Chapter 5
Whose International Order? Which Law?

Thomas Mertens and Janine van Dinther

Abstract The legality and legitimacy of the Iraq war in 2003 has been widely discussed before, during and after the hostilities. Though hardly anyone questions the lack of a legal basis for the military operation in Iraq, it has been argued that other grounds could have justified the undertaking of military action. The political support of the Dutch government for the American-led invasion in Iraq needs to be understood along these lines. This contribution focuses on the legal and intellectual trends that can be observed preceding the support given to the 2003 war. These trends could be summarised as a move from legality towards legitimacy, from positive law to morality, broadly understood. The support of the Dutch government for the war can be interpreted as a reflection of a certain discontent with existing international law and of changing attitudes vis-à-vis the international order. The following questions will be raised in this contribution: What was really relevant in this context: the international legal order of the Charter of the United Nations or some other international order dominated by certain values other than the ones embedded in the Charter? Moreover, what kind of a war was the invasion of Iraq: a legal war on the basis of international law broadly understood or an ethical war in accordance with the criteria of the just war tradition? These questions will be dealt with from the Dutch constitutional perspective and from the perspective of ethics.

The title is a paraphrase, as many will recall, of A. MacIntyre's *Whose Justice*? *Which Rationality*?, University of Notre Dame Press, Notre Dame, 1988.

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5.1 Introduction

In his famous essay 'Towards Perpetual Peace', Kant wrote the following about the relationship between politics and right: '[f]or all politics must bend the knee before right, although politics may hope in return to arrive, however slowly, at the stage of lasting brilliance.'[1] Herewith, Kant rejects the position of Machiavellian politicians who subordinate the requirements of law and morality to power politics. He pleads instead for moral politicians who work towards the establishment of the legal conditions under which world peace can be obtained. These conditions include republican government on the domestic level, federalism on the international level and cosmopolitanism on the global level.

It might have been relatively clear what these three conditions entailed in Kant's world at the end of the eighteenth century, where hardly any republican governments were in place, where there was not even a glimpse of a true federal global structure in sight, and where an understanding of cosmopolitanism was nothing more than the vague hope that a violation of rights in one part of the world would be felt everywhere.[2] Kant calls for the replacement of the monarchical principle by the republican principle, in line with the French revolution, because of the republican attribution of the decision to go to war to its citizens; for the establishment of a permanent congress of states in which matters of controversy between states can be solved in a peaceful manner; and finally for foreigners and foreign communities to be respected and for the abolishment of colonialism.

Our world, at the beginning of the twenty-first century, looks very different. The principle of republicanism is widely enacted, at least on paper, with lip service to the principle of popular sovereignty everywhere. The world has witnessed the

[1] Kant 1970, p. 125.
[2] Ibid., p. 108.

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establishment of at least two universal international organisations, the League of Nations and its successor, the United Nations. The idea of humanity as a community as such with shared values has been realised, at least in theory, since the almost universal recognition of human rights. Yet, the world has not yet witnessed the 'outbreak' of the peace Kant hoped for. Even after the end of the cold war, a moment some saw as the occasion for the realisation of Kantian ideals, conflicts occur on a regular basis. The question must be raised whether the way in which the international order is presently institutionalised is the kind of order that Kant had in mind as an essential requirement for the establishment of peace. Obviously, this is too large a topic for the modest contribution that we present here. But it is this larger question that motivates our reflection upon the decision of the Dutch government to lend political support to the American-led invasion of Iraq in 2003, prompted by the evaluation of that decision by the Davids Committee in its important 2010 report.[3] The conclusions of this Committee—that the Dutch government had lent its support to a war without a proper international legal mandate—led to fierce political discussions in The Netherlands. In this contribution we do not wish to discuss the well-established fact of the lack of a second Security Council resolution. This has been duly noted in a variety of comments, both at home and abroad;[4] nor will we discuss the so-called corpus-theory, endorsed by the Dutch government in the period leading up to the invasion, according to which the existing Security Council resolutions sufficed as authorisation of the use of force against Iraq. It is now widely agreed that the Iraq war could not be legally justified on the basis of this theory, a conclusion subscribed to by the Davids Committee.

What interests us here are the legal and intellectual trends that we think can be observed preceding the political support given to the 2003 war. These trends could be summarised most briefly as a move from legality towards legitimacy, from positive law to morality, broadly understood. The support of the Dutch government for the war can thus be understood as a reflection of a certain discontent with existing international law and of changing attitudes vis-à-vis the international order. Hence the question: whose international legal order and what kind of war? Formulated differently: What is really relevant, the international legal order of the Charter of the United Nations or some other international order dominated by certain values other than the ones embedded on the Charter? And, what kind of a war: a legal war on the basis of positive international law or an ethical war in accordance with the criteria of the just war tradition? These questions will be dealt with in two sections, the first dealing with the internal Dutch constitutional perspective. Here, we focus on the incongruity between the provisions of the Dutch constitution with regard to the international order and positive international law. The second section focuses on the transition from understanding the international

[3] Commissie van onderzoek besluitvorming Irak, Rapport commissie van onderzoek besluitvorming Irak [Committee Report on Investigation of Decision-Making on Iraq] 2010.

[4] See e.g. Sands 2005.

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realm through positive law towards an understanding of this order from the perspective of ethics. Such a transition, at least according to Koskenniemi,[5] is taking place. It is our conjecture that these two movements complement each other: the Dutch constitution's emphasis on 'promoting' the international legal order (rather than on the legality thereof, i.e. the strict compliance with its positive law) seems now to be supported by the emphasis on the ethical, as opposed to strictly legal, dimension of international relations. Yet, the following caveat should be stressed: the fact that we try to put the intellectual underpinning of the Dutch support for the Iraq war in a broader context does not mean that we endorse its wisdom. Rather the contrary; with Kant, we defend the need for positive international law and, contrary to the proponents of the ethical just war tradition (Kant call them 'sorry comforters'), we are not in favour of a 'turn to ethics' in international relations. But it needs to be admitted that this turn to ethics has also affected the understanding of Kant's philosophy of law and led some commentators to present Kantian thinking as supporting the Iraq war.[6] We hold that this is incorrect.

5.2 Provisions in the Dutch Constitution

It is not a new observation, but nonetheless worth noting again that the provisions in the Dutch constitution do not unequivocally endorse the importance of positive international law. 'Promoting the international legal order', as the Dutch constitution requires,[7] need not be the same as respecting existing international law. This becomes evident from several military missions which have been decided in accordance with the Dutch constitution, but which were, it could be argued, not necessarily in accordance with positive international law. By means of a small historical survey, this paragraph will elaborate on this particular observation a little further.

Since the end of the Cold War, the Dutch government has increasingly deployed its military forces all over the world. Military troops have been dispatched to Cambodia, Iraq, Bosnia, Kosovo, Afghanistan and Somalia, to name but a few countries. Before the 1990s, however, the dispatch of Dutch soldiers abroad was rare, with Dutch participation in the Korean war in the 1950s and the military contribution to UNIFIL in Lebanon from 1979 to 1983 as the only examples of any significance.[8] Since 1989, that situation has changed drastically: the deployment of the Dutch army has increased in number, frequency and goals, and now encompasses peace keeping, peace enforcement and humanitarian aid. The legality of these missions has been based on Articles 90 and 97(1) of the Dutch constitution. The former stipulates that the Dutch government has the duty to promote the development of the international

[5] Koskenniemi 2002.

[6] Gerhardt 2003, pp. 557–569; Scruton 2003.

[7] Articles 90 and 97 para 1.

[8] van Genugten et al. 2007, p. 404.

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legal order, whereas the latter describes the tasks of the military as follows: 'There shall be armed forces for the defence and protection of the interests of the Kingdom, and in order to maintain and promote the international legal order'.

It is obviously the definition of the concept of 'international legal order' that is important here. How does the Dutch constitution define 'international legal order'? To what extent and in what manner are Articles 90 and 97 applied as justification for deploying the military?[9] As Article 97(1) is relatively new, having obtained its current form in 2000, and since its meaning is mostly derived from Article 90, the emphasis in defining this concept is on the latter provision. It is clear that 'international legal order' is a rather vague notion. This has not gone unnoticed. During the early 1950s, Members of Parliament were concerned about the supposed obscurity of the provision and pointed out that its vagueness could be used to endorse any governmental policy. The then Minister of Internal Affairs, L.J.M. Beel, after some debate, acknowledged the difficulty of defining the term 'international legal order' clearly. Mr. Beel stated that the international legal order changed with the structure of society and was under the constant influence of the prevailing *Zeitgeist*.[10]

These remarks are in line with the constitutional history of Article 90, which starts in 1922. At that time, the predecessor of Article 90 (Article 58) was included in the Dutch constitution. It read as follows: '[t]he King shall attempt to resolve conflicts with foreign powers through judicial and other peaceful means. He shall not declare war unless the States General gives their prior assent'. A first draft of the provision only contained the second sentence.[11] The first sentence was added only to make clear that declaring war was not a normal 'aspect' of Dutch foreign policy as long as the States General were to give 'their prior assent'.[12] The reference to 'judicial and other peaceful means' gives the predecessor of Article 90 a somewhat idealistic ring.[13] This is understandable in the context of the early 1920s, where the end of the First World War occasioned the founding of the League of Nations and the will, of not only the Dutch parliament, to prevent another war. The idea was to pursue peace through (international) law.[14]

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[9] Noteworthy to mention is that the Articles 90 and 97 para 1 are to be understood, in a constitutional sense, as tasks. Generally, this means that the 'attributive' and 'regulative' aspects of the Articles are debatable. Here, we rely on Besselink 2003, pp. 118–135.

[10] *Aanhangsel Handelingen I* [Proceedings of the First Chamber of Parliament] 1951/1952, 2374, pp. 854–855.

[11] Verslag van de Staatscommissie ingesteld bij Koninklijk Besluit van 20 December 1918 [Report of the State Commission established by Royal Decree of 20 December 1918, No. 78, which has been commissioned to prepare a revision of the Constitution] 1920, p. 4.

[12] Attached note of J.H.A. Schaper in: Verslag van de Staatscommissie ingesteld bij Koninklijk Besluit van 20 December 1918, pp. 3–4.

[13] Besselink 2003, p. 99.

[14] *Handelingen II* [Proceedings of the Second Chamber of Parliament] 1921/1922, nr. 90, pp. 406–407. The writings of Cornelis van Vollenhoven, a Dutch scholar in public international law, on war, peace and law were highly influential at that time, see Boogman 1984, p. 166.

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In 1953, the constitutional provisions concerning foreign affairs were thoroughly revised in the light of the acknowledgment that the Netherlands could no longer hold on to its policy of neutrality.[15] The new objectives were focused on international cooperation and (European) integration. The Netherlands joined several international organisations (e.g. the United Nations, North Atlantic Treaty Organisation and European Coal and Steel Community). The constitution needed to reflect the development of these intergovernmental and supranational organisations and the subsequent limitation of state sovereignty. The predecessor of Article 90 was amended to read as follows: '[t]he King shall have supreme authority over foreign affairs. He shall promote the development of the international legal order'.[16] The new second sentence was intended to broaden the original meaning of the provision. It was no longer solely the government's task to resolve peacefully disputes with foreign powers but it was also entrusted with the development of international cooperation and integration.[17] At the time, a Member of Parliament stated that one could object to 'promoting the development of the "international legal order" as *Leitmotiv'*, because it is insubstantial, difficult to determine and therefore holds the danger of being too broad'.[18] Another Member argued that the obscurity of the provision could be taken to support a broad array of policies.[19] The Minister acknowledged this but argued that it would be impossible to give a clear-cut definition, as the 'international legal order' changed with the structure of society.[20]

Article 90 acquired its present text in 1983: '[t]he Government shall promote the development of the international legal order'. Contrary to the debates in the 1920s and 1950s, the government now provided extensive elaboration on the meaning of 'the development of the international legal order'. It described the international legal order as based on legal norms of universal validity; it linked the content of the provision to a number of policy objectives, i.e. the promotion of universal human rights in the broadest sense possible (not only civil and political rights, but also economic, social and cultural rights), the promoting of the well-being of the world population,[21] the strengthening of relations with other nations by means of the conclusion of treaties, compliance with written legal standards,[22] the promotion of a new international economic order and, finally, the pursuit of

[15] Voorhoeve 1979, p. 47; Bovend'Eert and Kummeling 2010, p. 354.

[16] Eindrapport van de Staatscommissie tot herziening van de Grondwet ingesteld bij Koninklijk Besluit van 17 April 1950, No. 25 [Final Report of the State Commission to amend the Constitution, established by Royal Decree of 17 April 1950, No. 25], 1954, p. 8.

[17] Ibid., p. 152.

[18] *Handelingen I* 1952/1953, p. 469.

[19] *Handelingen II* 1951/1952, 2374, 1933.

[20] *Aanhangsel Handelingen I* 1951/1952, 2374, pp. 854–855.

[21] *Kamerstukken II* [Parliamentary Documents of the Second Chamber] 1979/1980, 15049 (R 1100), nr. 7, p. 5.

[22] *Kamerstukken I* [Parliamentary Documents of the First Chamber] 1980/1981, 15049 (R 1100), nr. 19, p. 2.

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lasting international peace and security.[23] All in all, the provision was seen as the embodiment of various policies of that time.[24] Interestingly, however, the government noted that the objectives of peace and of promoting the development of the international legal order, though connected, need not necessarily be in accordance with each other. It was suggested that the objective of peace could be overruled by the objective of promoting the development of the international legal order,[25] implying that respect for the existing international legal order is not an absolute requirement or, perhaps better, that the 'international legal order' in the Constitution need not necessarily coincide with positive international law. On this point, at least, the lack of clarity was not removed. The constitutional history of Article 90 reveals an idealistic spirit coupled with a certain, though not unrestricted, commitment to international law. Article 90 is therefore best described as an open norm.

Given this lack of clarity, it does not come as a surprise that the government has been able to justify and support a variety of military operations on the basis of Article 90 and, since 2000, Article 97—ranging from a military contribution to the UN-mission UNMEE in Ethiopia and Eritrea to the dispatch of military engineers to Poland to help cope with flooding.[26] There is little doubt that these military operations were in accordance with positive international law. However, this does not apply to the Kosovo intervention and to political support for the Iraq war. Despite the questionable legality of these latter cases under international law, the Dutch government nonetheless gave its military support to NATO's Operation Allied Force in Kosovo in 1999 and its political support for the Iraq war in 2003. Could these decisions be justified by reference to the constitutional objective of promoting the international legal order? Is promoting the development of the international legal order compatible with a breach of positive international law?

As the literature on Articles 90 and 97 suggests, these provisions indeed have a broader meaning than merely the observation of and compliance with existing international law, due to the use of the dynamic words 'promoting' and 'development'.[27] The main focus in these provisions is not merely existing law but the promotion of *new* desired law as well.[28] Over the last 20 years, statements and actions of the government confirm this. In 1993, the government explicitly endorsed this position when the then Minister of Foreign Affairs, P.H. Kooijmans, stated that 'at times international law can hamper the promotion of the international legal order'. When different views on the content of international law, including as to what it prohibits, obstruct decision-making, he further stated, 'it may be necessary to conclude—preferably with other states—that the use of

[23] *Handelingen II* 1979/1980, 4086.

[24] Besselink 2003, p. 105.

[25] *Kamerstukken II* 1979/1980, 15049 (R 1100), nr. 7, p. 5.

[26] *Kamerstukken II* 2001/2002, 22 831, nr. 37, p. 10; *Handelingen I* 1997/1998, nr. 22, p. 1080.

[27] Besselink 2003, pp. 105–110.

[28] Besselink 2008, p. 91.

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military means is necessary to promote the objective of the international legal order. In these particular circumstances, military action can influence the development of law'.[29] This statement did not go unnoticed. One Member of Parliament, M. van Traa, responded that military action should never be in violation of international law. He stated that it should never be the case that 'we would encourage everyone to determine on its own what international law is'.[30] The Minister clarified his remarks, noting that they referred to situations in which international law was not clear or sufficiently responsive: 'the development of principles of international law should not be determined by the one with the slowest pace, which is why in such diffuse situations it can be important to take cooperative action with other countries (…).'[31]

The importance of this discussion between the Minister and Parliament can hardly be overstated. It suggests that the constitutional duty of the government is not always towards the strict observance of positive international law. Moreover, it is remarkable that the Dutch government has refused explicitly to rule out the use of force where the Security Council is incapable or unwilling to respond to what is widely viewed as a (humanitarian) crisis. A number of government statements and decisions make clear that its policy is not to be exclusively centred on (conformity with) the United Nations Charter, as illustrated most explicitly by the military support for the Kosovo intervention in 1999. Since 1999, the government has argued on several occasions that a resolution of the Security Council is not a *conditio sine qua non* for the legitimacy of military action.[32] When fundamental human rights are violated on a large scale, the use of force is by and large considered to be justified on moral and political grounds, even if a legal basis is lacking.[33] The government has justified this line of argument by referring to, unsurprisingly, the objective of the international legal order.[34]

It is worth considering the government's statement 'that in case of a humanitarian emergency, the use of force can be justified on moral and political grounds, even when a clear legal basis is lacking',[35] from the perspective of the important debate between Simma and Cassese on the legitimacy of the Kosovo intervention.[36] The government has explicitly referred to Cassese's arguments as justification for intervention. Cassese famously held in his exchange with Simma that we might be witnessing the emergence of a new doctrine in international law

[29] *Handelingen II* 1992/1993, nr. 70, p. 5005.

[30] Ibid.

[31] Ibid.

[32] *Handelingen II* 1998/1999, nr. 61, p. 3793; *Handelingen II* 2002/2003, nr. 95, p. 5665; Hellema and Reiding 2004, p. 8.

[33] *Kamerstukken II* 2006/2007, 29521, nr. 41, pp. 7–8.

[34] *Handelingen II* 1998/1999, nr. 61, pp. 3784–3799; without mentioning the concept of 'promoting'.

[35] *Kamerstukken II* 2006/2007, 29521, nr. 41, p. 8.

[36] Cassese 1999, pp. 23–30; Simma 1999, pp. 1–22.

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according to which the use of force is allowed 'to impede a state from committing large scale atrocities on its own territory, in circumstances in which the Security Council is incapable of responding adequately to the crisis'. Indeed, governmental advisory committees have described this idea of an emerging doctrine of humanitarian intervention as 'customary international law'.[37]

To sum up this section, then, the Dutch government has quite consistently stressed the importance of existing international law,[38] but it has also argued that international political and legal developments evolve and influence each other.[39] Political considerations thus have an independent importance. Articles 90 and 97(1) of the Dutch constitution do not therefore command 'politics' to bend the knee always before positive 'right'. In the light of this and from a strictly constitutional perspective, the critical findings of the Davids Committee and its emphasis on positive international law could thus have come as a surprise. The reasons for its establishment are clear. Both the legality and legitimacy of the Iraq war in 2003 had been challenged widely and fiercely before, during and after the hostilities.[40] In the wake of these exchanges, the Davids Committee was therefore given the task 'to investigate preparations and decision-making in the period from summer 2002 to summer 2003 regarding The Netherlands' political support for the invasion of Iraq in general, and with regard to matters pertinent to international law, to intelligence and information provision and to alleged military involvement in particular'.[41] Unsurprisingly, the Committee concluded that the decision to support the invasion of Iraq was based not on positive international law but 'mainly on international political considerations', such as Trans-Atlantic solidarity and the desire for continuity in Dutch policy with regard to Iraq.[42] Unsurprisingly again, the Committee argued that this continuity was dubious since, by 2003, the US and Britain were pursuing a radically different objective (regime change) than during the 1990s (penalising aggression).[43] As regards the law, the Committee concluded that the military intervention in 2003 had no sound mandate under existing positive international law. The Committee rejected the government's view that a new Security Council mandate for the use of force was politically desirable but not legally indispensable. Further, it rejected the so-called 'corpus-theory', according to which various earlier Security Council resolutions on Iraq passed since 1990 constituted, taken together, a mandate for the use of force that was still valid in March 2003.[44] All this suggests that the Davids Committee's findings are in line with positive international law and with most international legal

[37] *Kamerstukken II* 2006/2007, 29521, nr. 41, pp. 7–8.

[38] Ibid., p. 3.

[39] Ibid., p. 9.

[40] Walzer 2004; Nollkaemper 2007.

[41] Commissie van onderzoek besluitvorming Irak 2010, p. 521.

[42] Ibid., pp. 426, 530.

[43] Ibid.

[44] Ibid., p. 524.

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commentaries, which state that the use of force is only legitimate when it is based on a Security Council Resolution.[45]

Yet, and this is where the surprise comes in, we have seen that this is not necessarily a position supported by the Dutch constitution. The requirement in Article 90 to promote international legal order is not equivalent to the requirement to respect positive international law. As a result, the Committee's findings have been criticised. While no-one questions the lack of a formal international legal basis for the war against Iraq, some have argued, most prominently A.P. van Walsum (one of the members of the Committee, in a separate comment), that other grounds should be considered sufficient to justify the policy of support adopted by the government. Van Walsum pointed out that the prevention of the proliferation of weapons of mass destruction-programs sufficed as a political ground for the use of force.[46] The Davids Committee's report hardly discusses this different opinion, and that is unfortunate, as the government, in response to the Committee's finding, maintained the legitimacy of military action even in the absence of a Security Council mandate. Such a situation, the government holds, occurs in cases of a (threatened) humanitarian catastrophe, most notably genocide, where there is broad international support for military action although not broad enough to make a Security Council mandate possible.[47] Thus, the Dutch government is insistent on keeping the option of humanitarian intervention open, even if such a military action is not mandated by the Security Council. This development is especially interesting as academic discourse involving both legal scholars and philosophers contains this line of argumentation too.[48] Arguing away from strict compliance with positive international law could be understood, with Koskenniemi,[49] as the turn to ethics in international law, or with Walzer, as 'the triumph of just war theory'[50] over international law. It is to these theoretical developments we now turn.

5.3 From International Law to International Ethics

It is of course impossible to give a full account of the move to ethics in the context of this comment on the findings of the Davids Committee. Yet, a good starting position for some tentative remarks is indeed the discussion between Simma and Cassese in the *European Journal of International Law*,[51] published at the very

[45] Nollkaemper 2010, p. 144.

[46] Commissie van onderzoek besluitvorming Irak, p. 270.

[47] *Kamerstukken II* 2009/2010, 31847, nr. 18, pp. 4–5.

[48] Especially among liberal philosophers, there seems to exist a consensus about the desirability of humanitarian intervention, See e.g. Tesón 2003.

[49] Koskenniemi 2002.

[50] Walzer 2004, pp. 3–22.

[51] Simma 1999, pp. 1–23; Cassese 1999, pp. 23–30.

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moment of the Kosovo intervention, not only because the Dutch government endorsed Cassese's position but also because many see this discussion as a pivotal moment in the development of our thinking about the ethics of international law.

Cassese, a distinguished international law professor and judge, argued that 'ex iniuria ius oritur'[52] and that we are indeed, under very strict conditions, moving towards a scheme under which intervention for humanitarian purposes is legitimate even if there is no proper international legal justification. This conclusion results from his reflection on the Kosovo intervention, which, he says, is a clear and blunt violation of international legality. Yet, from an ethical standpoint the resort to armed forces was justified and can be seen as rooted in 'contemporary trends of the international community', such as the *erga omnes* character of human rights that gives rise to a responsibility for states to protect citizens of other states, particularly in circumstances that shock the conscience of mankind. If a decision by the Security Council is impossible, a group of states has, in other words, sufficient authority to take the decision to intervene. The argument continues: this could then develop into a new, independent exception to the UN Charter's system of collective enforcement, in addition to the exception recognised in the UN Charter, namely self-defence. The resort to armed force is thereby justified not only in the case of self-defence but also in the case of the defence of others. If one can defend oneself, why would one not be justified in defending others, a reasoning which dates back to Augustine? Cassese admits that the addition of such an exception to the prohibition to use military force internationally, even if it is tied to the most stringent conditions, can never be tight enough so as to preclude possible abuse, but it is a price worth paying.

Simma, in the article to which Cassese replies, is clearly more worried about opening Pandora's Box, to which unauthorised humanitarian intervention might lead, and stressed that the Kosovo intervention cannot be seen as setting a precedent. But Simma's piece is not only interesting because of its warning regarding the potential abuse of a non-Security Council authorised threat or use of force. It is also interesting when considered in connection with our reading of the Dutch constitution, according to which a distinction can be made between existing positive international law with the UN Charter as its 'constitution' and the possibility of a future 'international legal order' that needs to be promoted. Why would it not be possible for organisations other than the UN to present themselves as the defenders or promoters of this order?

Simma carefully analyses, in the context of the Kosovo crisis, the evolving relationship between the UN and NATO, in which the latter is moving beyond its original mission of collective self-defence towards 'venturing into the field of "enforcement action" against third states'. In the statements made by leading NATO politicians in the context of 'Kosovo', Simma notes a blurring of the strict legal relationship between UN and NATO, when it is defined in terms of synergy and cooperation rather than as one of hierarchy. In particular, a careful analysis of

[52] Cassese 1999, pp. 23–30.

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the statement by US Deputy Secretary of State Talbott warrants, according to Simma, the conclusion that NATO, at least according to this powerful voice, should be entitled to take action with regard to the defence of 'its common interests and values, including when the latter are threatened by humanitarian catastrophes, crimes against humanity, and war crimes', even if a Security Council mandate or authorisation of such NATO missions (i.e. beyond collective self-defence) cannot be obtained. According to Simma, this argument entails that self-defence, enshrined in Article 51 of the UN Charter, would include the defence of what NATO considers 'common interest and values', suggesting a broader scope of self-defence than foreseen in positive international law.

Simma's article is often read as a warning against the use of the Kosovo intervention as legal precedent. True as that is, his concerns run deeper. Simma was particularly worried by the blurring of the hierarchical relation between the UN and 'regional organisations' such as NATO and the fundamental challenge to the legal primacy of the Charter. Discussing the legitimacy of the prevailing system of positive international law led NATO to the conclusion, according to Simma, that the legal primacy of the obligations flowing from the UN Charter should be relativised. His worry is thus not merely that Kosovo will function as a precedent, but specifically that 'other states or new alliances in Europe or in other parts of the world might [also] proclaim to 'stand ready to act' without the Security Council, or decide to defend 'certain interests and values' by armed force'. What concerns Simma most, therefore, is the erosion of respect for positive international law based on the Charter by the desire for a (new) international legal order, in which NATO or any other coalition (a coalition of the willing?) claims for itself the right to act in defence of 'common interests and values', such as protection against weapons of mass destruction, in place of the UN Security Council.[53]

The implications of NATO's intervention in Kosovo for the relationship between legality and legitimacy were publicly discussed not only by leading European legal scholars but also by philosophers, such as Jürgen Habermas. Habermas's comment on the Kosovo intervention is cautiously entitled: 'Bestiality and Humanity: a War on the Border between Legality and Morality'. This carefully drafted text, the Kosovo intervention was a particularly sensitive issue in Germany, makes clear that Habermas sympathises with the pacifist's rejection of every war and with the international lawyer's rejection of the Kosovo intervention as illegal, at the same time, however, he welcomes the intervention as protecting human rights. Therefore it can be seen, he argues, as a step within the transition from an international legal community of states towards a cosmopolitan world community. Habermas distinguishes between positive international law as the law between states with the United Nations at its centre and a future world community, in which human rights carry more moral weight than state sovereignty. Therefore, an illegal war should not necessarily be identified as an unjust war. Legitimacy may trump legality. Hesitantly, Habermas agrees with the Kosovo intervention

[53] Simma 1999, pp. 1–23, especially pp. 10, 16, 18 and 20.

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despite its lack of legality and the risk of unilateralism, acknowledging that the acceptance of humanitarian intervention could pave the way for expansionism and for the blurring of the distinction between intervention and aggression. He therefore pleads for the establishment of an independent judicial body that would determine when humanitarian intervention is justified.[54]

Whereas Habermas seems to side, in the end, with Cassese, Simma's position seems to be supported by Koskenniemi. His well-known article 'The Lady Doth Protest too Much'[55] is primarily an effort to understand what he calls the turn to ethics in international law. There is little doubt that he regrets the preference given by most international scholars in the discussion on the Kosovo intervention to its moral desirability rather than to its illegality. The main reason for rejecting such a moralisation of international relations at the cost of formal (international) legality is that it 'transforms international law into an uncritical instrument for the foreign policy choices of those whom power and privilege has put into decision-making positions'. Formal law is thus seen as a bulwark against power politics dressed up in morality's clothing.

In his article, Koskenniemi describes the process that enables international lawyers to transform themselves into moralists. For us, in the context of this paper, it is telling that the teleological element in the Dutch constitutional provision of 'promoting' the international legal order is prominent in this process. In what Koskenniemi calls 'instrumentalism', the aim of positive international law is sought and then the (black) letter of the Charter is subordinated to this aim, namely its 'substantive morality' of, among other things, human rights. This moving away from the letter of the law is further confirmed by what Koskenniemi properly calls the 'turn to ethics'. Here the argument is typically that the formality of the law should be 'complemented' by a careful consideration of the particularity of situations and that the responsibility of decision-makers cannot be reduced to the mere application of formal rules. In exceptional situations, so the argument continues, decisions need to be taken on the basis not of strict rules but of the moral responsibility of the decision-makers. In those circumstances, a decision is 'born out of the legal nothingness' as a response to what a situation demands. In other words, one should not evade moral responsibility through reference to inapplicable rules. Here, Koskenniemi argues, the true nature of the international order reveals itself and it does not lie 'in the Charter of the United Nations nor in the principles of humanitarianism but in the will and the power of a handful Western civilian and military leaders'. The main fear that drives Koskenniemi's rejection of the turn to ethics is, to paraphrase Kelsen, that behind the mask of ethics one finds 'staring at him the Gorgon head of power'[56] or, to use his own words, that what counts as law 'is decided with conclusive authority by the sensibilities of the Western Prince'.[57]

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[54] Habermas 1999, pp. 263–272. Many cosmopolitans are in favour of international 'independent' bodies. Sceptics would of course ask how these bodies could be established and composed.

[55] Koskenniemi 2002.

[56] Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 1927, pp. 54–55.

[57] Koskenniemi 2002, pp. 159–175, especially pp. 159, 165 and 170-1.

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5.4 Concluding Remarks

The turn to ethics thus reveals the political element in the decision to intervene, on humanitarian grounds of course, in Kosovo. According to Koskenniemi, this turn to ethics forms part of the general movement of international law between apology and utopia, between formalism and anti-formalism, between reason and emotion. In 'The Lady Doth Protest Too Much' he regrets the departure from positive international law, precisely because 'the culture of formalism' is able to set 'limits to the impulses—moral or not—' and to constitute 'a horizon of universality, embedded in a culture of restraint'.[58]

With this in mind, it is remarkable that the Davids Report does not contain a constitutional analysis of Article 90 and the possible distinction between obligations following from positive international law and obligations resulting from the duty to promote the international legal order; nor does it contain a thorough discussion on the legal versus the moral aspects of the Kosovo intervention. This is not only remarkable because a gap of merely 4 years separates the bombing of Belgrade from that of Baghdad, but also because one member of the Committee, van Walsum, in August 2002, published an op-ed in the Financial Times in which he presented precisely this argument in favour of invading Iraq and explicitly referred to the Kosovo precedent. In this piece, worth quoting at length, van Walsum comments on the statement made by the French President and the German Chancellor that military intervention could only be justified on the basis of a specific resolution of the Security Council. Van Walsum did not then agree with such a 'narrow interpretation of international law'. He endorsed the position taken by the then UK Prime Minister, Tony Blair, according to which 'any action should be taken in accordance with international law'. On the basis of the 'historic precedent' during the Kosovo crisis in which 'a military intervention [was] undertaken neither in the exercise of self-defence nor on the basis of a Security Council mandate', the rule that 'military intervention is only justified if it is based on a specific Security Council resolution has been superseded by two principles: first, a threat can be so exceptional that it justifies military intervention with a Security Council mandate; second that military intervention can be legally based on a country's consistent non-compliance with a binding Security Council resolution.'[59] It is easy to recognise in van Walsum's second principle the corpus-theory, later explicitly rejected by the Committee of which he was a member; but it is remarkable that the first principle, and its connected idea that only a 'narrow interpretation' requires a specific resolution on the use of force, was not discussed by the Committee at all.

The preference for a much broader interpretation has even made its way, as mentioned before, into Kant scholarship. Despite Kant's explicit rejection of humanitarian intervention, Habermas endorsed the Kosovo war, and, in the run up

[58] Ibid., p. 174 (emphasis left out from the original).

[59] van Walsum 2002.

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to the Iraq war other Kant scholars defended that invasion on 'Kantian' grounds.[60] Most Kant scholars, Habermas included, did not agree but it is apparently less easy to know how politics is to bend its knee before 'right' now than in the context of the eighteenth century. Is it the 'right' of 'the constitutionalization of international law'[61] or that of the law of the Charter?

In Koskenniemi's terminology, the Committee's standpoint is a return to formalism and many have applauded the Committee for that; but, unfortunately, the really interesting issue is not this return to positive international law, nor is it the question asked by Nollkaemper of whether the decision to support the Iraq war was based on the wrong legal argument or on a political argument instead of a legal one.[62] The important question is: 'whose international order and which law'? Is there an independent 'international legal order' or does the ultimate decision on what it is lay with the global hegemon?[63] Is there a gap between the duty to respect positive international law and the duty to promote the international legal order? This really important issue needs discussing.[64]

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[60] Gerhardt 2003, pp. 557–569; Scruton 2003.

[61] Habermas 2006, pp. 115–193. On why it is wrong to understand Kant's philosophy as representing the just war tradition, see Mertens 2012.

[62] Nollkaemper 2010.

[63] http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/.

[64] Fasseur 2010.

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