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Editorial

This volume of *International Legal Theory* marks the beginning of our second year of publication, and the third year of the ASIL Interest Group on the Theory of International Law. The Interest Group's decision to provide a forum for innovative and constructive discussion about the theoretical basis of international law has borne fruit in two candid and provocative issues. The high level of interest and caliber of response fully justify the effort expended and encourage a renewed commitment to this novel enterprise.

With this issue of the publication Professor Mortimer Sellers of the Center for International and Comparative Law at the University of Baltimore School of Law joins Professor Francesco Parisi as Editor of *International Legal Theory.* The Editors invite each of you to submit comments or lead articles and discussion pieces for future issues to *International Legal Theory* c/o Center for international and Comparative Law, University of Baltimore School of Law, 1420 North Charles Street, Baltimore, Maryland 21201.

Professor Joaquín Tacsan, President of the Arias Foundation in San José, Costa Rica, (and the Chair of our interest group) has provided this issue's topic with his discussion of an alternative approach to the question of effectiveness in international law. The editors are very grateful to Dr. Tacsan, and to those members of the legal and academic communities who have added their valuable reviews and comments to his fascinating and thought-provoking contribution.

The Editors

Letter from the Chair

I am pleased to present the third issue of the bulletin of the Interest Group on International Legal Theory. This issue, like its predecessors, presents a main contribution and the commentaries it provoked from other members. Several invitations have gone out to prominent international law scholars soliciting contributions to our bulletin which we hope will generate stimulating debate, not only among members of the group, but in the legal community in general.

I would like to take this opportunity to reemphasize that this bulletin is first and foremost a forum for members of the Interest Group. Members are encouraged to use the bulletin as a sounding board for ideas that they are still formulating and as a means for further developing those ideas based on the comments and criticisms of other members. In this way, the interest group can truly contribute to the development of international law.

The next issue of the bulletin will feature an article by Professor Jonathan Charney of Vanderbilt University. His paper, "International Law-Making-Article 38 of the ICJ Statute Reconsidered", discusses the evolution of community international law making and enforcement as a component of the current state-based system. Professor Charney admits that the state-based system is not in any immediate danger of being replaced; nonetheless, the phenomena of consensual community action cannot be dismissed.

Specifically, Charney evaluates the role of the various multilateral forums in lawmaking. Although many norms that are born in such settings are only hortatory, an increasing number can be considered to be "general international law." Unlike customary international law or general principles, which are claimed to be international law despite sometimes inefficient investigation into state consent and inaccurate interpretation of state practice, general international law has the benefit of avoiding the mystery of traditional international law-making procedure.

Because norms are introduced, developed, and revisited in public fora, governments are alerted to the process and given a real opportunity to participate. In this context, the concept of tacit consent takes on more legitimacy than is the case for customary law or general principles. Furthermore, this public forum approach allows all states-big or small, rich or poor, powerful or weak-to participate more effectively in the process.

Charney then switches gears and moves to a discussion of enforcement. After a brief discussion of the traditional means of enforcement, Charney gives us his own interpretation of the ICJ's dicta in Barcelona Traction. He submits that, rather than defining two kinds of norms-bilateral or erga omnes-the ICJ was in fact classifying two kinds of interests. In other words, enforcement of international law may either be bilateral, because essentially only the injured party has an interest at stake, or erga omnes because the interest at stake is of interest to all members of the international community. In the latter scenario, the interest at stake is the very interest which the rule of law was designed to protect.

Charney offers three criteria for declaring an interest erga omnes: (1) no single state was directly injured; (2) the state injured is unable to act for reasons beyond its control; or (3) either the injury is so massive or the offender or group of offenders is so powerful that no one victim can be identified. As the international community continues to create law in international fora, it will undoubtedly also increasingly act to protect interests that are perceived as concerning the whole international community. Thus, states will have to accept that international law is developing as more community oriented than bilateral.

Professor Charnev has offered an interesting starting place for what I think will be a particularly stimulating discussion of the creation application, and enforcement of international law. The reality of international law making by "international legislatures" is indisputable. It now remains to be seen how that phenomena will be accepted and integrated into the current system based on Article 38 of the ICJ Statute.

The forthcoming issue will allow our interest group to set the tone for what promises to be a lively- international law discussion. I encourage all members to submit their thoughts on this piece once they have had the chance to read it.

In closing, I would like to ask all members to help brainstorm on possible topics and speakers for an interest group sponsored panel at the 1997 Annual Meeting. Although we did not sponsor a panel at this year's meeting, I feel that we are now ready to take this step.

This past year has given the group the time it needed to consolidate and focus on its objectives. Increasing participation in the bulletin's commentary section illustrate the high level of interest and dedication of the group's members. Richard Falk has suggested a panel on "International Law in an Era of Globalization", and I welcome any comments on that topic or suggestions on participants for such a panel as well as other panel topic proposals that could be presented in the next issue of the bulletin.

It is important that our first panel display the seriousness with which the group has approached this endeavor from the beginning, thus I ask that all members come forth with contributions to this project as soon as possible in order that we may begin preparing for an exceptional and illuminating first showing. I look forward to hearing from all of you with suggestions for this event as well as contributions to the bulletin and ideas for other activities that the interest group could pursue.

The Effectiveness of International Law: An Alternative Approach

I. Moving Beyond Enforcement

The search for international legal enforcement mechanisms has occupied scholars throughout the years. This is mainly due to the fact that the international community lacks centralized law-applying institutions to invariably guarantee the coercive application of legal commands. Although it may be the natural reaction of the jurist to focus on problems of enforcement, the fact is that current methods of enforcement do not fully explain the broad phenomenon of legal effectiveness in the present world order. The application of environmental law, human rights, and other emerging legal instruments of global cooperation is not only a matter of legal coercion and enforcement, but also a question of persuasion and consensus.

The discussion of enforcement has been so endemic to international legal scholarship because international law has traditionally been studied by comparing it with domestic law. International law is alleged to be “weaker" than domestic law for its lack of enforcement. The comparison seems persuasive; however, its inaccuracy has yielded devastating consequences for international law as a discipline, provoking strong cynicism toward international law. Critics of international law commonly question the use of having international norms if those norms are to be respected only at the state's discretion.

Moreover, the short life of the League of Nations and the passive role of the United Nations Security Council during the Cold War in preventing and resolving armed conflicts have led many analysts to discard the idea of a major role for the rule of law in international affairs. Professor J.L. Brierly perceived this attitude in the following terms:

When the layman thinks of law, he is apt to think first of the policeman, and he is inclined to doubt the value of a system which, so far as he can see, makes no definite provision for the policeman's function. (J.L. Brierly, *The Basis of Obligation in International Law and Other Papers* 201 (1977).)

But not only the layman has thought of international law in these terms. J. Austin believed that the law had to be enforceable in order to be legally binding. G. Austin, 7he *Province of Jurisprudence Determined* 14 (1955).) He argued that a law which is not binding is not law. Insofar as the international society lacks a coercive power to enforce its rules, its rules are not binding. As a result, lawyers have used the best of their capacities to counter this charge of the "weakness" of international law. They have argued that enforcement is not the hallmark of "law" (A. D'Amato, *International Law* 1 (1987)); that much of what we call domestic law is also non-enforceable (R. Fisher, *Bringing Law to Bear on Governments,* 74 Harv. L. Rev. 1130 (1961)), and that in any case, "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." (L. Henkin, *How Nations Behave,* as cited in D'Amato, *supra,* at 2.)

As early as 1931, Professor Brierly, addressing the Annual Meeting of the Grotius Society, defined international law enforcement as a body of unorganized sanctions emerging from the "strength of public opinion." (J.L. Brierly, *supra,* at 202.) His argument has been adopted with multiple variants, one of them being Richard Falk's notion of normative restraint as depending on the as yet not fully realized “energies of civil society". These energies, according to Falk, curbed the militarist excesses of royalty in thirteenth-century England and produced the Magna Carta. "International law, if it is to be effective in the war and peace area, will develop more in response to pressure from citizens for a lawful policy than as a shift in official stance by the leading governments of the world." (R. Falk, *Revitalizing International Law* 100 (1989).) Although many have confused the lack of an enforcing agency with lack of enforcement, Kelsen, Hart, and others have espoused the idea that coercive sanctions do indeed exist in international law. In the international realm, sanctions are applied in a decentralized way by individual states or a group of states, or by the community at large

rather than by an agency or agencies specifically authorized to enforce the rules. (H. Kelsen, *Pure Theory of the law* 211; Hart, *The Concept of law 80.)*

Legitimacy of legal claims can indeed be measured by the reaction of the legal community to the incident in question. Nonetheless, can we justify an armed attack based upon the inaction or the indifference of the international community? If so, situations like the U.S. invasion of Grenada in October 1983 would be rendered legitimate simply because there was no significant reaction from the international community. (For a discussion about the illegality of the U.S. invasion of Grenada, see F. Boyle, *World Politics and International Law* 272 (1985).) Thus, there is a need for further inquiry into how inter- national law does in fact impact international decision making.

The most important observation we can derive from existing theory is that the problem of enforcement cannot be taken for granted; enforcement depends more on political conditions than on legal mandate and institutional mechanisms. However, there must be a reason why a significant number of treaties and customary rules are obeyed without much hesitation. For example, norms related with diplomatic relations, international fishing, and territorial seas have elicited compliance from states in most cases.

While it is important that we improve the means by which international law can be enforced, the long-term effectiveness of international law only partially depends on it. To seriously investigate the dynamics of law obedience, we must move beyond coercion and begin thinking more in terms of effectiveness. I propose that an alternative approach to law effectiveness can be sought by understanding how, through persuasion and consensus, the rule of law can guide and constrain decision making. The following are some reflections intended to serve as the basis for a methodology to monitor and explain the restraining and guiding role of international law in policy making.

II. An Alternative Approach in Brief

1. Normative Knowledge

Looking beyond the aspects of control and enforcement of the body of international legal norms implies that we monitor the interplay between *normative knowledge* and public and private decision-making. By *knowledge I* mean the information contained in principles, norms, rules and other criteria about proper behavior, as well as in theories about that information. I argue that this knowledge, if accepted with sufficient consensus at a given time among interested actors, can serve as a compelling guide to decision making or public policy.

We consider actors to be those people, public institutions, non-governmental organizations, businesses and groups that are relevant to the use of that knowledge. Relevant actors include those who have the decision-making capacity to incorporate the mandate of the legal standard in the determination of conduct or public policy. Those who have access to the decision-making in the public sector are also relevant, using the content of the standard as a criterion for choosing between one option or another.

From this viewpoint, international law can be conceived as a form of *knowledge.* Since legal commitments are normative in character-they prescribe a certain form of action or inaction by political actors-we can consider them as *normative knowledge. (See* J. Tacsan, *The Dynamics of International Conflict Resolution* 52 (1992).) Normative knowledge in its most widely conceived terms includes not only "legal knowledge" as found in conventions, legally binding instruments and decisions, customary international law, *soft law,* international legal *doctrine,* and case law, but also the expectations that actors derive from their moral and scientific imperatives and perceptions of proper conduct.

For example, in the international arena, the perception that the protection of biodiversity is mandatory to all states and human beings shows how a scientific prescription has become normative knowledge despite the fact that such a principle has not yet acquired formal legal status. (The 1992 Rio Convention on Biodiversity has not yet entered into force or become customary law, but the need to protect biodiversity is widely recognized as necessary and mandatory. 36 *BioScience* 298-300 and *INBio Newsletter, Dec.* 1990.) Thus, international normative knowledge encompasses far more than just legal information and takes into account also the expectations that relevant actors derive from the language of rules, customary norms, standards, non-binding statements, generally accepted scientific prescriptions, international judicial decisions, adjudication, and doctrine. (See Tacsan, *supra,* at 52.)

Normative knowledge becomes *consensual* when it succeeds in dominating the policy-making process and, therefore, is able to imply acceptance by all major actors. The level of consensus that normative knowledge requires in order to be effective must go beyond the acceptance of a particular drafting of rules. It must also be reflected in the normative expectations of relevant actors. By effectiveness we understand, in the first place, the actual use of norms by relevant actors, and ultimately, the final application of consensual normative knowledge in the resolution of a controversy, the drafting of a public policy, and the making of a particular decision. Measuring the effectiveness of normative knowledge requires that we look not only into legally-related issues but also into an interdisciplinary set of questions, such as the staffing and budgeting of bureaucracies for achieving compliance, the quantity and quality of the data that is available, and the extent to which incentives and sanctions are actually used and imposed. We need thus to inquire into the dynamics by which normative knowledge becomes public and consensual (see discussion infra part HI.3) and into the vehicles that incorporate that knowledge into the behavioral or policy- making realm.

Some of the vehicles that have been identified in major existing theoretical works for making knowledge public and consensual among policy-makers are governmental and non-governmental organizations, foreign experts, the media, consultants, MNCS, and the so called epistemic communities or specific communities of experts with common belief systems. ("Epistemic communities" is a term drawn from the literature on the sociology of knowledge and has been adapted for use in international relations to refer to a specific community of experts sharing a belief in a common

set of cause-effect relationships as well as common values to which policies these relationships will apply. *See* Peter M. Haas, *Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control,.* 43 Int'l Org. 377,377-403 (1989).)

2. Effectiveness vs. Coercion

In operational terms, normative knowledge becomes effective when the explicit or implicit set of behaviors, policy-making styles, and goals of convening parties are accomplished according to shared expectations of conduct (i.e. consensual normative knowledge). Thus, the operational effectiveness of international and national normative knowledge does not depend only on enforcement or coercive measures, although the latter are also means to accomplish such objectives.

Despite its importance in forging the obedience of normative commands, authorized coercion encounters several limitations. First, most legal commitments are drafted in differential and contextual, as opposed to absolute, terms. (D. Magraw, *Legal Treatment of Developing Countries: Differential, Contextual, and Absolute Norms, 1* Colo. J. Int'l L. & Pol'y 69.) Second, even when drafted in absolute terms, these commitments lack high degrees of determinacy. (The 'ability of the text [of the norm] to convey a clear message, to appear transparent in the sense that one can see through the language of the meaning." T. Franck, *Legitimacy in the International System,* 82 Am. J. Int'l L. 705 (1988).) Third, the principles of sovereignty and non-intervention, and the lack of a supranational arrangement, downplay most possibilities of direct international enforcement. Fourth, implementation and compliance may not only be a matter of governmental will but also a matter of financial and technological capabilities.

In contrast with positivist coercive enforcement approaches, the concept of normative knowledge encompasses not only the necessary enforcement of certain norms and rules, but also several alternative methods for the effective implementation of legal commitments. From this perspective, it is thus possible to take into account the role of *epistemic communities* in forging consensual knowledge and incorporating it into the decision-making process, and in creating effective regimes. - (P.M. Haas, *Do Regimes Matter?, supra;* P.M. Haas, *Saving the Mediterranean: the Policies of International Environmental Cooperation* (1990); P.M. Haas et al., *Institutions for the Earth: Sources of Effective International Environmental Protection* (1993).) The widely acclaimed Montreal Protocol-for its success in achieving consensual understanding among international actors in restricting the production of ozone-layer depleting chlorofluorocarbons (CFC's)-illustrates the effectiveness of the epistemic community. The first substantial scientific atmospheric observations by NASA satellite data in 1978, and NASA's subsequent Ozone Trends Panel in 1986, followed by the British Antarctic Survey team in 1985, and the World Meteorological Organization were instrumental in the initial activization of public servants and private industry alike. These organizations continued to act as catalysts to negotiations among the politicians, industrialists, and diplomats engaged in the evolution of the final protocol as it passed through deliberations within UNEP's World Plan of Action and its Coordination Committee on the Ozone Layer (CCOL), the “Toronto Group,” the failed Vienna Convention, and the Montreal Convention.

When considering epistemic communities as vehicles for normative knowledge, we may also address the vast potential of nongovernmental organizations in promoting the effectiveness of international law in matters such as environmental protection (P.J. Sands, *The Environment, Community and International Law,* 30 Harv. Int'l L.J. 393), or include in our investigation contributions to the strong connection between domestic practices and international obligations as central to making international commitments work. (E. Barrat-Brown, *Building a Monitoring and Compliance Regime Under the Montreal Protocol,* 16 Yale J. Int'l L. 519 (1991).) By looking at formal and informal international arrangements as normative knowledge, we are able to include several existing efforts toward the generation of information that could be made available for consideration by decision makers. (For example, D.D. Caron, *Protection of the Stratospheric Ozone Layer and the Structure of International Environmental Lawmaking,* 14 Hastings Int'l & Comp. L. Rev. 755 (1991); J.T. Mathews and D.B. Thunstall, *Moving Toward Eco-Development: Generating Environmental Information for Decision Makers,* WRI Issues and Ideas, August 1991. The World Resources Institute has been concerned about the lack of knowledge on environmental issues and has long since started a series of publications to fill the information gap.)

As noted earlier, normative knowledge endows us with a rich interdisciplinary scope since it encompasses international commitments, implementation of legislation, and most importantly, the expectations of major actors in the society. For this reason, we will be investigating issues not merely from a legal or technical perspective, but also from the social sciences' points of view. The expectations of actors as a critical societal component can be either convergent or divergent and by no means are free from ideology, individual interests, information gaps, habits, stereotypes and prejudices. To create a common base from which to grasp these many types of actors and expectations, we can employ a comparative study of how such actors and expectations fared during the drafting of several conventions, resolutions and declarations, and their subsequent implementations and applications.

III. Monitoring Effectiveness

1. From Plain to Legitimate and Authoritative Normative Knowledge

The consensual nature of a particular set of normative knowledge endows it with legitimacy and authority. No normative knowledge can be effective in operational terms unless it is legitimate and authoritative and exercises restraint on relevant actors, or simply enjoys some credibility and respect from its users. The authoritativeness of a "human right to development" for example, might be called into question when evaluated in light of the controversy that has risen from this new concept in the community of human rights scholars. (W.F. Felice, The Right to Development as a General Principle of International Law, paper presented at the Annual Meeting of the International Studies Association in Chicago, Feb. 21-25,1995.) However, the existence of such controversy does not impair the chances for that right to achieve consensual acceptance and legitimacy in the future. In fact the formation of a rule or a particular set of normative

knowledge is equivalent to the consensus-building process through which the norm acquires authority. The consensus derived from normative knowledge also offers legitimacy and authority. Knowledge that is not legitimate and authoritative, that does not exercise any type of credibility, respect and restraint from its users, cannot be effective.

From this perspective, it is possible to better understand the role of the jurist. In human rights, for example, the discussion of whether these rights are universal or not is irrelevant. What is important is whether a human right is effective because there is a high enough level of consensus on the particular normative knowledge it contains. The right to life, for instance, is indisputable in most regions of the world, and, as such, it is legitimate, credible, and therefore can more easily compel policy makers and governments to apply it. The jurist interested in the effectiveness of normative knowledge of human rights should thus monitor the norms which inspire the most consensus as demonstrated by their adoption and subsequent application.

The formation of all rules of law says much about their legitimacy. Let us take an example. When Amnesty International called the world's attention to torture, there were conceptual and operational difficulties that delegitimized the right to not be subject to torture. When the same organization began to investigate the situation of prisoners of conscience, it found that torture and other cruel treatment of detained prisoners was a serious and growing problem. In 1972, Amnesty International launched a worldwide program called "The Campaign Against Torture", with the purpose of educating diplomats, politicians, and the general public about the mass character of torture in the world, and also tried to reinforce the express prohibition of the use of torture by any means or under any circumstance. In this moment, the normative knowledge regarding torture was not consensual and was therefore not legitimate. The word "torture" was understood in distinct ways by distinct actors.

In 1975, promoted by Amnesty International but with the support of some sympathetic states, the Congress of the United Nations for the Prevention of Crime and the Treatment of Delinquents was organized. Subsequently, the General Assembly of the United Nations adopted declarations condemning torture and other denigrating, cruel or inhuman punishments. Having reached broader levels of consensus through the prohibition of torture, greater additional efforts were made that led to the 1984 adoption of the Convention Against Torture, supervised by an Expert Committee Against Torture. To ensure that no country would escape scrutiny by not ratifying the Convention, Amnesty International and others also lobbied for the naming of a Special Spokesperson on Torture for the United Nations Commission on Human Rights in 1985. (See H. Hannum, Guide to International Human Rights Practice 33 (2d ed. 1992).)

Thus we see how the prohibition on torture evolved from being a moral type of normative knowledge (result of a preliminary investigation by Amnesty International), to become consensual normative knowledge (result of the United Nations Congress on Crime Prevention and the Treatment of Delinquents), and finally to convert itself into authorized legal knowledge endowed with absolute legitimacy and authority (result of the Convention Against Torture of 1984).

2. Observing International Actors

International law cannot make policy on its own, but people can. Normative knowledge can only serve as a frame of reference, although sometimes a compelling one, for statesmen, political leaders, organizations, corporations, and individuals, who, in the final analysis, are the ones who make the decisions. For normative knowledge, international law, like all law, is ineffective if it lacks "operators," that is, legal subjects entitled to use the law for particular purposes. ("Norms comprise symbols of normative conceptions about reality. A translation of these conceptions is operationalized by the user." B. Holzner et al., Knowledge Application: The Knowledge System in Society 95 (1979).) States, organizations, relevant groups, and individuals can become both target subjects and operators of international legal and institutional frameworks. (The terms "operator," "actors," "decision makers," and "international participants" are used here to refer to international legal subjects that enjoy sufficient access and standing to create policy or make decisions. Thus, for example, states are the only operators and participants with access and standing at the International Court of Justice, though individuals may also become operators before an international human rights court. Presidents, Ministers, leaders of governmental and non-governmental organizations, organizations themselves, and individuals, if entitled with the authority to participate in a decision-making process, are operators or relevant actors. For more detailed information on the various international subjects in contemporary international law, see M. McDougal and W.M. Reisman, International Law in Contemporary Perspective, in The Structure and Process of International Law 107 (1986).) To borrow Professor Chayes' terminology, international law is not self-activating; someone has to invoke legal norms and legal arguments before anything "legal" can take place. (A. Chayes, The Cuban Missile Crisis, in R. Falk et al., International Law: A Contemporary Perspective 44 (1987).) Rules do not apply themselves. (M. McDougal, Law and Peace, in W. Scott Thompson and K. Jensen, Approaches to Peace 134 (1991).) Once we acknowledge the essential role of human actors in international law, we can only ascertain the effectiveness of international law if, in addition to the more traditional bases of legal inquiry, we consider the interaction of what actors believe--or want to believe-the law is.

The process by which actors refer to the normative framework of international law can be dissected into two interrelated phases: the myth and the operational. These phases or systems demarcate the distinct transformations of normative knowledge throughout the decision-making process. From phase to phase, this knowledge may or may not be transformed from a mythical set of norms upon which actors justify their actions into a consensual and authoritative framework to restrain and guide political behavior. The two phases also show the ways in which actors change under the influence of normative knowledge. In the best of several scenarios, actors learn and change goals, policy-making, and/or bargaining styles. In the worst, they simply remain non-cooperative and unchanged.

3. Assessing the Dynamics of Myth and Operational Normative Knowledge

We may distinguish between two normative systems. A myth system is a normative system that is supposed to be applied; one, in other words, that enjoys lip service among elites. An operational system is a normative system that actually is applied. (W.M. Reisman and A. Willard, International Incidents 12 (1988). Although the terms "myth" and "operational" systems are borrowed from Reisman and Willard, they are given a somewhat different meaning and a fully different use.) The effectiveness of international law may be assessed by examining the distinct and varied relations between international operators and these two normative systems.

3.1. The Myth System

A myth system comprises all normative knowledge available to international actors, including formal and informal sources of law, as well as the perceptions and expectations the actors derive from that knowledge. The ways in which actors interpret existing normative knowledge are by no means free of their ideological preferences or self interests. The myth system, in other words, incorporates normative knowledge that international actors can use to justify, criticize, or frame policy. We can measure the effectiveness of the myth system of normative knowledge according to the relative use and relevance actors give to such knowledge.

A myth system becomes effective when actors decide to base their behavior, policy or demands on the framework provided by normative knowledge, regardless of the way they interpret that knowledge or the expectations they derive from it. A myth system's effectiveness only indicates that participants are willing to use normative knowledge in their policy-making endeavors. It by no means indicates that the law will become the exclusive framework upon which policy will be adopted; that is, parties will not create policy or resolve their differences by looking strictly at the mandate of legal information.

In order to illustrate what constitutes a myth system and the use of this concept, we take for example the Mayan population of the province of Quiche in Guatemala. In 1985, normative knowledge of human rights was unheard of by this population. For them, human rights was a myth system. It was known that human rights were written about in books, but the books and their content remained unknown. The myth system would have been ineffective if that situation had remained unchanged and if the massive killings and violations of human rights by the Guatemalan military had continued, which they did.

Nonetheless, in 1988 the United Nations began the Development Program for Central American Refugees, Repatriated and Displaced Persons (PRODERE) with the goal of helping reintegrate refugee populations in the process of returning to their places of origin. In Guatemala, PRODERE worked in Quiche, particularly in the municipalities of Ixcan and Triangulo Ixil. As part of the new theories of human development, PRODERE not only concerned itself with reaffirming and fomenting health and educational services but also promoted the productive capacity of members of the Quiche population, and educated and empowered them on the subject of human rights. In the midst of civil war in Guatemala, PRODERE organized activities for the promotion and divulgation of human rights, also working in order to assure that the Public Office for the Defense of Human Rights established auxiliary defender's offices in the province, and that the courts were strengthened in that area. (See lnstituto lnteramericano de Derechos Humanos, Informe de Consultoria de la sistematizaci6n de la experiencia del PRODERE en el componente de los derechos, Office of Research and Development-IIDH, San Jose, Costa Rica, July 24, 1995.)

The example of PRODERE is one of the effectiveness of the myth system of human rights, especially when human rights began to be used and taken into account by Mayan populations in order to defend their families and basic liberties in a context of war and generalized violence. In the Guatemalan province of Quiche, the myth system of normative knowledge of human rights was effective.

The questions that need to be asked here include the following: What makes international actors utilize legal principles, norms, rules, and procedures in their decision-making contexts? What factors cause actors to view existing legal information as tactical or referential guidelines? These questions focus on the stage of the decision-making process in which the international operator decides what "knowledge" to use and what criteria to advance. "Extrinsic" and "intrinsic" factors related to the myth system of international law lead actors to use "normative knowledge." Such factors define the degrees to which these actors would rely upon and emphasize that knowledge in order to define their political goals.

Examples of "extrinsic" factors include the participants' exposure to the contents of the system, the financial and educational resources they have allocated to research and training in relevant international legal issues, the degrees of influence exerted by legal departments in governmental offices, and the educational and professional orientation and background of decision makers. Obviously, " extrinsic" factors are also intimately linked to the relative power of the antagonists, their position in alliances, and the issues that engage them. For example, developing states exhibit a strong affection for legal structures, as indicated by the role of international law in North-South relations, because these countries believe that "the biases of constitutive rules of the sovereignty game today favor the weak." (See T. Jackson, Quasi-states, Dual Regimes, and Neoclassical Theory: International Jurisprudence and the Third World,41 Int'l Org. 537 (1987), citing M. Bedjaoui. See also B. Ramcharan, Caribbean perspectives on International Law and Organizations (1989); A. Cassese, International Law in a Divided World 119, 145 (1986).)

"Intrinsic" factors refer to the particular ways in which the structure of norms and the specific "language" of rules affect decision makers in their applications of international legal knowledge. My understanding of the "intrinsic" factors of the myth system draws extensively from Franck, for whom the legal rule may not necessarily require external means of enforcement to exert compliance from international actors. Franck calls this quality of the norm its "pull to compliance" or "legitimacy." In applying this analysis, Franck observes that some rules are complied with more than others, and, consequently, that legitimacy, as opposed to coercion, seems to be the key to legal order and systematic obedience." (Franck, supra, at 705-08.)

It is important that we understand that the mythical phase describes a form of mental operation. The political actor has mentally taken into consideration the existence of normative knowledge. He or she has not yet decided to realize or manifest a particular action. Thus, in the mythical phase, President X or Minister Y will be barely contemplating the various alternatives for action. The myth system is effective when President X or Minister Y has seriously considered, among many other factors, the referential mandate of normative knowledge and its implications for his or her preoccupations. The myth system thus consists of normative knowledge not necessarily consensual and its effectiveness depends upon whether or not international actors refer to it to create policy or resolve their disagreements.

3.2. The Operational System

Even though actors decide to frame policy under the structures of the myth system, they do not necessarily mean to comply or feel obliged to respect those structures. Universal history is plagued with actors making merely rhetorical references to principles of law and morality, or, what may be worse, interpreting those principles to suit their interests and justify their wrongdoings. In fact, the language of legal rules is usually ambiguous, and, as such, the information that legal rules contain-and consequently, the expectations that actors derive from them is rarely fully consensual. Normative knowledge will start to direct decision making when all relevant actors begin to share similar expectations about its contents and act accordingly. Normative knowledge can become compelling to actors when it enjoys high degrees of consensus and authority. Knowledge is consensual when it dominates the policy-making process and implies acceptance by all major actors and target audiences. (Haas refers to a similar phenomenon by saying: "Once knowledge escapes the political and economic control of its originators, it becomes a kind of 'international public good'." E.B. Haas, Why Collaborate, 32 World Politics 368 (1980).)

When normative expectations are divergent, knowledge cannot become consensual unless a particular set of these expectations prevails and the divergence is eradicated. A set of expectations may prevail if the divergence is resolved by negotiation among the parties, or by third party authoritative determination. The prevailing expectations become consensual when they are shared by most parties and target audiences. If expectations are consensual, the normative knowledge from which they arose becomes consensual as well. (Expectations may prevail either because they are shared by participants through negotiation and interaction or because they are authoritatively determined by impartial third party action). The mechanics of translating divergent normative expectations, first into prevailing expectations and later into consensual and authoritative normative knowledge, are characteristic features of the “operational system.”

The operational phase starts when decision makers are ready to act and use the relevant normative framework. The operational phase is activated when one or more participants have in fact resorted to the “myth system," either to advance their legal entitlements or simply to justify their acts. We may simply say that the operational system is employed when the myth system has already achieved significant effectiveness. Most actors evaluate actions and formulate policy according to their particular understanding of applicable legal standards of conduct. In operational contexts, international actors have already decided to frame a particular demand or decision within the context of normative knowledge and to advance their normative expectations by operationalizing available legal, institutional, or diplomatic means. To phrase it differently, in the operational phase, actors use the normative knowledge of a myth system in their policy-making tasks. This operational system develops through the actual adoption and implementation of policy or through the exchange of claims and expectations occurring within a bargaining process, as well as through the bargaining styles of participants and their capacity to manage knowledge and achieve consensus.

Political scientists use at least four main decision-making styles and knowledge interconnection scenarios to explain the relation between consensual knowledge and decision-making styles in international relations. (A seminal model has been developed by Ernst B. Haas. See E.B. Haas, Why Collaborate, supra. For the most recent formulation of Haas's model, see E.B., Haas, When Knowledge is Power (1989).) In the first decision-making style, actors link issues and goals in full coherence with normative knowledge; that is, they share common interpretations and expectations of a particular set of normative knowledge and take decisions accordingly. Under the second scenario, all actors link decision-making with the same normative knowledge, but they do not necessarily draw convergent expectations from that knowledge. If the majority of actors agrees on particular expectations and interpretations, the others may adapt. The third style involves actors who raise divergent expectations and issues that are not coherent with the normative knowledge at stake. The knowledge base is less consensual and the possibilities for adaptation are much lower. Finally, there is the case where no consensual knowledge exists and, thus, issues are linked in purely tactical fashion, if at all. No change is expected here, except by coercive means or enforcement.

These four scenarios are relevant because it provides the monitoring tools to assess how normative knowledge can influence the decision-making process. This model can be applied intra-governmentally (between domestic epistemic communities, constituencies, bureaucracies and decision-makers), intra-coalitionally (among members of coalitions), or inter-coalitionally (among international groups of participants). Looking at international law as normative knowledge helps us to understand legal effectiveness not only from the viewpoint of compliance by international actors but also in terms of its contribution to the building of cooperation in the international community. The more consensual the normative knowledge, the higher the possibilities that normative expectations will converge in order to address specific problems. When actors agree on the issues and goals and share common, consensual, behavioral criteria, the chances for cooperation increase as do the chances for peace and security.

In international conflict resolution and other law implementation and application processes, such effectiveness of the operational system can be identified in the bargaining styles participants use to link different issues and goals. It may also be surveyed in the international reaction to expectations that prevail or survive, and the degrees of consensual knowledge, learning, adaptation, and restraint that may have motivated participants during and after the decision-making process. (It is useful to point out here that these indicators are inevitably "empirical." Although social scientists have discussed some of them in an effort to demonstrate the “rationality" of legal debates, such demonstration is not their purpose here. The empirical devices here only intend to facilitate basic empirical criteria to help international lawyers and politicians evaluate international legal dynamics in terms of their probable degrees of effectiveness at influencing decisions). In other words, the purpose of the operational system is to permit the actors to collaborate in the realization of the norm. As much as the content of these norms tends to be ambiguous, the operational system contributes to endow decision-making processes with significant criteria for the shaping of similar normative expectations.

The convergence of expectations between the users of ambiguous normative knowledge in the operational system may be reached through two principal means: negotiation and adjudication. Negotiation (including pure and simple negotiation, mediation, and conciliation) permits parties, with or without the presence of a third party, to converge their expectations by means of a transaction. Adjudication, arbitrary or judicial, resolves the problem of divergent expectations by defining the one that prevails and to which both parties should adhere.

The Contadora and Esquipulas processes in Central America are good examples of negotiation. While Contadora failed to produce more consensual normative knowledge and, therefore, failed to foster peace in Central America, Esquipulas proved successful in building upon an International Court of Justice clarification of normative

knowledge to foster converging expectations in a bargaining context. The Contadora Group was formed in 1983, by Venezuela, Colombia, Mexico, and Panama, as a reaction to the military and paramilitary activities of the U.S. against Nicaragua. The group also searched for a peaceful resolution of the larger crisis in Central America. From its inception until 1986, Contadora was the main negotiating arena for the conflict, and it enjoyed the full support of the international community.

Contadora based its "good offices/mediation" approach on abstract principles of international law, such as self-determination and non-intervention. The ambiguity of these norms gave rise to different normative interpretations by the parties, leading to contrasting expectations between the actors in the process and the U .S., as the external but influential hegemonic power. One set of opposing expectations arose between Nicaragua and the U.S. in relation to the principle of non-intervention. While Nicaragua maintained that the principle allowed for no exceptions and that it should be read literally from Article 18 of the OAS Charter, the U .S. allies found individual and collective intervention in Nicaraguan internal affairs permissible. U.S. allies in Central America considered that the Sandinistas were " exporting" their revolution to neighboring countries and that they had manipulated the 1984 national elections in Nicaragua, thereby violating the Nicaraguans' right to self-determination.

Instead of trying to clarify these extreme interpretations of non-intervention, Contadora decided to focus on military balances among the Central American countries and undertook rhetoric to avoid discussing the hard issues and the parties' contrasting expectations. A few years after its creation in the Island of Contadora, the group had failed.

By that time, Costa Rican President Oscar Arias had been successful in launching his peace plan for the region, which later became the basis for the Esquipulas II accords. By the time Arias announced his plan, the International Court of Justice had already rendered judgment in the Nicaragua Case. The Court's clarifications of the illegality of "forcible intervention" made the need for peaceful dialogue clear to all regional actors. Arias maintained the need to avoid intervening in Nicaragua's affairs in any way whatsoever, but at the same time called for Nicaragua's active participation in the Esquipulas negotiations. The dialogue led to elections in Nicaragua, in exchange for El Salvador's, Honduras' , and Costa Rica' s commitment not to support any Contra operations against the Sandinista government in their respective territories. At the same time, Arias called for a U .S. disengagement in Central America and termination of the U.S. supported Contra activities in and against Nicaragua. With clear rules and consensual normative expectations, the presidents of the five Central American countries were not only able to sign an agreement in Esquipulas, but also were capable of implementing the accords which finally ended a decade-long regional conflict.

One example of how the operational system works within the adjudication model could be the judgment passed by the International Court of Justice in *Military and Paramilitary Activities in and Against Nicaragua*, a case raised by Nicaragua against the United States in 1984. (*Military and Paramilitary Activities in and Against Nicaragua* (Nicar. V. U.S.), 1986 I.C.J. 149.) In this case, diverging perceptions of human rights in general were discussed. The United States maintained that massive violations of Nicaraguans' human rights by the Sandinistas authorized the U.S. and its allies in Central America to intervene in internal affairs in Nicaragua, in order to prevent greater violations. Nicaragua denied this possibility on the basis that the principle of non-intervention is sacred and without exception. These were two divergent normative expectations that should have been resolved by the operational system.

To prevent the protection of human rights from converting itself into an excuse for foreign military intervention, the International Court of Justice resolved that the inter-American system offers the appropriate mechanisms for protecting human rights. Furthermore, it declared that if the United States of America or its allies desired to protect human rights in Nicaragua, they should use those mechanisms and not intervention by force against Nicaragua and its government. The importance of the decision of the World Court in this aspect had the immediate effect that those involved in the Central American crisis stopped using this and other excuses to use force and intervene in the internal affairs of other states. (See full discussion of this phenomena in Tacsan, supra, at Part II.)

These examples of fostering consensus demonstrate how divergent normative expectations can be aligned through negotiation and adjudication. As consensus is built and actors' expectations increasingly converge, normative knowledge becomes operational. Because consensual knowledge serves as the common bond for actors with different interests and demands, it plays a crucial role in making expectations uniform and forging cooperation among participants. In this context, the question of coercion or enforcement falls into the background, only to be invoked for more extreme cases.

IV. Conclusion

The efforts of legal inquiry should be addressed to reveal how international law is effective in helping international participants to vindicate expectations about rights. An appraisal of such effectiveness is not only a matter of enforcement or retaliatory strategies; it involves much more than that. It should determine how useful the dynamics of normative knowledge are in disclosing the prevailing expectations of rights the international community is ready to advance and defend, irrespective of the opposing individualistic interests of its members. The problem was aptly posed by Hart when he suggested that one of the essential features of a legal system is that it provide “some generally effective motive for obedience (perhaps a sense of obligations and not necessarily fear) when obedience runs counter to the individual’s inclinations or interests.” (H.L. Hart, *The Concept of Law*, cited by T. Nardin, *Law, Morality And The Relations of States* 131(1983).) Thus, enforcement is perhaps not more than one way through which the law becomes effective. “This is not to deny that enforcement is an important condition of the effectiveness of many sorts of rules in a wide range of circumstances,…but no simple formula is adequate to summarize the forms, occasions, and degree of enforcement by which the efficacy of law is affected.” (T. Nardin, supra, at 131.) International lawyers should thus be able to measure and monitor and even predict effectiveness under certain conditions. This is the most valuable advice that legal scholars can give to an international audience, when the latter is confronted with the decision of whether to operate international law or resort to other mechanisms for solving conflict or drafting policy.

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International Law and the Decision Making Process: Some Observation on Tacsan's Alternative Approach

Dr. Tacsan has provided us with a challenging hypothesis about how and why International Law is effective in International Relations. His contention that International Law is effective when its provisions are known and accepted by all or most relevant decision makers and, thus, when it is assumed as a normative framework in the decisions making process, seems, at the outset, an enlightened insight. This thesis seems particularly accurate if we consider the most general principles of International Law. Undoubtedly, those principles, such as the *pacta sunt servanda*, are effective when foreign policy makers assume them as broad guidelines or constraints when choosing their states' policies or patterns of conduct.

However, it seems to me difficult to explain the normal operation of International Law only as the crystallization, through convergence, of consensual normative knowledge into specific actions. Both in international and in municipal politics, decisions are rarely made because there exists some shared knowledge of the problems and their solutions but rather as the result of bargaining. Knowledge is an important variable in the decision making process, but not the only one.

1. The State and Bureaucratic Process

Unfortunately, Dr. Tacsan has not expounded on the conception of 'state' that he uses in his alternative approach. He proposes as International Law operators: "[s]tates, organizations, relevant groups and individuals," at the same time that he acknowledges the indispensable role of human actors in the cognitive process and defines the relevant actors as those who have access or participation in the determination of public policy and conduct. This seems to be contradictory. If human beings are the relevant actors, the conduct of the corporate entities; whether states, public organizations, or non-governmental organizations; is simply the outcome of the actions of those individual human beings. If the corporate entities are the relevant actors, it is necessary to attribute them a unitary and rational character, and, therefore, to ignore the constituting individuals. This latter position is traditional both in International Law and in International Relations Theory. (For a general discussion on the level of analysis problem see: Hollis, Martin and Smith, Steve *Explaining and Understanding International Relations*, (1990); and the classic: Singer, David "The Level-of-Analysis Problem in International Relations" in Knorr, K. and Verba, S. (eds.) *The International System: Theoretical Essays* (1961), 77-92).

Similarly, Dr. Tacsan has not explained the concept of 'decision making process' on which he bases his approach. He seems to regard the unilateral consideration of the shared knowledge, International Law, by the pertinent actors as the relevant conduct for his analysis. In this sense, for example, he argues that the 'myth system' becomes effective when the relevant actors are willing to consider it, by themselves, when pondering policy options; and the 'operational system', when they actually use it. He further relies on E. Haas model of decision-making styles for explaining the influence of consensual knowledge. However, neither Dr. Tacsan's approach nor Haas's model explain how decisions are actually made. Even more, Haas's model only classifies the decision making process, *ex post facto*, considering the degree of influence that the shared knowledge has had upon it. Nevertheless, if Dr. Tacsan's thesis, that International Law is effective when incorporated as consensual knowledge in the decision making process of public policy and conduct, were to be accepted, a clear conception of the policy decision making process seems indispensable for determining the role of knowledge in it.

Political Science has provided several models both of the nature of the state and of the foreign policy decision-making process. Among them, Allison's Bureaucratic Politics model (Allison, Graham T. *Essence of Decision: Explaining the Cuban Missile Crisis* (1971)) seems particularly helpful in the framework of Dr. Tacsan's alternative approach, because it deals simultaneously with both problems and gives a distinctive role-to knowledge.

According to Allison's model, states are not unitary decision making actors but sets of bureaucrats bargaining between themselves. The actions attributed to the state are not rationally chosen solutions to particular problems but rather the result from compromise, conflict, and confusion among officials with diverse interests and unequal influence. Therefore, governmental action is either the agglomeration of independent decisions taken and actions performed by individuals or coalitions of individuals, or the outcome of a formal decision which results from a combination of either the preferences and relative influence of the central actors or of the special subset of actors dealing with the particular issue. Thus, states' policies and conducts are the result of bargaining among several actors each of which "pulls and hauls with the power at his
discretion for the outcomes that will advance his conception of national, organizational, group, and personal interests'" (Allison (1971) at 171).

This model contends that each individual actor in the decision-making process has its own goals and interests flowing, in part, from his position in the governmental organization but also from his personal values, interests and conception of his role. Furthermore, their capacity to influence the final governmental action, their power, depends on their possession of bargaining advantages; including his formal authority and responsibility, expertise, knowledge, control of information and resources, charisma, and personal relations with other actors which also have bargaining advantages; on his skill and will to use his advantages, and on the other actors' perception of his possession and willingness to use those advantages. In consequence, for this model, knowledge and expertise are not the determining element of the decision making process but only a bargaining advantage, a form of power, which is used, among others, by the individual actors to influence the final decision. Knowledge might be also a relevant, but not the only, variable in the formation of the individual actors' goals and expectations.

Allison's model seems compatible with Dr. Tacsan's approach. According to it, if a broad consensus about the relevant knowledge develops, it will possibly influence all the decision-making processes, and, therefore, the actions of the different entities will tend to converge. This conclusion seems to explain Haas's 'analytic' style of decision-making

and might explain the effectiveness of incontestable Customary International Law norms. However, if the relevant knowledge is less consensual or appears to be less certain, it is probable that other variables will prevail either in the formation of the actors' goals and expectations or as bargaining advantages and, in consequence, knowledge will be less influential in the final outcome. This situation seems to explain Haas's pragmatic', 'skeptic' and 'eclectic' decision making styles.

In addition, not only states' conduct and policy, but also the actions of international organizations, non-governmental organizations, interests groups, transnational coalitions and epistemic communities, can be explained as the outcome of bureaucratic bargaining. Furthermore, Allison's model, while recognizing the central role of governmental officials in their governments' bureaucratic decision-making process acknowledges that certain individuals outside the governments' formal structure: members of the parliament, press, interest groups and the public, can and do take part in the decision making process.

2. The role of International Law in the Decision Making Process

In a decision making process described in Allison's terms, International law can play four different roles. First, it might be an element in the formation of the individual actors' goals and interests. Second, it might be part of the subject matter being decided. Third, it might be a bargaining advantage in the hands of some of the actors; and, fourth, it can be part of the constraints that might exist upon the bargaining process. Its effectiveness depends on whether, in any of these roles, it affects the decision making process in such a way that the final outcome will comply or be in accordance with its substantive provisions.

First, International Law might be an element in the formation of the actors' goals. According to Allison, those goals are determined by the actors' positions in the governmental structure, their personal values, interests, expectations and conception of their role. Thus, it is possible that some actors may have certain personal preference, inclination or commitment to International Law. If it is so, they may prefer and promote policies and conducts that comply, or are in accordance, with International Law. President Wilson, who promoted mechanisms based on International Law to maintain international peace and security, exemplifies this attitude. This kind of commitment to International Law might flow from the education, previous experiences or ethics of the actors, but it also can flow from the pure calculation of the advantages of that policy, either in the form of reducing future conflicts or in creating norms of conduct that will, in the future, be favorable to their interests or increase their bargaining advantages. Thus, for instance, Foreign Ministries' legal advisors will tend to advance policies in accordance to International Law both as a result of their commitment, due to their education and position, to Law, and as a form to increase their own influence and promote their parochial interests in the overall bargain process.

Second, International Law can be the subject matter of the decision making process. Frequently, due to previous decisions and commitments, states' and international organizations' bureaucracies have to develop policies or conduct towards International Law or have to frame their decisions in terms of International Law. In principle, the determination of such policies or conducts follows the same process of bureaucratic bargaining as that of any other kind of decision. An extreme example of this process is the extended negotiations, and contradictions, inside the United States to determine its policy during the Third United Nations Conference on the Law of the Sea. In those negotiations, the fact that their objective was the conclusion of a treaty required s, to advocate their preferred policies or conducts on the substantive issues in normative terms, because only in such terms they could have been embodied in the final outcome.

Third, International Law can be a bargaining advantage in the decision making process. When International Law is the subject matter or a relevant element in the decision making process, the bargaining acquires certain degree of technicality or intricacy that excludes from it most of the regular participants in the decision making process, due to their lack of the necessary knowledge to determine the key issues. In such conditions, the task of making the decision is shared with or transferred to experts in International Law. Hence, the experts become not only participants but influential, i.e. powerful, in the bureaucratic bargaining because of their knowledge. Moreover, even when International Law is less central to the issue at stake, its knowledge can still be a bargaining advantage. In those situations, the actors that posses such knowledge can use it to bring, in favor of their positions, the 'authority' of previous commitments, stressing the convenience of consistency, or 'superior values', such as the respect for law. As far as the use of such arguments allows them to influence, or even modify, the final outcome of the decision making process in line to their policy goals, their knowledge of International Law becomes a base for their power. The use of International Human Rights Law as an argument during the decision making process seems to exemplify this situation.

Fourth, International Law can be a constraint upon the decision making process. Structural elements of International Law are seldom reconsidered. They are, in fact, the result of previous decisions making processes that have settled the particular issues. Thus, in the making of most decisions, they are assumed by all or most players. For instance, when the policy toward a particular treaty negotiation is considered, the principle of the sovereign equality of states, finally agreed during the 1645-1648 negotiation of the peace of Westphalia, is usually assumed and, therefore, the decisions are made taking it into consideration. Furthermore, in certain cases, International Law can establish the patterns of the bargaining or the relative power of the actors.

In these cases, International Law determines the rules of the game' of the decision making process. For example, the bargaining process which creates resolutions the of Security Council of the United Nations is informed by the Charter and its rules of procedure. Thus, as far as the adoption of the resolutions requires certain majority and favors decisions by consensus, the delegates that take part -in the negotiations try actively to obtain the acquiescence of even the smallest powers. Similarly, the influence of the delegates of the permanent members is increased by the shadow of their veto power, granted also by International Law.

Dr. Tacsan's approach to the effectiveness of International Law seems to consider only the first and part of the fourth roles of International Law. Undoubtedly, International Law acquires certain effectiveness when it informs, as a shared knowledge, the goals, preferences and expectations of all actors, and when its more uncontroversial elements are assumed by the all relevant actors when making a particular decision. However, International Law can inform the goals of some of the actors or serve as a constraint upon their actions even when it is not consensual. In such a case, those actors in the decision making process with some knowledge or commitment to International Law may promote policies or

conducts that comply or are in accordance with it, while others will not. Whether the final outcome of the bargaining will comply with international law or not will depend on who prevails in the bargaining process.

In addition, Dr. Tacsan's approach seems to ignore the role of International Law as a bargaining advantage during the decision making process, and the possibility that International Law in itself could be the subject matter of the conduct or policy taken. Furthermore, it does not seems to consider the institutional constraints on the bargaining process and the distributions of power based on International Law. All these roles of International Law appear to be at least as relevant for its final effectiveness as its role in the formation of preferred policies, conducts or expectations of the actors.

3. The Epistemic Community of International Lawyers

Dr. Tacsan argues that his approach makes it possible to take into account several alternative methods for the effective implementation of legal commitments, including, inter alia, the role of epistemic communities in creating international regimes. However, it seems that he gives only a secondary role to this kind of community in his model. Nevertheless, if consensual knowledge were to be considered a relevant factor for the effective implementation of International Law, the role of epistemic communities should become a central element in such interpretation.

Consensual knowledge does not exists in the vacuum. As P. Haas stated: "Consensual knowledge does not emerge in isolation, but rather is created and spread by transnational networks of specialists" (Haas, Peter M. "Epistemic Communities and the Dynamics of International Environmental Co-Operation," in Rittberger, Volker (ed.), Regime Theory and International Relations, (1993), 168-201, at 179.) Thus, if International Law were to be considered a form of consensual knowledge, it would be necessary to found the community on which such knowledge resides and is transmitted.

It seems that International Lawyers form that community. All International Lawyers share, on broad terms, certain number of professional beliefs: a similar conception of International Law, its principles, sources and procedures. If these elements are generally effective in International Relations, is because those professionals are able to advance their shared values through their states' or organizations' policy making processes.

The existence of a transnational network of international lawyers is proved by the extended membership of professional organizations such as the American Society of International Law and the existence of activities such as the annual meeting of Foreign Ministries' Legal Advisors during the General Assembly of the United Nations. The regular contact of International Lawyers from several countries through those associations and meetings provides them with an opportunity to form acquaintances, to share information and to create common values. Such regular contact constitutes the network and facilitates the formation of coalitions for the promotion of specific policy objectives.

The existence of shared professional beliefs is evidenced by the fact that most introductory manuals to International Law argue the same points, with the same examples, and, usually, even follow the same structure. Similar syllabi and teaching methodologies in International Law lectures around the world reinforce the homogeneity of the shared knowledge.

Whether the members of this network share the same values and policy objectives and, therefore, form an epistemic community in the proper sense or not, is a more complex problem. I will argue that, on a very broad basis, they do. Most International Lawyers seem to be committed to promoting the rule of law in International Relations; "world order through law". Nevertheless, some empirical research seems necessary to assess the extent of this commitment and whether it is transformed into specific policy recommendations. On the other hand, subgroups of this network clearly have shared values and policy objectives. For instance, some of the main negotiators of the 1982 United Nations Convention on the Law of the Sea have worked since its signature to assure its entry into force, including the negotiation of two implementation agreements. These individuals show a strong sense of cohesion and are cheerfully known as the 'fathers of the Law of the Sea'. Another example is the coalition of foreign ministries' legal advisors, legal counselors in several permanent missions to the United Nations and the World Health Organizations, and private international lawyers belonging to several NGOs, such as 'The Lawyers' Committee on Nuclear Policy', that was able to advance the requests for advisory opinions on the use of nuclear weapons to the International Court of justice.

In consequence, it seems that any further research along the lines of Dr. Tacsan's approach will require a deeper consideration on the role of International Lawyers as an epistemic community and as members of more specific epistemic communities and transnational coalitions.

4. Legitimacy, power or Perception?

Unfortunately, Dr. Tacsan's use of the concept of legitimacy seems somehow equivocal. It is not clear whether he uses it to indicate that the outcome of a decision making process dominated by consensual knowledge is rightful, credible and worthy of the respect of all the members of the society, or just to indicate a conviction of rightfulness in the minds of the holders of that knowledge.

If he were arguing that the consensus among the relevant actors gives legitimacy to the pertinent knowledge and its policy recommendations in respect to all members of the society he would be advancing an elitist conception of legitimacy. Undoubtedly, if all the relevant actors share the same knowledge; their causal beliefs, policy recommendations and expectations will not be contested. Therefore, they would tend to assume that their share beliefs are legitimate. Even more, they will possibly try to convince themselves of the legitimacy of their claims in order to be more committed in their promotion. However, the only individuals relevant to determine whether the knowledge is legitimate or not appear to be those influential and educated enough to posses it and to take part in the policy making processes. This conclusion would only be acceptable if we were prepared to assume an extremely realist approach to politics.

On the other hand, it is possible that, when Dr. Tacsan argues that the consensus among the relevant actors gives legitimacy to the pertinent knowledge, he is referring only to the sense of legitimacy that those actors feel. Thus, legitimacy would be the impression of rightfulness that the relevant actors experience in respect to their shared

knowledge. This impression seems to be an important element for explaining how and why they commit themselves to particular policies. However, it does not validate the knowledge or its policy recommendations in relation to those actors that do not posses, or who are not committed, to such knowledge.

It would be desirable if Dr. Tacsan could clarify his use of the concept of legitimacy. Nevertheless, it seems that his approach does not have any need of it. The relevant issue is not legitimacy of knowledge but, using Dr. Tacsan's own words, whether it actually "exercise restraints on relevant actors" in subsequent policy or conduct decision making processes or not.

The credibility and potential to be respected of any outcome of the decision making process depend on whether it reflects the distribution of power among the actors or not. If it does, it will embody a combination or compromise of the goals and interests of the prevailing actors. As far as the outcome incorporates those goals and interests, the prevailing actors will tend to be interested and committed to use their power in future policy or conduct decision making processes in order to assure its implementation or respect. In addition, if the outcome incorporates the values of those actors, they will tend to perceive it as legitimate.

Furthermore, as far as the outcomes of the decision making process always result from the bargaining among the actors, they will always tend to reflects the distribution of power among the actors at the particular juncture. Therefore, they will always tend to embody a combination or compromise of the goals, interests and values of the prevailing actors-Thus, the prevailing actors will not only tend to perceive the outcomes as legitimate but they will also tend to use their power in future decision making processes to assure their implementation.

5. Conclusion

Dr. Tacsan has provided us with an enlightened insight regarding the relevance of the cognitive process for effectiveness of International Law. His contention that consensual knowledge can serve as a compelling guide in the policy decision-making process deserves further consideration. Nonetheless, it seems to me that the emphasis of the research should be not on the knowledge but on the bearers of such knowledge.

International Law is the creation of International Lawyers influential in the decision making process. If it is effective, it is because those individual human beings are committed to it. They have undertaken the task and the responsibility to assure that the outcomes of such process comply with the norms, and, in most cases, they are successful in doing so. Thus, perhaps, it is time to begin looking at ourselves.

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Can Man Govern by Knowledge Alone?: A Comment on Tacsan

Joaquin Tacsan presents a innovative alternative to mainstream ideas in his short piece, The Effectiveness of International Law: An Alternative Approach. The starting point is the unfulfilled quest for enforcement mechanisms in international law. Tacsan's approach is "alternative" because he looks to totally different explanations for compliance with international law, rather than rework enforcement. There is more to the international law than coercion and the author wants to, "move beyond coercion" to persuasion. States and decision makers can be motivated to comply with international legal commitments by knowledge shared by the entire global community.

1. Framing an Alternate Approach

The central concept of the paper is control of policy-making by consensual normative knowledge. When a sufficient number of states are guided by the same norms and principles about international law, there will be compliance with international law. The author uses "normative knowledge" as a very dense term. To truly understand his meaning of the word it is imperative to know its function as well as its component parts. He views law, in the form of treaties, customary law, legal doctrine, case law and expectations, as knowledge. The term knowledge normally implies that information, data, or opinion is assimilated by an individual or a society. Tacsan makes this leap without description of the process of learning. This is surprising considering the importance of the word knowledge to his argument. The Vienna Convention on the Law of Treaties (1969) is only a collection of words on paper until it is read and understood by an actor. Then it becomes knowledge that can affect behavior. It is also interesting that the authors conception of law as knowledge combines hard facts with opinion or feeling. Yet this is the way the mind works toward a decision, influenced by myriad forms of information.

2. Tools of Analysis

Effectiveness is a key part of the author's description of an alternate approach to compliance with international law. It would not make sense to study normative knowledge in international law if it had no effect. However, good scholars and lawyers must go beyond this binary question and find out how much effect there is and why. The consensus of knowledge forms in a social setting, among communities of linked actors. The knowledge is effective when behavior meets the expectations of conduct that are shared by the community. There is no operational effect unless the normative knowledge is endowed with legitimacy and authority. There is also no effect to normative knowledge unless there are actors who use the knowledge. As noted previously, The Vienna Convention is only ink and paper by itself.

Tacsan also covers the progression of knowledge from myth systems to operational systems, realizing norms, and decision-making styles. It is not necessary to paraphrase these arguments in order to grasp the main ideas of the article and the logic behind them. State behavior is affected by consensual knowledge of legal norms. This is a very different approach than one focusing compliance through coercion. It lends itself to analysis borrowing on social science methodology and terminology.

The author embraces this world view and at times the article reads more like a work on psychology than international law. In this view, decisions are made based on group opinions and influenced by "epistemic communities". Norms are realized and the style of decision making is important. He sees a role for myth systems of knowledge. The author is pushing the envelope of new ideas in the subject by borrowing from other fields of study It is possible that many of the ideas and terms in this paper will not be accepted or catch on but this does not prove that they do not accurately describe some behavior.

3. Criticisms of Methodology

The phrase an alternate approach implies that there is a conventional approach. The paper begins by discussing this briefly and then leaves it behind. The author does acknowledge in his conclusion that enforcement can explain some compliance behavior. Just as the conventional theories neglected the position of normative knowledge, this theory neglects the role of coercive enforcement. Tacsan is eloquent in his expression of his viewpoint but in his strenuous efforts to express his ideas, has placed himself out on a philosophical limb. The author views persuasion as a step beyond coercion. Presumably he means that this step beyond is also a step up.

Understandably, coercion, as a general tactic, is not endorsed by legal scholars. However, Tacsan believes in a rule of law in international law despite the absence of enforcement. It seems logical that this rule of law is worth defending. Therefore, there could conceivably be a role for policing power to prevent defections from the consensus. Tacsan does not describe a world where a consensus of normative knowledge dominates policy and this policy is preserved. He may feel that any defection from consensus causes total breakdown and any attempt to police this could only have harmful effects. Coercion and persuasion both function in the real world, often serving to complement each other. Persuasion can create voluntary compliance with international law. No legal system could endure without cooperation from the participants. Yet there are occasions when the possibility of coercive power encourages a consensual solution.

Imagine a state system which operates by normative knowledge shared by all states. Coercion and police power are absent from the system. Peaceful order among states is self-enforcing because of risk aversion and lack of information. The actors do not know which states are stronger or weaker, who gains and loses through the consensual system. Therefore, these actors avoid the risk of great loss by refusing to disturb the order. This is dependent on what is called a veil of ignorance by John Rawls in A Theory of justice (1971). However, if the veil is lifted, the system will change rapidly. Certain states will see it is in their interest to defect from the consensus. Defection will go in multiple directions and states will end up at odds as each state seeks to maximize its own welfare. This scenario indicates how different the real world is than the worldview Tacsan expounds. The world is a menagerie of states who all have some degree of knowledge of their interests and those of others. A total veil of ignorance does not exist.

The paper is based on the idea of law as a source of knowledge, and the knowledge can result in states following a rule of law in their international actions. It focuses on an idea that has not been actively studied and has some validity. However, it seems to over emphasize the role of normative knowledge. The basic idea is almost circular as it goes from law to knowledge to rule of law affecting policy.

Any discussion of the source or sources of intemational law should look to The Statute of the International Court of Justice. That statute lists sources of international law to be used to decide disputes: (a) international conventions, (b) international custom, (c) general principles of law, (d) judicial decisions and teachings. (Article 38. 1.). Consensual knowledge drawn from international law appears to be synonymous to "general principles of law". If the phrases are equivalent, then consensual knowledge falls below customary law and treaty in the hierarchy It is generally accepted that treaty law and customary law are higher sources of international law than general principles. This is merely a crude form of the principle of lex specialis, or superiority of rules that are more specific.

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Effective International Law and Relative Resource Endowments

General rules of international law transcend differing levels of economic development among states. Tacsan does not sufficiently describe how states with disparate resource endowments adhere to general rules of international law that are fostered by normative knowledge. His approach relies too heavily on objective assessments of domestic compliance mechanisms as the means for determining whether international law is effectively enforced by consensus and persuasion.

Tacsan's Normative Knowledge Approach.

Tacsan's premise is that legal enforcement by persuasion and consensus stems from the formation of effective international rules through a three step process. First, normative knowledge emerges as a medley of legal knowledge and expectations that derive from moral and scientific imperatives. Thus normative knowledge may concurrently evolve from elements of customary and articulated rules, jus cogens, and natural law. Second, it becomes consensual normative knowledge when it dominates the policymaking process and implies acceptance by all major actors and target audiences. It relies on pivotal actors to advance the doctrine and expand the scope of its shared belief. Finally, consensus bestows absolute legitimacy and authority upon the normative knowledge. It does this by expanding over the necessary spatial, temporal, and economic dimensions. As a prerequisite for becoming credible and commanding respect and restraint, the doctrine must encompass a sufficient number and breadth of major actors and endure over some relevant time period. At that point it becomes authorized legal knowledge.

Tacsan differentiates 'myth systems' where the normative knowledge is used to justify policy but is not acted upon, and 'operational systems' where the normative knowledge actually is applied. He describes a myth system as only

a mental operation where the decision maker seriously considers the normative knowledge mandate and its implications among other factors. Ultimate effectiveness depends on an operational system, which results in actual implementation of policy and permits the actors to collaborate to realize the authorized legal knowledge.

The theory as Tacsan describes it leaves some apparent anomalies in the enforcement of international rules. Among them is the evident conclusion that the 'persuasion and consensus' enforcement mechanism is not neutral to state 'strength' or relative resource endowments, as the amicable phrase might suggest.

Is Enforcement by Persuasion and Consensus Respective of Relative Resource Endowments?

Tacsan notes that government and non-govemmental organizations, foreign experts, the media, consultants, multinational corporations, and episternic communities are among the pivotal vehicles for expanding the scope of the normative knowledge's shared belief-making it "public and consensual". Unfortunately he does not explain the intermediate development from normative knowledge that is public but not consensual (such as a 'grass-roots' movementt where it is accepted by the target audience but not the major actors) or knowledge that is consensual but not public (where it is accepted solely by the major actors but not the target audience), or if either public or consensual knowledge alone is capable of achieving the necessary acceptance. The free and expeditious flow of information between and within states possessing a relatively strong endowment of communications resources makes them more likely to advance normative knowledge through grass-roots movements. Conversely, while the policy-makers of lesserdeveloped states may be equally amenable to a particular set of normative knowledge as their counterparts from developed states, comparatively weaker internal communications networks could inhibit their ability to convey the message sufficiently to the constituency required to legitimize the normative knowledge.

Tacsan suggests that to be restrained or guided by the persuasive power of international law, a fully-operational system with the necessary mechanisms for compliance must be in place and must be functional. Thus the state must not only accept the international rule, but establish, staff, and fund (and motivate) a domestic bureaucracy to ensure compliance. It must produce complete and accurate data to provide feedback and prove compliance. It must voluntarily use incentives and impose sanctions to guide its own behavior.

One must ask whether these self-enforcing mechanisms, motivated by persuasion and consensus, are feasible for all states with respect to general rules of international law. Alternative resource endowments among parties to an international rule may make the fully-operational and functional system envisioned by one state cost-ineffective for another. It seems that states with comparably disadvantageous resource endowments are excluded from the luxury of normative persuasion and consensus as the method of enforcement as Tacsan describes it, and can only be motivated by the coercion of 'stronger' states.

Normative Knowledge and Ex Post Realities.

Consider Tacsan's example that biodiversity protection is mandatory to all states and human beings and is normative knowledge. Assume that it has become authorized legal knowledge. A wealthy and highly-developed state might comfortably make an expensive but token investment in domestic mechanisms to protect its remaining biodiversity and adhere to the persuasive authority of the normative knowledge. A cash-strapped and lesser developed state with greater biodiversity (perhaps due to less industrialization) may be equally committed to the general international rule and adopt normatively persuasive policies ex ante. But its implementation could be considerably less effective since less financial capital would be spread over more abundant biological resources. The lesser developed state's ex post marginal utility from the proposed diversity protection programs would be much smaller or even negative. Under these conditions it may be financially or logistically unable to effect compliance mechanisms which ensure that the authorized legal knowledge is followed within its borders to the extent expected by both parties ex ante.

If this were the case, the fiscally poor but biologically diverse state might be said to have only a mythical normative system. Its decision makers seriously considered the normative knowledge only in light of other factors, namely the state's fiscal reality. This determination prevented it from maintaining the same expectations as its stronger counterpart who has developed an operational normative system. Since the persuasion and consensus of normative knowledge alone could not operationalize the weak state's duties under the rule, would enforcement revert to some active credible threat by the state with an 'operational' system? Probably so, in the form of a threatened trade sanction or withholding of development assistance, thereby invoking a new 'cost-avoidance' benefit into the state's calculation of marginal utility from adhering to the rule. It is the force of this necessarily unspoken but potential coercive power that provides the persuasive authority for the mutually-accepted normative knowledge between states with significantly different resource endowments.

This reasoning proposes that only developed states could ultimately define effective general rules-that is, their minimal expectations for operational systems would be sufficient, and lesser developed states must revert to a special customary rule because of their inability to match developed states' compliance mechanisms. An articulated objection to the general rule would seem to contradict a lesser developed state's support of the rule as authoritative normative knowledge.

If strong states under-invest in compliance mechanisms (not persuaded to match the weak state's expectation of the rule via the normative knowledge behind it), it is less likely that a weak state with an operational system could evoke a credible threat which would coerce the rich state into compliance. Negotiation too would likely prove unfruitful, due to the imbalance of the two states' relative global bargaining power. It seems as if the weak state would have to revert to adjudication to resolve the problem of the two states' divergent resource endowments and ex post notions of compliance with the general rule. The resource-endowment imbalance prevents the weaker state from packing any persuasive punch.

Imbalances in Relevant Resources and Predicting the Effectiveness of International Law.

If states with a lesser endowment of the relevant resource mix (financial capital relative to remaining domestic biodiversity in the example given) are not capable of actively coercing or negotiating reciprocal rules with states with more advantageous resource endowments, they seem to be excluded from participating in the unspoken but effective persuasion and consensus enforcement mechanism. Furthermore' reliance on adjudication or arbitration to settle their divergent expectations returns us full circle to the inherent weakness in international law.

Tacsan says that when an international audience is confronted with the decision of whether to administer international law, international lawyers should be able to measure, monitor, and even predict effectiveness under certain conditions. His normative knowledge approach is not applicable across states at different levels of economic development, but only explains how the adherence to general rules of international law occurs via persuasion and consensus among states with comparable endowments of the relevant resource mix.

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Normative Knowledge and Self-Enforcing Rules in International Law

Nineteenth and twentieth century jurisprudence has attributed only residual importance to the role of consensus and uncoerced social beliefs in the creation of rational rules. Even in international law, the historical preeminence of customary rules gradually has given way to express treaty-making. Notwithstanding the positivist claims of much contemporary jurisprudence, the interpretation and implementation of treaties necessarily relies on norms of spontaneous compliance based on the practices of the member states. In this setting, Tacsan's paper touches upon a crucial aspect of the theory of international law, with important implications for all legal systems that lack an effective enforcement mechanism.

1. Internalized Norms and Self-Enforcing Rules

The fact that rules supported by a universal consensus (and fully internalized by the individual decision-makers) become self-enforcing is not novel. A problematic and still unsettled issue remains, however, in identifying the determinants of effective internalization of rules. The law and economics literature has recently attempted to develop a general framework for understanding the critical interaction between accepted social norms and enforceable rules of law. This scholarship attempts to rediscover the forgotten wisdom that originally defined the common law as "the rule acknowledged by all parties as applicable" (Frederick Pollock, First Book of jurisprudence, 6th ed., 254 (London: Macmilhan. 1929)), challenging traditional skepticism surrounding the idea of law as a voluntary process. In doing so, it confutes the positivist and Hobbesian belief that social order cannot emerge without enforceable legal rules, and suggests that greater attention should be paid to all decentralized social forces that contribute to the general equilibrium of a social system. Whenever the conditions for the emergence of self-sustaining consensus are met, formal lawmaking processes should give way to such sources of social order. (See, e.g., Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes, 138 (Cambridge: Harvard University Press, 1991)) Tacsan's paper pursues a similar enterprise, but omits results reached by the law and economics literature. (Most recently, see Robert D. Cooter, Structural Adjudication and the New Law Merchant: A Model of Decentralized Law, 14 International Review of Law & Economics 215 (1994); Francesco Parisi, Toward a Theory of Spontaneous Law, 6 Constitutional Political Economy 211-231 (1995); and Id., Law as a Voluntary Enterprise, in S. RatnapalaG. Moens, The Jurisprudence of Liberty 111-128 (Butterworth, 1996))

Unlike other sources of law which are generated by formal political processes, normative consensus and customary sources are allegedly free from the shortcomings of political machinery. A public choice perspective underscores the unique features of spontaneous law, noting that unlike statutory law, customary rules are not under anyone's control so their formative process cannot be affected by the pressure of narrow interest groups. In this setting, Tacsan's paradigm of normative knowledge can be reappraised within the more traditional framework of opinio iuris. Similar to customary rules, true consensus emerges outside of state constraints as norms that individuals and organizations recognize and spontaneously follow in their interactions. Individual actors gradually come to abide by certain norms, which they consider as necessary for achieving a more desirable social order. But just as not every regularity in behavior amounts to a proper custom, not every agreed upon principle generates a self-enforcing equilibrium. Ex ante articulations are likely to diverge from ex post behavior because of incentives to deviate opportunistically from the agreed upon norm. The concept of normative knowledge thus begs the question about which conditions are necessary for mere consensus to yield a self-enforcing behavioral regularity. Traditional legal theory is ill equipped for answering this question, but some guidance can be found in the game-theoretic literature concerning the emergence of cooperation in the absence of contract enforcement mechanisms. Indeed, the study of international relations provides an elegant field for testing various game-theoretic and evolutionary model predictions on the emergence of cooperation among self-seeking actors in the absence of a central enforcement power.

Because of the powerful analogies between international law and the strategic setting of game-theoretic and evolutionary analyses, the legal and economic sciences are in a position to contribute to each other's advancement. This is possible in two different ways. First, the evolution of international and domestic customary rules offers the opportunity to verify retrospectively the game-theoretic predictions about the emergence of spontaneous cooperation. Symmetrically, the game-theoretic apparatus offers precise tools for identifying the social settings that are most likely to generate spontaneous welfare-maximizing rules.

2. Self-Interested State Actors and the Emergence of Consensus

Consensus amounts to the realization and articulation of a collective belief that the norm is necessary for the group's welfare. A norm endorsed by a universal consensus is one that no one should have reason to contest publicly. An emerging consensus obviously does not exclude the possibility that individual states might endorse or acquiesce in a rule that they do not plan to follow. However, instances of strategic deviance from voluntarily chosen rules should not be regarded as undermining the qualitative element of the norm. General acceptance or acquiescence to a norm is indeed almost exclusively related to the aggregate effect of the norm over thecollective well-being of the group. Assuming symmetrical payoffs, the rules that enjoy widespread consensus are those that maximize the expected aggregate welfare of the group. Whenever a consensus emerges for conforming to a given rule of conduct, and enough individual members of the group internalize that obligation by disapproving and sanctioning others' deviations from the rule, an important process is triggered. Normative consensus successfully emerges when the ex ante individual incentives are aligned with the collective public interest. Unlike the ex post incentives of parties to a dispute, the ex ante incentives for state actors induce a choice among alternative solutions that does not attempt to maximize strategically the advantage brought about by random circumstances. (More generally on the point, see also Martin Shubik, Game Theory in the Social Sciences: Concepts and Solutions, 4th ed., 179-216 (M.I.T. Press, 1987))

Many social interactions, however, generate inefficient equilibria. Inefficiencies occur when there is a divergence between the parties' ex post private incentives and the collective good. In game-theoretic terms, these conflicts generate Nash equilibria that are not optimal. Given that the benefit pursued by each individual actor is not sufficient to compensate for the harm suffered by the other players, members of a group will not bolster or endorse such behavioral rules as a social necessity. Conversely, whenever a given behavioral pattern contributes to maximizing the collective welfare of the group, a social norm will emerge and underscore the importance of such conduct for the public good. The existence of such a belief of social desirability is exactly what lawyers should consider when appraising of the qualitative condition of legal necessity and desirability. This group ethic facilitates the process of social evolution by discouraging strategic behavior between parties. Communities that are able to develop a stronger form of group ethic unavoidably will enjoy a comparative advantage over the others.

The present analysis suggests that there are a number of principles of justice which may emerge spontaneously through the voluntary interaction and exchange of individual actors. I believe that the reality of consensus formation could be more profitably appraised as a process through which members of a community develop principles that govern their future relationships by means of voluntary adhesion to emerging behavioral rules.

3. Normative Knowledge in a Rawlsian Perspective

Similar to a implicit contractarian setting, the process of defining common principles is analogous to that identified in economic literature regarding the formation of norms. According to Harsanyi, optimal social norms are those that would emerge through the interaction of individual actors in a social setting with impersonal preferences. (John C. Harsanyi, Cardinal Welfare Individualistic Ethics, and Interpersonal Comparisons of Utility, 63 journal of Political Economy 315 (1955)). The requirement of impersonality in individual preferences is satisfied if the decisionmakers have equal chance of finding themselves in any one of the initial social positions, and they rationally choose a set of rules attempting to maximize their expected welfare. John Rawls utilizes Harsanyi's model of stochastic ignorance in his theory of justice, introducing an element of risk-aversion which substantially alters the outcome achievable under Harsanyi's original model. (John Rawls, A Theory of Justice 12 (Cambridge, Mass.: Harvard University Press, 1971)

The formative process of consensus and normative knowledge can be usefully appraised within a similar private ordering contractual model. Consider a society of rationally self-interested individuals bargaining toward a mutually acceptable social contract. Assume that the various actors play a non-zero-sum cooperative game, and that the bargaining occurs behind a Rawlsian veil of ignorance, so that there is uncertainty as to which role, status, or condition, each member will hold in society. This unrealistic model of social interaction is used just as Harsanyi originally conceived it. Its sole purpose is defining what an individual may recognize as good from the social point of view, as distinguished from what he would regard as desirable for his personal interest. (John C. Harsanyi, Cardinal Welfare Individualistic Ethics, and Interpersonal Comparisons of Utility, 63 journal of Politicall Economy 315 (1955); and Amartya K. Sen, Rational Fools: A Critique of the Behavioral Foundations of Economic Theory, in F. Hahn-M. Hollis (eds.), Philosophy and Economic Theory, 103 (Oxford: Clarendon Press, 1979)). Once all parties have agreed on a set of rules to govern their relationships they will fully and voluntarily compliance in all interactions, in spite of possible temptations to violate the agreed-upon rule to seek occasional higher payoffs. (On this point, see the more extensive commentary of Robert P. Wolff, Understanding Rawls 17 (Princeton, NJ: Princeton University Press, 1977)).

If a Pareto-literal teast is used to evaluate this voluntary framework of law formation, one could readily come to the conclusion that the shared belief should not be opposable against those states that consistently object to it during its formation. This analogical application of the persistent objector rule allows any state to opt out of a rule during its formative process. (See, e.g., Jonathan 1. Charney, The Persistent Objector Ruleand the Development of Customary International Law, 56 British Yearbook of International Law 1, 1-24 (1986))

The use of a Rawlsian model of imaginary social interaction is useful for understanding some of the underlying conditions of a valid consensus. First, the stochastic symmetry characterizing Rawls' social contract does not give opportunity for strategic preference revelation. Parties ignore their respective place, position, class, or social status in society, and the odds of being advantaged or disadvantaged are equally distributed for each member of the group. Each individual has incentive to agree on a set of rules that maximizes the aggregate welfare of the group, consequently maximizing his or her expected share of the wealth. The stochastic harmony of Rawls' imaginary world, however, calls for an actual but rarely obtainable symmetry of payoffs when applied to real life situations. True preferences are revealed in situations of ex ante stochastic ignorance, whereas strategic choices are more likely to characterize real life situations with ex post asymmetric individual incentives. In the formation of law, individuals make choices according to their perception of the costs and benefits of alternative rules of conduct. Similar to preferences for alternative goods on the market, individual preferences for alternative rules are based on a mere comparative economic evaluation of alternative solutions. This implies that in the presence of asymmetric individual incentives, non-optimal Nash equilibria may emerge in the final outcome. Reciprocity and close-knittedness in long-term interactions may indeed appear as necessary conditions for self-sustaining principles of justice.

4. Conclusions: Consensus and Endogenous Preferences

In traditional economic models, the dynamic of consensus formation guarantees a purely inductive accounting of objective aggregate values. Ex ante preferences are exogenously determined and the collective decision rule yields an outcome that is subsequently enforced against all members of the group. Tacsan's notion of normative consensus instead begs for a model of endogenous preference formation. The incorporation of endogenous preferences poses a challenge to traditional frameworks of collective decision making. Preferences are now subject to change and adaptation during the process of consensus formation. In a symmetrical world, each state has equal chance of contributing to the formation of a normative consensus, by articulating its ex ante preferences and inducing adaptation of other parties' beliefs. The emerging rule will no longer be the result of an aggregation of ex ante preferences through collective choice processes, but a synthesis of different ex ante preferences into an ex post normative belief.

In an ideal world of equal opportunity for influencing the shared opinion, this inductive law-making process guarantees an optimal weighing of individual values in public choices. just as we know that prices reveal individual preferences for tradeable goods and services, we should in fact expect that this form of social exchange would reveal true collective preferences for alternative social outcomes. And consequently, if we infer objective market values from the observation of market exchanges, we should give equal inferential weight to consensus and spontaneous normative knowledge. In this setting, the evolutionary and game-theoretic appraisal of the lawmaking process sheds new light on the normative foundations of spontaneous and self-sustaining norms. However, this framework requires an appropriate analysis of the more problematic results that it generates in the absence of equal voice in the international arena.

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Persuasion and Consensus Are Not Enough: Comment on Tacsan

Dr. Tacsan makes an excellent argument for the importance of persuasion and consensus, in addition to legal coercion, in making international law work. However, several of his points need further analysis and perhaps support.

First, Dr. Tacsan argues that actions in international law equate international legal commitments with expectations and perceptions of proper (legal) conduct. This seems a far jump; legal commitments in the international arena are traditionally thought to arise because of the binding nature of custom. Custom is developed over time and through the many actions of states. Not only do expectations and perceptions of proper legal conduct involve no action whatsoever by states, they do not involve specific actions by the individual actors that hold the expectations or persuasions either.

Along those lines, the example of how protecting of biodiversity is a scientific "prescription" but not a rule of international law has the obvious problem that it is rarely a domestic law either. just because something is accepted as a scientific fact does not make it a rule of international law recognized by those Dr. Tacsan considers international actors -- those with power within the state to get things accomplished through the government.

Dr. Tacsan attempts to explain how the expectations and perceptions, or normative knowledge, can attain the significance of legal commitment, by achieving a certain level of acceptance among relevant actors. He posits the theory that, "[i]n operational terms, normative knowledge becomes effective when the explicit or implicit set of behaviors, policy-making styles, and goals of convening parties are accomplished according to shared expectations of conduct." One major problem with this theory is that is assumes that relevant actors include both people with real power to affect change within the government and communities of experts who have most of the normative knowledge. Politicians are rarely scientists. While this may be oversimplifying the issue, it doesn't follow that knowledge gathered by the scientific elite, who dedicate their lives to finding the truth, would often or even usually find its way into the hands of international politicians and other power players. The examples cited by Dr. Tacsan are convincing, but the examples for the opposite view are far more numerous.

Another problem with the theory is that Dr. Tacsan proposes that only norms celebrated by all relevant actors should be considered in the analysis. He admits that relevant actors almost always disagree on outcomes, provisions, premises and other important aspects of "normative knowledge'. So the real question is what is common and who determines it? If five states believe in an issue and one doesn't, does this constitute a common belief? The term and the idea are ambiguous. There is also a time dimension. Unlike custom, a common belief has not stood the test of time. This cuts against Dr. Tacsan's own statement that the consensus on normative knowledge offers legitimacy and authority, two elements necessary for his theory to work.

Does a declaration by a group of relevant actors lend the authority and legitimacy necessary to make normative knowledge into binding international law? Probably not. A declaration can always be repudiated and certainly means little or nothing until some action must actually be taken.

There are many thoughtful and well-prepared arguments in Dr. Tacsan's proposal, but they are not without holes. Coercion cannot be discarded as an irrelevant part of international law, as parts of the proposal suggest. Custom can not be disregarded either in the context of what constitutes the effective enforcement of international law. Finally, the process of achieving the all-important consensus breaks down under the Coase Theorem. These are all areas not discussed or not sufficiently analyzed and supported in the proposal.

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

This paper makes a valuable contribution to international legal theory because it moves beyond the narrow conception of international law as a set of compulsory hard-and-fast rules. I particularly welcome the paper because it contributes to the growing literature which looks to intersubjective factors to account for the operation of international law.

I would, however, like to raise a couple of points. The first concerns the manner in which Tacsan subsumes international law into the broader category of normative or consensual knowledge. I agree that we need to incorporate "soft law" when asking political questions of international law but the approach of Tacsan seems to beg the question as to just how international legal knowledge differs from any other - scientific knowledge for example. Could and indeed, do both make an equivalent contribution to international society? And how significant is the degree of hardness of the legal vehicle within which a legal norm, principle or rule is embodied? It seems to me that international law is beginning to slip away.

From my perspective we need to retain a distinction between a perspective of international law internal to the system, and the political or external analysis of international law. Within international law, the distinction between what is and is not international la is vital. Analyzed from outside the system that distinction may be less important but any account of its operation must be able to explain the importance of the boundary within international legal discourse.

I would also like to comment briefly on Tacsan's use of the concept "effectiveness". Tacsan defines effectiveness as, "in the first place, the actual use of norms by relevant actors, and ultimately, the final application of consensual normative knowledge in the resolution of a controversy, the drafting of a public policy, and the making of a particular decision". (3) Much of the work at the vanguard of enquiry into the effectiveness 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 Governmance 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.

1. 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

Joaquin Tacsan has distinguished "myth systems" of normative knowledge from the "operational systems" that apply then. "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. Intemational 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" maybe 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. Joacquin 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 one that is actually applied. He argues that a myth system is effective when regardless of their own normative beliefs, international actors pay lip service to the normative system in their decision-making in international affairs. A myth system evolves into an operational system when all major international actors start using the same normative knowledge as the basis of their decision-making and expectations about international interactions. At that point the knowledge previously paid lip service to has become consensual normative knowledge and is effective in predicting the behavior of individual and state international actors.

In the development of an operational system it is necessary to gage when actors make the step from paying lip service to knowledge to actually using the knowledge in their decisions. In this context, Dr. Tacsan introduces the work of Ernst B. Haas in developing a model to explain the relation between consensual knowledge and decision making styles in international relations. By looking at the style used, one can gain a good idea of the underlying knowledge used and gauge whether actors are working in a myth or an operational system and thereby monitor the effectiveness of consensual normative knowledge.

The major strength of Dr. Tacsan's "alternative approach is its movement beyond the question of enforcement to a discussion of why, lacking enforcement mechanisms, there is international law which is adhered to. His normative knowledge theory strives to explain how consensual knowledge is reached and how it in turn impacts on decision-making and international law. By incorporating not only his theory of consensual normative knowledge, but also Haas' work enabling one to monitor the actions of international actors and from those actions determine the normative system they are operating under, Dr. Tacsan has provided a strong approach from which to view the international legal system. His theory does account for why, lacking an effective enforcement mechanism, international law does exist and is complied with most of the time.

A major weakness of Dr. Tacsan's "alternative" approach is the presumption of the existence of shared consensual knowledge which it is based on. This presumption does not seem to take into account what role non-consensual knowledge, or disparities in perception have in the international system. The process of consensus formation which his approach is based on is exemplified by the development of customary international law and *jus cogens*, where through the subjective belief on each actor's part that a rule is, or should be, binding, it in fact becomes so. However, without this shared normative knowledge, Dr. Tacsan's approach does little to explain why, given the limitations of coercive enforcement, international law is abided by when such consensual normative knowledge is lacking.

While he does discuss the formation and development of consensual normative knowledge Dr. Tacsan does not address what role the intermediate steps have in international law. In the Amnesty International example he uses, tracing the history of the 1984 Convention Against Torture, the stages prior to the adoption of the Convention do not meet the requirements of legally authoritative consensual normative knowledge, yet must at some point have some weight as law even before the consensus and Convention. Dr. Tacsan states that the normative knowledge evolved from being simply normative to being consensual, to conversion into authorized legal knowledge endowed with absolute legitimacy and authority. Yet it is not clear what, if anything, other than the larger number of states within the consensus effected the change from consensual normative knowledge to authorized legal knowledge. If the only difference between the two is the number of states agreeing with the proposition, then how many are necessary? Dr. Tacsan's article does not answer these questions.

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