control by citizens of decision-making which affects them and overcoming disparities in the distribution of citizenship rights and opportunities."[202]

Marks' approach is supported by Anghie, who notes that while his work demonstrates the "imperial dimensions" of various initiatives, he is "not arguing that we should dispense with the ideals that inform them … Rather, the attempt here is to contest imperial versions of these ideals, and to seek their extension to all areas of the international system."[203] Anghie continues: "As Susan Marks puts it, … '[w]hen ideals begin to seem like illusions, we can jettison and replace them. Or we can reassert and reclaim them'."[204]

Rajagopal argues that as social movements adopt a cultural politics informed by alternate conceptions of territory, autonomy, rights or identity, and alternate visions of development, human rights discourse has been unable to recognise much social movement resistance.[205] This suggests that it is critically important that a regime of home state regulation be structured so as to acknowledge the capacity of subaltern communities to define their own vision of participation and development, rather than imposing a predetermined view of participatory rights that may not reflect community culture.[206] The question is whether this vision is compatible with Marks. Marks

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been reshaped, as contradictions have spawned new laws, new interpretations, new procedures and new principles." *Ibid*.

[202] *Ibid.* at 110.

[203] Anghie, *supra* note 85 at 272.

[204] Anghie, *ibid.* citing Marks *Riddle* at 119.

[205] See especially Rajagopal, *From Below*, *supra* note 85 at 263-266, "Property and territory: autonomy without sovereignty?"

[206] In the mining context, see especially *Indigenous Perspectives on Consultation and Decision-Making About Mining and Other Natural Resources in Latin America, the Caribbean and Canada (Phase II) Project Description*, online: North-South Institute <http://www.nsi-ins.ca/english/research/progress/56.asp>.

acknowledges that arguments are often raised in the human rights context suggesting that proposed norms are not appropriate for the society concerned due to various cultural considerations, such as the claim that the community is more important than the individual, or duties are more important than rights, or economic prosperity is more important than civic engagement.[207] Yet Marks counters with the observation that culture is a series of contested practices, with the central issue being the politics of any argument based on culture in human rights discourse: one must always ask the status of the speaker, in whose name the argument is advanced, and what degree of participation in culture formation impacted social groups have.[208] This suggests that Marks would support a nuanced vision of democratic engagement that opens the door to local community views *as defined by local communities themselves*, provided that the contested nature of cultural politics is acknowledged and accounted for. Such a vision must then be incorporated into any proposed home state regulatory regime.

Conclusions

A worthwhile contribution to counter-hegemonic globalisation, then, may be to rethink the established legal doctrines of sovereign equality and non-interference guided by Marks' principle of democratic inclusion, in accordance with Rajagopal's project of writing resistance into international law. Crucially, this rethinking must be informed by the insight that subaltern perspectives and experiences, such as those of local communities impacted by global mining investment, are central not only to the content of

[207] Marks, *Riddle*, *supra* note 185 at 115.
[208] *Ibid.* at 115, citing Arati Rao, "The Politics of Gender and Culture in Human Rights Discourse" in Julie Peters & Andrea Wolper, eds., *Women's Rights, Human Rights: International Feminist Perspectives* (London: Routledge, 1995) 168 at 173. Moreover, Rajagopal clearly recognises that not all cultural politics are progressive. Rajagopal *From Below*, *supra* note 85 at 236.

the primary rules of international law, but also to the very structure of international legal argument and the international legal form. While the purpose of this article was ostensibly to evaluate whether unilateral home state regulation could contribute to customary international law process, the conclusion is that the answer to this question can only be gleaned by taking into account the perspectives of subaltern local communities themselves. This suggests that the legitimacy of unilateral home state regulation is likely to be greater if the structure of the regulation gives voice to those communities. This is in keeping with Marks' principle of democratic inclusion, as well as Nancy Fraser's "all-affected principle", according to which "all those affected by a given social structure or institution have moral standing as subjects of justice in relation to it."[209] Furthermore, Fraser proposes that the "all-affected principle" should inform the "meta-political" framing of justice, thus embracing "parity of participation" in the meta-discourses that "determine the authoritative division of political space".[210]

It is difficult to conceptualise how subaltern voices could participate in customary international law process, or, as identified by Fraser, in the even more elusive framing of customary international law process, at least if one accepts that customary international law is a state-based regime designed by and for states.[211] Brunnée and Toope's proposal for an interactional theory of international law based on the legal theory of Lon Fuller

[209] Nancy Fraser, "Reframing Justice in a Globalizing World" (2005) 36 New Left Review 69 at 82. Fraser continues: "On this view, what turns a collection of people into fellow subjects of justice is not geographical proximity, but their co-imbrication in a common structural or institutional framework, which sets the ground rules that govern their social interaction, thereby shaping their respective life possibilities in patterns of advantage and disadvantage." Fraser credits John Ruggie's "immensely suggestive essay" for the idea of a post-territorial mode of political differentiation. See John Ruggie, "Territoriality and Beyond: Problematizing Modernity in International Relations" (1993) 47 Int'l Org. 139.

[210] Fraser, *ibid.* at 85. Without such parity of participation, Fraser observes that "the majority is denied the chance to engage on terms of parity in decision-making about the 'who',", as the activity of frame-setting is monopolized by "states and transnational elites." This denies voice, and blocks the creation of democratic arenas where the claims of the excluded can be "vetted and redressed". *Ibid.*

[211] But see Ochoa, *supra* note 57.

may offer some insights, however.[212] For example, if customary international law is best understood as "a process of persuasion, dependent upon shared perceptions of legitimacy", then a customary international law process that includes subaltern voices among the social actors from which it seeks allegiance would have to recognise the importance of subaltern perception's of legitimacy.[213]

The structure of the *FCPA* described in the opening pages of this article, which in turn led to multilateral agreement on anti-bribery and corruption matters, would likely accord with subaltern perceptions of legitimacy. The legislation has been criticised as imperialist by some scholars who claim that it imposes Western understandings of bribery, disregarding the pluralist cultural meanings of gift-giving around the world. However, as the legislation also provides an exemption for payments that are lawful under host state law, it serves to ensure that host state officials who wish to receive payments that might be viewed as bribes do so in a transparent manner, by passing legislation to protect their actions. This increases the ability of local communities within the host state to hold their government officials to account, should subaltern perspectives on what qualifies as acceptable gift-giving not be reflected in host state legislation.

The *HBA*, on the other hand, while ostensibly about promoting democracy in Cuba, had within it no provisions that would have enhanced the ability of local communities within Cuba to express their views about democracy either to the government of the United States, or to their own government. Instead, the legislation

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[212] Brunnée & Toope, *supra* note 198. Brunnée and Toope also draw upon the work of international relations scholars who adopt a constructivist theory according to which the interests of states and other actors are formed as part of their interaction in society – thus identity formation is relational and prior to interest formation, with interests defined in both material and non-material terms. Notably, they, like Fraser, cite the work of John Ruggie. See John Ruggie, "What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge" (1998) 52 Int'l Org. 855 passim.

[213] See generally Toope, "Powerful" *supra* note 58 at 306, 301 & 306.

provided U.S. companies with an opportunity to recoup the cost of expropriated investments, while attempting to pressure non-U.S. companies from investing in Cuba now or in the future. This reflects U.S. foreign policy goals far more clearly than any international policy goal relating to Cuban democracy that might find support from Cuba's subaltern.

In conclusion, this article reveals that home state regulation, if structured in light of a principle of democratic inclusion, can be conceptualised as an example of transnational governance informed by the counter-hegemonic project of reading subaltern resistance into international law, rather than as an illegitimate if not imperialistic exercise of unilateral jurisdiction. It is beyond the scope of this paper to make any concrete proposals about the exact structure home state legislation should take in the human rights and environment context. However, at a minimum, this analysis provides moral support for the exercise of unilateral home state jurisdiction, which, if transformed into state practice, would build support for the positive obligation to regulate under traditionally conceived customary international legal process. Moreover, the analysis underscores the need for a rethinking of the content of the primary rules of international environmental and human rights law. While international environmental and human rights law does not reveal a hard law obligation for home states to regulate TNCs in order to both prevent and repair harm, there are clear signs that such norms are emerging.[214] The emergence of these norms becomes more evident if the reshaping of the principles of sovereign equality and non-interference proposed in this article inform the assessment.

[214] Seck, *supra* note 4; SRSG Report, *supra* note 1. The terminology used here suggests that emerging norms can become hard law norms. However, as the theory of the legal form adopted here is not based upon a coercive model, it is not necessary for a bright line to exist between emerging and hard law norms. For a nuanced discussion of this issue in the context of their proposed interactional model of international law, see Brunnée & Toope, *supra* note 198, especially at 67-69.