THE PITFALLS OF UNILATERAL LEGISLATION IN INTERNATIONAL LAW: LESSONS FROM CONFLICT MINERALS LEGISLATION

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Abstract This article examines the compatibility of the extraterritorial application of unilateral legislation with the project of international law. Focusing on two instruments, the Dodd-Frank Act passed by the United States Congress and intended to regulate the activities of US listed companies operating in the Congo and the EU conflict minerals legislation, the article challenges their underlying premises that revenues from natural resources perpetuate conflict and resulting human rights abuses. In so far as these instruments make no provision for meaningful participation by the foreign populations which are the objects of legislation, it is argued that there is a tension between these unilateral instruments and the basic premises of law-making in international law as a democratic enterprise centred around governmental representation. By exclusively directing sanctions and other disciplinary measures at rebels, both legislative instruments have the problematic effect of strengthening the exploitation of natural resources by kleptocratic regimes and undermining the right of populations in conflict zones to civil disobedience as an inescapable component of their right of self-determination.

Keywords: public international law, unilateral legislation in international law, EU conflict minerals legislation, Dodd-Frank Act, natural resources.

I. INTRODUCTION

A predominant feature of civil wars in Angola, Sierra Leone, Sudan, Liberia and the Great Lakes region of Central Africa is the centrality of illegal exploitation of natural resources, both as a cause and as a means of funding conflicts. The most complex resource-driven war to date has been that in the Democratic Republic of Congo (DRC). The complexities of this conflict in part stem from the fact that the *de jure* government, foreign occupying forces, criminal

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networks, private companies and rebel groups have all been extensively implicated in the illegal exploitation of Congolese resources.[1] While the need to stop this pernicious exploitation has been repeatedly acknowledged, consensus on an effective multilaterally agreed framework through which to do so has proved elusive. There are several reasons for this. First, exploitation and regulation of natural resources has always been regarded as an inherent governmental power which is not subject to external oversight.[2] The designation of natural resources as a right of peoples in the two 1966 human rights convenants[3] has not been followed by a coherent framework which regulates that right in situations of armed conflict, or sets out what can be done to safeguard the interests of the population in the resources of the territory. A second cause of regulatory reticence lies in the past complicity of international law in facilitating the exploitation of natural resources as part of the imperial project.[4] As a result, increasingly there are attempts to circumvent the impasse at the multilateral level either through voluntary codes or through regulations in the form of unilaterally adopted domestic legislation.[5]

This article examines the compatibility of the two pieces of such legislation adopted by the United States and the European Union which seek to regulate both the trade and exploitation of natural resources in conflict zones. The conflicts in question involve coherent and well-organised insurgencies which present credible challenges to governmental power and are able to sustain themselves through their exploitation of natural resources. Since both instruments are intended to operate extraterritorially, there are profound questions concerning their compatibility with international law, understood as a consent-based order in which jurisdiction is generally confined to State territory. The relevant legislation has been passed by the United States Congress and by the European Union respectively without any input from the communities impacted by it.

The term 'unilateralism' does not have a defined or coherent meaning in international law but broadly refers to any range of activities undertaken by States outside the multilateral processes of decision making. In so far as all

[1] United Nations Security Council (UNSC), 'Report of the Group of Experts on the Democratic Republic of Congo' (29 November 2010) UN Doc S/2010/596; Human Rights Watch, *The Curse of Gold: Democratic Republic of Congo* (Human Rights Watch 2005); see also T Turner, *The Congo Wars: Conflict, Myth and Reality* (Zed Books 2007).

[2] P Okowa, 'Sovereignty Contests and the Exploitation of Natural Resources in Conflict Zones' (2013) 66 CLP 33.

[3] United Nations International Covenant on Civil and Political Rights, New York (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) and United Nations Covenant on Economic, Social and Cultural Rights, New York (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

[4] A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005).

[5] D Dam-De Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (Cambridge University Press 2015).

governmental acts are by nature unilateral, the term only assumes particular significance where a domestic instrument is intended to have extraterritorial effect.[6] Multilateral instruments may of course expressly require, permit or delegate their implementation to individual States. In such situations, the extraterritorial application of domestic legislation in accordance with such instruments becomes the vehicle for their implementation and is, therefore, consistent with international law. There are, however, profound difficulties in determining whether there is, in fact, a mandate to act unilaterally where the authority to do so is not explicit but is to be inferred from Security Council resolutions which 'call on' States to address a particular problem without setting out how they might legitimately do so. How, for instance, should international law respond to a manipulation of the Security Council's presumed authority for purposes which do not reflect the collective interest?

The conflict minerals legislation under consideration in this article highlights these tensions,[7] and raises the spectre of vigilante justice when multilateral processes are wanting, and States decide to act alone. Secondly, at times it has been suggested that non-binding guidelines issued in multilateral forums such as the OECD on responsible sourcing of minerals in conflict zones can provide authority for unilateral legislation.[8] Such guidelines encourage States to exercise due diligence when sourcing minerals from areas of armed conflict, and especially where armed groups are implicated in the resource trade. Such diligence must, however, be consistent with respect for the sovereignty of the resource States which are the intended beneficiaries and it is difficult to see how this due diligence can justify intrusive laws requiring radical infrastructure reforms in the territory of the target State. It should not be forgotten, of course, that unilateralism may also be purely political, not traceable to any binding legal instruments or desired policy outcomes but designed largely to advance the hegemonic interests of the States concerned, even if this is presented in altruistic terms.[9]

Section II of this article situates the two instruments in question within debates concerning unilateralism in public international law, in particular cosmopolitan arguments that challenge the dominance of multilateral processes in law-making. It does so by examining whether such unilateral measures are compatible with international law as a consent based legal order. Section III then considers arguments against unilateral legislation from the perspective of democracy and democratic governance. Section IV sets out

[6] See P Sands, '"Unilateralism", Values and International Law' (2000) 11 EJIL 291.

[7] See UNSC Res 1952 (29 November 2010) UN Doc S/Res/1952 calling on States to observe supply chain due diligence when sourcing from the DRC.

[8] See OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (2nd edn, OECD 2013) (Henceforth called OECD Due Diligence Guidance).

[9] C Chinkin, 'The State That Acts Alone: Bully, Good Samaritan or Iconoclast' (2000) 11(1) EJIL 31.

and explores in detail the key features of the two instruments and the specific mischief that they were intended to address. It also offers a tentative assessment of the prospects of the EU legislation which is not due to become binding until 2021. Section V then explores the domestic challenges to the constitutionality of the Dodd-Frank Act and the threats by the Trump administration to roll back its provisions on grounds of national security.[10] It also looks at some of its implications within the Democratic Republic of Congo (DRC). Section VI offers some concluding reflections.

II. UNILATERAL LEGISLATION IN A CONSENT-BASED SYSTEM

A. A Necessary Corrective or Jurisdictional Overreach?

It is fitting to begin with an overview of the specific challenges that unilateralism presents for international law. It is clear that multilateralism remains the dominant means through which to address issues in international law.[11] Yet even the staunchest supporters of multilateralism accept that it does not preclude the existence of a range of other options available for the enforcement of international law. There is also increasingly a recognition that multilateral processes frequently fail to address problems adequately. Yet unilateral responses to collective problems, in the strong form of one State or group of States 'going it alone', remain an anomaly. The recognition that certain obligations are peremptory in character, and owed to all States, has not dented the pre-eminence of consent as the only true basis of obligation in much of international law. For all their shortcomings, multilateral processes provide the most realistic way of accommodating the diverse interests of States in a pluralist international society.[12] They also remain the most effective medium for ensuring respect for sovereign equality as a foundational ideal. Even though hegemonic States still retain a dominant influence over the negotiation of most multilateral treaties, that dominance, it could be argued, is mitigated by dualist filters that some domestic legal systems insist upon before negotiated treaties become binding. Moreover, in many democracies, treaties are subject to parliamentary approval or direct endorsement by citizens in popular plebiscites, thus providing them with the necessary legitimacy.

Unilateral legislation involves the domestic legislatures of one country legislating for another without involving it in that process. Why do States in some instances choose to deviate from the path of multilateralism in favour of such unilateral acts? In effect, they are imposing quasi-domestic standards

[10] Presidential Memorandum: Suspension of the Conflict Minerals Rule, Explanatory Statement (8 February 2017) <http://online.wsj.com/public/resources/documents/SECDraftOrder02-08-2017.pdf>.

[11] JE Alvarez, 'Multilateralism and Its Discontents' (2000) 11 EJIL 393.

[12] J Brunnée, 'International Environmental Law and Community Interests: Procedural Aspects' in E Benvenisti and G Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018).

on a third State but without processes of deliberation or participation by the affected States: and why should third States acquiesce in domestic law-making processes in which they have had no formal role and whose enforcement mechanisms are largely devoid of democratic safeguards? The answers to these questions are central to the debates on the utility of the Dodd-Frank and EU conflict minerals legislation, even if they have not been cast in these terms. Much of the writing on the subject has failed to provide a coherent account of the place of unilateral measures in the normative framework of international law.[13] Unilateral measures, whether in the field of human rights, use of force or environmental protection, have largely been treated as discrete subjects divorced from wider questions concerning their compatibility with international law.[14] To reiterate, unilateral measures are, on the face of it, inherently in conflict with international law understood as a consent-based, positivist inspired project. Their use by States with imperial histories on a sensitive subject such as the regulation of natural resources overlooks the past complicity of international law in the exploitation of natural resources and the continuing existence of inequality and subordination in inter-State affairs.[15] The claims made in support of unilateral measures cannot be taken at face value; there remains a justifiable scepticism that those with hegemonic interests cannot be the best custodians of third State interests in the absence of a framework of international oversight.

Of course, international law as a multilateral project is itself a flawed concept. In some cases, the consent at the heart of a treaty or regulatory framework is presumed rather than real, and weak States are rarely in a position to resist the will of the majority.[16] However in most instances consent remains a vital safeguard of national interests. Unfortunately, insistence on consensus often means that law-making proceeds at the pace of the slowest.[17] Moreover, States may choose to frustrate the collective goals of regulation when they consider it is in their self-interest to do so. It could therefore be argued that unilateral instruments may be justified as acts of necessity, even when incompatible with the system's foundational principles.[18]

[13] J Cuvelier *et al.*, 'Analyzing the Impact of the Dodd-Frank Act on Congolese Livelihoods' Social Science Research Council (November 2014); V Stork, 'Conflict Minerals, Ineffective Regulations: Comparing International Guidelines to Remedy Dodd-Frank's Inefficiencies' (2017) 61 NYLSLR 429.

[14] For an exception see LB de Chazournes, 'Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues' (2000) 11 EJIL 315; A Reinisch, 'Human Rights Extraterritoriality: Controlling Companies Abroad' in E Benvenisti and G Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018) 396.

[15] G Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004) Ch 10.

[16] See RB Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108 AJIL 211; B Kingsbury, 'Sovereignty and Inequality' (1998) 9 EJIL 599.

[17] M Hakimi, 'Unfriendly Unilateralism' (2014) 55 HILJ 105; de Chazournes (n 14).

[18] de Chazournes (n 14).

Furthermore, enforcement frameworks in many multilateral instruments, including adjudicatory frameworks, are frequently optional and non-binding.[19] International instruments increasingly give States wide discretion as regards their implementation, and may include an implied power to achieve the collective goals agreed upon through national laws and institutions. Many States wanting to encourage the development of the law in a more progressive direction, or to suit their national interests, increasingly take matters into their own hands and regulate extraterritorial activities by means of their own domestic law.[20] On this view, unilateralism becomes a justifiable form of delegated enforcement, backed by the coercive power of the regulating State in circumstances where the international system has failed to provide an appropriate and effective forum for adjudication.[21]

States adopting unilateral measures may also be concerned by the limitations of traditional mechanisms of international law-making and enforcement which do not impose obligations directly on multinational corporations or on non-State actors, even when they are the key participants in a regulated activity.[22] Moreover, although States are the principal bearers of obligations under international law, as a result of internal political crisis in many cases they may not be in a position to carry out the enforcement obligations expected of them. For example, there has been a near paralysis in the functioning of key judicial and administrative institutions in the principal jurisdictions affected by conflict minerals in the Great Lakes Region of Africa for considerable periods of time. Imposing obligations directly on corporations has the benefit of effectiveness, even when there are no hard sanctions attached to duties imposed. For all the talk of coercion underpinning treaty and customary regimes, the element of compulsion is largely illusory in an international system in which the enforcement of State obligations is decentralised and largely optional.

For their supporters, unilateral measures have the advantage of imposing obligations directly on those who are central to the realisation of the laws'

[19] On the optional and non-binding nature of dispute mechanisms see Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 33 and Statute of the International Court of Justice art 36(2).

[20] See generally legislation discussed in K Dawkins, 'Ecolabelling: Consumers' Right-to-Know or Restrictive Business Practice?' in R Wolfrum (ed), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* (Springer 1996) 551; see also the contested jurisdictional ambit of Canada's Coastal Fisheries Protection Act, RSC 1985 c. C-33, which extended Canada's jurisdiction competence over foreign vessels in the high seas in order to enforce its unilaterally determined conservation and management measures and was the subject matter of a dispute before the International Court of Justice; see *Fisheries Jurisdiction Case* (*Spain v Canada*), Jurisdiction of the Court, Judgment [1998] ICJ Rep 432. The dispute did not proceed to the merits, and the Court did not make a formal finding on the legality of Canada's unilateral measures as a result of a preliminary finding by the ICJ that it did not have jurisdiction.

[21] A Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors' in P Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005) 37, 58.

[22] HH Koh, 'Transnational Public Law Litigation' (1991) 100 YaleLJ 2347.

objectives and backing them up with a realistic prospect of enforcement. But how can unilateralism be rationalised with other values protected by collective consent in international law-making? How does one ensure the democratic participation of those who will be affected by such legislation? How does one guarantee the availability of public accountability mechanisms to enforce what are, in effect, public law obligations? Later sections of this article will demonstrate that the main shortcoming of the Dodd-Frank Act and the EU conflict minerals legislation is their failure to provide meaningful engagement opportunities for the affected populations. Moreover, the imperial history of international law and the subjugation of peoples in the colonial project means that attempts by third States to project unilaterally their law enforcement powers extraterritorially is immediately suspect as a matter of both doctrine and policy.[23] The next section, however, examines some conceptual and normative justifications which have been put forward by jurists in support of unilateralism.

B. Unilateral Legislation as an Implicit Consequence of Trusteeship

The idea that States have obligations of trusteeship, and a concomitant duty to act for the common good, has recently been advanced as a justification for unilateral legislation by Professor Eyal Benvenisti.[24] Whilst his work is not concerned with conflict minerals as such, much thought is given to the idea of extraterritorial regulation by States being a 'public good' which is undertaken in the interest of humanity. He argues that statehood involves not just a bundle of rights but of obligations too, and in particular obligations of trusteeship which are owed to humanity as a whole. He envisages a collective duty on States to exercise their plenary powers not just for the benefit of their own nationals but for the benefit of third State nationals as well. Governments, he argues, are agents of human society and not constrained by traditional rules restricting their jurisdictional competence to the territory of their State.

He sees unilateral legislation as unproblematic, provided it is in the public interest and directed at rectifying 'global bads'. For him, 'Sovereignty should be regarded as embedded in a more encompassing global order, which is a source not only of powers and rights, but also of obligations that essentially require sovereigns to exercise their authority in ways that promote global goods while taking the interests of all affected individuals into account.'[25] His main argument is that recalcitrant States, who may have their own

[23] Anghie (n 4).

[24] Professor Benvenisti's central arguments were first mooted in a highly influential article: E Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 AJIL 295, and have more recently been developed in a collection of essays under his editorship: E Benvenisti and G Nolte, *Community Interests Across International Law* (Oxford University Press 2018) Introduction.

[25] E Benvenisti, *The Law of Global Governance* (Brill Nijhoff 2014).

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reasons for resisting regulation, should not be allowed to employ what are effectively unilateral vetoes against the progress of international law.[26] He further argues that those who want to nudge the law in a more progressive direction should be permitted to do so, provided that they take into account the interests of others when devising policies. For the same reason, he argues that third State nationals—including foreign States—affected by such unilateral policies must consider complying with them because of their own obligations as trustees for the promotion of global welfare.[27] He is, of course, conscious of the real danger that such unilateral measures might be open to manipulation and believes that they must be subject to robust safeguards to ensure they are legitimate and for the benefit of third State nationals.[28] The safeguards mooted include providing meaningful opportunities for third State nationals to have their interests taken into account and to challenge the resulting legislation, preferably on the same terms as are available for nationals. Benvenisti's trusteeship concept is rooted in what he sees as a radical shift in international law from bilateral duties to a model that is rooted in a sense of community obligations; the obligation to legislate for foreign interests arises even in the absence of a treaty commitment to do so.[29] Seen in another context, it is an attempt to give effect to '*erga omnes*' obligations by decentralising their enforcement to individual States.

This is not the place for an extended critique of Benvenisti's thesis but it is clear that there are profound flaws in the trusteeship concept. As critics of Benvenisti have so ably pointed out, there is virtually no evidence that States see themselves as trustees of humanity or that international law itself confers such a broad power of legislative self-help.[30] On the contrary, the general trend since 1945 has been to limit the instances where self-help is available to individual States, and, when available, its use is heavily circumscribed by the institutions of international law.[31] The controversy surrounding the putative existence of the responsibility to protect is another illustration of there being no general obligation to rectify 'global public bads' which enjoys

[26] ibid 125; see also N Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997).

[27] There are, in fact, echoes of this idea in the 8th principle articulated in J Rawls, *The Law of Peoples* (Harvard University Press 2001) 37, under which 'Peoples have a duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political and social regime.'

[28] E Benvenisti, 'Legislating for Humanity: May States Compel Foreigners to Promote Global Welfare?' (2013) Global Trust Working Paper Series No 2/2013 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2646880>.

[29] ibid 4; Benvenisti, *The Law of Global Governance* (n 25) 129.

[30] C McCrudden, 'AJIL Symposium: Comment on Eyal Benvenisti, Sovereigns as Trustees of Humanity' (Opinio Juris, 25 July 2013) <http://opiniojuris.org/2013/07/25/ajil-symposium-comment-on-eyal-benvenisti-sovereigns-as-trustees-of-humanity/>.

[31] O Elagab, 'The Legality of Non-Forcible Counter-Measures in International Law' in E Cannizzaro and BI Bonafè (eds), *Countermeasures in International Law* (Oxford University Press 2015).

general acceptance in international law.[32] Secondly, the thesis presupposes a social consensus concerning the 'public bads' remediable by individual State action, but there is little supporting evidence for this in practice. How can a trusteeship be useful when it is to operate in an inter-State structure dominated by rich countries and where poor States cannot exercise meaningful oversight? In any case, bystander obligations in international law, as in national law, remain the exception.[33]

Moreover, there is considerable evidence, at least in relation to the Dodd-Frank Act, that the legislation was predominantly undertaken to safeguard the reputational and commercial interests of the participating States. The clearest evidence of this is the proposal by the Trump administration to repeal section 1502 of the Dodd-Frank Act on the grounds that it could no longer be regarded as being in the security or economic interests of the United States, without any regard being paid to the infrastructure changes that the Congolese had implemented in order to comply with the legislation or the extreme hardship anticipated.[34] It is also hard to escape from the neo-colonial overtones that underlie the trusteeship argument:[35] after all, this is a power that can only be exercised by powerful States with enough leverage to compel others to comply with standards that they impose.[36] Furthermore, there is also the unresolved question of which 'others' come within the ambit of protection.[37] How do you ensure the meaningful participation of such a transient and heterogeneous constituency? The rules on standing in almost all legal systems deny judicial review to applicants who are not specifically affected by a decision. In any event, if the decision to act in the interest of humanity is a political decision, and not a legal obligation, how much oversight can courts realistically have over its exercise? As will be argued in Section V of this article, the content of the Dodd-Frank Act and the challenges to its constitutionality by way of judicial review do not support the empirical assumptions that underpin Benvenisti's humanity thesis.[38]

[32] G Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Brookings Institution Press 2008).

[33] See generally, M Hakimi, 'State Bystander Responsibility' (2010) 21 EJIL 344.

[34] In February 2017, a leaked version of a draft executive memorandum was widely in circulation indicating that the Trump Administration planned to suspend Section 1502 of the Dodd-Frank Act. See E Pilkington, 'Proposed Trump Executive Order Would Allow US Firms to Sell "Conflict Minerals"' (*TheGuardian.com*, 8 February 2017) <https://www.theguardian.com/us-news/2017/feb/08/trump-administration-order-conflict-mineral-regulations>.

[35] See F Sayre, 'Arising from the United Nations Trusteeship System' (1948) 42 AJIL 263; S Pahuja, *Decolonising International Law* (Cambridge University Press 2011) 5.

[36] McCrudden (n 30).

[37] J Klabbers, 'AJIL Symposium: On Medium and Message' (Opinio Juris, 25 July 2013) <http://opiniojuris.org/2013/07/25/ajil-symposium-on-medium-and-message/>.

[38] ibid. But for a sympathetic reception, see A von Bogdandy and D Schmalz, 'AJIL Symposium: Pushing Benvenisti Further – International Sovereignty as a Relative Concept' (Opinio Juris, 24 July 2013) <http://opiniojuris.org/2013/07/24/ajil-symposium-pushing-benvenisti-further-international-sovereignty-as-a-relative-concept/>.

C. Leif Wenar's Popular Sovereignty

Perhaps the most compelling recent case study in support of unilateral State legislation has been put forward by the philosopher Leif Wenar, who argues that responsible democracies should have the legislative power to stop kleptocratic regimes selling their natural resources on the international market.[39] Wenar's thesis is rooted in a radical concept of popular sovereignty, by which undemocratic regimes not based on the consent of the governed are automatically disentitled from transacting on behalf of the population. He proposes a series of clean trade acts that would create *de facto* embargoes on trade with kleptocratic governments in situations where such trade has already occured, for instance by circumventing the restrictions in place. He argues that responsible democracies are required to create a trust fund in which the proceeds of such sales are to be held for the future benefit of the population.

Wenar's project is not short on ambition and although confined to oil, many of the arguments advanced could apply to the regulation of trade in any natural resource. He contemplates two distinct forms of legislative responses. First, a 'clean oil' bill as a result of which responsible democracies would only be able to trade with regimes that are fully accountable to their populations for the use of natural resources. Wenar is alive to the danger that not all States will subscribe to his progressive agenda; in fact, a policy of boycott may benefit regimes not inhibited by ethical considerations. He therefore also proposes what is, in all but name, a penal tax on foreign States. States choosing to continue trading in natural resources with unaccountable regimes will themselves be subjected to heavy penalties which would be paid into a trust fund for the future benefit of populations deprived of natural resource revenue, or until such time that their sovereignty is restored to them.

The problem with Wenar's thesis is that it does not seem to rest on any source of authority or power, normative or political, found in existing practice. It is an example of unilateral legislation driven purely by the logic of political expediency. Such a comprehensive framework of what is, in effect, economic sabotage stands in tension with attempts to eradicate vigilante justice in the international system since 1945. Moreover, he does not address how such widespread economic coercion can be reconciled with an international system committed, at least formally, to the political equality of States and which has outlawed in express terms all forms of intervention in the internal affairs of States, including through economic coercion.[40] Furthermore, the central plank of the thesis rests on a presumed requirement of democratic accountability of governments to their populations as a matter of international

[39] L Wenar, *Blood Oil: Tyrants, Violence, and the Rules That Run the World* (Oxford University Press 2015).

[40] See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America), (Merits)* [1986] ICJ Rep 14.

law. Yet we know that this remains an aspiration and that the *lex lata* of international law generally has not insisted on a hard form of accountability.[41] Although this is desirable and international law may well be moving in that direction, there is nothing to suggest that it is as yet a peremptory requirement. In many ways, Wenar's thesis is fundamentally regressive. In so far as it is an attempt to entrench a privileged position for liberal democratic States, it is a throwback to the dark days when only 'civilised nations' could be participants in the law of nations. Moreover, he is surprisingly unperturbed by the neo-colonial overtones that underlie his project—or the lack of regard for his 'objects' of justice. Tellingly, the democratic States singled out as entitled to take the lead in unilateral enforcement action are predominantly, if not exclusively, in the Global North.

It is easy to dismiss Wenar's thesis as a particular version of a philosopher's utopia, except that in many areas States are already enacting intrusive forms of legislation which are intended to take effect extraterritorially. This is especially so in conflict situations where sovereign powers are contested and governance structures work for the benefit of a small ruling elite. The regulation of the sale of tropical timber,[42] corruption of foreign State officials, and trade in conflict minerals,[43] although only directed at those within their jurisdictional competence, have far-reaching effects on governance structures in third States. The issues are complex, but the reality is that these interventions are not value free. There is considerable purchase in the argument that those who disenfranchise their own populations undermine democracy and the rule of law and that they must not be allowed to insist on their sovereign prerogatives. Yet foreign intervention that undermines the core foundations of the political autonomy of States is also in fundamental tension with the sovereignty of the regulated. Clearly, the questions of legitimacy that such measures raise cannot just be swept to one side.

These arguments in support of unilateralism are, in many ways, variants of the more general challenges to the traditional State-centred structures of international law brought on by globalisation.[44] Yet if the challenges of globalisation require alternative structures of governance, these need to be adopted by consensus, or at least with the substantial involvement of the key constituencies affected by the decision. Both Benvenisti and Wenar are

[41] J Crawford, *Chance, Order, Change: The Course of International Law: General Course on Public International Law* (Brill Nijhoff 2014); B Roth, *Sovereign Equality and Moral Disagreement* (Oxford University Press 2011) 82–3; WM Reisman, 'Why Regime Change Is (Almost Always) a Bad Idea' (2004) 98 AJIL 516–17.

[42] European Union Regulation (EU) No 995/2010 of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (text with EEA relevance) [2010] OJ L 295/23.

[43] B Kingsbury, N Krisch and R Stewart, 'The Emergence of Global Administrative Law' (2005) 68 LCP 15.

[44] J Habermas, 'The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society' (2008) 15 Constellations 445–6.

ambitious in their efforts to find workable solutions to the enforcement problem in international law; but both are surprisingly myopic in their failure to fully take on board international law's imperial history. There is already enough resistance to implementing multilaterally agreed regimes because of the way in which they largely work to the advantage of rich countries and to the disadvantage of the poor, and it is therefore hardly surprising that these unilateral regimes have been resisted and, when implemented, barely effective.

Perhaps the strongest criticism that can be made against the interventionist agenda proposed by Wenar is that it ignores the fundamental point that international law is a continuing balancing act between the twin demands of justice and order, and that durable justice cannot be achieved by external pressure. Walzer's argument that there must be presumed to be a natural fit between the State and the population is particularly apt, and it is not for outsiders to second-guess what amount to acceptable arrangements between a State and its nationals. In other words, governance structures, however unacceptable, can only be altered through internal processes and not imposed by foreign legislatures, however well-intentioned.[45]

D. Other Pragmatic Arguments in Support of Unilateral Legislation

Unilateral law-making or enforcement authorised by a multilateral treaty regime presents no conceptual problems for positivist approaches to international law, where it can properly be regarded as a form of delegated enforcement. What remains difficult are the parameters of such delegation and the safeguards needed against manipulation for collateral agendas.[46] In a number of cases delegated authority has been implied from a liberal reading of Security Council Resolutions and other regulatory institutions that promulgate standards but leave to individual States the modalities of implementation. Some argue that States are allowed to depart from the positivist/voluntarist framework of international law if they are taking action to protect fundamental values having the character of *jus cogens*, such as those underpinning human rights regimes.[47] Although not stated in explicit terms, these arguments have certainly informed the unilateral measures taken relating to the regulation of natural resources in conflict zones, even if this departs from the traditional understanding that the effect of a *jus cogens* norm is limited to invalidating inconsistent treaty or customary law regimes. *Jus cogens* has never been understood as authorising unilateral regimes of enforcement.

In some cases, a normative regime delegates enforcement to individual States, either because it lacks an institutional enforcement framework or

[45] M Walzer, 'The Moral Standing of States: A Response to Four Critics' (1980) 9 PPA 209–12, 216.

[46] Hakimi (n 17) 105; D Bodansky, 'What's So Bad about Unilateral Action to Protect the Environment?' (2000) 11 EJIL 339.

[47] P Craig, *UK, EU and Global Administrative Law* (Cambridge University Press 2015) 653.

because those which exist are generally ineffective. Unilateral measures may also occur when there has been international inaction, and without direct authority from any international instrument. In these cases, unilateral legislation may act as a catalyst for the development of the law or guide it in the right direction.[48] On one view, the Security Council's commodity sanctions—calling on States to refrain from trade in conflict minerals in circumstances where these would benefit rebel groups—gave member States a wide discretion as to the exact modalities of enforcement.[49]

It is also evident that by avoiding the State-centric constraints of general international law, States acting unilaterally are able to exercise authority directly over multinational corporations and non-State groups. Yet caution is still required in evaluating unilateralism: far from being ideologically neutral, it will be argued that interventions are carefully calibrated to advance the commercial interests of the intervening States. They are only peripherally directed at putting an end to human rights violations.

III. DEMOCRATIC ARGUMENTS AGAINST UNILATERAL LEGISLATION

A. Concerns about Asymmetry of Power

There are nevertheless powerful democratic arguments against the exercise of unilateral legislation, some of which have already been alluded to. In general, unilateral legislation is viewed with suspicion because it is a form of power that can only be exercised by a few, powerful States and undertaken in the absence of any general agreement on its necessity by those affected.[50] As such, it is a threat to both pluralism as a value and attempts to ground international decision-making in objective rule-of-law principles. Moreover, it is a power that easily gives rise to concerns about jurisdictional overreach, and the risk that it can be used to serve the imperial agenda of the legislating States by displacing negotiated rules with self-serving regulatory measures.[51]

The disparities of power between the regulator and the regulated and the heterogeneous nature of the constituency affected by legislation mean that in practice there is hardly any direct accountability by the legislating States to those affected by their decisions. In many cases, third States have no choice but to comply with the relevant instrument, especially when this is insisted upon as a condition of securing access to foreign markets.

Unilateral legislation is, in fact, only possible where there is an asymmetry of political power—with States in the Global South primarily at the receiving end of its regulatory overreach. Put simply, unilateral legislation is a power that

[48] Hakimi (n 17).

[49] UNSC Res 1952 (n 7).

[50] L Partzsch *'The New EU Conflict Minerals Regulation: Normative Power in International Relations?* (2018) 9(4) Global Policy 481ff.

[51] J Cohen, *Globalisation and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism* (Cambridge University Press 2012).

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lacks an egalitarian spirit at its core, since it can only be exercised by hegemonic States, who are usually acting in the shadow of domestic political interests.[52] Unilateral regulatory regimes are to be resisted not because of their own inherent defects but because they perpetuate inequality and disregard for the interests of the objects of regulation.[53] Moreover, by sidelining multilateral institutions as the appropriate fora for deliberation, unilateral legislation poses a direct threat to a rules-based international order: States who dislike rules can simply walk away from them and adopt new ones that are better aligned to their own interests.

It is possible to argue that unilateral legislation is unproblematic when it gives effect to generally agreed standards. However, in many cases unilateral legislation is enacted in circumstances where multilateral processes have failed, or where disagreements between States are so pervasive that it is impossible to agree on binding instruments. In some cases, the failure to agree on a treaty or a hard version of a rule may indeed be the appropriate outcome of democratic processes of deliberation between States. Failure to enact a treaty or arrive at an agreed rule of customary law does not necessarily amount to a failure of the international law project; international law, like other legal constructs, may sometimes simply provide forums for managing conflict without producing enforceable rules.[54] To unilaterally legislate when multilateral processes have failed to produce an outcome could be seen as an attempt to sabotage the will of participating States.

B. Accountability Deficit

There is a general expectation that the legitimacy of legislation depends upon its conformity with certain basic democratic standards. In national law, legislation derives its authority from the democratic mandate given by the people to their representatives. The processes of deliberation that accompany treaty-making ensures that the interests of those likely to be affected by a resulting regulatory regime are taken into account through processes of mutual accommodation. Moreover, dualism remains the dominant framework through which international law enters domestic systems; in effect, treaties, which are invariably the result of political compromises, have no effect within the domestic legal system without the consent of elected representatives of the people.[55] There is also continuing oversight in the form of opportunities for consultation and, at periodic intervals, the legislative mandate can be reviewed or withdrawn.

But how can democratic accountability be secured when foreign parliaments legislate extraterritorially? The domestic legislature would find it difficult to

[52] de Chazournes (n 14) 318.
[53] Kingsbury (n 16) 599–625.
[54] J Waldron, *Law and Disagreement* (Oxford University Press 1999).
[55] See D Feldman, 'The Internationalization of Public Law and Its Impact on the UK' in J Jowell, D Oliver and C O'Cinneide (eds), *The Changing Constitution* (Oxford University Press 2015); C McLachlan, *Foreign Relations Law* (Cambridge University Press 2014) 78–80.

take into account the concerns of foreign stakeholders and appropriately articulate their claims. The consultation processes that preceded the EU conflict minerals legislation and the Dodd-Frank Act were largely dominated by powerful economic interests.[56] Although NGOs participated, including those lobbying for affected groups, it is increasingly open to question whether many of these lobby groups are effective representatives given that most have their own agendas, often in part influenced by the priorities of their financial donors.[57] It is true that further supervision can be provided by oversight institutions such as courts but as the litigation under the Dodd-Frank Act, considered in the final section, demonstrates, such institutional structures are generally wholly inappropriate for taking into account the interests of the foreign populations affected. In sum, the basic premises of unilateral measures are flawed because the processes of deliberation that precede law-making exclude those affected by them. Thus much unilateral legislation has largely been developed without any coherent theory of accountability to relevant outside interests. Moreover, even if it is recognised that the State adopting such measures should take into account the interests of those affected, can that foreign population realistically insist on accountability? In many jurisdictions, the fact that a group is affected by legislation does not necessarily translate into constitutionally recognised standing before domestic courts.

Moreover, since much of such regulation is directed at corporations it will in many cases be difficult for the foreign populations concerned to establish a causal relationship between a particular activity and harm and to identify the appropriate entity from whom to demand accountability. There is the additional danger that, in the absence of an organised framework of oversight, unilateral acts lend themselves to the risk of chaotic over-regulation by a multiplicity of States.

IV. UNILATERAL REGULATION AND NATURAL RESOURCES—THE LEGISLATIVE INITIATIVES

A. The Problem Restated

The preceding sections have outlined the main arguments advanced for and against unilateral legislation in recent literature. The discussion has also highlighted rule of law concerns inherent in unilateral legislation. The

[56] See for instance the dominance of industry in the consultation process leading to the adoption of EU legislation. 'Public Consultation on a Possible EU Initiative on responsible sourcing of minerals originating from conflict-affected and high-risk areas: Contributions' (European Commission) <http://trade.ec.europa.eu/consultations-archive/conflict-minerals/>; RSN Staff, 'Group of Investors Urge European Union to Adopt Stronger Conflict Minerals Legislation' (Responsible Sourcing Network, 21 October 2014) <https://www.sourcingnetwork.org/blog/2014/10/21/group-of-investors-urge-european-union-to-adopt-stronger-con.html>.

[57] Cuvelier *et al.* (n 13) 7.

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systemic violation of human rights remains a particularly protracted problem in civil wars, especially in political communities that possess abundant natural resources. Yet the precise nexus between armed conflict, natural resources and human rights violations remains deeply controversial and has proved a major stumbling block in developing a cohesive multilateral regime. Is the appropriate response to the problem inherently a collective one, or should individual well-meaning States be encouraged to chart their own path in developing appropriate responses without the constraints of deliberation in a multilateral forum? How should States ensure that natural resource revenues are not a primary conduit for human rights violations and other atrocities committed in situations of armed conflict?

The answers to these questions are far from straightforward, yet in the absence of any empirical evidence they have been answered affirmatively, informed public policy debates, and have served as the basic pillars supporting the two legislative initiatives by the US[58] and the EU in this field.[59] The relevant instruments were adopted by States acting on their own accord, under national law or, in the case of the EU, under a regional instrument. They derive their authority exclusively from 'domestic institutions', thus bypassing multilateral processes that would normally engage affected States.[60] They are of interest because they operate extraterritorially, even though broadly speaking they have been arrived at without due regard to the participatory processes that normally makes legislation legitimate. The existence of regional instruments negotiated under the auspices of the Great Lakes Peace process basically on the same subject matter, and with local participation, raises questions concerning the necessity of States 'going it alone' instead of consolidating these regional initiatives.[61]

Attempts have, of course, been made at the multilateral level to support regulatory regimes that would effectively address the systemic problems generated by the funding of rebel groups through trade in conflict minerals. These initiatives, both public and private, are varied in nature and have included the sustained efforts by the Security Council Expert Group on the Illegal Exploitation of Natural Resources to highlight the link between revenues generated by natural resources and armed conflict, and what can be

[58] Section 1502, Dodd-Frank Wall Street Reform and Consumer Protection Act, 2010 (to accompany H.R. 4173) United States (henceforth called the Dodd-Frank Reform).

[59] It is also the declared legal basis of the Kimberley Certification Process that applies to conflict Minerals.

[60] China is the only other country to have recently taken up significant unilateral initiatives but these are broadly voluntary and do not raise concerns of legislative overreach since they do not impinge on the administrative structures of natural resource of States; see China Chamber of Commerce, 'The Chinese Due Diligence Guidance for Responsible Mineral Supply Chains' <http://www.cccmc.org.cn/docs/2016-05/20160503161408153738.pdf>.

[61] International Conference on the Great Lakes Region, Protocol on the Illegal Exploitation of Natural Resources in the Great Lakes Region (30 November 2006).

done to break that chain.[62] The Council has also imposed targeted sanctions and placed trade restrictions on corporations that were found to be complicit in the illegal trade in conflict minerals.[63] It called on member States to implement its resolutions and stop rebel groups from profiting from the trade in natural resources, thus providing the impetus for action by the US and the EU.[64]

Regulating conflict minerals has also been a central concern of intergovernmental organisations operating in the economic field. The increased public sensitivity to the importance of human rights and environmental values has made many economic organisations realise that unethical investment decisions have little purchase with consumers and is not in the interest of the corporations that they represent or of member States.[65] The OECD remains a leader in this field, but sectoral initiatives have also been adopted in relation to the diamond trade,[66] timber,[67] tin and gold.[68] These regulatory initiatives have the distinct advantage of reaching out to all stake holders and not just to States. At the regional level, the Pact on Security, Stability and Development in the Great Lakes Region stands out as the first comprehensive instrument in a region that has been at the forefront of the trade in conflict minerals since the first Congo war in 1996. It obligates the parties to adopt a 'regional certification mechanism for the exploitation, monitoring and verification of natural resources within the Great Lakes Region'.[69]

None of these initiatives have resulted in hard, binding obligations and enforcement has so far remained patchy and discretionary. Nevertheless, their very existence raises profound questions about the necessity of unilateral initiatives of the kind under consideration, since the case for unilateralism is only credible when there are no viable multilateral processes in place.[70] Moreover, extraction of natural resources by unrepresentative governments, as opposed to by rebels, has received far less attention even though they give

[62] UNSC, 'Report of the Panel of Experts on Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo' (16 October 2002) UN Doc S/2002/1146; UNSC, 'Report of the Group of Experts' (n 1).

[63] UNSC, 'Addendum to the Report of the Panel of Experts on Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo' (13 November 2001) UN Doc S/2001/1072.

[64] UNSC Res 1952 (n 7).

[65] See United Nations Office of the High Commissioner for Human Rights (OHCHR), 'Guiding Principles on Business and Human Rights' (United Nations, 2011); OECD *Due Diligence Guidance* (n 8); JG Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights' (2017) Corporate Responsibility Initiative, Harvard Kennedy School, Working Paper No 67 <https://research.hks.harvard.edu/publications/getFile.aspx?Id=1564>.

[66] Kimberley Certification Process <http://www.KimberleyProcess.com/home/index-en.html>; JE Wetzel, 'Targeted Economic Measures to Curb Armed Conflict? The Kimberley Process on the Trade in "Conflict Diamonds"' in N Quenivet and S Shah-Davis (eds), *International Law and Armed Conflict: Challenges in the 21st Century* (TMC Asser Press 2010).

[67] See Commission of the European Communities, Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan, 2003 <http://www.euflegt.efi.int/flegt-action-plan>.

[68] See OECD Due Diligence Guidance (n 8).

[69] International Conference on the Great Lakes Region, Pact on Security, Stability and Development for the Great Lakes Region (15 December 2016) art 9.

[70] Hakimi (n 17).

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rise to principally the same concerns as those generated by rebel groups, especially in conflicts characterised by widespread human rights abuses on both sides.

The Dodd-Frank Act was passed into law by the US Congress as part of the reforms on financial regulation introduced in the wake of the 2008 financial crisis. Section 1502 of the Act introduced a provision specifically intended to stop companies from buying national resources from armed groups operating in the Democratic Republic of Congo (DRC) and adjoining countries.[71] The EU legislation was introduced in 2017 and has broadly similar legislative objectives but with a much wider geographical reach; it is intended to stop armed groups from obtaining mineral resources not just from the DRC but from all regions that are deemed unstable or are affected by armed conflict.[72] Both instruments were acts of 'domestic parliaments' addressed primarily to commercial operators who were appropriately within the jurisdiction of the legislating States and on the face of it both were consistent with international law principles governing the jurisdiction of States.

The remainder of this article focuses on these two initiatives by the US and the EU. They are of interest because they represent the first concerted efforts at imposing binding duties and, unusually, by deploying strategies that are fundamentally coercive and in many ways at odds with international law as a consent-based system. Although directed at economic actors within the jurisdiction of the acting States, they make demands on the administrative infrastructures of third States without any public law discourse. On the face of it, these non-consensual strategies are necessary as correctives to systemic failures in the regulation of conflict minerals under international law. Proponents argue that they are a worthwhile attempt to fill a regulatory *lacuna* where the normative framework of international law is weak or enforcement is lacking.[73] It has also been argued that there is usually a mismatch between those coming within the regulatory ambit of public international law, primarily States, and multinationals and non-State groups who wield leverage but remain beyond its reach.[74] Nevertheless, as domestic initiatives that are intended to operate extraterritorially, the two instruments raise fundamental questions of legitimacy and their compatibility with what is still a

[71] Dodd-Frank Reform Act, Sec.1502; CR Taylor, 'Conflict Minerals and SEC Disclosure Regulation' (2012) 105 HBLR <http://www.hblr.org/2012/01/conflict-minerals-and-sec-disclosure-regulation/>; Canada introduced a similar legislation but it failed to garner support and was eventually shelved.

[72] European Union Regulation (EU) 2017/821 of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas OJ L 130/1 (henceforth called EU Conflict Minerals Regulation).

[73] M Ayogu and Z Lewis, 'Conflict Minerals: An Assessment of the Dodd-Frank Act' (Op-Ed, Brookings, 3 October 2011) <https://www.brookings.edu/opinions/conflict-minerals-an-assessment-of-the-dodd-frank-act/>.

[74] Ruggie (n 65); see generally, RB Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108 AJIL 211.

predominantly consent-based and territorially circumscribed law-making framework. The due diligence obligations imposed on European or American corporations by the two instruments, both mandate and are in fact dependent on the introduction of extensive governance reforms in the targeted States, in the form of internal audit systems and compliance certification processes. It is, in effect, a bold claim to the exercise of extraterritorial jurisdiction without adherence to processes that confer legitimacy. Moreover, in the case of the DRC the changes necessitated by the legislation have been the source of profound resentment by the local populations, who were not consulted about critical infrastructure decisions affecting their livelihood.[75] Yet the literature on unilateral legislation has largely eschewed any meaningful discussion of their compatibility with the project of international law.[76]

It is argued that by focusing on rebels as the appropriate target of disciplinary condemnation in resource transactions, the core premises of these instruments are also fundamentally flawed and the deference that they show to ruling governments is broadly unjustified.[77] First, they are based on a false narrative that the primary force driving these conflicts is the presence of natural resources.[78] The existence of a prolonged civil war is in itself an indication that public power is contested and that no one particular institution or government should be privileged in natural resource matters. Moreover, the democratic case for civil disobedience, and even the overthrow of the incumbent regime, as being broadly consistent with Congolese self-determination is lost in the zealous attempt to deprive rebels of the economic means of realising their political aspirations under international law.[79] Focussing on rebels has the perverse effect of legitimising looting by the Congolese State and others.

[75] LWolfe, 'How Dodd-Frank Is Failing Congo' (Foreign Policy, 2 February 2015) <https://foreignpolicy.com/2015/02/02/how-dodd-frank-is-failing-congo-mining-conflict-minerals/>.

[76] N Stoo, M Verpoorten and P van der Windt, 'More Legislation, More Violence? The Impact of Dodd-Frank in the DRC' (2018) 13 PLoS One; B Mbubi, 'Let's Be Frank: The Impact of Dodd-Frank and International Legislation on Congolese Extractive Industry' (Carnegiecouncil.org, 11 October 2017) <https://www.carnegiecouncil.org/publications/ethics_online/impact-of-dodd-frank-and-international-legislation-on-congolese-extractive-industry>.

[77] EU Conflict Minerals Regulation (n 72) para 7 provides 'controlling trade in minerals from conflict areas, is one of the ways of eliminating the financing of armed groups'. EU Conflict Minerals Regulation, para 10 states: 'Union citizens and civil society actors have raised awareness with respect to Union economic operators not being held accountable for their potential connection to the illicit extraction of and trade in minerals from conflict areas. Such minerals, potentially present in consumer products, link customers to conflicts that have severe impacts on human rights, in particular the rights of women, as armed groups often use mass rape as a deliberate strategy to intimidate and control local populations in order to preserve their interest. For this reason, Union citizens have requested, in particular through petitions, that the commission make a legislative proposal to the European parliament and to the Council to hold economic operators accountable under the relevant guidelines as established by the UN and OECD.'

[78] Dodd-Frank Reform, Sec.1502 (a); J Verweijen, *Stable Instability: Political Settlements and Armed Groups in the Congo* (Rift Valley Institute, Usalama Project: Governance in Conflict 2016)

[79] ICESCR (n 3) art 1; ICCPR (n 3) art 1; see generally, J Crawford, 'The Right of Self-Determination in International Law: Its Development and Future' in P Alston (ed), *People's Rights* (Oxford University Press 2001).

The focus on rebels in these instruments, it is suggested, is also evidence of a more systemic malaise in the international literature; a failure to analyse the legal consequences of domestic power struggles and their impact on international rights and obligations. It is suggested that the focus on 'rebels' is misplaced in prolonged civil wars where governmental abuse of natural resources in fact may have precipitated conflict and where violations and atrocities are committed by both sides.[80] Indeed, the need to dispense with the government as the principal unit of authority may be long overdue. It is suggested that the binary distinction between legitimate and illegitimate sources of power makes no sense in conflicts where both sides may lack democratic credibility and where the rebels themselves may in fact be a political force for progressive change.[81] The two legislative instruments under discussion are likely to be of marginal effect precisely because they duplicate the systemic weaknesses of multilateral regimes by legitimising governmental structures of kleptocracy and excluding rebels from any meaningful discussion on uses to which natural resources should be put.

Moreover, the roots of many such conflicts may actually lie in the systematic exclusion of large segments of the population from the resource bounty. To assign exclusive authority to a discredited ruling elite stands in tension with the basic justifications for foreign legislation—which are that they are attempts to give meaning to the principle of permanent sovereignty and that the resources of a territory belong to their populations.[82]

In the specific case of the DRC, the US legislation also ignores the complex interdependency that exists between the Congolese State and armed groups within a general culture of military entrepreneurship. Many of these groups are periodically co-opted into the Congolese army. The argument that the main contributing factor to the Congolese civil war is the funding of armed groups through the country's natural resources[83] has consistently been shown to be fundamentally reductionist and not supported by empirical evidence.[84] Both the Dodd-Frank and EU Conflict Minerals legislation reveal a general lack of an effective normative framework for managing revolutions in

[80] Cuvelier *et al.* (n 13).

[81] J Verweijen, *The Ambiguity of Militarization: The Complex Interaction between the Congolese Armed Forces and Civilians in the Kivu provinces, Eastern DR Congo*, PhD dissertation, (Utrecht University) Utrecht 2015.

[82] See United Nations General Assembly Res 1803 (XVII) 'Permanent Sovereignty over Natural Resources' (14 December 1962) UN Doc A/5217.

[83] See P Collier and A Hoeffler, 'Greed and Grievance in Civil War' (2004) 56 Oxford Economic Papers 563.

[84] See L Nathan, 'The Frightful Inadequacy of Most of the Statistics': A Critique of Collier and Hoeffler on the Causes of Civil War' (2005) LSE, Crisis States Development Research Centre, Discussion Paper No.11; H Ohmura, 'Civil War, Natural Resources, and Democracy – When Do Natural Resources Lead to Civil War?' (2014) The Hikone Ronso 399; This argument was forcefully made in the litigation contesting the legality of the Dodd-Frank Act; see *National Association of Manufacturers v. Securities and Exchange Commission*, United States Court of Appeals for the District of Columbia Circuit, No. 13-5252 (18 August 2015) at 21, fn 21.

modern international law; there is an almost complete inability to come up with a workable criterion for allocating competence in situations where there are crises of political authority and where armed groups are not outliers but are in fact integrated in both the social and governance structures of the community as agents of social change. In sum, the Dodd-Frank Act and the EU conflict minerals legislation perpetuate the same reductionist arguments that only governments have a right to sell the resources of the territory.[85]

B. Section 1502 of the Dodd-Frank Act

The previous section has outlined the broad systemic problems inherent in the regulation of natural resources in conflict zones and the general lack of accountability to those impacted by foreign legislation. It is now necessary to look at the key features of the two regulatory instruments in some detail. Section 1502 of the Dodd-Frank Act is to date the most significant national instrument that applies to the regulation of natural resources.[86] Much of the Act is a financial regulatory instrument, and is primarily directed at the commercial interests of corporations regulated by the US Securities and Exchange Commission (SEC) and affected American consumers. However, Section 1502 is different; it enshrines into law a unique form of corporate social responsibility by requiring corporations to exercise due diligence in the sourcing of minerals from the war-torn DRC and neighbouring countries.

Section 1502 requires any domestic or foreign company that is under an obligation to report to the SEC to provide evidence of the due diligence steps they have taken to ensure that tin, tungsten, tantalum and gold (3TGs, the main components used in mobile phones, laptops and other consumer electronics) that they have sourced from the DRC and nine neighbouring countries,[87] have not been obtained from rebels or in a manner that supports armed conflict in that country.[88] In each case, a US company is required to verify

[85] In the legal challenges to the Dodd-Frank before US courts, US companies argued that the measures expected of them were disproportionate and imposed in the absence of any objectively verifiable evidence of the link between revenues generated by trade in conflict minerals and rebel participation in the civil war. See *National Association of Manufacturers v Securities and Exchange Commission*, United States Court of Appeals D.C. (No. 13-5252) (18 August 2015).

[86] Dodd-Frank Reform; On 22 August 2012, the US Securities and Exchange Commission adopted regulations to facilitate disclosure requirements under the Act; see Securities and Exchange Commission, 17 CFR Parts 240 and 249b [Release No. 34-67716; File No. S7-40-10], RIN 3235-AK84.

[87] The listed countries are; Angola, Burundi, Central African Republic, Rwanda, Republic of Congo, South Sudan, Tanzania, Uganda and Zambia.

[88] The US Securities Exchange Committee suspended enforcement of due diligence requirements in April 2017 following a court case, but the bill has not been repealed; see SN Lynch, 'SEC Halts Some Enforcement of Conflict Minerals Rule Amid Review' (*Reuters*, 7 April 2017) <https://www.reuters.com/article/us-usa-sec-conflictminerals/sec-halts-some-enforcement-of-conflict-minerals-rule-amid-review-idUSKBN1792WX>. In November 2017, the US House of Representatives Financial Services Committee approved a bill that would repeal Section 1502 of the Dodd-Frank Act. The bill is awaiting approval by the US Senate and therefore current law remains in effect. See

that the minerals used or sold by it were not obtained from militia, warlords, or a trader who works for any of the warring parties. In addition to making this information available to regulators, corporations are also required to publicise this information on their websites. They must also disclose the due diligence measures they have taken to ensure that minerals used in their products are conflict free.[89] The information is intended to enable shareholders to make an informed decision about the economic returns of their investments and the negative humanitarian impact of trading in particular commodities sourced through questionable transactions.[90] Less publicised are the Act's provisions that are intended to eradicate corruption by all parties involved in natural resource transactions, including the governments. They require corporations to publish the amounts paid to State officials in return for access to mineral resources.[91]

On the face of it, the juridical basis of the Dodd-Frank Act is straightforward; the act only applies to corporations listed on the New York Stock Exchange and therefore appropriately within the jurisdiction of the United States. Nationality as a basis of jurisdiction is well established in international law and in general its extension to corporations as a category is unproblematic.[92] The act contemplates a territorially circumscribed enforcement jurisdiction, lying squarely with the domestic institutions in the State of the corporation's nationality, thus bypassing the structural weaknesses of the international system alluded to earlier. The obligations imposed on companies by the Act apply irrespective of the physical *situs* of the company or where the activities are carried out.[93]

Yet for companies to meet the additional reporting obligations as stipulated by the SEC, there is the expectation that the natural resource States should have adopted and executed an elaborate regulatory infrastructure that would make compliance with SEC obligations possible. The success of the Dodd-Frank Act's regulatory regime depends on on-site audit and certification processes by the DRC and neighbouring States. The effect of the legislation would, of course, be largely unremarkable if such regulatory structures were already a regular feature of mining operations in the DRC. This was not the case. In fact, the foreign legislation indirectly compelled the Congolese State to

Braumiller Law Group, 'Latest Updates in Conflict Minerals Law' (Lexology, 20 November 2017) <https://www.lexology.com/library/detail.aspx?g=d27d2d5f-df96-4506-8302-4b2958cb92a4>.

[89] Securities and Exchange Commission, OMB No. 3235-0697, Form SD Specialized Disclosure Report 3 (2014).

[90] In introducing the disclosure rules required by SEC, the Commission observed that the Rule provides information about a product 'that is material to an investor's undersanding of the risks in an issuers reputation and supply chain' Securities and Exchange Commission, Federal Register/Vol.77, No.177, (12 September 2012)/Rules and Regulations.

[91] United States Securities and Exchange Commission, 'SEC Adopts Rules Requiring Payment Disclosures by Resource Extraction Issuers' (22 August 2012) <https://www.sec.gov/news/press-release/2012-2012-164htm>.

[92] V Lowe, 'Jurisdiction' in M Evans (ed), *International Law* (Oxford University Press 2003).

[93] 15 USC, Section 78m – Periodical and other reports (2011).

suspend all mining operations whilst it put in place a patchwork of regulatory infrastructures which were costly and the benefits of which, for reasons explained below, were dubious.[94] Moreover, it is quite clear that compliance with the regulatory infrastructure was a condition for accessing the US market.

The Act's central failing lies in its treatment of the Congolese armed rebellion as a law and order question, in respect of which the Congolese government needs assistance.[95] It fails to address in a systematic way the political factors that have led to the mainstreaming of armed rebellion and the entrenchment of these armed groups within the political fabric of Congolese society, where local politicians consistently depend on them for influence and authority.[96] The proposal by the Trump administration to repeal the legislation on the basis that the Act puts US companies at a competitive disadvantage and is therefore broadly inconsistent with American commercial and security interests, without any consultation with the Congolese or concern for the impact of its repeal on the Congolese economy, raises profound questions concerning the motivation for, and the suitability of, a foreign instrument as a response to systemic problems of internal civil war.

C. EU Conflict Minerals Legislation

Notwithstanding profound misgivings about the Dodd-Frank Act and the threat by the Trump administration to suspend its operation, the US legislation has in fact acted as a catalyst for legislation elsewhere,[97] the most significant being the EU Conflict Minerals legislation.[98] The preambular provisions of the EU legislation expressly acknowledges that it is, in part, a means of

[94] BBC, 'DR Congo Bans Mining in Eastern Provinces' (BBC News, 11 September 2010) <https://www.bbc.com/news/world-africa-11269360>.

[95] Verweijen (n 81) 8.

[96] The International Crisis Group, 'The Congo's Transition Is Failing: Crisis in the Kivus' (Crisisgroup, 30 March 2005) <https://www.crisisgroup.org/africa/central-africa/democratic-republic-congo/congos-transition-failing-crisis-kivus>.

[97] China Chamber of Commerce of Metals and Chemicals, 'Guideline for Social Responsibility in Outbound Mining Investments' (2015) <http://images.mofcom.gov.cn/csr2/201812/20181224151850626.pdf>. The due diligence checks imposed by the legislation require companies to conduct risk assessments and confirm that their sources are not implicated in armed conflict. The regulations are however totally voluntary and there is little evidence that they are being complied with at present; see H Vella, 'Addressing Conflict Minerals – China Publishes "Groundbreaking" Guidelines' (*Mining Technology/Mining News and Views Updated Daily*, 13 November 2014) <https://www.mining-technology.com/features/featureaddressing-conflict-minerals-china-publishes-groundbreaking-guidelines-4439995/>.

[98] On 15 November 2017 the US House of Representatives Financial Services Committee approved a bill that if adopted would result in the repeal of Section 1502 of the Dodd-Frank Act; see Deloitte, 'Perspectives on New EU Conflict Minerals Regulation' (*T*axathandcom, 23 January 2018) <https://www.taxathand.com/article/9047/European-Union/2018/Perspectives-on-new-EU-Conflict-Minerals-Regulation>. The Canadian legislation, which was intended to achieve the same objectives, failed to garner parliamentary approval and was voted down in the Canadian Parliament; see House of Commons of Canada, Bill C-486, *Conflict Minerals Act* an act respecting corporate practices relating to the extraction, processing, purchase, trade and use of conflict minerals from the Great Lakes Region of Africa (1st Session, 41st Parliament, 2013).

implementing UN Security Council Resolution 1952 on the DRC, which had called on States to exercise supply chain diligence in sourcing minerals from that country.[99] It also takes inspiration from a number of voluntary instruments adopted by the OECD on responsible sourcing in conflict zones.[100] The legislation also gives effect to intra-EU policy commitments.[101] The conflict minerals legislation is an attempt to ensure that any trade carried out by EU countries in conflict zones is fully consistent with these broad principles.

Like the Dodd-Frank Act, the EU legislation has been informed by the dominant narrative in the academic and policy literature that natural resources fund armed rebellion, and that the resulting atrocities committed by armed groups can be directly attributed to natural resource revenues. That these premises are fundamentally flawed has already been noted in relation to the Dodd-Frank Act. The EU Legislation aims to regulate the sourcing of minerals, principally tin, tantalum and tungsten and their ores originating from conflict affected and high-risk areas. Unlike the Dodd-Frank Act which was confined to the DRC and neighbouring countries, the EU legislation applies to all conflict zones and areas that are politically unstable, whether hostilities are actually taking place or are just anticipated.[102] By applying to all conflict and post-conflict States, the EU legislation avoids one of the systemic weaknesses of the Dodd-Frank Act which applied only to the DRC and its immediate neighbours and made it easy for corporations to avoid its legislative controls by, for instance, moving to a State that was not subject to regulatory constraints.

The breadth of the EU legislation brings with it new concerns of legislative indeterminacy. While it is easy to delineate the parameters of a war zone, areas vulnerable to political instability or civil unrest could potentially encompass very many countries, making it difficult to objectively verify who comes within the ambit of the regulatory regime. There is the additional risk that because of these loopholes, the legislation will be inconsistently applied and easily avoided by unscrupulous operators.[103] Such indeterminacy is not assisted by the regulation defining conflict-affected and high-risk areas as 'areas in a state of armed conflict or fragile post conflict as well as areas witnessing weak or non-existence governance and security, such as failed states, and widespread and systematic violations of international law including human rights abuses'.[104] Applied strictly, this could encompass a

[99] UNSC Res 1952 (n 7).

[100] OECD Due Diligence Guidance (n 8).

[101] For instance, arts 21 and 22 of the Treaty of Lisbon required the EU to implement its common commercial policy while fully respecting the promotion of the rule of law, respect for human dignity, the preservation of peace, prevention of conflicts and the strengthening of international security.

[102] EU Conflict Minerals Regulation (n 72) art 2(f) defines conflict-affected or high-risk areas as 'areas in a state of armed conflict or fragile post-conflict areas as well as witnessing weak or non-existent governance and security such as failed States and widespread and systematic violations of international law, including human rights abuses'.

[103] It is proposed that the European Commission will prepare an indicative list of conflict-affected areas to be updated regularly, a strategy that will help reduce inconsistency in application but not eliminate it all together.

[104] EU Conflict Minerals Regulation (n 72) art 2(f).

significant number of countries that have natural resources, and experiencing varying degrees of internal turmoil, thus rendering it meaningless for most practical purposes. It remains to be seen whether the proposal to have a list of experts who will produce an indicative list of conflict-affected and high-risk areas will resolve some of the inherent issues of indeterminacy.

Unlike the Dodd-Frank legislation which applies to any company that files with SEC and uses any of the 3TGs in its production process, the EU legislation applies to a narrower range of companies, namely those who directly import 3TGs into the EU and to smelters and refiners that process 3TGs from conflict-affected and 'high risk' areas. Downstream manufacturers and sellers are also exempt from the scope of the legislation. The EU legislation presents a risk of strategic sabotage by unscrupulous actors. Economic actors not wanting to be burdened with the due diligence obligations could simply relocate to a country outside the EU, and manufacture from there before importing items back into the EU. Moreover, given the geographic reach of the legislation, it can be assumed that the EU does not anticipate meaningful consultations with affected populations or providing them with opportunities for contestation and review. The fact that consultations in the pre-legislative phase were dominated by powerful economic groups indicated that those impacted at the grassroots level were—and are—a low priority.

The rules apply to EU established importers and their declared objective, like the Dodd-Frank Act, is, ostensibly, to stop the nexus between armed conflict and illegal exploitation of natural resources. This is done by requiring companies to demonstrate the due diligence steps they have taken in their supply chain to ensure that the minerals which they place in the EU market do not directly or indirectly fund armed conflicts in the territories identified. In a nutshell, EU importers need to demonstrate that the minerals in their supply chain have been sourced responsibly. The core elements of due diligence are defined by way of *renvoi* to the guidelines provided by the OECD and companies are encouraged to apply them in formulating due diligence practices.[105]

The regulations go beyond due diligence and impose supply chain liability on EU importers of conflict minerals. Member States are given a broad discretion to determine appropriate sanctions for violations; this may include requiring an importer who has not complied with due diligence standards to do so within a given deadline. Member States left open the possibility of imposing tougher penalties in 2023, in the event of persistent violations. Much about the EU legislation remains speculative, since there is a long lead time to enable companies to make the necessary adjustments prior to its becoming operational in 2021. The supply chain due diligence anticipated will include a

[105] OECD, 'OECD Due Diligence Guidance for Responsible Business Conduct' (2018) <https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

combination of voluntary procedures, such as independent third-party audits and compliance reports, developed and overseen by governments, industry associations, or groupings of interested organisations.

On the face of it, this is a laudable framework of compliance. However, the legislation, like its American counterpart, rests on a number of unproven empirical and normative assumptions; that the revenue from natural resources is used by armed groups to fund militia who are responsible for human rights abuses, including child labour, sexual violence, the forced disappearance of persons and other forms of violence that could be directly linked to the demand for minerals. Like the Dodd-Frank Act, the legislation and its supporters fail to explore the counter-argument that the root cause of the Congolese political crisis, and similar conflicts, is a profound failure of governance, the political disenfranchisement of large segments of the population, and an entrenched culture of cronyism in which the natural resources only benefit a few, leaving the majority of the population in abject poverty.

In addition, whilst the EU regulation was preceded by extensive consultations with the private sector, including industry and non-governmental groups, a key constituency was not consulted—those individuals within the countries concerned directly impacted by it.[106] It remains unclear whether extending consultations to NGOs fully addresses legitimacy concerns where there has been no direct engagement with the affected populations since, as has already been said, many of the NGOS have their own agendas, which are sometimes dictated by their funding bases and which raises further questions concerning their impartiality.

D. EU Legislation: Some Tentative Remarks

It is impossible to give a proper assessment on the effectiveness or likely impact of the EU legislation in advance of its entry into force in 2021. The main areas of indeterminacy cannot properly be evaluated until it is in force and appropriate criteria are devised for determining which countries are within its reach. It is, however, clear that the Act is likely to have a profound domino effect on countries outside the EU, since those countries will need to comply with the EU requirements if their intended markets are within the EU or EU registered companies. The legislation would thus have extraterritorial effects on third-State companies and governance structures, thus raising the same concerns about democratic deficits noted in the context of the US Act. These companies would have to comply with EU regulations without any means of influencing the substantive standards they impose or of challenging their application. Moreover, the wide geographical reach of the legislation means that it is,

[106] European Commission, Directorate-General for Trade, Report on the Public Consultation on 'A Possible EU Initiative on Responsible Sourcing of Minerals Originating from Conflict-Affected and High-Risk Areas' (July 2013).

practically, impossible for those affected to mount effective challenges in legislative or judicial forums.

In effect, the EU legislation is an attempt to assume global stewardship over trade in natural resources without due process. Moreover, what are the processes for its amendment or withdrawal if its application results in unexpected hardship? Multilateral treaties usually have default provisions concerning adjustment, modification or even denunciation in order to accommodate the changes that may occur over time. No doubt provisions of this kind are implicit in all EU treaties but there is nothing to suggest that there is a developed framework for accommodating third State interests or for insisting on the democratic engagement that accompanies intra-EU legislation. The bulk of the legislation is mandatory for countries that import directly into the EU but the exact penalties for non-compliance at this stage remain undefined. Although the geographical scope of the EU legislation is broad when compared to the Dodd-Frank Act which was concerned primarily with a single country (although it included nine of its immediate neighbours), its narrow focus on just three minerals and not the full range of natural resources relied on by armed groups, undermines the underpinning logic that the measures are necessary to stop the link between armed conflict and revenue from natural resources. The legislation ignores the fact that other natural resources such as coal are increasingly the main source of revenue in a number of conflict zones especially in South America.[107]

V. THE DODD-FRANK ACT IN PRACTICE

A. Litigation in the US Courts

Perhaps one of the strongest criticisms of the Dodd-Frank Act is the lack of fit between its objectives and the means chosen to accomplish them. It has already been argued that there is no empirical evidence to support the thesis that there is a direct causal link between human rights atrocities in the DRC and rebel access to revenues through the sale of natural resources.[108] The prolonged civil war is in large measure the result of the Congolese government's indifference to democratic principles and the lack of an inclusive governance structure for all Congolese.[109] Although it is true that access to mineral resources provided a reliable revenue for funding the war, it is not the underlying reason for the war and there is plenty of evidence to indicate that the rebel groups would find alternative sources of funding the conflict even if access to natural resources were no longer possible. In the *National Association of*

[107] See JA McNeish, 'Resource Extraction and Conflict in Latin America' (2018) 93 Colombia Internacional <https://revistas.uniandes.edu.co/doi/full/10.7440/colombiaint93.2018.01>.

[108] Cuvelier *et al.* (n 13) 9; Nathan (n 84).

[109] MP Dizolele, 'Dodd-Frank 1502 and the Congo Crisis' (CSIS, 22 August 2017) <https://www.csis.org/analysis/dodd-frank-1502-and-congo-crisis>.

Manufacturers v SEC,[110] the US DC Circuit Court took issue with the rationale underlying the Act, noting that the presumption that the cessation of trade in conflict minerals would avert a humanitarian catastrophe was largely speculative and unsupported by empirical evidence. The Court noted that Congress had not held any hearings in the DRC and Congressional testimony after the passage of the Act did not unequivocally support its effectiveness. The Court further noted that the Government accountability office charged with evaluating its effectiveness had failed to do so and SEC had also failed to quantify any benefits of the forced disclosure regime. It is worth quoting the Court's devastating assessment of the Act in full:

> … In the first round of briefing the SEC described the government's interest as 'ameliorating the humanitarian crisis in the DRC' … after identifying the governmental interest or objective, we are to evaluate the effectiveness of the measure in achieving it. Although the burden was on the government, here again SEC has offered little substance beyond citations to statements by two senators and members of the executive branch and a United Nations resolution. The government asserts that this is a matter of foreign affairs and represents the 'type of value judgment based on the common sense of the people's representatives' for which this Court has not required more detailed evidence … But in the face of such evidentiary gaps, we are forced to assume what judgments Congress made when crafting this rule. The most obvious stems from the cost of compliance, estimated to be $3 billion to $4 billion initially and $207 million to $609 million annually thereafter and the prospect that some companies will therefore boycott mineral suppliers having connection to this region of Africa. How would that reduce the humanitarian crisis in the region? The idea must be that the forced disclosure regime will decrease the revenue of armed groups in the DRC and their loss of revenue will end or at least diminish the humanitarian crisis there. But there is a major problem with this idea – it is entirely unproven and rests on pure speculation.[111]

The Dodd-Frank Act also provides a good basis for testing Benvenisti's thesis that when States legislate to rectify 'common bads' they have an obligation to take into account the interests of third-State nationals. What emerges from the legislative history and the scrutiny of the Act in the US courts, is that virtually no attention was paid to the foreign interests affected by the legislation, a point noted by the Court in the *National Association of Manufacturers* case.[112] Thus, although SEC is held accountable for the implementation of the legislation, accountability is limited to those who have standing to hold it to account and this does not include the Congolese. Crucially, no effective strategies were in place for assessing public attitudes to the Act in the DRC itself. Furthermore, it is questionable whether a financial regulatory body,

[110] *National Association of Manufacturers v Securities and Exchange Commission* (n 85).
[111] ibid 15–24.
[112] *National Association of Manufacturers v Securities and Exchange Commission* (n 85).

primarily set up to ensure the efficiency of markets, is well placed to exercise oversight of what is said to be a humanitarian project in a foreign country.

In the *National Association of Manufacturers* case, it was argued by the applicants that the legislation, by creating a *de facto* embargo of Congolese minerals, had in fact aggravated the pre-existing humanitarian crisis resulting from the DRC's civil war. Many companies decided to avoid the stringent due diligence requirements mandated by the Act by not sourcing from the DRC at all. The impact of this *de facto* boycott on Congolese livelihoods was catastrophic; artisanal miners dependent on mining for their livelihoods were most affected. In many cases they were forced to rejoin militia groups who were able to continue making money through racketeering and other forms of illegal taxation. The legislation thus had the perverse effect of aggravating armed conflict by opening new frontiers for its continuation.[113]

B. The Act and Congolese Governance Structures: Some Problems of Implementation

Punitive measures directed primarily at rebel groups sit uncomfortably with the logic of self-determination and the designation of natural resources as a right of peoples, over which they have permanent sovereignty. The 1962 General Assembly Resolution explicitly confirmed 'the right of peoples and nations to permanent sovereignty over their wealth and resources'.[114] The Resolution went on to provide that the exploitation of such resources had to be exercised in the interest of national development and the well-being of the people of the State concerned. At a minimum, there is an expectation inherent in the concept that the population and their credible representatives cannot be excluded from the key resources of the territory, even if they do not wield power within the formal constitutional structures of the country. Yet excluding rebels from natural resource transactions strengthens the economic and political position of an unaccountable elite and forecloses all meaningful options for progressive dialogue.

The Dodd-Frank Act also had the unintended effect of considerably strengthening the political position of the Congolese government by effectively weakening the opposition and allowing the Congolese government to co-opt many of their members, including rebel groups, into the military. In

[113] *The Unintended Consequences of Dodd-Frank's Conflict Minerals Provision: Hearing Before the Subcommittee on Monetary Policy and Trade of the Committee on Financial Services U.S. House of Representatives, 113th Congress, 1st Session* (21 May 2013, Statement of Rep. Campbell); S Raghavan, 'How a Well-Intentioned US Law Left Congolese Miners Jobless' (*Washington Post*, 30 November 2014) <https://www.washingtonpost.com>; Wolfe (n 75); Cuvelier *et al.* (n 13).

[114] See UNGA Res 1803 (XVII) (n 85), the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and well-being of the people of the state concerned; N Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997).

anticipation of the legislation, the DRC's President Kabila banned mining in the three provinces of North Kivu, South Kivu and Maniema, ostensibly to forestall mining by militia groups, but ignoring the fact that a considerable amount of mining activity was undertaken by renegade members of the Congolese military.[115] In reality, the legislation had the unfortunate effect of acting as a stumbling block in the realisation of Congolese self-determination by entrenching the repressive policies of successive Congolese governments. The fallacy inherent in the simplistic assumption that trade in minerals was the singular obstacle to Congolese peace quickly became apparent as the conflict intensified with rebels finding new ways of funding their military activity.

Many aspects of the Act remain problematic. It assumes the existence of a functioning State with a workable infrastructure, capable of implementing the regulatory structure on which it rests. On its own terms, it fails to fully grapple with the failure of governance which lies at the heart of the Congolese political structure. The legislation also ignores the crucial role played by the neighbouring States in the exploitation of Congolese natural resources[116] and the continuing incentives for them to circumvent any statutory control in the Congo itself. There is considerable evidence that minerals from areas controlled by rebels are increasingly smuggled out of the country, bagged and sold off with Rwanda given as the country of origin.[117] Moreover, many of these rebel groups have resorted to the outright theft and smuggling of minerals from licensed and authorised mining sites.

One of the persistent criticisms directed at the Act is the prohibitive costs involved in its implementation. Various costs have been mooted, with some estimates ranging between nine and 16 billion dollars.[118] It is then argued that since its benefits are largely speculative, the costs of implementation are grossly disproportionate when measured against the putative gains. Moreover, even the most diligent corporations have concluded that it is practically impossible for an end-manufacturer to establish that components derived from other components are totally conflict-free.

Perhaps the greatest shortcoming of the Act is the assumption that minerals obtained from government-controlled areas are in fact conflict-free, and that as a result any trade in them is for the benefit of the Congolese people. On the face of it, this reveals a fundamental inability to grasp the complexities of the Congolese conflict and its governance structure. For one, this is a civil war where the goalposts are constantly changing and the identity and political loyalties of the actors equally fluid. It would be myopic in the extreme to regard minerals obtained from government-controlled areas as necessarily conflict-free or for the benefit of the population. The fiscal standards of

[115] BBC (n 94).
[116] UNSC, 'Report of the Panel of Experts' (n 62).
[117] See P Schütte, G Franken and P Mwambarangwe, 'Certification and Due Diligence in Mineral Supply Chains – Benefit or Burden?' (2015) Federal Institute for Geosciences and Natural Resources (BGR) <https://www.bgr.bund.de/EN/Themen/Min_rohstoffe/Downloads/Vortrag_certification_2015_en.pdf?__blob=publicationFile&v=3>.
[118] Ayogu and Lewis (n 73).

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accountability by the Congolese government to the population for resource revenues are rudimentary and, in some cases, virtually non-existent.

Moreover, the Congolese government has frequently co-opted militia groups into the army; in effect making them *de facto* law enforcement agencies.[119] How is a company to ascertain that those who, on the face of it, appear to be *bona fide* law enforcement agencies are in fact militia? Moreover, in certain areas, such as the Kivu province of Eastern Congo, there is hardly any government presence, thus making the distinction between rebel- and government-controlled minerals largely illusory.[120] There is compelling evidence that in the DRC's long civil war both rebels and governments have been equally complicit in resource exploitation for purposes of funding the war and not for the benefit of the population.[121]

In these circumstances, it is difficult to understand the deference shown to government-sanctioned exploitation of mineral resources by these legislative instruments. The Dodd-Frank Act's preoccupation with rebels and other non-State groups as the exclusive authors of 'public bads' is, in the circumstances, misplaced. There are now extensive documented accounts on the role of the Congolese army in the mass rape of civilian women carried out in Eastern Congo, extortion rackets, as well as other forms of illegal taxation.[122] By focusing on rebels and not all parties involved, the Act perpetuates the shortcomings of State-centric, multilateral initiatives such as those undertaken by the Security Council and the OECD—and perversely acts as a stumbling block to Congolese self-determination in natural resource matters.

Moreover, much of the mining in the DRC has been carried out informally, and in most cases there are no records which could form the basis of a distinction between legal and illegal exploitation. In order to comply with the Dodd-Frank Act, the Congolese government embarked on a process of certifying mining sites as 'conflict free' or free of rebel control. However, as of December 2017, the Congolese government had only certified 11 out of 900 sites as conflict-free.[123] In most cases the government has been hampered by the

[119] ME Baaz and J Verweijen, 'The Volatility of a Half-Cooked Bouillabaisse: Rebel–Military Integration and the Conflict Dynamics in Eastern Congo' (2013) 112 African Affairs 563.

[120] World Bank, 'Democratic Republic of Congo: Growth with Governance in the Mining Sector' (2008) Report No 43402-ZR.

[121] J Stearns, J Verweijen and ME Baaz, 'The National Army and Armed Groups in Eastern Congo: Untangling the Gordian Knot of Insecurity' (Rift Valley Institute 2013).

[122] Human Rights Watch, 'Democratic Republic of Congo: Ending Impunity for Sexual Violence' (Human Rights Watch, 10 June 2014) <https://www.hrw.org/news/2014/06/10/democratic-republic-congo-ending-impunity-sexual-violence>; Human Rights Watch, *Soldiers Who Rape, Commanders Who Condone: Sexual Violence and Military Reform in the Democratic Republic of Congo* (Human Rights Watch 2009).

[123] S Raghavan, 'Obama's Conflict Minerals Law Has Destroyed Everything, Say Congo Miners' (*The Guardian*, 2 December 2014) <https://www.theguardian.com/world/2014/dec/02/conflict-minerals-law-congo-poverty>.

logistics of carrying out certification in an unusually large country. [124] In effect, the structural premises of the Act presuppose the existence of a functioning well-ordered State, a situation which in the present circumstances the Congolese State cannot even aspire to.

VI. CONCLUSIONS

Unilaterally imposed obligations have generally been under-theorised and underdeveloped and as a result they occupy a precarious place in the existing body of rules in international law. Most accounts describe their content without any systemic analysis of the challenges which they pose for international law. In so far as they have been directed at weak States, they have been tolerated but not necessarily accepted as a legitimate response to the issues they address. They are problematic because they elevate a particular world view of how to manage intractable problems as being the only appropriate way of doing so, thus undermining diversity and pluralism as inescapable values in a fractured State system. However, it is possible to argue that, despite their normative blind spots, there are situations where unilateral legislation can sometimes be a force for good, especially in situations where multilateral enforcement is at an impasse. This, in fact, is the primary justification for them advanced in the literature. This is likely to be the case where the underlying values are uncontested and have been arrived at by consensus, clear examples being extraterritorial unilateral measures for the protection of uncontested human rights norms or the protection of the environment.

The Dodd-Frank Act and EU Conflict Minerals legislation fail on their own terms because the central premises on which they are grounded, that revenues from armed conflict fund insurgencies and play a direct link in human rights violations, are largely based on conjecture and not supported by empirical evidence. They are quite simply the wrong response to a crisis that has the most tenuous connection with revenues from the sale of natural resources. These inherently disciplinary measures directed at armed groups stand in tension with an implicit right to civil disobedience as a necessary corollary of the right to self-determination. In many ways, the Dodd-Frank and EU legislation have the perverse effect of legalising the looting of resources by governments in conflict zones in circumstances in which they are not accountable to their populations. They also disguise the extent to which they exemplify hegemony at work, and carry with them a real risk of mainstreaming alternative processes of law-making that works in the interests of powerful States at the expense of multilaterally agreed initiatives. Crucially,

[124] Globalwitness.org, 'The Hill Belongs to Them: the need for international action on Congo's conflict minerals trade' (*Global Witness*, 14 December 2010) <https://www.globalwitness.org/en/archive/hill-belongs-them-need-international-action-congos-conflict-minerals-trade/>.

these unilateral measures are problematic because they fail to engage with the regulatory impact on the populations affected. The legal challenges to the Dodd-Frank Act demonstratse just how peripheral Congolese concerns were in the implementation of the legislation.

Most fundamentally, they fail because of a profound inability to understand the sources of authority in conflict zones and that power does not necessarily reside with the government, as the Congolese conflict clearly demonstrates. International law and international lawyers continue to be preoccupied with governments, even when they are only one of many sources of political authority in conflict zones. Where rebels have responsibility for those under their control, it makes sense that they too should have access to these natural resources to discharge these responsibilities.