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Comment on Tacsan's The Effectiveness of International Law: An Alternative Approach

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fectiveness of international law and organization is concerned with international environmental law. Such literature (Jacobson, Harold K. & Weiss, "Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project", *Global Governance* 1 (1995), 119-148) now distinguishes between compliance with international law and effectiveness. For, even if all states were to comply with provisions for protection of the environment the law might not be effective in preventing further degradation. While I recognize that Tacsan wishes to move away from a simple compliance/non-compliance as opposed to effectiveness. I think that the paper would be strengthened through distinguishing between compliance and effectiveness.

To conclude, I agree with Tacsan that the "concept" of normative knowledge, as developed by Peter Haas, is a useful one but believe that it does not in itself have great explanatory potential unless situated within a broader framework of the relationship between international law and politics. While I do not think this is a suitable occasion on which to discuss at length my own theorization of this relationship I do believe that a theorization of international law as neutral ideology provides such a framework. I would welcome further discussion along these lines.

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The Effectiveness of International Law

To be "effective" international law must be obeyed. Often it is, even by unopposably powerful nations such as the United States of America. Why? Force and coercion cannot be the reason, but fear plays a role—the fear of appearing unjust in one's own eyes, or the eyes of one's friends.

I. Blame

Greek kings in the Homeric age employed

poets to praise themselves and to blame their enemies. Praise and blame set the parameters of acceptable behavior, which could be moved in one direction or another by clever verses and a loud voice, within certain external canons of plausibility. Some behavior simply is not praiseworthy. Some sovereigns deserve to be blamed.

These human universals made international law possible, when scholars such as Grotius, Pufendorf and Vattel first expressed their perceptions of the universal *jus gentium*—perceptions whose influence depended entirely upon the author's ability to convince readers of the justice and utility of proposed precepts of behavior. Some scholars had more authority than others, and could move law in one direction or another at the behest of their royal employers, just as a good poet could manipulate Hellenic public opinion with elegant verses or a memorable line of invective.

Human nature relies on the concepts of "right" and "wrong". As social animals we have a natural tendency to think in moral terms, to turn fiercely on others who violate our sense of propriety, and to feel shame when we ourselves transgress, or others perceive us to have done so. As rational animals, humans naturally seek to turn these moral emotions to their private advantage, manipulating human feelings of indignation and shame to serve selfish ends, constructing conceptions of justice that harness public opinion to private interests, and cultivating self-righteousness in pursuit of personal appetites and desires.

II. Normative Knowledge

Speaking in terms of "right" and "wrong" implies that there are "right" and "wrong" answers to moral questions. Praise and blame depend on claims of "normative knowledge" - the knowledge that one activity or attitude is "right" and praiseworthy and another is "wrong" or shameful.

Some types of normative knowledge are widely shared. The "golden rule," for example, has overwhelming resonance, as do its concomitant hesitations about homophagy, or the recreational deprivation of human life. But even these

prohibitions are violated, with confidence, in societies that have constructed social realities to support their moral eccentricity. People care a great deal about the views of others, and can be moved quite far even from quasi-instinctual moral knowledge by the pressure of social constructs, like religion.

Nevertheless, the presumption of normative knowledge invites discussion of its content, and implies that grounds must be offered for any views advanced. Like other knowledge, normative knowledge rests on arguments about human perceptions, and is subject to change. Communities of discourse will tend to converge on certain answers to contested moral questions. Discussion and reflection lead to deeper and more accurate knowledge about norms. People find it very hard to maintain idiosyncratic personal "truths" in the face of steady interaction with others.

III. Epistemic Communities

Human communities tend to converge on shared conceptions of moral and scientific "truth." But this fact of human nature need not always mean that social "truth" and reality coincide. Societies often construct moral conceptions to serve their interests, or the interests of those who dominate the social discourse. Powers that control the television and radio transmissions in a given territory, for example, will have a disproportionate impact on that specific society's outlook, and conceptions of moral knowledge.

Those interested in justice, by which I mean real moral knowledge about the structure of political societies, will need a theory of valid epistemic community. For although it is natural that epistemic communities should converge on shared conceptions of "moral knowledge," these conceptions may be false or unjust. One advantage of international law in pursuit of justice lies in its transcendence of numerous otherwise discrete epistemic communities, since it must apply to governments throughout the world, and gain their acceptance.

But this is a disadvantage also, because so

many governments serve the unjust and improper interests of their rulers, often violent and self-interested local elites or individuals. Giving such figures a voice in international moral discourse corrupts the creation of moral knowledge about international law. When unjust regimes predominate, international legal discourse may even serve to encourage and validate injustice, while putting democracies and liberal republics on the defensive, by allowing despots to reinforce and justify each other's bad behavior.

IV. Consensus

Consensus creates the international legal regime, consensus first about the principles of international law, and then about the details of their application. Widespread consensus creates compliance, even among regimes that may not fully share the consensus thus created. Human actors tend to internalize widely-shared moral standards. Individuals find it personally difficult to maintain a separate viewpoint in the face of overwhelming agreement. Diplomats and politicians suffer shame at cocktail parties. Their children criticize them. They doubt their own convictions.

Who will have a voice in the international forum becomes immensely important, and one major task of detached or supposedly dispassionate analysis of international law in universities and elsewhere, should be to determine which voices deserve to be heard. If participants in moral discussions tend to converge on consensus, who should these participants be to create the most just or accurate conception of moral knowledge? Democratic republics rest on the principle that all voices should be heard that are willing to debate the creation of a shared or "common" good. According to this theory, justice best emerges from the widest possible discussion with the greatest number of sincere participants.

Looking primarily to sovereign governments to represent the voices of their populations presents an obvious problem when most governments serve the narrow interests of a ruling clique. Non-governmental organizations, the media and other self-appointed and self-regulated groups also suffer from a lack of democratic

accountability. Their motives may be purer than those of most governments, but their value lies more in the information they bring to the discussion, such as satellite data, or scientific studies, than it does in any legitimate claim to be heard or respected about the emerging content of moral knowledge about international law.

V. Operational Systems

Joaquín Tacsan has distinguished "myth systems" of normative knowledge from the "operational systems" that apply them. "Myth systems" will be more or less appealing depending on the quality of the norms they embody. Operational systems develop the consensus that make these norms effective.

Operational systems may be more or less successful (1) in achieving consensus and (2) in finding justice. Both attributes are important. The ideal operational system will create consensus about real normative knowledge—will help people and nations to find and agree upon normative truth.

I would like to suggest that democratic republics make the best operational systems for discovering legal norms, and that a republican federation of democratic republics will be the best operating system for authorizing or legitimating moral knowledge about international law.

VI. Democratic Republics

By "democratic republics" I mean states committed to finding the common good (*res publica*) for their inhabitants through public deliberation (democracy) in which all citizens have a voice. A republican federation of democratic republics is a federation of states that observes the same rules of participation and deliberation among the representatives of its component peoples that they observe internally among their own citizens. Such states and federations will more likely discover valid normative truths than other epistemic communities, because they involve the moral perceptions of wider groups of people, under conditions of mutual cooperation.

The best epistemic community for discovering international law will include only those

voices that seek the common good, and respect the democratic process. Other voices, be they governments, publicists, non-governmental organizations or the media should carry weight only to the extent that they convey useful information to democratically validated participants in the international normative discourse.

The substance of international law depends on consensus, and consensus depends in turn on the identity of those that forge it. Democratic republics deserve deference in this process, and should not themselves be swayed by the views of non-democratic or non-republican voices. International law should not be effective unless it is just, and it will not be just if its epistemic community embraces too many corrupted or usurping speakers.

VII. The Rule of Law

The rule of law ideal constrains decisions made in democratic republics more than in other states, because only through the rule of law can democratic decisions ever successfully guide government officials in service of the common good. This makes the concept of "law" a powerful tool in international relations for moving democratic republics towards conformity. They blame themselves for legal transgressions. Successfully label something a "law" and the battle for effectiveness will soon be won, at least among the democratic republics.

Tribunals such as the International Court of Justice derive improper influence from this analogy with domestic legal institutions. One must examine the provenance of would-be lawgivers before deferring to their rulings. Did they arise from a democratic process? Who had a voice in the decision? The authority of the International Court of Justice is diminished by its derivation from the Security Council and General Assembly of the United Nations, which contain many corrupt and despotic governments, and by the limited terms in office of the judges themselves, which leaves them subject to outside influences.

International law derives in part from universal perceptions of normative reality and in part from the expression of that reality by authorized

speakers. This latter process posits specific rules of law, and the claim that states should respect them. "Extrinsic" factors about the structure of international discourse may have as much influence on state behavior as the "intrinsic" validity of the norms proposed. The more the standards advanced can be made to look like law, the more likely they will be obeyed.

Conclusion

The effectiveness of international law rests on two pillars: the desire to respect its norms and the ability to do so. Ability depends primarily on the existence of a functioning bureaucracy, fostered through education and the rule of law to create the discipline and intelligence without which obedience cannot occur. Desire is more complicated, and grows out of either "normative knowledge" or the threat of violence. The first has been my main concern here, since powerful states safely disregard most external sanctions.

"Normative knowledge" may be manipulated by eloquent argument and the structure of the relevant epistemic community. Consensus creates international law, but consensus will be mistaken when the wrong actors play too large a role in its elaboration. Yet truth has special resonance. Those who would subvert normative reality find their task more difficult once morally significant truths ever enter the conversation.

Scholars should see to it that this happens, and strive to bring international institutions into line with democratic and republican imperatives. International lawyers who wish to measure, monitor, or even to predict the effectiveness of international norms should look first to the norm's validity and then to its foundations in democratic discourse. The sounder this basis the longer the law will survive to influence the actions of the international community.

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From Politics to Consensus?: A Comment on Tacsan

Dr. Joaquin Tacsan's article *The Effectiveness of International Law: An Alternative Approach* moves the discussion about the efficacy of international law from the topic of enforcement, or lack thereof, to his theory of compliance due to consensual normative knowledge. Dr. Tacsan defines knowledge as "the information contained in the principles, norms, rules and other criteria about proper behavior, as well as in theories about that information." Legal normative knowledge includes not only treaties, conventions, customary international law, case law and doctrine, but also "the expectations that actors derive from their moral and scientific imperatives and perceptions of proper conduct." Consensual normative knowledge is reached when it dominates the policy-making process and implies acceptance by all major actors.

Working from these definitions, Dr. Tacsan compares the effectiveness of consensual normative knowledge with coercive enforcement of international law. He argues that this knowledge does not have the inherent drawbacks that coercion does in running into sovereignty principles; logistical, financial and technological limitations; lack of absolute terms to enforce; and lack of determinacy. Dr. Tacsan seems to argue that when consensual normative knowledge exists, coercion is no longer necessary because all major actors are operating from a common basis of knowledge and sense of obligation and expectations. The next step from consensual normative knowledge is authorized legal knowledge. Dr. Tacsan argues that the consensual basis of normative knowledge also offers legitimacy and authority in the international legal system and that it is this level of shared knowledge which is effective without the need for coercion.

Dr. Tacsan then goes on to discuss the effects of this approach on international actors and their decision making. He looks at two normative systems, myth and operational, defining the myth system as one that is supposed to be applied but is not and the operational system as