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## The Right To Republican Government Under International Law

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systems of government than their own. So equipped, these citizen-athletes are less prepared to accept unconditionally a regime lacking in human rights as a way of life. Thus, the ground work is arguably laid for the concept of greater human rights.

Sports have traditionally played a large role in the expansion of rights. A terrific example is the requirement that U.S. universities provide an equal playing field in terms of number of sporting opportunities for both male and female varsity athletes. (U.S. Court of Appeals for the 2nd Circuit, *Amy Cohen et al v. Brown University*, No. 95-2205). Female athletes, exposed on campus to a larger number of varsity teams available to male athletes than to themselves, came to view this discrepancy as wrong and rightfully protested the incongruity. Eventually, equality (at least in terms of absolute number of teams for men and women) was mandated by the courts. Similarly, athletes at international events are exposed to human rights discrepancies between their own country and the countries of their competitors. The importance of sporting events in highlighting human rights should not be underestimated.

### Study Abroad

Study abroad programs have become more and more popular among university students searching to broaden both their academic education and their exposure to different cultures. (See Bill Nolting and Clay Hubbs, *Education Abroad Bibliography*, 1997). Similar to the role of international sporting events, programs for students to pursue studies outside of their own country is another undervalued method for the spread of basic human rights. The value of such programs is particularly highlighted in graduate studies, where students have already achieved some degree of educational sophistication, allowing them to be more open to intellectual discussion than their more junior undergraduate colleagues. Graduate students typically are involved in a greater degree of independent research, which encourages them to seek out dialogue beyond the printed syllabus of an undergraduate course. As a result, their exposure to the culture they are living in and studying in is increased greatly, affording them more opportunity to interact with the citizens of their host country.

Students are able, in effect, to compare the

degree of human rights between different countries. Those students blessed with living in a more tolerant state serve as unofficial diplomats of democracy, while those students living in less fortunate circumstances are exposed to the principles of human rights. While students may not be able to force restrictive governments to become more tolerant of human rights, as evidenced by events in China, once introduced, the concept of human rights cannot be "de-introduced." Instead, it now becomes possible for persons to covet those human rights they have begun to realize they do not possess.

### Non-Traditional Diplomats

Professor Tesón's call for the global promotion of universal respect for human rights is extremely important. While the traditional modes of diplomacy can play a large role in this effort, the non-traditional diplomats, such as the Roman Catholic Church, international athletes and students studying abroad, also have a contribution to make in this regard. While their roles as diplomats may be more evolutionary than revolutionary, their contributions are surely not.

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### The Right To Republican Government Under International Law

The fall of the Soviet Union and the liberation of East and Central Europe have emboldened international lawyers to reassert the principles of human rights and democracy that intermittently inspired their predecessors over the last four centuries. Some such arguments rely on state practice. Thomas Franck and others have demonstrated that many governments now formally recognize some sort of individual or collective right to self-government. This is the "positivist" argument for liberal democracy.

Other scholars, such as Fernando Tesón, make the same argument from a "naturalist" or "deontological" perspective (to use Tesón's vocabulary), identifying human rights that exist whether or not states recognize them as binding in practice. This

more direct approach better reflects the moral truth that obligates states to obey international law, but understates the value of their agreement or deliberation about the content of legal standards, and how to enforce them. This paper will advocate an intermediate position in insisting that all people have the right to republican government, which is to say to government for their own individual and collective good or well-being, but also that people speak best through the organized structure of republican institutions. Bald assertions by scholars of detailed lists of individual rights are only slightly more likely to be correct than bald assertions made by the governments or foreign ministries of existing non-republican states.

### The Positivist Mistake

Self-styled "positivists" in international law mistakenly derive international obligation from state consent, or recognition. This confuses power with authority, by attributing binding force to the views of various despots or tyrants, whose actual influence depends more often than not on terror, force or usurpation. Such sovereigns' "consent" obligates no one, nor do any existing human rights become more (or less) binding on states because governments have agreed (or not) that such rights apply to them. In practice, states will be more likely to implement rights that they publicly agree to exist, but even that is open to question. The existence of rights influences state behavior with or without agreement, and governments frequently violate rights that they have formally endorsed as binding.

States do, however, often also maintain internal legal systems that operate to some extent independently of the immediate desires of the leaders that they serve. To the extent that states have "law", they recognize legal principles of general application, which they claim to be morally justified. States that recognize preexisting human rights thereby make it more likely that their own legal system will recognize and apply these rights in practice. To this extent it makes a difference that states recognize human rights, and states should be encouraged to do so.

In fact, as Fernando Tesón has observed, democracies are more likely to recognize human rights than other states have been, and having recognized human rights, democracies are more likely to implement and protect them. This stands as a

powerful argument in favor of democracy. Positive law in municipal legal systems can strengthen the application of justice to particular peoples in particular cases. States earn their legitimacy by serving the individual and collective good of their subjects. Since democracies serve fundamental human rights better than other types of government, they are more legitimate than other types of governments, and their directives more binding.

### The Rousseauian Mistake

The value of democracy in protecting fundamental human rights has misled some of its advocates to endorse democratic institutions as the sole or final arbiter of international legitimacy. Just as positivists view the consent of existing governments as decisive in measuring the validity of international norms or standards, so some democrats treat majority votes as the sole conclusive measure of obligation under international law. This loses sight of the purposes that justify democratic voting in the first place. Universal participation in voting prevents self-interested elites from running the state in their own interests. It does not license the majority to usurp state power in pursuit of its own self-interested private agenda.

Some types of coordination problems may best be solved by the essentially random (or even somewhat self-interested) procedure of majority voting. The maximum width of the continental shelf may be settled, perhaps, by the vote of all states. The direction of traffic may be settled by plebiscite, or the distribution of executive authority. These sorts of questions do not necessarily admit of "right" or "just" answers. They do need some answer, so that society may move forward. On other questions, such as human rights, or the definition of crimes, getting the right answer determines the legitimacy of the government concerned. Democracy is required under international law and justice, because non-democratic states usually get such questions wrong, due to the self-interest of their rulers.

This does not mean that democracies always get such questions right. Democracies do not constitute republics unless they serve the individual and common good of the people, in preference to that of a majority, or elected elites. All republics are democracies, but not all democracies are republics. The rule of law, an independent judiciary, respect for fundamental human rights, the separa-

tion of powers, bicameral checks and balances, representative government and other republican safeguards must be in place, before democracies will serve the republican purposes that alone confer legitimacy on the coercive power of the state.

### The Liberal Mistake

The excesses of certain democratic regimes have caused some liberals to denigrate democracy itself, or to minimize its importance under international law. Liberals rightly view universal human rights as fundamental to human well-being, and condition all governments' legitimacy on their respect for human rights. But liberal scholars and lawyers often do not understand democracy's centrality in achieving this goal. Fernando Tesón, for example, values democracy for the equal concern and respect that it shows citizens, for its generally peaceful attitude to foreigners, and for its usual respect for human rights, but questions its role in the "deliberative process" of discovering human rights and protecting them. Liberalism emerged as a distinct philosophy by setting aside democracy and political science in the wake of Robespierre's terror, when many blamed unfettered democracy for the destruction of France. Fear of democracy has weakened liberalism ever since.

The problem with liberalism's agnosticism about political procedures lies in the danger rights face without general agreement to recognize and enforce them. Non-republican governments will not readily recognize rights nor protect them. While individual scholars may assert the existence of certain rights, such rights will not enjoy widespread recognition or legitimacy until they are tested by public deliberation. Non-democratic governments simply will not respect or even accurately identify what fundamental human rights entail. States without independent judges, the rule of law, the separation of powers, a mixed and balanced bicameral legislature and an elected representative assembly will not defend human rights, or treat all citizens with equal concern and respect, or show restraint in their international affairs, because they lack the republican defenses that would help them to do so.

Liberalism requires republican institutions, including democracy, to realize its goals. Liberals who assert the primacy of certain rights, without subjecting them to the test of public reason in a republican deliberative procedure, will often make mistakes, pursuing unwarranted interventions in

the frenzy of their own self-righteous self-importance. Decent humility demands that would-be arbiters of international obligation test their convictions against the best available procedures for taking everyone's insights into account, treating every person and people's well-being with equal concern and respect. Such republican procedures go beyond democracy, in their search for universal human rights, but also respect the separate needs of different nations and cultures, which liberal universalism may sometimes violate or overlook.

### Conclusion

International law derives whatever binding force it has from its ability correctly to determine the international rights and obligations of states and individuals. Positivists overvalue the importance of existing state governments in making these determinations. Democrats overvalue the importance of simple majority decisions. Liberals overvalue their own standing to dictate rights to the world. Republican government satisfies the needs of all three viewpoints, by showing how states may earn the legitimacy democratically to determine the human rights due to all their citizens. Without the support of republican institutions and principles, international law would become the nebulous assertion of rival moralities, without authority to control state behavior or self-interest, in any specific situation.

Only republican structures of government can legitimately determine the content of international law sufficiently to deserve deference from actors in the international arena. Republican deliberation confirms the nature of existing international norms. Neither treaties, nor practice, nor democratic majorities, nor academic declarations of rights can stand as proxies for real moral discourse in settling the content of the law. The right to republican government under international law is the ultimate source of all international obligation, just as the right to republican government is the only real source of obligation in domestic systems of law. Governments exist for the collective and individual well-being of those subject to their control. When they violate human well-being, states forfeit their authority to rule.

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