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### Humanitarian Intervention and the Self-Image of the State

den Hartogh, G.A.

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GOVERT DEN HARTOGH<sup>1</sup>

## HUMANITARIAN INTERVENTION AND THE SELF-IMAGE OF THE STATE

Need the state make false claims?

### 1. INTRODUCTION

My basic question concerns the self-image of the state, but I will rely mainly on an argument concerning humanitarian intervention to make my point. Within the framework of that argument I will also find occasion to address a question concerning the nature of *opinio juris* and of customary law. How my three topics are connected with each other will become clear as we go along.

### 2. THE SELF-IMAGE OF THE STATE: THE HOBBSIAN VIEW

The thesis about the self-image of the state which I want to discuss was first formulated by Joseph Raz, and has recently been elaborated by Christopher Morris in his *Essay on the Modern State*.<sup>2</sup> The thesis, in its unamended form, says that it is essential to the state as a specifically modern institution to claim, within a territory with clearly defined boundaries, an authority over the residents within that territory, which is supreme, comprehensive and unlimited. That the state claims supreme authority means that if it allows other people or institutions (heads of families, churches, syndicates) to exercise authority, it claims the power to define the scope and the limits of their authority. That it claims comprehensive authority means that it does not allow any aspect of people's behaviour to fall outside of its scope. That it is unlimited means that, concerning the aspects of behaviour within its scope, it does not recognize any constraints on the possible content of its instructions. Unlimited authority is necessarily comprehensive and comprehensive authority is necessarily supreme, but supreme authority need not be comprehensive and comprehensive

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<sup>1</sup> I wrote this essay in the stimulating atmosphere of the Netherlands Institute for Advanced Studies in Wassenaar. I am grateful to Ms Anne Simpson for correcting my English. She is not responsible for mistakes made by last-minute alterations.

<sup>2</sup> Raz 1975, 150-2; 1979, 30-1, 116-9; 1986, 76-7; Morris 1998, ch. 7. I borrow the term "self-image of the state" from Green 1988, ch. 3. Green's own view is that the state claims to have supreme and comprehensive, but not necessarily unlimited authority. The Raz/Morris claim has for a long time been made in the context of a traditional dispute in international law concerning the extent of the exclusive domestic jurisdiction of states. One side in this dispute used to affirm that this was not a matter of the actual state of international law, but rather of the "essence" of states, and as such preceding international law as the law for a world of states. See Tésou 1997, 136-9. In a decision of 1923 the Permanent Court of International Justice took the opposite "legalist" view.

authority need not be unlimited.<sup>3</sup> I will concentrate on limitations of scope and content.

Both Raz and Morris go on to deny that the state, any state, actually has a measure of authority answering to this description. Still, the thesis, even if it only concerns the claims of the state and not their validity, may seem surprising at first sight. Perhaps at some time in European history states actually made that kind of claim, and it was certainly articulated in political and legal theory, but modern states apparently accept all kinds of limitations on the scope and content of their authority. Churches may exercise an authority concerning the religious behaviour of their members which cannot be taken away by the state, and people have the right to express any opinion they like, both in private and in public whether state officials, any state officials, like what they say or not. Both the authority of the church and the right of the individuals are limited, to be sure, and the exact limitations will be authoritatively settled by the state. But in setting the boundaries the state seems to grant that it has no alternative but to respect the core. The state, in other words, recognizes its authority to be restricted by human rights and by other moral constraints, e.g. some principles of equality. I will concentrate on human rights.

Most actual states consider their authority to be limited, Morris concedes. But in his view that doesn't refute the basic point Raz originally made about the self-image of the state. For according to this self-image human rights constrain the exercise of the state's authority only because this same state has decided to be so constrained. The limits of authority are set by authority. They may be set for good moral reasons, of course. Let us say, in order to avoid any commitment to mythological ideas of "legislative intent", that the decision to set those limits will in some way reflect some relevant moral beliefs commonly or jointly held by the persons involved in this decision. Nevertheless, the limits supposedly do not derive their constraining power directly from those moral reasons, but from their authoritative recognition. In most cases human rights are enshrined in the constitution, but the constitution has been laid down by a legislative act and it can be changed by a legislative act. Often changing the constitution or at least this part of it requires a qualified majority. In the Netherlands, for example, the constitution can only be changed if the changes have been ratified by the government and two successive parliaments, the second decision being taken by both houses in joined session by a majority of 2/3.<sup>4</sup> Hobbes would say that this procedural requirement reveals the identity of the real Sovereign in the Netherlands. This real Sovereign has the power to change the constitution, hence to abridge freedom of speech or freedom of religion in any way it thinks fit. (In the Dutch case, parliament also has the final power to determine that any law it passes is in accordance with the constitution; there is no appeal to any constitutional court.) In some cases the constitution does not allow some or the other part of the constitution to be changed at all, as for example the first article of the German constitution cannot be changed. ("Die Würde des Menschen ist unantastbar."<sup>5</sup>) Hobbes again would argue that such self-binding is necessarily futile: if the legislative has the power to enact a constitution, it has the power to change it as well, whether or not this is recognized by

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<sup>3</sup> Morris 1998, 178, 205-6.

<sup>4</sup> Dutch Constitution, art. 137.

<sup>5</sup> The dignity of man is inviolable.

the constitution. Even if this argument is rejected<sup>6</sup>, the point remains that the reasons why these provisions cannot be changed is that they have been made unchangeable by the framers of the constitution. Hence one can still hold that the limits of authority can only be determined by authority.

This seems to be confirmed by the practice of the courts. In all cases in which citizens accuse state officials of having invaded their human rights and bring their case to the courts, the courts will not decide the issue on its merits, but only by appeal to the constitution and its interpretation in statute and court decisions. The court will not ask itself the question: is it true that the state has made requirements on this citizen which are morally void because no state could have the authority to make that kind of requirement? It will only consider whether the state itself has at some point decided to recognize any such constraints.

So the state may concede that it recognizes limits of scope and content, because it has good moral reasons for recognizing them. But still, it does not seem to allow its citizens to judge its behaviour in the light of those reasons directly, or rather it does not allow them to act on such judgements. They are expected to refer to the constitution -and in the Netherlands not even that- and in cases where they believe state officials to have transgressed the constitutional boundaries, they are expected to wait for the final verdict of the courts.

What is most striking about this thesis is the way it is argued for. That some such conception of state authority, under the description of sovereignty,<sup>7</sup> has been highly influential in shaping both state practice and political theory, is undeniable. And it doesn't come as a surprise that states tend to adhere to this self-image for reasons of self-interest or from ideological blindness. But Raz and Morris make the stronger claim that the modern state cannot renounce its false claims without undermining its very existence. It is a matter of institutional logic. As Morris says, it is hard to see how states could claim anything else than that they are limited only by constraints they acknowledge.<sup>8</sup> It would be odd, or even incoherent, for a state to allow private individuals to decide for themselves whether they have a duty to obey any of its instructions. No court will allow the disobeying citizen to argue his case on its moral merits and then concede that he is right.

I will call this the Hobbesian conception of the self-image of the state.<sup>9</sup> As we have seen, Raz and Morris completely reject Hobbes' normative claims about the nature of sovereignty, but they agree that all states make these claims. There is something slightly odd about an institution which, because of its essential nature, necessarily

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<sup>6</sup> Cf. Hart 1961, 145-6. My conjecture is that Raz would accept and Morris reject it. Cf. Lagerspetz 1995, 115-6 on Hobbes' argument.

<sup>7</sup> Sovereignty" could be defined as authority which is supreme, comprehensive and either unlimited (cf. McCormick 1999, ch. 8) or only limited by self-imposed limits. But the concept surely is vague enough to allow some even more modest interpretation, cf. note 20. Because of this vagueness I will generally avoid it.

<sup>8</sup> Morris 1998, 196.

<sup>9</sup> Even Hobbes accepted one constraint on the state's authority: no one can be held to obey commands which threaten his life. More importantly, and less commonly recognized, he believed that natural law could and should regulate the interpretation of positive law. "Princes succeed one another; and one Judge passeth, another cometh; nay, Heaven and Earth shall passe; but not one title of the Law of Nature shall passe; for it is the Eternall Law of God." *Leviathan* XXVI, 8.

makes false claims, in particular when the institution is as deeply-entrenched and widely influential as the modern state. And I believe that the relevant facts about the state allow another interpretation of its basic pretensions.

### 3. THE ALTERNATIVE LOCKEAN VIEW

But let me first point out some aspects of the Hobbesian conception which are also controversial but which I will not discuss because I fully subscribe to them. In the Hobbesian view the moral authority the state claims to have not only consists in it being morally permitted to use the means it actually uses -admonition, the intentional shaping of conventional expectations, and in particular coercion- for making people comply with its instructions. The authority it pretends to have basically consists in providing people with all kinds of reasons, prominently including moral reasons, for intentionally complying or, in other words, for obeying. More precisely, the claim is that, if you have no other reasons for obeying -which may frequently be the case-, you at least have moral reasons.

Secondly, I also accept that there is no universal moral obligation to obey the law, not even a so-called *prima facie* one. It is not uncommon for the state, any state, to give instructions which its citizens have no obligation to obey at all, or occasionally may even have an obligation to disobey.<sup>10</sup>

Accepting these two theses as the common ground, what is the alternative to the Hobbesian conception? To use a Socratic figure of speech, if the citizen complains to the Laws and Constitution of the Kingdom of the Netherlands that they make false pretensions, the Laws might reply to him: "We do not. We recognize that our authority is limited, both in scope and in content. It is limited, not because we recognize it to be limited, but we recognize it to be limited because it is. If we did not acknowledge the validity of those constraints, to that extent you would have no duty to obey us, and we do not claim that you would have. It is true that we have provided for the possibility to change or to revoke some aspects of this recognition. But that is not because we believe that we are in a position to authoritatively determine your moral position *vis-à-vis* these aspects. Rather we believe that our recognition of the antecedent validity of those constraints on our authority is not infallible, however sure we are it is true, and if at some time in the future we arrive at better insights, we prefer not to have blocked the way for implementing them. It is true that we thereby also have opened the way for implementing future false beliefs. Hence it is conceivable that in the future we would permit the state or anyone else to abridge your basic human rights, and in that case, of course, we would claim that this would not distract from your duty of obedience. But we fully agree with you that this claim would be false."

I will call this the Lockean view of the self-image of the state. For John Locke held that the state could lose its legitimate authority by transgressing the boundaries of that

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<sup>10</sup> On the other hand, I believe that there is a selective obligation for obeying the law, i.e. that in normal circumstances the citizens of a minimally decent state have a moral reason to obey the law because it is the law. So I do not share the general scepticism about the obligation to obey which is characteristic for adherents of the Hobbesian view, and which now prevails in the literature on political obligation. See Den Hartogh 2001, chs. 4 & 5.

authority.<sup>11</sup> Whether that happens, is for each citizen to decide for himself. Locke did not mean that the citizen had any authority to decide this question.<sup>12</sup> If he decided wrongly, he had no moral standing at all. But the same is true for the state: it has no authority to decide on its own boundaries, but only the duty to acknowledge them. Locke expressed the point by saying that neither the state nor the citizen has any appeal except to God ("Jephtha's appeal").<sup>13</sup> The secular version of this view is that this is a matter of right and wrong, and not a matter of "appeal", of authoritative decision at all: right and wrong do not depend on authoritative decision in this case. As we have seen, Raz and Morris accept the Lockean conception as the proper normative view. But they believe that the state as an institution would undermine its own foundations by accepting it. According to them the state is institutionally unable to recognize the appropriateness of Jephtha's appeal. This is the thesis which I want to question. I have granted already that as a matter of historical fact states have tended to subscribe to the Hobbesian view, but I also claim that they need not do so, and that at least some states are by now at least half way to acknowledging the Lockean view.

#### 4. EVALUATING THE HOBBSIAN VIEW

How do you reach a decision in a controversy like this?<sup>14</sup> The fact is that speaking about the claims of the state is only a metaphor: it is as dangerous to take literally this way of speaking as it is to take literally talk of legislative intent. We should look at the ways states actually behave. As we saw the main aspect of a statist institutional order which suggests a Hobbesian logic is that the state does not allow the disobedient citizen to have his actions assessed on their merits. On the contrary, the courts will assess his actions by appeal to the authority of the law and will present their verdicts as binding and final. There seems to be no space for Jephtha's appeal within this institutional order.

Let us go slowly through the several stages of this argument. First there is the fact that, apart from the possibility of appeal to another court, courts present their verdicts as binding and final. This fact is compatible with both the Hobbesian and the Lockean view. For it is obvious that the courts do not claim that their decisions are worthy of respect and obedience simply as such, they claim at least that these decisions are in accordance with the law as it stands. So if the state generally accepts that the binding power of its law depends on respecting basic human rights, the court will not only claim that its decision is in accordance with the law, but also that it respects those rights.

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<sup>11</sup> Locke distinguished three types of boundaries: set by inalienable rights, by a presumption of rationality of the parties to the original contract, and by the actual terms of delegation of political power. Den Hartogh 1990.

<sup>12</sup> Therefore in the Lockean view the authority of the state is neither unlimited nor comprehensive, but it may still be supreme. The state need not recognize any competing authority.

<sup>13</sup> Second Treatise of Government, § 21, 168, 176, cf. *Judges* 11:27. As a matter of fact Jephtha's appeal as made in 1688 also involved an appeal to "humanitarian intervention", by the Dutch Republic.

<sup>14</sup> In Den Hartogh 2001, ch. 9, § 3, I argued on this issue that legislative and judicial authority are not created by authority but by custom (convention) and therefore the limits of authority are also not a matter of authority but of convention.

If you assert something, you claim it to be true, you do not claim that whatever you assert, is always true. Similarly, if you give an authoritative decision, you claim to be within your powers, you do not necessarily claim that you are within your powers whatever you decide. To be sure, if the highest court of the state occasionally makes a decision which is actually outside of its powers to make, the decision will stand. But it doesn't follow that the exercise of judicial power is unconstrained by legislative authority.<sup>15</sup> Similarly the fact that a decision will be final, even if it violates human rights, and for that reason is unworthy of either respect or obedience, does not show that the decision was not constrained, and allowed to be constrained, by the antecedent validity of human rights.

John Austin would reply that the court will show you the inconclusiveness of your reasoning by hanging you. But the consequences of court decisions derive from the nature of the authority they claim, not from its limited or unlimited character. Many court decisions concern disputed enforceable obligations. So if the court has executed its arbitrating authority and decided that you have this or that enforceable obligation, it will be enforced, even if the decision is mistaken. But that the decision of the court will be executed whether it is right or wrong, does not show that the court claims to have authority to order the execution of every wrong decision it might possibly make. A second relevant aspect of the argument for the Hobbesian view from the institutional logic of a statist order is the following. If your disobedient acts are considered in court, the court will not assess them in terms of right and wrong at all, but only by reference to the authority of the law. Even if your conscientious objection or act of protest is taken seriously, it is not because you were morally justified in what you did, but because the law provides a general defence for this type of action. In such cases your apparent violation of your duty of obedience in the final analysis turns out not to be a violation of duty at all. Doesn't this show that the court does not allow itself considerations of right and wrong, but only considerations of authority? All this is make believe, of course, as Morris forcefully argues: judicial and legislative authorities are not really coordinated as smoothly as a statist institutional order claims. Hence as a matter of fact courts have lots of manoeuvring space for taking into account the moral merits of acts of disobedience. But it is precisely this myth of the law as a seamless web of authority which is surely only compatible with the Hobbesian view.

I am not convinced. In the first place the legal officials of the state need not be committed, not even in public, to a jurisprudential view that no respectable legal philosopher has held for a century: that every legal question can be decided by reference to the authority of legislation or precedent. Perhaps they could take the view that the courts are duty-bound to apply such source-based law where it is applicable, but are allowed or even bound to make new law where source-based law is silent, or gives absurd results.<sup>16</sup> Or they could take the view that the law only partially consists of the formal conventions laid down by authority, but for another part of patterns of mutual expectations which do not derive from any authoritative source, and which may include some basic constraints on formal conventions as well as some basic

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<sup>15</sup> As Hart showed in his famous "scorer's discretion" argument, Hart 1961, ch. 7.

<sup>16</sup> In Den Hartogh 2001, ch. 10, § 2, I argue, however, that this is a legal philosophy which cannot be publicly acknowledged by judicial officials.

canons of its interpretation.<sup>17</sup> Or the state could, most plausibly, leave these questions open, to be discussed by lawyers and philosophers without prescribing any official doctrine.

Suppose you arrive at a red light at a crossroad at a time when there is no traffic around and you can verify beyond any possible doubt that there is not. According to Joseph Raz, if you accept the state's claims to authority, you should in such a case allow yourself to look ridiculous in the eyes of the gods.<sup>18</sup> But I see nothing contradictory in a legal system in which a court decides in such a case that you had no duty to stop.

But even if a state made the false claim that its source-based law is never silent and fully determines the answer to every question any court could possibly have to decide, it still would not need to make the further false claim that its authority was either unlimited, or only constrained by self-imposed limits. Its courts would deny being enabled to hear any form of Jephtha's appeal, but they would not have to deny the possibility of this appeal being sometimes right. At this point the Dutch constitutional arrangement with its denial to the court of the power of judicial review presents a useful analogy. For of course this arrangement doesn't imply that the legislation is empowered to legislate without any regard to the constitution. The arrangement expresses a division of labour in which it is the exclusive duty of the legislative to ensure that the law conforms to the constitution; hence the courts are supposed to operate on the presupposition that the laws satisfy this requirement, even if it is common knowledge that this is not invariably true. Similarly, if the courts do not assess the behaviour of the disobedient citizen in terms of right and wrong, they may operate on the supposition that this assessment has already been made, and by and large correctly been made.<sup>19</sup>

So the actual behaviour of the courts is as compatible with the Lockean view as it is with the Hobbesian one.<sup>20</sup> We might even be tempted to think that it rather confirms the Lockean view. For the development of human rights law is everywhere largely determined by the courts, and this development follows from the political morality expressed in the idea of human rights, and of specific human rights. However, this argument is not conclusive either. It is generally accepted that the legislative can make a moral principle into positive law, in the same way as it could adopt a provision of a foreign law system (or of international law). In that case it is obvious that the judge should do some ethics in arriving at a proper legal conclusion, but that does not in itself show that the moral principle had any antecedent legal status.

As a matter of fact, for any state which has given human rights a legal status and acts accordingly to some considerable extent, it will be difficult to discriminate between the Hobbesian and the Lockean interpretation of its self-image only on the basis of its internal behaviour, its way of dealing with its own citizens. It does not follow,

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<sup>17</sup> The view I defend in Den Hartogh 2001.

<sup>18</sup> Raz 1979, 25.

<sup>19</sup> In accordance with Raz's dependence thesis, Raz 1986, ch. 3.

<sup>20</sup> A legalistic style of adjudication in an oppressive regime is of course only compatible with the Hobbesian view. Cf. the Apartheid judges as discussed by Dyzenhaus 1991, or the notorious decision of the Dutch Supreme Court 1942 that it had no power to assess the legality of the decrees of the German authorities in occupied territory.

however, that it does not matter which conception of its self-image is the right (or rather the more appropriate) one. It may make a subtle difference to the way the legal profession operates whether they have (by implicit or explicit teaching) internalized the one or the other view in law school. It is obvious that a system staffed by Lockeans will be better enabled to recognize the possibility of justifiable or excusable disobedience.

It is because the evidence from internal behaviour is inconclusive, that I propose to have a look instead at the interaction between states, and in particular to the controversial issue of humanitarian intervention.

It may appear that we thereby change the subject altogether. Until now I have discussed the internal sovereignty<sup>21</sup> of the state: the authority it has in relation to its subjects. But humanitarian intervention is a matter of the external sovereignty of the state: its right not to be interfered with in the exercise of its authority. However, the ideas of internal and external sovereignty are related in the following way. It is possible to hold that a government has no internal sovereignty, for example because it does not fulfil its task of protecting the basic rights of its subjects to even a minimal extent, but still should not be interfered with, i.e. has external sovereignty. But if one believes that the state's failure to protect the basic rights of its citizens may justify intervention by another state, obviously one does not only deny the external, but also the internal sovereignty of that state. Hence my interest in the topic of humanitarian intervention.

## 5. HUMANITARIAN INTERVENTION: ITS STATUS IN LAW.

After the Kosovo-war the Dutch Minister of Foreign Affairs asked two advisory committees to advise him about the moral and legal aspects of humanitarian intervention (HI) and in particular about the possibilities of further legal development. The committees wrote a common report which I will henceforward refer to as "the Report".<sup>22</sup> The Report starts by defining HI as an action by a state or a coalition of states on the territory of another state, without the consent of the legitimate government of that state, using military force or threatening the use of it, with the aim to end or to prevent grave and large-scale violations of fundamental human rights.<sup>23</sup> The intervention can either be authorized, or not be authorized by the Security Council. The persons to be protected should not be subjects of the intervening states.

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<sup>21</sup> In a Lockean interpretation sovereignty over a territory T should be defined as a form of authority answering the following conditions: (a) all personal and institutional agents within T are subject to it, (b) it is not itself subject to any other authority, except, perhaps some authority it has itself recognized for some limited domain. Condition (a) does not imply that the relevant actors (e.g. churches, individuals) are subject to the state's authority for every aspect of their behaviour. But in this conception it is still presupposed that the state is characterized by a unity of decision-making which allows us to treat it as a single institutional agent. As Morris shows, however, we should rather think of it as a collection of empowered agents who have found some modus vivendi for working in tandem.

<sup>22</sup> Humanitaire Interventie 2000.

<sup>23</sup> On this definition the actual deployment of forces in Haïti by the USA (1994) and in Eastern Timor by the U.N. (1999) do not count as humanitarian interventions, because the rulers of Haïti and the government of Indonesia had given their consent to the action before it took place. I agree with Hoffmann 1995 that such actions should be included because the consent was obtained by threats of force which would normally have been forbidden.

The report goes on to argue for two theses. (1) Only authorized HI can possibly be in accordance with present international law. (2) There may be circumstances in which the use of force for humanitarian reasons is morally permissible or even highly desirable, even if it is not authorized by the Security Council. The report concludes therefore that the Dutch government should make it a matter of policy to contribute to a development of present international law, as a result of which it would allow even unauthorized interventions if some very strict conditions have been satisfied. And it makes some specific recommendations in this respect, including a list of the relevant conditions.

In my view both theses initially seem highly plausible, but their conjunction is puzzling, especially if they take the form of recommendations to a Minister of Foreign Affairs. Let me start by considering the legal status of HI. I will follow the main line of the Report's argument.

To begin with any form of HI seems to be excluded categorically by the Charter of the United Nations. Art 2 (4) prohibits the threat or use of force against the territorial integrity or political independence of any state as a basic violation of the constitution of the international community of states.<sup>24</sup> There are only two exceptions to this rule. Any state has the right to defend itself against aggression or to help another state in defending itself (Art. 51). And the Security Council is empowered under Chapter VII to authorize military action when this is needed to maintain international peace and security. States in other words may have a duty to respect the human rights of their subjects, but this is not a duty which any other state or even the international community is allowed to enforce. It seems obvious that the basic concern of the Charter is to protect the peace, not to secure the strict observation of human rights. To that extent it represents a Hobbesian view of international law.

Of course the same Charter, already in the first words of its Preamble,<sup>25</sup> explicitly recognizes human rights and this recognition has been the starting-point for a development in which the status of human rights as a second focal point of international law has become ever more prominent. In particular the U.N. and other international agencies have developed an institutional apparatus for monitoring the level of respect for human rights in individual states. Diplomacy and economic pressure are fully accepted methods of exerting pressure when violations have been established. So it surely is no longer the case that a state has exclusive responsibility for the way it treats its citizens, it is accountable for its behaviour in this respect to the international community.<sup>26</sup>

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<sup>24</sup> Cf. the *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States*, General Assembly Resolution 2131 (20) 1965, and the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States*, GAR 2625 (25), unanimously adopted 1970.

<sup>25</sup> And in Art 1 (3), 55, 56, 76.

<sup>26</sup> The milestones in this development: The *Universal Declaration of Human Rights* 1948; the *International Covenant on Civil and Political Rights* 1966, the institution and authorization of the UN Commission on Human Rights and of the Human Rights Committee, the building of specialized theme mechanisms (Working Groups concerning disappearances and arbitrary detention, Special Rapporteurs concerning summary and arbitrary executions and torture), and the appointment of Special Rapporteurs for Afghanistan, Chile, El Salvador, Iran, Romania etc. See Donnelly 1995.

Furthermore, in a number of cases the Security Council, using its powers under Chapter VII, has authorized the use of military force to end or to prevent large-scale violations of human rights. At first the Council used to point explicitly to the destabilizing effects of a humanitarian crisis: large flows of fugitives, extension of the hostilities beyond borders because of arms traffic or of guerilla forces seeking safe havens. In this way its decision to intervene could still be interpreted as basically motivated by a concern for international peace and security. But beginning with the intervention in Somalia 1992 these references have recently been omitted, and it is obvious that in some cases (Haïti 1994 is a case in point<sup>27</sup>) the humanitarian crisis had hardly any destabilizing external effects.<sup>28</sup> At first the Council used to say in these cases that the case at hand was a "unique" one, obviously in order to prevent its decision getting the force of a precedent. But after a number of these unique cases (Somalia 1992, Rwanda 1994, Haïti 1994) this description lost its plausibility and has also been quietly dropped (Zaire 1996). So it has become increasingly clear that the Council is giving an extensive interpretation to the concept of a "threat to peace and security" (Charter, Art. 39) so as to cover massive human rights violations as such.

One could ask whether the Council, being neither a legislative nor an adjudicative organ, has the power to re-interpret the provisions of the Charter. I will return to that question below. The Report anyway concludes that authorized HI has become legal. What about unauthorized intervention? It does not seem to be covered by either of the two exceptions provided for in the UN Charter. It is not motivated by the aggression of one state against another, and even if it is motivated by a threat to peace and security in the new interpretation of that concept, Chapter VII requires authorization by the Security Council for acting on that motive.

One could try to argue that there is a rule of customary law, or perhaps a rule in some embryonic stage of development, allowing unauthorized HI under some conditions. But until now unauthorized intervention has only rarely been practised, so state practice on its own does not point to a new rule, but rather to breaches of the old one.<sup>29</sup> Of course the actions in these cases, notably in Kosovo, have sometimes been defended by the intervening states on humanitarian grounds, but the attitude of those states, the report concludes, cannot be interpreted as amounting to an opinio juris, mainly because important states like China, Russia and India do not share it. Anyway, the Report rather ruefully concludes, the non-intervention principle should be seen as Jus cogens, hence it cannot be overruled by customary law.

## 6. HUMANITARIAN INTERVENTION: ITS MORAL STATUS

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<sup>27</sup> This does not exclude the possibility that stopping the influx of Haïti refugees was a major motive for the US involvement in the intervention.

<sup>28</sup> In a similar way the criterion of "substantial international effects" had gradually disappeared as a requirement for the authorization of diplomacy and economic pressure as instruments of policy aimed at improving human rights records.

<sup>29</sup> The three famous actions of the Seventies which were directed at situations of severe humanitarian crisis (Uganda, Kampuchea and Bangladesh) have all primarily or exclusively been defended by the invading states as forms of self-defence. India saw to it that the motivation in humanitarian terms it originally provided in the U.N. for its intervention in Bangladesh was deleted from the provisional verbatim records.

The Report finds it hard to deny that even unauthorized HI may sometimes be morally permissible or mandatory. It quotes Kofi Annan on Rwanda: “if, in those dark days and hours leading up to the genocide, a coalition of states had been prepared to act in defense of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?”

A survey of the opinions of authors on the ethics of international relations shows that there is virtual consensus among them on this point. By and large, they can be divided into two groups. The first group, prominently represented by Michael Walzer and John Rawls, accepts that the international community is fundamentally characterized by a moral division of labour, by which states have an almost exclusive responsibility for protecting the rights and security and promoting the well-being of their own citizens.<sup>30</sup> If a state does badly in executing this task, other states may censure it and use diplomatic and economic pressure in order to induce improvement, but only in very rare cases are they allowed to use force. It is the primary task of the citizens of that state to rectify such situations. In addition to the obvious risks of armed conflict spreading and escalating, the following arguments have been presented, in particular by Michael Walzer, for recognizing such a division of labour. (1) Human rights do not exist in a vacuum but require political institutions to protect them, but there is no supranational power which is able to do so effectively and consistently. Hence states should interact with each other on a presumption of each other’s legitimacy. (2) Standards of legitimacy are not universal but reflect the history, culture and religion of a community. As Walzer expresses the point, there may be a “fit” between a political community and its authoritarian government which outsiders should respect, even if it does not square with their own liberal and democratic ideals. A political movement which in our eyes has a rather repulsive platform may actually have the deeper roots in a community’s history. It is a form of paternalism to consider a state illegitimate by our standards when it is supported by the bulk of its own population and expresses their shared political ideals. (3) Whether or not this fit exists, even when we observe widespread opposition and repression, is hard for outsiders to determine. They should hesitate to put many lives at risk for their fallible judgement. (4) Every intervention changes the internal balance of powers, even between opposition groups, and involves the intervening state as a major factor in shaping the future of the other state. Either the new constellation will remain dependent on this support or, if the support is withdrawn, the internal instability may re-emerge. For such reasons the opposition itself may prefer to bring about its own liberation rather than to receive it from the hands of a foreign power. External intervention is a kind of counterfeiting of the internal political process. It never attacks only the government, it also interferes in numerous other ways in the life of a political community.<sup>31</sup>

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<sup>30</sup> Walzer 1977, Elfstrom 1983, Rawls 1999.

<sup>31</sup> These considerations form Walzer’s interpretation of Mill’s famous argument that intervention violates a supposed right of self-determination of a people, even if the intervention is motivated by oppression. (*A Few Words on Non-Intervention*. 1859). If the opposition is not strong enough to liberate itself, one cannot be sure that it sufficiently represents the will of the people. In my view the argument only establishes a presumption which in many cases of an oppressive elite exploiting its own people may be clearly overridden, e.g. Haiti in the early ‘90’s. Of course, in order to complete the liberating process the intervention should be followed by an internal development involving the necessary institutional and cultural changes.

In the view of Walzer c.s., even the fact that a government has lost its internal legitimacy on Lockean criteria, does not suffice to justify a foreign intervention on its territory aimed at helping the people to liberate themselves.

The other group of authors which we may call the cosmopolitans, criticizes Walzer c.s. for being unduly respectful of sovereignty. States exist to serve the interests of their citizens, so if they fail to fulfil their duties, they do not have any moral standing at all. Of course, this failure should be fully apparent in order for any state to be allowed to intervene, but unfortunately it is not very rare for this condition to be met. The appeal for the need to protect the common life of a people in particular is hardly convincing if this common life implies the exclusion of minorities from the community. In cosmopolitan eyes the arguments of Walzer c.s. either fail or do not support their position.<sup>32</sup>

I do not need to take sides in this particular controversy, for both groups accept that it is permissible to use force in some circumstances, in particular in order to resist a government bent on destroying or evicting a substantial part of its subjects.

Of course, all this is only the beginning of the real argument concerning HI. If the cosmopolitan criticism of Walzer c.s. is to the point, it follows that states which have lost their internal legitimacy, have no right not to be interfered with. It doesn't follow that the actual intervention in such cases can be justified.<sup>33</sup> Even if HI can sometimes be justified in principle, there are reasons to be sceptical about the application of the principle in the real world. One may for example doubt whether actual actions may be predicted to satisfy the traditional just war requirements: that the intervention is likely to end the abuse it intends to end, and that this success can be achieved without a disproportional use of force. The main reason for this doubt is that intervening states will tend to limit their own commitments, in terms of the costs and risks they are prepared to accept.<sup>34</sup> These limits are partially determined by the *de facto* legitimacy of the intervention in the eyes of their own citizens. If it turns out that the intervention can only succeed by sacrificing the lives of many of its own soldiers, no state, and certainly no democratic state, will continue such an action for a great length of time. Because the target state knows this, it may be provoked into passing over some steps on the escalation ladder, going to the point of the use of force which it expects to be unacceptable to its opponent. In any case the internal actors will be more single-minded, more dedicated, more prepared to go on accepting setbacks than the intervening parties, perhaps to the point of hysterical resistance to superior force.<sup>35</sup> They are far more able to cope with the inevitable uncertainty and -to use a

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<sup>32</sup> Doppelt 1978; 1980; Luban 1979; 1980; Téson 1997. In a forceful criticism Slater & Nardin 1986 argue that Walzer's criterion of "fit" does not exclude the most massive violations of the human rights of minorities. In order to allow HI to be justified in such cases one has to appeal to a basic core of human rights directly, e.g. as identified by Walzer 1994. Walzer could restore the parallelism between his criterion of fit and his direct appeal to human rights by requiring a fit between a government and each of the communities constituting its political nation, but in that case many more cases of human rights violation would justify HI "in principle" than Walzer seems prepared to acknowledge.

<sup>33</sup> As Slater & Nardin 1986 recognise.

<sup>34</sup> Another reason may be the usual confusion of a civil war, in particular the lack of a clear centre of power which can be held responsible for the human rights catastrophe and can be attacked directly. Somalia provides the classic example.

<sup>35</sup> Stedman 1993; Farer 1973.

Clausewitzian term- the "friction" of war than the external parties. As a result the intervening state itself may be tempted, in order to keep its costs and risks within acceptable limits, to use forms of force which are prohibited by the rules of war, in particular against civilian aims. All this is well-known from the Kosovo-war.<sup>36</sup>

For such reasons one may be inclined to counsel restraint even in cases in which intervention would be justified "in principle". It may be the case that, given the resources available, in particular of will-power, unity of aim, political leadership and popular support, most nuts are too hard to crack.

## 7. THE QUASI-HOBBSIAN ARGUMENT

But in the context of my inquiry it is the principle which interests me. Are there any arguments which should lead us to deviate from Kofi Annan's intuition and the consensus of authors on international ethics and to adopt the alleged position of the U.N. Charter as a morally legitimate one? Unlike the Report most authors on international law who agree that unauthorized HI is illegal, also hold that it should be illegal.<sup>37</sup> The basic argument is always the Hobbesian one, this time taken seriously - as Raz and Morris did not- in its normative claims. We should not allow individual actors in a system regulated by law -usually people or corporations, but in the case of international law states- to act on their own judgement of right and wrong in their dealings with each other, certainly not in matters concerning the use of force. We should rather require them to submit to arbitration and hence to authority.<sup>38</sup> There are two dangers supposed to be involved in allowing them Jephtha's appeal. The first danger is that they will abuse this "right", masquerading egoism as humanitarian concern. Even to the extent that they are sincere in their weighing of the relevant values, they will inevitably be partial. We have no reason to trust the judgements and certainly not the professions of any state powerful enough to engage in intervention in other states. One may agree with Walzer that mixed motives do not matter as long as long as the actual behaviour of the intervening state can largely be justified by the humanitarian motive alone, but if the motives are mixed, one cannot safely expect the actual behaviour to satisfy this criterion. The second danger follows partly from the first. In a world in which many states have no great concern for respecting the basic rights of their citizens, there will be a never-ending series of violent conflicts seemingly motivated by humanitarian concerns. It is particularly dangerous when the leading world powers feel free to use military force without first securing each other's consent. We face a stark choice of priorities, and we should opt for universal peace

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<sup>36</sup> Reading Clausewitz ("the best strategy is to be very strong", the priority of the actual fighting to strategy, the logic of escalation, the advantages of the defending party, war as a contest of will-power, and in particular his notion of friction) one is struck by the naiveté or carelessness of the allies which started the Kosovo-war.

<sup>37</sup> Brownlie 1973, 147-8 ("A rule allowing HI... is a general license to vigilantes and opportunists to resort to hegemonial intervention"); Franck and Rodley 1973; Vincent 1974; Donnelly 1984; Akehurst 1984; Verweij 1985 a.o.

<sup>38</sup> This should rather be called a quasi-Hobbesian argument, for one essential element of Hobbesianism is missing: Hobbes did not only insist that all possibly controversial questions should be decided by (one and the same) authority, but also that this authority should have irresistible power to enforce its judgement.

rather than for the protection of human rights everywhere in the world. That will in the long term also prove to be the best form of protection of human rights.

It is hard to find this argument explicitly stated and defended with any level of sophistication. But it seems to me that this way of thinking is still very widespread, especially in the legal community. It also seems to inform the persistent opposition from most non-Western states to the legal recognition of unauthorized HI in any form. They fear that a “right” to intervention may serve to cloak interference in their domestic affairs by Western powers, in particular the USA. It may become a disguise for imperialism.<sup>39</sup>

The general form of the argument is well-known from the discussion about morally motivated disobedience to the law, beginning with Socrates in his rejection of Crito’s kind offer to arrange his escape from unjust execution. “Can you deny, Socrates”, the Laws of Athens ask him, “that by this act which you are contemplating you intend, so far as you have the power, to destroy us, the Laws, and the whole state as well? Do you imagine that a city can continue to exist and not to be turned upside down, if the legal judgements which are pronounced in it have no force but are nullified and destroyed by private persons?”<sup>40</sup> If the NATO-states allow themselves to use force in Kosovo for alleged humanitarian reasons, why should any other state take pains to abstain from intervention for whatever reason it finds compelling?

The argument makes several mistakes. The most fundamental one, which I already hinted at in explaining “Jephtha’s appeal”, is to mistake a judgement of right and wrong for an exercise of discretion or of authority. You know it from the classroom (especially in law schools): you argue for a position and the students reply: it is only you saying so. But to claim to say or to do the right thing is different from claiming the right to say or to do it (or to say or to do something else), and it is also different from claiming the right to act on your view of right and wrong.<sup>41</sup> The second mistake is to think that we can only have justified expectations concerning the behaviour of other agents if we can expect them to act on authority. As soon as we are at the mercy of their judgement of right and wrong, we cannot trust them anymore, for such judgements are highly fallible and widely divergent. I agree that a judgement of right and wrong should be a judgement in terms of basic norms or principles shared by the relevant agents. The mistake is to think that such principles are never available, that judgements of right and wrong are inherently less predictable than the appeal to

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<sup>39</sup> The argument is indicative for so-called “realism” in thinking about international relations. Realists do not trust any state to have any non self-interested motives. As a matter of fact this is as inconsistent with insisting on the inviolability of territorial integrity as with allowing HI. The only consistent realist position is to become resigned to the fact that states will use force anytime they believe it suits their ends. Not even in a Hobbesian state of nature is it plausible that general adherence to a non-intervention principle is an equilibrium strategy for prudential agents, and it is even less plausible for strategic interaction between agents highly unequal in force. Quasi-Hobbesianism is a moral position. A good discussion of realism and its Hobbesian foundations can be found in Beitz 1979, part One.

<sup>40</sup> Crito, 50ab, translation Hugh Tredennick. For further discussion see Den Hartogh 2001, ch. IV, § 3.

<sup>41</sup> According to Donnelly 1995, 121, unauthorized HI can never be morally justified, because “if it occurs, it rests on state power, not legitimate authority”. Of course, if a state is authorized to intervene, whether it succeeds will also depend on its power. (Including, for a small part, the power it derives from the justification and/or authorization of its cause.) The statement is characteristic for the inability of many authors in law and political theory to even conceive of any alternative to the quasi-Hobbesian view.

authority. This cannot be true, for even "obey justified authority" or "put your controversies to arbitration" or "keep your treaties" are principles of a common morality which do not themselves derive their validity from authority or contract. Basic human rights are by now on a firm footing as part of the shared morality underlying international law, as is also testified by the impressive development of international criminal law in recent years.<sup>42</sup> No one can sincerely claim that the immorality of ethnic cleansing is more controversial than the non-intervention principle. (And the corresponding legal norms are both *Jus cogens* norms.) A third mistake is to think that in allowing space for the elephant's tail, you necessarily allow space for the elephant. But it is an open question whether a rule which doesn't allow for an exception will be better maintained than a rule which does: accepting well-founded exceptions to a rule may strengthen the rule rather than undermine it. Of course, it is true that if it is generally accepted that unauthorized HI may be permissible under some circumstances, states will appeal to this principle in justifying unjustifiable forms of aggression. Examples from the past include the attack of Russia on Turkey which started the Crimean War in 1853, and the invasions by the USA of Cuba 1898, by Japan of Manchuria 1931, and even by Nazi-Germany of Bohemia and Moravia 1939. But as such examples show, in such cases it may be clear to all that the appeal is both invalid and hypocritical. The borderline between cases which do and which do not answer to the description of a massive violation of basic human rights may be vague, but that doesn't mean that most cases will not lie clearly on one or the other side of it. That is the point of Kofi Annan's remark. It is hard to sustain a categorical rejection of unauthorized HI even in cases of Holocaust-proportions. It is the usual fallacy involved in most slippery slope arguments to think that as soon as you accept this point, you cannot draw a line before arriving at a Reagan or a Breshnev Doctrine.<sup>43</sup>

If the rule could not survive any exception, self-defence could not be allowed as an exception either. The appeal to self-defence is at least as prone to being abused as a cover for aggressive intention as the appeal to humanitarian motives. In both cases it is also pretty naïve to think that the unavailability of the cover would deter any would-be aggressor. Aggressive states decide to use military force and then look around for any available justification, however unconvincing.

It is also important to consider the alternative options. The argument suggests that we should not allow any single state or group of states to judge whether any violation of human rights is severe enough to justify HI, they should be authorized by an impartial moral umpire. But unfortunately the Security Council does not really qualify as an impartial moral umpire. If there is a danger of the major powers unjustifiably intervening in their own interests, there is exactly the same danger of these same powers preventing a justified action in their own interests.<sup>44</sup> Because the Council is a political organ, one cannot even expect a minimum of consistency in its approach to

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<sup>42</sup> Milestones: the Pinochet-case, the legal action against Milosevic, and in particular the adoption of the Rome Statute of the International Criminal Court 1998 (unfortunately opposed by the USA).

<sup>43</sup> Cf. Den Hartogh 1998b.

<sup>44</sup> "States don't lose their particularist character merely by acting together. If governments have mixed motives, so do coalitions of governments." Walzer 1977, 107. This is as true of the U.N. as of NATO. (Vi t nam was condemned for its ending of the Khmer Rouge regime by both China and the USA.)

the authorization of interventions, let alone a minimum of efficiency in authorized action. (Rwanda, Srebrenica.)

None of this is meant to deny, of course, the possibility of abuse. Jephtha's appeal can be made wrongly, and also insincerely. These dangers should lead states which consider intervention, first to seek authorization if it can be obtained, and secondly to state the principles they believe justify their action in general terms. It even makes sense to develop new criteria for assessing such justifications, as long as this is not done with the necessarily futile intention to rule out the option of Jephtha's appeal altogether. Acting on one's own judgement is an ultimum remedium, but the ideal arbitration scheme which would exclude the need for this remedy altogether is unattainable. And nowhere more unattainable than in the international arena.<sup>45</sup>

## 8. THE IMPLAUSIBLE COMBINATION OF TWO PLAUSIBLE THESES

I claimed that the positions taken by the Report on the moral and the legal status of unauthorized HI are both initially plausible. However, the combination of the two positions is puzzling, both in itself and in its consequences. The conclusion the Report draws from its argument is that we must hope for the development of rules of customary law allowing unauthorized HI under some conditions. One contribution the Report makes to that development is to propose the framework of assessment it believes to be appropriate for judging such actions.

However, if the argument of the report concerning the legal status of allowing unauthorized HI is cogent, this enterprise is doomed from the start. For according to the Report the opinio juris which is needed for a customary rule to exist, cannot be said to exist unless the opinio is shared by such important states as China, Russia and India. But these states insist on authorization because they want to be in a position to check any proposed action against their interests. It is highly unrealistic to expect them to change their views. There is a long tradition in legal philosophy, extending from Locke to Hart, asserting that one of the main "inconveniences of the state of nature" is the inflexibility of its customary rules. This deficiency has to be remedied by the introduction of formal rules giving some agency the authority to change the rules. In this case, however, the "rule of change", which establishes the authority of the U.N. Charter seems to have introduced a nearly-absolute inflexibility. If the legal and the moral status of unauthorized HI are what the Report tells us they are, there is no step the Dutch government can take in order to promote the adjustment of the legal status to the moral one.

The combination of the two theses is not only troubling in its consequences, but it is also puzzling as such. For the Report, remember, is an advice to the Minister of Foreign Affairs who consequently is recommended to adopt both positions. (As he had in fact already done, both in defending the Dutch involvement in the Kosovo-action, and in his request for the advice.) But what would it mean for the official representative of a state to assert both that unauthorized HI is not allowed by international law, and that there may nevertheless be decisive moral reasons for

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<sup>45</sup> "Even 19 democratic states constitute a party when they empower themselves to intervene. They claim a competence of interpretation and decision which ideally should only be given to independent institutions..." Habermas in his evaluation of the Kosovo-intervention, *Die Zeit* 29/4/1999 (my translation). I agree, provided that such terms as "empowerment" and "competence" are not understood to refer to a claim to authority.

engaging in it? It would be understandable if this meant that there might be such decisive moral reasons in the absence of a prohibiting legal norm, but that is not what is meant. The position is that there may be decisive moral reasons for breaking a valid norm of international law.

The intuition that this is an odd position for a government to take can be articulated in the following way. The law of nations should be conceived of as the corpus of legitimate expectations states may entertain concerning each other's behaviour. Why do states expect each other to conform to these mutual expectations? Obviously because they believe each other to have good reasons for doing so. What kind of reasons might these be? In order to avoid the suspicion of any anti-positivist bias in my argument, let me quote Hart on this: "fear, inertia, admiration of tradition, long-sighted calculation of selfish interests as well as recognition of moral obligation".<sup>46</sup> In Hart's view moral reasons need not be included in the set. That is what makes him a positivist. However they are not excluded either. So if the participants to the system of mutual expectations believe they have moral reasons for conforming to them, that is partly constitutive of their "internal point of view". Prominently among such reasons will be the principle of keeping faith: violating the legitimate expectations of others is a breach of trust. (It may also be a form of exploitation.)<sup>47</sup>

Now I can explain why it is odd to say from the internal point of view: you are justified in expecting me not to X, but I may nevertheless have decisive moral reasons to do it.<sup>48</sup> In a system of customary law a rule is a rule because it is accepted as such by the participants. Hence if the participants start to announce that actually they do not accept it, for moral or for any other reasons, this tends to undermine the rule.

## 9. OPINIO JURIS

It is puzzling for a participant to a system of customary rules, as the law of nations largely is, to state, from the internal point of view: this is required by the rules, but there is a decisive moral reason for not complying with it. If a system of law largely consists of norms which are derived from authoritative sources, it makes better sense, even from the internal point of view, to make that kind of statement. (Though it is still puzzling for judicial officials of the system making it, for reasons alluded to in §4

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<sup>46</sup> Hart 1958, 93.

<sup>47</sup> I have elaborated this conception of the nature of law in Den Hartogh 2001.

<sup>48</sup> From an external point of view it may even be possible to assert both that there may occasionally be decisive moral reasons to engage in an action which nevertheless not only is but should be legally prohibited. In the footsteps of some XIX-century authors referred to by Lillich 1973, 249, Brownlie 1973 takes that position, as do Slater & Nardin 1986. Brownlie makes an interesting comparison to a common view on the legalization of euthanasia. Such views presuppose a conception of the moral truth as a kind of *disciplina arcana*, only accessible to an enlightened elite, which reminds one of Sidgwick's view of the relation between utilitarianism and common-sense morality. (And of Voltaire: don't tell the lackeys that God doesn't exist, for they will start stealing the table silver.) Otherwise it is incompatible with the nature of customary law: if it is common knowledge that in some circumstances states will make an exception to a rule, it cannot be part of the law that the rule has no exception. There is also the question (as in the case of euthanasia!) of whether it is wise policy to tolerate a category of behaviour without attempting to domesticate it, cf. Farer 1973, 160.

above.<sup>49</sup>) In such a system the criterion of the validity of a rule is given by the authoritative source, and not even the staunchest anti-positivist would deny that there may be discrepancies between valid law on this criterion and what you have reason to do as an individual actor.

The criterion of validity in customary law is the actual practice of the agents and their shared opinio juris. I have suggested that this criterion, in particular the criterion of opinio juris, does not allow for similar discrepancies. But authors in international law commonly hold that it does. To give a representative example, Brownlie asserts that opinio juris consists in the belief that a practice is required by or at least consistent with international law, and then goes on to say: "Some writers do not consider this psychological element to be a requirement for the formation of custom, but it is in fact a necessary ingredient. The sense of legal obligation, as opposed to motives of courtesy, fairness, or morality, is real enough..."<sup>50</sup> But what does he mean by "legal obligation" in this context? The term is often used by legal scholars in an etiolated sense. There is a legal obligation to do X, if this is required by a valid rule, the validity of the rule being determined by a relevant authoritative source. This is an etiolated sense because it leaves entirely open the question of whether the existence of this requirement gives the agents subject to it any reason to act on it at all. But in the case of customary law this etiolated sense is not available. If someone asserts the existence of a legal obligation from the internal point of view and says he means by obligation "what is required by a valid rule", we will ask him what he means by a valid rule, and the only answer available to him will be: a rule which obligates.<sup>51</sup>

It doesn't seem either that this etiolated sense is what Brownlie has in mind when he says that the sense of legal obligation is real enough. This appears to indicate that he uses the concept of "obligation" in an internalist sense: if a participant to the system of rules acknowledges the obligation, he cannot fail to some extent to recognize it as a reason and to be motivated by it. In that sense it is a "psychological ingredient". What he seems to assert is that this kind of reason is a free-standing one: the very fact that it is a matter of mutual expectation between the relevant agents to do X, gives them a reason to do it, without recourse to any other value they recognize and are motivated by, neither courtesy nor fairness, nor morality, nor even, I suppose, self-interest. It is "free-standing" in the sense that it is not founded on anything else. I have to confess that this free-standing conception of "a sense of legal obligation" is unintelligible to me.<sup>52</sup> I can imagine two ideas approximating it. The first of these is the Hobbesian view: the highest priority of the agents is or should be the avoidance of conflict and this requires conformity to the rules whatever they may be. But though this is a

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<sup>49</sup> See Den Hartogh 2001, ch. 10.

<sup>50</sup> Brownlie 1990, 7.

<sup>51</sup> Hence I am less reluctant than Nardin 1983, ch. 9, to consider customary international law as the common morality of international society. Many provisions of international law, however, are conventions in the sense of Lewis 1969: solutions to coordination problems, for which everyone has non-moral reasons to comply with. But for other norms it is commonly believed that, if there are insufficient non-moral reasons, they are to be supplemented by moral ones. This does not mean that this common belief is beyond criticism.

<sup>52</sup> See Den Hartogh 2001, ch. VIIi, § 3, on Hart's similar conception of legal obligation. It should be noted that this conception is not shared by Raz. Razian positivism does not depend on a distinction between legal and moral obligation, but only on a conception of the nature of authority. So I would expect Raz to accept my view of opinio juris.

content-independent conception of the relevant reason, it is not a free-standing one: the reason for complying with the law is derived from some other type of consideration, either of self-interest or of morality, even if the foundation does not import any restrictions on content. The other view which may explain to some extent why “the sense of legal obligation may seem real enough” is that the very existence of justified expectations of other agents gives us a reason to honour them. But this again appeals to a deeper motive, for example trustworthiness. Like the Hobbesian view it may seem to imply no restrictions on the content of the expectations it feels bound to honour, though I think it actually does. (Some expectations are such that not even a trustworthy person will feel bound to comply with them.)

The view of opinio juris which prevails in treatises of international law and which is represented by the quotation from Brownlie, seems to me deeply confused. The common view is that opinio juris means: what the participants in the system of customary rules believe the rules to be. And it is held that this belief leaves it entirely open, even to those same participants, to take whatever moral attitude towards this rule they think appropriate. I have argued that, if we take this last claim seriously, we lose our grasp of the concept of validity, and hence we are unable to explain what it is someone believes who believes a possible rule to be valid law. And I have suggested that what these authors really mean, is that the rational and probably the moral foundation of the relevant system of law, in the eyes of the participants to it, are such as to import no restrictions on its possible content. Whatever is mutually expected, should be acted upon, in order to keep the peace, or to keep faith. But thereby it is already conceded that opinio juris means: what the participants to the system of mutual expectations are prepared to honour, for whatever relevant reasons, including moral ones. It is this very fact that the participants are known to be prepared to honour the expectations which justifies them.<sup>53</sup>

Opinio juris is incompatible with moral rejection. This is marvellously illustrated by the Report itself, even though it appears to subscribe to the usual conception of opinio juris. For, as we have seen, it argues that there is no rule of customary law permitting unauthorized HI under any circumstances. There is no such rule, because the necessary opinio juris is lacking. This is shown by reference to the attitude of states like China, Russia and India. But if opinio juris is what the Report says it is, the attitude of such states is not specifically relevant at all. The Report itself concludes that there is no rule of customary law, it expects the Minister to accept that conclusion as a true legal statement, and then the position of the Netherlands would be equally supportive of this conclusion as the position of China, Russia or India! These states stand out, not because they share the legal views of the Report, but because they don't share its moral views. Their position, whatever its deeper motives, is that unauthorized HI should never be allowed.

By recognizing the illegality of unauthorized HI under present law the Report frustrates its own professed aim of changing the law. The only way to change a rule of customary law is by starting to assert that it does not exist.

## 10. UNRAVELLING THE KNOT

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<sup>53</sup> See Den Hartogh 1998a on the apparent circularity in the concept of opinio juris.

I have argued that the Dutch minister of Foreign Affairs cannot consistently proclaim that the Law of Nations prohibits unauthorized HI and that he feels morally free or even obligated to engage in it under a particular set of circumstances. If either the legal or the moral position has to be surrendered, it is obvious that it should be the legal one.

The main obstacle is the status of the non-intervention principle as Jus cogens. For this means that the meaning of the principle as it is stated in the U.N. Charter cannot even be changed by explicit declarations of the Security Council, but only by a shared opinio juris concerning its interpretation. The Council has no formal power at all to amend any provisions of the Charter. Only if its re-interpretation of some provision is allowed by all states without objection, it acquires legal status.<sup>54</sup> In this way, as we have seen, the concept of “a threat to peace and security” has actually been re-interpreted so as to include massive human rights violations.

However, the reason why states like the Netherlands do not want to exclude unauthorized HI is that authorization cannot be expected to be given in all cases which require it on the merits of the case, not even as a rule. But the same states which will tend to block authorization in such cases will veto interpretations of the Charter allowing unauthorized actions in any case, and this same veto will then be proof of the non-existence of an opinio juris allowing it.

The status of the Charter as a whole and of its several provisions, however, is itself determined by opinio juris. “Jus cogens” is defined by the Vienna Convention on the Law of Treaties (Art. 53) as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. I have argued that a norm categorically prohibiting unauthorized HI under any circumstance does not satisfy this description. Hence it is false that the non-intervention principle in its traditional interpretation should be considered Jus cogens.

I conclude that the Charter cannot stand on its own feet, not even as regards Art/ 2 (4). No source-derived law ever can. It is authoritative because it is commonly recognized to be authoritative, and this recognition can never be fully independent from its perceived content. Hence the core meaning of its provisions is as much a matter of opinio juris as its general status. If there is no longer a sufficient consensus about any part of this core meaning within the community of states, to insist on a formerly shared interpretation being Jus cogens is hollow. Re-interpreting a norm is not identical to derogating from it.

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<sup>54</sup> This means that if the Council decides by unanimous vote, it has de facto legislative power after all. Tésou 1997, 238-244 correctly argues against Malanczuk 1993 (and the Report) that the Security Council has no authority to extend the Chapter VII criteria for justified collective use of force. He concludes in Dworkinian vein that its more recent interpretation should therefore be understood as a re-discovery of pre-existing law. (Which as such is only confirmed by the opinio juris of the concurring states.) But this makes a mystery of opinio juris, for it is obvious that before 1990 there was an opinio juris that gross violation of human rights as such was not to be considered a threat to peace and security. Hence either the former or the latter opinio was mistaken, and can not itself have been a criterion of the validity of the law. What states can justifiably expect from each other changes with their shared moral views. Occasionally Tésou recognises this, e.g. by calling Resolution 688 (1991) concerning Northern Iraq “a custom-originating act” because it was not objected to by the international community and was followed by similar decisions.

From this point on I should wisely leave it to the expert to complete the argument. But I cannot resist making some amateurish suggestions for whatever they are worth. The standard move is to propose a narrow reading of “the threat or use of force against the territorial integrity and political independence of any state”, according to which the formula does not cover an intervention which does not aim at changing either the government or the borders of a state.<sup>55</sup> This reading is, at best, only plausible if the intervention takes the form of a “surgical operation” in order to end a massive violation of human rights.<sup>56</sup> But often the only way of removing the threat to some oppressed minority is “to eliminate the threat at its source”, which means at the least curtailing the powers of government, if not changing its personnel or even its form.<sup>57</sup> In addition, Clausewitz’s problem of friction means that the intervening party can hardly ever be sure enough that “a surgical operation” will be sufficient.

The most attractive line of argument in my view would be the following. By the series of its resolutions authorizing HI the Security Council, as we have seen, has re-interpreted the concepts of peace and security: they no longer exclusively refer to the relations between states, but also to the condition of a people or of peoples within a state. Art. 51 explicitly links together the right to self-defence (against an armed attack on a U.N. member) and the task of the Security Council to maintain international peace and security: the right of self-defence only exists as long as the Council itself has not taken the necessary measures. But then we should interpret the right to self-defence as arising in any situation which the Council defines as a breach of the peace. If peace and security can be threatened by a humanitarian crisis as such, this surely is a kind of peace and security which can only be enjoyed by people, not by governments. So “defending a state” should not be taken to mean defending a government, but defending the people who have organized themselves as a state for the protection of their rights and the promotion of their interests, possibly against their own government.<sup>58</sup>

These arguments exemplify the same strategy of interpretation. Interpretation is the art of making sense of our shared convictions as a whole, in a way which we may justifiably expect to command general agreement.<sup>59</sup> The core insights which we somehow have to accommodate are the following. It is undeniable that states by now have enforceable duties concerning the protection of the basic human rights of their

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<sup>55</sup> Stone 1958, 237; McDougal 1967; d’Amato 1987, 57-73.

<sup>56</sup> Another objection to it is that it seems to allow the sweeping of mines in Corfu Channel, and even acts of piracy or looting expeditions.

<sup>57</sup> Farer 1973, 153. Achieving the humanitarian end can also require changing the legal status of a territory (Bangladesh, Kosovo, Eastern Timor).

<sup>58</sup> This also means that the *de facto* exercise of power over a territory is no longer the exclusive criterion for the recognition of a government. But this had already been made clear by the whole decolonisation process, e.g. the refusal of the community of states to recognize the Smith regime in Rhodesia, or South Africa’s reign in Namibia.

<sup>59</sup> My position on this point is obviously close to Tésou 1997. But I want to stress that the moral principles I appeal to are derived from the common morality of the international society as found in its developing law, not an ideal morality or critical moral truth. I don’t suppose that this common morality is itself beyond moral criticism. Cf. Den Hartogh 2001, ch. VIII, § 6 and Nardin 1983, ch.7.

subjects. These are not only duties arising from a treaty, hence duties owed to the other parties to the treaty. Rather they are obligationes erga omnes.<sup>60</sup> All states have a legal interest in their protection. There is a remedy available for violations of these duties, consisting in chapter VII actions by the Security Council. But if the Security Council fails to take its responsibility, there can be no general Hobbesian argument, though there may be numerous other arguments of morality or prudence, why some other states should not step in.

If this argument does not succeed in gaining general approval, to that extent the law is unsettled. But if there is no consensus as regards a prohibiting norm, there is no prohibiting norm. For, as I have argued, it is a mistake to assign the burden of proof to those who deviate from a traditional interpretation of part of the law, when they have good reasons for their claim to be faithful to the whole of it.

## 11. CONCLUSION

What are the conclusions we can draw concerning the self-image of the state? It is obvious that the development of accountability of states for their behaviour in respect to human rights means a limitation of their authority, and so does the growing recognition of the legality of authorized HI. (As well as the fast development of the accountability of state officials for war crimes and crimes against humanity.) But in these cases it is still possible, though hardly plausible, to argue that these are all cases of self-limitation by the state because much of the relevant new law is treaty law.<sup>61</sup> However, if one state reserves the right to intervene in the affairs of a second state for the protection of human rights within that state whether or not the intervention is consented to by the second state, or authorized by an organ whose power of authorization is recognized by the second state, the first state obviously does not claim that the execution of state power is only constrained by human rights if that state has recognized that constraint itself. I have argued that this Lockean position is not incompatible with any essential aspect of the nature of the state, and that it is increasingly implied by the positions on unauthorized HI taken by at least some states.

Modern constitutional states often claim authority in cases in which they do not have it. But they do not need to claim any kind of authority which they do not have.

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<sup>60</sup> Barcelona Traction case, *ICJ Reports* 1970, 3, the decision which started the process of identifying a special category of Jus cogens norms.

<sup>61</sup> It is implausible because new states hardly have the option to forsake membership of the UN and hence being party to the Charter, because the re-interpretation of the concept of "international peace and security" has not been formally authorized by any treaty, and because the actual forms of accountability largely derive from initiatives of the relevant UN organs rather than from specific treaty provisions.

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University of Amsterdam, Faculty of the Humanities, Department of Philosophy  
Netherlands Institute for Advanced Studies in the Humanities and Social Sciences,  
Wassenaar

#### ABSTRACT

According to Joseph Raz and Christopher Morris all states necessarily claim to possess an authority over their subjects which is supreme, comprehensive, and either unlimited or only limited by self-limitation. This Hobbesian view of the self-image of the state is to be contrasted with a Lockean view, according to which the state does not claim to have itself authoritatively determined the limits to its authority, but only to have recognized their antecedent validity. The internal behaviour of constitutional states towards their own citizens turns out to be compatible with either view. Therefore I consider the external behaviour of states, in particular in cases of large-scale violations of basic human rights in other states. Intervention in such cases, even without authorization by the Security Council, seems morally legitimate, at least sometimes, and this is recognized by at least some states. This recognition should be taken into account when we try to identify the relevant *opinio juris* which should be taken to determine the specific content of the principle of non-intervention. I conclude that states need not make false claims to comprehensive or unlimited authority, even if they frequently do.

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