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Letter from the Chair

As Fernando Teson observes in his short paper for this issue of *ILT*, whether communities have a right to democratic rule has emerged as a central question in contemporary international thought. International lawyers and political scientists tend to be confused in their answers, for reasons that Professor Teson indicates in striking terms. He concludes with a strong endorsement of liberal priorities: rights first, democratic procedures second, judicial review third. With so much packed into so few pages, it is no wonder that the four responses to Teson are so different. Two of them imaginatively extend the discussion in practical directions. Two of them challenge Professor Teson's premises in ways that remind us of the fertile tension between liberal democracy and a republican concern for the common good.

The next issue of *ILT* features Terry Nardin's subtle development of an argument that he initially advanced in his justly renowned book, *Law, Morality and the Relations of States* (1983). Don't just read it. Respond in writing. After all, the main purpose of our Interest Group is to expedite scholarly exchange without the encumbrance of extensive citation and full-dress review.

I have been involved in the International Legal Theory Interest Group from its creation, first as Vice-Chair and, since 1996, as Chair. Throughout I have firmly supported the Interest Group's commitment to the discussion of important theoretical issues through the pages of this journal. And, I am happy to say, *ILT* is thriving. I also believe that institutions benefit from periodic changes in leadership. With this in mind, I intend to step down as chair at our next business meeting, which will be scheduled during the ASIL's annual convention in Washington next March. I look forward to seeing you there.

Two Mistakes About Democracy

The question of whether all communities in the world have a right to democratic rule has taken center stage in the debate about the role and content of international law in this new era. This has occurred not only in human rights circles but generally; indeed, it is one of the few international law issues that has caught popular attention. People are finally realizing that peace and democracy are inextricably linked and that the way nations are internally organized *matters* for international purposes. It has taken more than 200 years for the right to democracy to percolate into international law (Kant published his essay *Perpetual Peace* in 1792) but we are, fortunately, getting there. The attempt to clarify the notion of the right to democratic entitlement in international will be worth the effort.

Here I will call into question the way most international lawyers treat democracy and suggest instead what I think is a better way of understanding the democratic ideal in a global context. There are two mistakes that international lawyers (and many others, especially political scientists) make, in my view, about democracy. The first one I will call the positivist mistake; the second, the *Rousseauian mistake*. I'll comment on them in turn.

The Positivist Mistake

Ever since Thomas Franck published his famous article, international lawyers (at least those with liberal orientations) have been particularly excited about the fact that state practice increasingly seems to support the proposition that all persons and groups have an individual and collective right to elect their governments (and, I may add, although this is seldom mentioned in the international law literature, democratically to enact their laws). But to bank on state practice as the foundation of democratic rule is a chancy proposition. To understand why this is so, I will suggest

that there are two different kinds of international law rules: those that enshrine fundamental moral principles (I will call them rules of the type A), and those that do not. (I will call them rules of the type B) For type B rules, it is natural and necessary to look at state practice: for example, whether the maximal extent of the continental shelf should be 350 or 375 nautical miles is not self-evident, and whatever governments agree on this matter will be acceptable to everyone. The same analysis can be applied to many and important matters of international law: diplomatic law, most of the law of treaties, the law of international trade, a good part of environmental law. In all of these situations the problem is one of coordination, of how governments can best cooperate with each other to move towards a point of mutual Pareto improvement (perhaps even Pareto optimality), and the rule in these cases represents, in game-theoretical terms, the salient point at which the parties have chosen to cooperate (say, 350 nautical miles for the continental shelf).

But rules of the type A can hardly fit this description. When rules embody fundamental moral principles it does not seem right to make their validity depend on whether a majority of governments in the world agree to them or not. Human rights norms are of this kind. Suppose you are a human rights advocate and someone shows up in your office and says: "I'm Chinese and we are being deprived of democratic entitlement in China." Under the positivist approach, you would have to research whether the emerging rule of democratic governance is applicable to China -perhaps under the persistent objector rule, or under the principles of *ius cogens*, or under some human rights document to which the Chinese dictators acquiesced in a moment of distraction. If your honest research doesn't yield a positive result you would have to dismiss your Chinese client and tell him he's simply out of luck: state practice does not bind China to give free elections.

But this is a strange way to handle human rights, including democracy. I suggest that every decent person will say that the Chinese have a right to democratic rule, *whatever state practice shows*. Practice, of course, is physical and verbal behavior by the authorities of the state. As to the *physical behavior* of the Chinese government, we already know that they have denied democracy for centuries. As to their *verbal behavior*, we will hear the usual lithany about Chinese tradition, nonintervention, cultural imperialism, and so on. This, of course, is not surprising, because the denial that there is a right to democracy is made by the very individuals who are in power and wish to deny that right, the exercise of which will likely throw them out of the presidential palace. But what is surprising is that the positivist holds these facts, Chinese traditional oppression and the government's justification of it, *against* the validity of democracy and thus against the Chinese dissidents favoring democratic rule. But that cannot be right: it should not count against democracy the fact that the undemocratic government says the people should not have the right to remove it from power, or (worse yet) that many other dictators, past and present, have said that the people over whom they rule cannot remove them from power. The positivist argument of making governmental behavior the touchstone for the validity of democracy is ultimately contingent and irrational, like most arguments of authority. The argument of authority runs thus: "people have a right to democracy because so and so (say, the UN General Assembly, or the majority of governments) said so," But if they have not said so (as indeed, many governments of the world have not) then people are not entitled to democracy. To be sure, the fact that governments of the world have started to accept democratic rule is a welcome development, but not, as positivists believe, because that means that there is now an "emerging" rule of democracy, but simply because less people in the world are oppressed. Something as central to political life as the right to participate in the election of one's government and in the making of the law- of the land should not depend on the vagaries of international diplomacy.

The positivist mistake consists of treating rules, of the type A as if they were rules of the type B. They see human rights principles as *solutions to problems of interstate cooperation*. They treat the imperative of democracy in the same way they treat the question of the extent of the continental shelf. For the positivist, just as the extent of the continental shelf is a contingent matter left to whatever governments agree upon, so democracy is a contingent matter left to whatever governments agree upon. Game theoreticians put this distinction in a different way: rules of coordination (like the continental shelf rule) attempt to solve a zero sum game. Moral rules, on the other hand, are almost always attempts to solve *zero-sum games*. (Of course there are many intergovernmental matters that are also zero sum *between those governments*; most human rights matters are zero sum games between the government and the people of a state, but not all zero sum games are human rights matters). Dictators don't want democracy, they want incumbency; the people want to decide who will rule. If there is democracy, there is no dictatorship, and vice versa. So democratic entitlement is, I suggest, a moral imperative, a principle that all governments in the world should honor regardless of what their practice, or general practice, or regional practice, is or has been. The rule of democratic entitlement favors the people over the rulers, and it matters little what governments want, especially given the perverse incentive they have on the matter.

So I think that we should stop talking about whether this or that cultural tradition is consistent or inconsistent with democratic entitlement. We should advocate instead democratic rule as a universal principle, much as human rights organizations do (this, without prejudging, of course, about different *procedures* by which different nations may implement democratic rule). In jurisprudential terms, this means accepting a natural law view over the positivist view (with the important proviso that one wants to remain neutral here between deontological and utilitarian justifications of

democracy) Democratic entitlement is a principle of international law, not because state practice has established it, but for all the reasons people like Mill, Kant, Locke, and many others have given. It is simply the right principle to have.

The Rousseauian Mistake

In the first section I elevated, as it were, the status of democracy as an international law principle whose validity does not depend on state practice. In this section I change sides: I suggest that many people *overvalue* democracy as a solution to political problems that communities (both state and substate groups) have around the world. The gist of my critique is that there are many principles (especially human rights principles) that trump the "collective will", the will of the majority. The Rousseauian mistake is believing that if we only allowed the people to speak through the ballots most problems faced by hitherto undemocratic societies are likely to be resolved.

Of course, a central point of deontological ethics (that majoritarian decisions cannot validly impinge upon fundamental human rights) is very well known and, I assume, correct. Nobody will suggest that it is all right for the majority to authorize through vote the torture by the police (maybe directed at the minority). Yet many people who discuss international affairs forget about this. When the Algerian government ignored the results of the fundamentalist electoral victory, many complained that the will of the people had been ignored. Yet perhaps the Algerian government had a justifiable reason for taking such an extreme step: perhaps the victorious party intended to establish a rigid totalitarian rule over the Algerian people (such as the current ones in Iran or Afghanistan). Similarly, perhaps the majority of people in Serbia *want* its government to engage in ethnic cleansing in Kosovo, but everyone else is rightly outraged by such possibility. The deontological principle can be put in general terms: that a majority of people say X is true doesn't make X true; that a majority of people say X is right doesn't make X right. (again, it's astonishing to see how we forget this simple truth; in current American politics, the polls rule: if 69% approve of the President's job, then that means he has done nothing wrong).

As I said, this point is too obvious to belabor it further. Yet there is one interesting trend in political philosophy today that regards democracy as a substantive *deliberative process* which under the right conditions yields results that are binding upon every citizen. This thesis, which is sometimes called civic republicanism, traces its origins to Aristotle and Rousseau. A version of it is endorsed, I believe, by John Rawls in his most recent work, when he argues for the idea of "public reason" as the kind of discourse that all reasonable citizens must resort to when trying to persuade one another of the policies that they respectively favor. The aim of this approach is to reduce the black-and-white effects of deontological ethics, to bestow on democracy the power to neutralize contrary rights claims. This is particularly true when rights have fuzzy boundaries, as they often do in international law. Take freedom of expression in international law, for example. Does it include the right to criticize the government? In the West we would automatically say yes. But consider Singapore. Let us assume, for the sake of argument, that the majority of citizens support a law that prohibits the press to criticize the government. Defenders of the regime will say that the democratic process there has been fair to all and has resulted, upon proper consultation under the local traditions, in banning press criticism of governmental behavior. Those who criticize this system, it is argued, are disrespectful of the democratic process in Singapore. While it is true that there is an international human right of free expression (the argument continues) local traditions and democratic procedures properly determine the boundaries of that right. And where the people have spoken, dissenters (and foreigners) must oblige.

But is this view sound? I suggest it is not, and its problem lies in a romanticized view of what democracy and majoritarian procedures are about. Contrary to what civic republicans and others believe, democratic procedures are *not* a proxy for moral discourse. Rather, democracy is a technical procedure for deriving a collective result or decision from a multitude of persons who have divergent individual views on an issue. A group has to adopt *some* laws and has to elect *someone* to govern. The most practical and plausible way of doing this is to resort to majoritarian procedures. But that's all. There is no particular moral significance in your having more votes than me and beating me on a particular issue. Public choice scholars put the point in a crude form: you want to use my resources (my property, my liberty) to subsidize your project, your life plan. Legislation is a way coercively to take those resources from me, since I won't surrender them willingly. But civic republicans, instead of admitting that this is what's going on, fantasize about a "deliberative process" which would further legitimize the exploitation by the majority. They don't want to admit that majoritarian decisions are often ways in which the majority steals from the minority, and want to say that as long as the winners give a "public reason" the transfer of resources will be morally legitimate. It is as if they would be ashamed of simply saying that they have won. In our Singapore example, the majority does not want to admit that they are simply suppressing bothersome dissent out of self-interest: they want to supply a reason of a higher order, one which transcends self-interest and mere preference - a public, objective reason. This, of course, will make the exploitation look better.

What I have just said does not mean that democracy is not essential to the sustenance of any decent political order. It is, and I have elsewhere given many reasons for the centrality of democracy. But the notions that majoritarian decision is a proxy for moral discourse, or that civic deliberation is a substitute for a strong protection of human rights, are not among them. This Rousseauian view simply undercuts the standing of the dissenter, of the unpopular loner who battles against political fads. It might well be that the democratic decision goes against our cantankerous dissenter, and as long as that decision does not violate his rights the majority can enforce it. But this will be simply because there is no other way to conduct political business in a society, not because now the dissenter has been ideally persuaded by the moral deliberation that took place in the "polis." The implication of civic republicanism is that the dissenter is a fool, someone who just cannot see that the majority is right. His dissent of course irritates the majority, because they are convinced that they have treated him with respect by giving him the public reasons why they should grab his property or liberty away from him.

I believe that there are three strong reasons for insisting upon democratic rule. First, as Ronald Dworkin has taught us, it is a way to treat every citizen with equal concern and respect. Second, as Kant has taught us, democracies are more peaceful. And third, as history has taught us, there are no examples of enlightened despots, of undemocratic governments who honor human rights. If the undemocratic government has real power (unlike, say, the British monarchy) it will either at some point violate human rights in order to remain in power or, if it has genuine liberal intentions, it will step down and allow free elections or gradually mature into a constitutional monarchy (similar to those found in Europe today.) Put differently: while human rights without democracy (the enlightened despot) is theoretically possible, well established experience shows that democracy is strongly correlated with the respect for human rights, and conversely, that undemocratic rulers are the worst human rights violators.

So democracy is justified, I believe, by a mix of deontological and utilitarian reasons, and that is why the absence of democracy is a serious flaw. But excessive reliance on democracy is another, although less serious, flaw. Unrepresentative governments are unacceptable in international law, the tyranny of the majority is also unacceptable, even when it appears disguised under the cloak of "substantive deliberative process." The best solution is the one supported by classical liberalism: let's promote globally, first, universal respect for human rights, and second, democratic procedures to make laws and elect governments, along with judicial review of constitutionality to make sure that majoritarian decisions don't violate human rights.

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In Search Of The Third Way

Here's a proposition: Only a monotheistic culture could have developed a binary system, and therefore computer technology. Is this deceptively simple (i.e. profound) or simple-minded?

In *"Two Mistakes About Democracy,"* Fernando R. Teson, by passes the now familiar debate over whether there is a "right" or "entitlement" to "democratic rule" in international law, to concentrate directly on what he terms "two mistakes" about the implementation of that right. The first, which he terms the "positivist mistake" lies in viewing the democratic right as a function of state practice. The right, he contends, cannot be adduced by tallying the number of states that subscribe to it, and then asserting in traditional international law fashion whether a norm of customary international law has thus emerged. The right to "democratic rule," (and indeed other human rights) he maintains, is too fundamental to depend on the chanciness that the appropriate number of the people of the world (say the majority), or their governments, will be operating under democratic rule at the time of the bean-counting. "[D]emocratic entitlement is, I suggest, a moral imperative, a principle that all governments in the world should honor regardless of what their practice, or general practice, or regional practice, is or has been."

The second mistake, which he calls "Rousseauian," consists in "overvalu[ing] democracy as a solution to political problems that communities (both state and substate groups) have around the world ... [T]here are many principles (especially human rights principles) that trump the "collective will", the will of the majority." Thus, the "moral imperative" which trumps state-practice is nonetheless subordinate to these other "principles."

"That democratic rule may be subordinated to other principles should be no cause for concern; after all, far from being a procedure for "moral discourse- democracy is a technical procedure for deriving a collective result or decision from a multitude of persons who have divergent individuals views on an issue."

So, how does Prof. Teson reconcile the view of the "democratic entitlement" as an inviolable 11 moral imperative," with the view of "democracy" as merely a "technical procedure" for deriving certain outcomes? His answer, given what preceded, is remarkably consequentialist (notwithstanding his claim that it is "a mix of deontological and utilitarian reasons"), and, for reasons I shall explain in a moment, highly unsatisfying. He offers three reasons for why international law should insist on democratic rule regardless of state practice and the general claim or position of the peoples of the world - whether they constitute the majority or not. First, democratic rule is a way to treat every citizen with equal concern and respect; second, "democracies are more peaceful"; third, "there are no examples of enlightened despots, of undemocratic governments who honor human rights."

As a preliminary matter, each one of these assertions can be challenged as to its factual accuracy. In what way is it really meaningful to state that democratic rule treats every citizen with equal concern and respect? Is the assertion just as valid for a plebiscitary democracy as for a representative one? Equally as true for a representative system based on "winner-take-all" as for one based on proportional representation? Recall that for Prof. Tes6n, "democracy is a technical procedure for deriving a collective result or decision from a multitude of persons." In short, what aspect of this "technical procedure" yields the "equal treatment and respect" that Prof. Tes6n asserts flows from "democracy?" In what way is his claim of "equal treatment" less a "romantic" vision of democratic rule than the "deliberative process" definition for which he excoriates "civic republicanism." Note further that the "equal treatment" applies to "citizens." Even assuming as a factual matter that "citizens" do indeed receive "equal treatment" and concern, why does the exclusion of the "foreigner" from the solicitude of democratic rule pose less of an intellectual jurisprudential problem than does the ultimate overriding of the interest of the "dissenter" in Prof. Tes6n's maligned civic republican example?

Similar problems of factual accuracy and intellectual proof attend the other two asserted justifications for internationalizing democratic rule as a principle of law. Thus, for example, the meaning of the assertion that "democracies are more peaceful," is not self-evident. If it is a variant of the now-popularized claim that "democracies do not go to war with one another," it begs the question - as political scientists are beginning to demonstrate - of which is the cause and which is the effect. Do societies become "democracies" because they are at peace, or is it that they do not fight one another because they are "democracies?" If the latter, what is inherent in the democratic process that denudes its practitioners of the war-fighting mindset? In any event, why do democracies go to war with non-democracies? Is it more satisfying to Palestinians on the West Bank or Kurds in Turkey, or Kashmiris in India, or Lesothans resisting South African intervention in their politics, or Basques in Spain, or Irish Catholics in Northern Ireland that the bullets that shoot at them are from the guns of practising democracies? And how about the starving children in Iraq or the Bosnian Serb made to watch a television program concocted by United Nations officials in place of Pale Propaganda? Should they accept their lot because it is being imposed on them ostensibly by democracies?

Simply put, Prof. Teson's justification of democratic rule as an international legal norm is unconvincing, particularly after his masterful job of undermining the positivist and Rousseauian rationales. I think that he is very much on the mark when he proposes that "let's promote globally, first, universal respect for human rights, and second, democratic procedures to make laws and elect governments, along with judicial review of constitutionality to make sure that majoritarian decisions don't violate human rights". I do not think he has offered an adequate explanation for the recommendation. Yet, the explanation is very much readily at hand. He simply overlooks it.

Recall that the issue - which Prof. Teson at the outset strove mightily to avoid confronting -is whether international law prescribes (or ought to prescribe) an entitlement to democratic rule. Prof. Tes6n asserts that democratic rule is a "moral imperative"; but declaring a phenomenon (or anything else for that matter) to be a "moral imperative" does not explain whether its violation should be outlawed. Consider, as an example: most of us probably subscribe to the notion that the avoidance of killing a human being is a "moral imperative". Yet, I daresay that few of us subscribe to the view that killing in self-defense - regardless of the circumstance - should be outlawed. Why do few of us subscribe to this notion? I could give consequentialist as well as deontological explanations; but ultimately, I suspect that the reason is simply because our social view of what ought to be outlawed has not reached a stage where we're comfortable punishing persons who kill in self-defense. Note that some societies have already outlawed some kinds of killings even when in self-defense; for example, such societies insist that the means chosen for self-defense should be proportionate to the imminence and scope of the anticipated danger. One can conceive of a society where threat to the safety of the person is so rare that the society criminalizes any kind of killing even if such killing was in the very rare case of protecting oneself.

Beyond the obvious point that we should not conflate "law" and "morality," or "legal norms" and "moral imperatives," what does the above example demonstrate? It is the truism, all too readily overlooked that law is the socialization of power. "Moral imperatives" may or may not be personal; the individual's adherence to them may be voluntary or coerced; but such choices do not exist with regard to law. Prof. Franck was well aware of that distinction when he posited that the "right to democratic rule" should not be viewed as a matter of grace, but as a principle of international law. Detractors from that view - and this writer counts himself as one of them - equally recognize that what is at stake is not a "moral commitment" to democratic rule - or its lack - but the legitimization of the coercive use of power to enshrine that vision across the globe.

Power derives from several sources; but whatever the source, if unchecked, it is dangerous to the welfare of the community. Indeed, the function of law should be to check power by making it accountable to persons other than those who wield it. That is what I mean by socializing power.

One of the most obvious forms of power - and one which Prof. Teson, strongly inveighs against is in the form of the "very individuals who are in power and wish to deny that right [of democratic rule], the exercise of which will likely throw them out of the presidential palace." But precisely because this form of power is so obvious - it is in reality oligarchic rule - obtaining widespread support for its regulation through law is generally the rule, not the exception.

A second but less clearly perceived source of power, which, in its own way, may be no less dangerous if unchecked than the first, lies in what Prof. Teson refers to in his critique of the "Rousseauian mistake" as an endorsement of the "tyranny of the majority". The problem with enshrining the democratic process as a legal norm lies neither with its justification as being based on state practice, nor with the romanticizing of the process of deliberation; rather, it is that by uncritically adopting it as the yardstick of legitimation, we throw away one of the keys to legality; that of accountability. To whom will the majority account for its use of power? In many ways, that is what the argument about civic republicanism is about. A constitutional democracy seeks to impose legal constraint on majority rule through such counter-representative measures as "written constitutions," judicial review, tradition, or even the rule of the "philosopher-king".

But there is a third source of power that must be checked; and it is particularly insidious because those who wield it typically do not think of it as power. I refer, of course, to the power of the publicist as such as Prof. Franck, Prof. Teson, myself, and others who invent ideas from their fertile imaginations, and often very little else. We live, we are frequently told, in an information or knowledge age. We glorify the epistemic community of which we are all members. The effective functioning of the "marketplace of ideas" gives us a license to divine rights and entitlements from our fertile imaginations, and we seek to foist these on others without the sanction of majority rule, or the accountability of deliberation. Who can deny that this is power?

Like the other forms of power, ours can be used for good or for ill; for that reason, it ought to be socialized and made accountable to the community. Of course, none of us will favor censorship -by oneself or others. How then do we socialize the power of the pen? By subjecting the idea, I suggest, to precisely those checks that Prof. Teson find wanting: state practice and reasoned deliberation. Shorn of such checks, publicists are unlikely to be accountable, and are therefore capable of inflicting as much harm as dictatorial oligarchs and tyrannous majorities.

My reason for being critical of the claim that there is an international right to democratic rule comes no from any virtuous sense of the supremacy of "human rights" (for example, against torture) over majority rule, but because it has not received the sort of scrutiny that it deserves. It is an idea woven out of a patchwork of intellectual musings; which takes the experiences of a discrete group at a discrete moment in time, and asserts it as universal, eternal, and above all, legal. It may be that in time, rule through the democratic process will command such widespread acceptance that acclaiming it as a right under international law will be more than the intellectual preferences of well-known scholars masquerading as law. Such an outcome would be more acceptable than the mere counter-assertion of another group of well-known scholars refusing to accord it a primary place among "human rights" on no more a ground than their own personal preference that human rights should have greater international legal protection than a "right to democratic rule." Ideas, whether presented as majoritarian or countermajoritarian, or whether they are said to constitute "human rights" or "democratic entitlements," need to be validated - at least if they are to be considered law - and so far, the only means of validation in the amorphous regime that we call international law is the persuasion across a broad section of the community the evidence of which is demonstrated by "state practice." Neither divine inspiration nor control over enabling resources such as access to influential legal journals are adequate substitutes because we have no means of assuring that the possessors of these resources, however benevolent, will be accountable to the international community.

Money Talks

Here are two realistic notions: Human rights are important. And, money talks. In his article "Two Mistakes About Democracy," Professor Fernando R. Teson brings to the forefront the importance of the human rights. However, perhaps we can expand Professor Teson's concern for human rights with some practical considerations.

Professor Fernando Teson advocates the theoretical "best solution." The first element of his "best solution" is to "promote globally . . . universal respect for human rights." In other words, people have a "democratic entitlement," regardless of what their government says because dictators will never choose a democracy.

The second element of Professor Teson's "best solution" is to promote "democratic procedures to make laws and elect governments, along with judicial review of constitutionality to make sure that majoritarian decisions don't violate human rights." In other words, democracy is not sufficient to guarantee acceptable outcomes, because the majority has the opportunity to exploit the minority, just as a dictator may exploit the people generally. Perhaps a more practical "best solution" exists. The first element, similar to promoting universal human rights globally, is that democratic nations could collaborate "secretly" to promote human rights via the democratic process; in other words, human rights would be an implicit goal, not an explicit goal. The second element, is these states with an implicit concern for human rights could create a global organization which, in return for economic benefits, imposes economic standards /restrictions for membership; thereby implicitly requiring a democracy or a democratic-type set of laws within a dictatorship. This practical "best solution" yields two benefits-increasing "democracy" globally and "monitoring" collective decision-making generally.

First ' governments, including dictators will evolve toward democracy or democratic-like outcomes, according to the practical "best solution." Most dictatorships operate in lesser-developed countries ("LDC"). Dictators of LDC's desire wealth. To have wealth they need to trade with other nations. The most effective /efficient trade is with an organization of states which has standards and procedures in place to promote trade. If dictators are required to meet certain standards/ requirements to be members of this organization, dictators will need to implement mechanisms for competition. Competition is a form of democracy. Companies "win" or "lose" because of the free-will choice of consumers. As competition grows, people carry over business principles and expectations to government. And, people gain economic power (not necessarily monetary). Dictatorships, however slowly, will move toward democracy; small movements are better than no movement.

Some may argue that dictators will just exploit their own people inside the borders while telling the rest of the world they are meeting the global organization's criteria. That probably will happen, but, consider the alternatives. One could replace national sovereignty with a global police force. This is an unacceptable alternative because the world would become a global dictatorship. Or one could refuse to interact with non-democratic nations at all until they comply with the global organization's criteria. This is an unacceptable alternative because without interaction, dictatorships may more easily keep "bad information" from the rest of the world. The practical reality is that governments cannot hide seven-year-olds working 15 hour days in sweatshops forever.

Governments will continue to evolve toward democracy or remain democratic as a result of the practical "best solution." In order to remain a part of the global organization, governments will have to continue to meet certain criteria. If dictators, for example, already see the monetary benefits to their pocketbooks from participating in the organization, they may increase competition on their own accord. The more likely scenario is the organization (with the implicit goal of promoting human rights through democracy) will be able to effectively impose additional requirements on members. These could include human rights standards, such as working condition standards, democracy or at least democratic-type results. The practical "best solution" then encourages evolution and endurance of democracy.

Some may argue that a "democracy" does not guarantee the majority will not exploit the minority. That is true; however, nothing does. This is a classic example of the "public choice theory." Even our own legislative, executive and judicial branches cannot prevent the majority from "exploiting" the minority-in fact maybe they are participants at times. The main concern, though, is human rights. In the practical "best solution," as this global organization

monitors" compliance with its regulations, the form of government is immaterial in some respects. Although a "democracy" is more likely to stay a democracy and ensure human rights, if a dictatorship achieves the same human rights result, progress has been made.

The practical "best solution" achieves promoting universal human rights by encouraging democracy or democratic-like outcomes and "monitoring" (as much as possible) those outcomes. Much of this practical "best solution" in fact already exists in the World Trade Organization ("WTO"), although the WTO's stated purpose does not include promoting human rights or democracy. And, the solution appears to be working-China wants to be a member. Money talks.

Kristy J. Hall
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Promotion of Human Rights Through Non-Traditional Diplomacy

Fernando R. Teson aptly describes the fine balancing act national governments must undertake in their pursuit of both democracy and human rights. Professor Teson rightly points out that while democracy is justified, the "tyranny of the majority is also unacceptable." While the temptation is great to apply this argument to modern day politics, I will instead focus on Professor Teson's call to promote universal respect for human rights. My suggestion for this promotion is through diplomacy, albeit not within traditional diplomatic circles.

The Framers of the U.S. Constitution wrote that basic human rights are inalienable. The difficulty, of course, lies in the universal acceptance and implementation of these human rights. While there are many examples that could be made of diplomatic efforts to promote human rights, my aim here is to highlight a few non-traditional diplomatic institutions that for one reason or another are better able to avoid being perceived by non-democratic states as threatening and interfering. Thus, these institutions run better odds of actually achieving their goal of basic human rights. The exact reasons as to why certain institutions may appear less threatening vary from situation to situation and requires greater analysis than this short paper can provide. Nevertheless, I will proceed here with a rudimentary analysis of three institutions and their diplomatic role in the promotion of human rights: the Roman Catholic Church, international sporting events, and study abroad programs.

The Roman Catholic Church

Tina Rosenberg writes (The Haunted Land 1995 at 160) that during John Paul II's first papal visit to then-Communist Poland in 1979, he proclaimed that "The future of the Poland will depend on how many people are mature enough to be nonconformists." The Pope has gone on to spread the same challenging message throughout his global travels. From Africa to Cuba, his mission has been to promote the concept of basic human rights and to advocate reform in non-democratic states.

Critics may argue that the Pope has had little effect on the recognition of human rights and that it is inevitably up to individual states either to provide for or to deny human rights to their citizens. But not many diplomats are given the opportunity personally to advocate human rights before the citizens of a government hostile to such values (See, for example, "Pope, Openly Challenging Castro, Is Pressing for Release of Prisoners," The New York Times Jan. 25, 1998 at p. A1). Pope John Paul II has personally taken on this challenge as no other man has done this century and has accomplished, through his own style of back-door diplomacy, what more-established diplomats have not. In so doing, John Paul II has carried on the mediating work of his predecessors in the promotion of human rights (See, Edmond Odescalchi, The Third Crown: A Study in World Government Exercised by the Popes, 1997).

International Sporting Events

Exposure to foreign people and places often can contribute to a degree of sophistication for the uninitiated. One of the best venues for such an experience is sporting events such as international championships and the biennial Olympic Games. At such events participants, coaches and officials are exposed to their fellow citizens of the world and begin to glean, for better or worse, what life is like in countries other than their own. These real world lessons in "comparative politics" can serve as a very useful, albeit indirect, conduit for the promotion of human rights. There are many prominent examples of athletes using sporting events as a means of defecting from their own country to a more democratic one. But there are surely even greater numbers of athletes, having returned from international sporting events to their own countries, now armed with knowledge of more tolerant 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 Teson'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 nontraditional diplomats, such as the Roman Catholic Church, international athletes and student 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 Tes6n, make the same argument from a "naturalist" or "deontological" perspective (to use Tes6n'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 Tes6n 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 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 for-ward. 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 separation 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 Teson, 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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