Master-Thesis in Philosophy

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Obligations of the state concerning the human rights of citizens and non-citizens in Thomas Hobbes and John Locke

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Introduction

This thesis is about the obligations of the state to secure and enforce human rights. Since the Universal Declaration of Human Rights has been drafted, officials of states have used human rights as a guideline for foreign policies. Human rights are taken to represent universal moral responsibilities - every person and every state should respect these basic moral rights of the human person. On the other hand, they represent political rights, that states should honour in their national policies. In international relations they form a moral standard for good or bad conduct of states as well as a political standard through international laws and treaties. Human rights in international relations are often used to denounce policies of states. Offences against human rights can form a reason for interference in other states. Different sanctions are proposed to counter the effects of human rights violations, ranging from public reprimands to more economic and trade sanction up to military intervention (Forsythe 2006, 57-89). From these actions in the international arena we may be led to think that the violation of human rights is itself reason enough for interference from outside. But it is not clear if human rights actually impel states to act towards others.

Human rights and states cannot be separated in the international arena. States are the primary actors in international relations, as well as the primary actors responsible for the enforcement of human rights. I do not wish to underestimate the influence of NGO's and multinational corporations and of some brave individuals, nevertheless this thesis will focus solely on the theory behind the duties of states with respect to human rights. More specifically, it is about the moral duties arising from accepting human rights. Political obligations arising from accepting international human rights law or the signing of human rights treaties are not the subject matter of this thesis.

The main question I want to answer in this thesis is: If a state accepts human rights as a guide for national policies, is it morally obligated towards non-citizens with respect to human rights? If the answer is yes, accepting human rights almost implies international interference from states. If the answer is no, then states cannot rely on human rights infringements alone in their argument for enforcing the human rights of non-citizens.

Three major questions will be tackled in this thesis: 1. Do human rights morally oblige states? 2. What are the obligations of states towards the own citizens? 3. What are the obligations towards non-citizens? I will try to answer these questions by looking at the social contract theories of Thomas Hobbes and John Locke.

Hobbes and Locke represent two influential arguments for the powers and duties of the state through the establishment of a contract conferring rights and duties of the people to the sovereign state. Both assume that all humans are endowed with certain natural rights and base the powers of the state on these rights. Although they start from similar premises, their arguments represent two ways to look at the obligations of the state. I will answer the question with both if the state has any moral obligations with respect to human rights. I will try to establish what the duties are towards the own citizens. Then I will see if these obligations would also apply to non-citizens. In the second part I focus on Locke's argument. His theory provides most evidence of moral concern for the fate of the human rights of non-citizens. Locke's argument establishes a right of states for interference towards non-citizens. I argue that a result of accepting human rights is that when a state enforces the human rights of non-citizens, they are faced with certain obligations.

The concept of human rights

To understand the relation between the state, human rights, and the moral obligations that arises from them, it is in order to give a definition of human rights from which the investigation can start. The concept I use should be able to be accepted by states as a guideline for national policies. Furthermore it should not exclude the possibility of obligations towards non-citizens at the outset.

Equal, Inalienable and Universal rights of the person

Human rights in international relations are justified by reference to human dignity. The most widely accepted human rights document in international relations is the Universal Declaration of Human Rights[i], which states that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" and "All humans are born fee and equal in dignity and rights". The declaration suggests that recognition of human dignity and rights go hand in hand, and that this recognition is the foundation of freedom, justice and peace in the world. According to this idea, all humans have a moral quality that requires a respect for their human rights. In effect this means that since all humans have dignity by virtue of being human, human rights are those rights that humans have by virtue of being human. If we take this definition we can already start to distinguish some important aspects to the concept. The first is equality; since all humans equally possess the moral quality dignity, everyone has equal human rights. The second is inalienability; since human rights are possessed by virtue of being human, they cannot be transferred or lost. One either is or is not a human, and as long as one is human (s)he has human rights. This is not to say that the right may not be overruled by other considerations, which could happen for instance when one's freedom is taken away after committing a serious crime. A third aspect is that human rights are possessed by human persons. What counts as a human person or member of the human species is not of interest for the subject of this thesis. In this definition there is no reference to institutions such as legal systems, states, or other structures that enable the protection of human rights. Human rights are possessed even if they are not enforced by political institutions; they are pre-political. A fourth feature then is that they are universal; all humans, no matter in what political system or culture they live, have human rights. The Universal Declaration puts it thus: "no distinction should be made on the basis of the political, jurisdictional or international status of the

country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty". By saying that rights are universal we are saying that all human not only have these rights, but that in principle all human should recognize and respect them.

Rights and obligations

Rights are "entitlements (not) to perform certain actions or be in certain states, or entitlements that others (not) perform certain actions or be in certain states," (Wenar 2007). A right demands consideration for the right-holder in the form of respect for his/her right. This can mean anything from non-interference in - to active support for the object of the entitlement. Rights can therefore give rise to obligations to do, or forebear, on the part of others (duty-bearer(s)).

Rights claims are legitimized by reference to a set of rules and human rights are legitimized with reference to moral rules. There is a tendency in international politics to legalize human rights through a growing number of binding treaties and increasing the importance of international human rights law, because it is deemed necessary for their enforcement. Still human rights remain moral rights, because these legal rules ultimately rest on moral considerations. By viewing them as moral rights, they can have an impact on the content of the rules that people or a society should adhere to. The point of human rights is that with or without a law that obliges people, humans have certain rights which ought to be respected. These moral rules are either a result of considerations that follow from accepting human dignity, or they can be taken as a code of conduct that all humans would rationally accept for some other reason, or as a code of conduct that a society should adhere to. It is in the character of human rights that their protection is so important that they are made the subject of political and juridical rules.

The Universal Declaration says that the member states should "promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples and territories under their jurisdiction." Under the jurisdiction of this document only 'Member States' are in the sphere of obligations, but the universality of human rights demands equal respect for the human rights of all humans everywhere, no matter what political system they live in. An obligation that arises from accepting this concept is equal respect for the human rights of all people. Since human rights are universal someone living in Indonesia has the same human rights as someone living in

Europe and someone living in Europe ought to respect the human rights of someone in Indonesia and vice versa. The respect of me for a person elsewhere does not necessarily oblige me to do anything other than to forebear certain actions. This in itself could provide an argument for altering state foreign policies: Thomas Pogge has argued that, if applied, the criteria of non-interference alone can go a long way in securing the human rights of most people around the world (Pogge 2008). But if human rights are used as an argument for state intervention elsewhere, they are used to support active interference for their enjoyment. In this thesis I will therefore focus on obligations to do arising from human rights, rather than on obligations to forebear. It is part of the question of this thesis if states would inherit the obligation to actively interfere outside of its borders, where human rights are not enjoyed.

Human right are generally thought of as entitlements against a government or state. They are not seen, as other rights, pertaining to interpersonal relations, but as Pogge suggests: "human rights are […] moral claims on the organization of one's society" (Pogge 2008: 70). Human rights claims are not just claims to the object of the right, but claims on, or sometimes claims to, an organization that ensures the protection of the object of these rights. Questions about obligations with respect to human rights normally ask; who has the obligation to ensure respect for human rights, or who should enforce human rights? Normally the own state is found to be responsible. In normal discourse about human rights, they oblige states to act in a certain manner. What is not determined is if states are responsible for the enforcement of the human rights of non-citizens.

On the basis of this concept the question is grounded which type of obligations would arise from the concept if a state accepts it, and also if the concept implies obligations only towards the states' own citizens or towards non-citizens as well?

Human rights and the obligations of the state

Human rights are thought of as *pre*-political moral claims. In the previous chapter I mentioned that the actor under an obligation to respect human rights is usually the state. We therefore need to see how the obligations of the state for the protection of human rights are theorized. We also need to establish what type of obligations arises from accepting human rights for the state. Even if human rights are moral rights, it does not necessarily mean that they give rise to moral obligations for states. Since most Western states legitimize state power with some form of contract-theory, the obligations of the state could be only contractual. I will focus on the obligations of states concerning human rights in two different contract-theories, that of Thomas Hobbes and that of John Locke.

The theories of Hobbes and Locke are among the most influential in the tradition. But even though they start from similar premises, they arrive at widely different conclusions regarding the powers and obligations of the state. They can be said to define the spectrum of possible moral obligations of states concerning human rights. Both Hobbes and Locke argue that the state has certain sovereign powers and responsibilities on the basis of a natural law that commands mankind and certain natural rights they are endowed with in the pre-political state of nature. In contract theories in general, the state is granted sovereign powers through the mutual transference of the powers of the citizens to the state by way of a social contract. The contract determines the scope and limits of the power of the state, and determines which conditions should be met by the state and the citizens for the contract to be legitimate.

In Hobbes' work, the power of the sovereign state is argued with some force. Hobbes uses a notion of natural rights, those rights that humans have by nature, to justify the sovereign power of the state. His argument for state sovereignty is influential in international relations. Recognition of state-sovereignty by outsiders has been part of international law since the Peace of Westphalia in 1648. It is a reason why states hesitate to interfere in the conduct of other states towards their own citizens. John Locke uses a definition of rights similar to human rights in order to argue for the necessity of the state and to define its powers. His argument was an influence on the form of the constitutions of Western countries, most notably of the United States of America. Both authors, as we will see, find the primary reason for the existence of the state with the discomfort of the people outside of such a state. Both authors agree that people have rights prior to any political organization entrusted with the power to ensure them. They use these rights to define the obligations of the state.

My question with the investigation of both authors is if the state has a moral obligation to ensure the human rights of the own citizens. I will try to find arguments in both authors that support a moral duty of the state for active support for human rights. In order to do this I will compare the concept of rights the authors use with the concept of human rights and try to see how it influences the duties of the state. After establishing the duties of the state for the human rights of the own citizens, we can find out what the authors think about a moral duty of the state extending towards the rights of non-citizens.

Hobbes

Hobbes' Leviathan was published in 1651. In it his argument for the power of the state starts from the imagined pre-political state of nature. When humans were not in a political society, they were free to use what Hobbes called their natural right to liberty:

> "The Right of Nature, which writers commonly call *jus naturale*, is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently, of doing any thing, which in his own judgement, and reason, he shall conceive to be the aptest means thereunto". (XIV, p.172)

This right of nature is similar to human rights in the sense that it is a right that all men share equally and without a political system. In the state of nature people could use their right as they pleased. This entailed for Hobbes that humans were isolated from each other, to such a degree that they would be in a state of war against each other; Hobbes famously argued that:

> "during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war, as is of every man, against every man". (XIII, p.171)

According to Hobbes, that there would be a state of war without a common power can be seen from the actions of independent monarchs:

> "But though there had never been any time, wherein particular men were in a condition of war one against another; yet in all times, kings, and persons of sovereign authority, because of their independency, are in continual jealousies, and in the state and posture […] of war." (XIII, p.171)
>
> This state of war of all against all forms the basis for establishing the state with powers of sovereignty.

In the pre-political state, although every man is free to act according to his will, there can be obligations. According to Hobbes, any obligation arises out of our own actions, such as making a promise or entering into a contract.

> "there being no obligation on any man, which ariseth not from some act of his own; for all men equally, are by nature free." (XXI, p. 207)

The obligation arising from the law of nature forms an exception to this rule. The law of nature obliges men to refrain from doing certain actions. The law of nature, Hobbes says…

> "is a precept, or general rule, found out by reason, by which a man is forbidden to do that, which is destructive of his life, or taketh away the means of preserving the same; and to omit that, by which he thinketh it may be best preserved". (XIV, p. 172)

To refrain from doing that which would harm one's own self-preservation is the only source of obligations that does not arise out of a voluntary act. Hobbes believes this to be the only moral obligation. It is a duty that only considers one's own fate. By this law, any act that one does, even those that result in having an obligation, would be out of one's interest. Following the obligation is ultimately done for this reason. This law is the motivation for establishment of the state with its sovereign powers.

According to Hobbes, because of this law that commands all men to act for the sake of their self-preservation, humans are commanded to endeavour peace (XIV, p.172); a state in which there is assurance that there is not a disposition to fighting. This level of security can only be obtained by giving up the right of nature, because when men use their natural right they have the freedom to use anything that they think will benefit their life, even the life of another man. Giving up this freedom is necessary for creating the security that best preserves the lives of each person. To obtain peace, the right of nature of all should be mutually transferred unto the sovereign through what Hobbes calls a contract:

> "Right is laid aside, either by simply renouncing it; or by transferring it to another […] The mutual transferring of a right, is that which men call contract" (XIV, 173)

All participants should transfer their right to liberty to the sovereign, and all should give up as much liberty as all others. Of course, the sovereign has more freedom than the other participants. Once the contract is established, those who live under the common power of the sovereign are obliged to follow the laws that the sovereign determines. The effect of the moral

law of nature is that the people should give up their natural rights and contractually establish the power of the sovereign state. The moral law remains in effect after the establishment of the contract.

Hobbes makes a point of defining a right only as a liberty, a freedom to do something, whereas human rights can oblige others to do something. In Hobbes' theory, such duties only come with the establishment of law. He writes that law and right…

> "ought to be distinguished; because RIGHT, consisteth in liberty to do, or to forebear; whereas LAW, determenith, and bindeth to one of them: so that law, and right, differ as much, as obligation, and liberty; which in one and the same matter are inconsistent. (XIV, 172)

This is not a mere difference in definition, but goes to the heart of the matter. Moral obligations on the part of others are as good as absent from Hobbes' theory. The only moral obligations that exist concern one's own actions to self-preservation. Only when there is a power strong enough to compel others to act can we speak of law and of obligation, but it remains out of the interest of self-preservation that people are compelled to act in these instances, not out of the force of a stronger moral obligation.

Hobbes' argument for the establishment of the state with its powers of sovereignty uses the idea of a pre-political right of mankind. But this idea is different from our idea of human rights. The rights are pre-political, but once the political society is established, this right has to be sacrificed. The state has no obligation under the contract to secure the right of nature. The rights of nature is neither inalienable, nor does the state have any obligations towards its citizens with respect to the right of nature.

The sovereign is free to determine, by way of law, the rights of the citizens and these rights could in principle be the same as what we now consider to be human rights. However, if the sovereign would alter the law, the rights would be altered as well. This is a fundamental difference between Hobbesian rights and human rights. It also makes clear that in this theory such rights are not universal. In a state of nature everyone possesses equal rights, but these rights are not universally shared, because they are dependent on the kind of state a person lives in.

There is however an inalienable right that cannot be sacrificed in Hobbes' theory:

> "Whensoever a man transferreth his right, or renounceth it; it is either in consideration of some right reciprocally transferred to himself; or for some other good he hopeth for thereby. For it is a voluntary act; and of the voluntary acts of every man, the object is some *good to himself*. And therefore there be some rights, which no man can be understood by any words, or other signs, to have abandoned, or transferred". (XIV, 173)

These rights consist in the freedom to act for the sake of self-preservation or to act in self-defence. The contract that establishes the state can therefore not be made so that the self-preservation of the members of the state would be harmed by its establishment. When the state does anything to harm the life of a person, or of its citizens, the contract is broken. The state should always make sure that the life of its citizens is better preserved than in the state of nature, and the preservation of the life of an individual member is enough reason to break the social contract for at least that person.

The state is thus obliged through the law of nature to ensure some level of peace for its citizens. However this cannot be called a moral obligation. The only moral obligations come from the maxim of self-preservation. It is a precondition for the legitimacy of the contract. If the state breaks the contract, it means that the individuals affected are not obliged to follow the rules of the sovereign because they threaten the minimal condition of their self-preservation. The legitimacy of the institution of the state for the rest of the citizens stays intact as long as there is no "war of all against all". The state is under a contractual obligation with respect to its citizens to ensure a condition that is better for their self-preservation than the state of nature. If the obligation is not met for one or more persons, the contract is broken for them. This is not a moral obligation towards the own citizens that comes from accepting human rights. Hobbes uses the maxim of self-preservation as the only criteria for the moral judgement of acts. This does not entail a duty towards others.

Hobbes wrote at a time when many wars were waged in Europe, a period that eventually led to the Peace of Westphalia, establishing the sovereignty of states. He noticed that without a common power enforcing international standards, independent rulers were keen to use their powers to better themselves. According to Hobbes, this disposition was not morally blameworthy, because without a common power there was no law that these monarchs were obliged to follow. Such a law needed effective enforcement-mechanisms, as another famous phrase suggests:

> "covenants, without the sword, are but words, and of no strength to secure a man at all". (XVII, 187)

But, not only was the sword useful to secure man, the sword is also necessary for the law to morally oblige men:

> "Where there is no common power, there is no law: where no law, no injustice" […] Justice, and injustice [are] qualities, that relate to men in society, not in solitude. (XIII, 171-2)

This suggests that the sovereign state is not under a moral duty, but that it provides the framework that is necessary for moral duties be meaningful. In Hobbes' sense, human rights would only have a meaning once they were politically established and enforced.

We can conclude that the obligations of the state through the social contract are very minimal. This is partly because of the minimal obligations of the law of nature to self-preservation, and furthermore because of the fact that the right of nature that all humans have in the natural state, can be given up and transferred to the state. The little responsibility that the state has to ensure that there won't be a condition of a war of all against all, it has towards its own citizens in order to uphold the contract by which they are obliged to follow the laws of the sovereign, instead of their right of nature. This condition is determined by the contract and is best understood as a contractual obligation.

Human rights by contrast define certain liberties of the person and also certain obligations on the part of the state. Not accepting these rights of the person as inalienable entitlements that the state cannot contravene without tyranny, here leads to a great amount of liberty for the use of state power.

I will return to examine the outcome of accepting such a theory with respect to the obligations of the state or lack thereof, towards non-citizens on page nineteen. First however, let's see if Locke's contract theory does use human rights as the guideline for the contract, and if it generates moral obligations of the state for the enforcement of human rights.

John Locke

John Locke's 'Second Treatise on Government' was published in 1689. In it, Locke's argument for the legitimate power of the state also starts out from the pre-political state of nature, which he defines similar to Hobbes:

> "To understand political power, right, and derive it from its original, we must consider what estate all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the law of Nature, without asking leave or depending upon the will of any other man" (Ch. II, §4, p. 312)

Freedom is a key-term, and again like Hobbes, this freedom is only restricted by the law of nature. On the content of this law of nature Locke has a markedly different view than Hobbes. Whereas Hobbes counted self-preservation as the only rule of reason in the state of nature, Locke refers to humans as the common possession of God, which denies us the right to take the life of another. The law inhibits the freedom in the state of nature in a number of ways.

> "But though this may be a state of liberty, yet it is not a state of licence […] The state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions". (II, 6, 313)

Locke assumes that we are all equal because we are of the same species. The law of nature then morally obligates us to respect the life, health, liberty and possessions of all other humans. All humans that have reason will accept the law. The state of nature is guided by a moral law with a content that, contrary to Hobbes' thinking, obliges us to refrain from certain acts for the sake of others.

But a moral law does not make a human right. We have seen the distinction that Hobbes makes between a right, consisting in a liberty to do or forebear, and a law, consisting in an obligation to do or forebear. Locke does not see this distinction. The obligation of the law of nature not to harm the life, health, liberty and possession, are also rights in Locke's definition. According to Locke humans are born with:

> "a title to perfect freedom, and an uncontrolled enjoyment of all *the rights and privileges of the law of nature*, equally with any other man, or number of men in the world" (VII, 87, 337)

The law of nature gives all humans a special title to its privileges of life, health, liberty and possession, and at the same time obliges others to respect these rights and privileges. His

concept of natural law approaches the concept of human rights because it defines pre-political entitlements, shared equally with all humans and obliging others' respect for them.

Furthermore, Locke's law of nature states that people should strive towards peace, not only for self-preservation, but for the preservation of all of mankind:

> "Every one, as he is bound to preserve himself, and not to quit his station wilfully, so by the like reason when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind, and may not, unless it be to do justice to an offender, take away or impair the life, or what tends to the preservation of life, the liberty, health, limb, or goods of another" (II, 6, 313)

According to this law of nature humans should not only seek to preserve ourselves, but we also have obligations to the preservations of all humans once we can feel secure about our own situation. A moral obligation to all humans is contained in the concept of human rights, and gives us reason to assume that obligations to do, not only to forebear, are involved.

A moral obligation of the people to honour these rights in the state of nature however does not mean that the state has a moral duty to enforce them. To understand if and why the state has such an obligation we have to examine Locke's argument for the establishment of obligations on the part of the state.

With Hobbes, the establishment of the political society meant that the right of nature had to be given up. The reason for establishing a political community according to Hobbes was to establish a state that would preserve the lives of its members better than the state of war of all against all that he argued would be the case without a common power.

Locke does not think of the state of nature as so horrible, because of the content of the moral law that governs it. But he does see the need for a common power, for two connected reasons. One is that there will be men who are corrupt and not guided by the law of nature:

> "[W]ere it not for the corruption and viciousness of degenerate men, there would be no need of any other, no necessity that men should separate from this great and natural community, and associate into lesser combinations." (IX, 128, 350)

It is striking that Locke thinks of the political society as a lesser combination than the 'great community' of the state of nature, meaning that the establishment of the state has some negative effects.

According to Locke, the corruption and viciousness is a fact which makes the establishment of a political community necessary. Still, the fact that some do not follow the law of nature does not mean that a political society should be established, as long as those offences against the law of nature can be dealt with appropriately. Locke thinks, as does Hobbes, that a law would be in vain if there was no one to enforce it.

> "And that all men may be restrained form invading others rights, and from doing hurt to another, and the law of nature be observed, which willeth the peace and preservation of all mankind, the execution of the law of nature is, in that state, put into every man's hands, whereby every one has a right to punish the transgressors of that law to such a degree as may hinder its violation. For the law of nature would, as all other laws that concern men in this world, be in vain, if there were no body that in the state of nature that had a power to execute that law, and thereby preserve the innocent and restrain offenders". (II, 6, 313)

The law of nature morally obliges people to do and forebear certain acts, but the enforcement mechanism ensures that the 'ought' in the law of nature is turned into an effective obligation. Since there are breaches of the law of nature, they have to be punished by someone for the law to be effective. But this right to punish is not a duty in the state of nature.

Punishment of the offences against the law of nature causes problems in the state of nature. In the state of nature everyone has executive power of the law of nature, which entails a right to punish crimes against it for the purpose of restraint or prevention, and a right of the injured to take reparations. The punishment should be equal to the crime, and enough to deter others from doing such a crime. This means that the person using the executive power has to sit as judge on the severity of the crime, often committed against him/ herself, and also as an executioner of the punishment. There is no possibility of appeal to the judgement in such cases. The punishment is exacted even if the judgement is unjust. Because it will happen - especially when men sit in judgement over crimes committed against themselves - that the punishment will not fit the crime; this situation is not a very stable and just one according to Locke.

The other reason for the establishment of the social contract then is that in the state of nature are there is no "settled known law, to be the standard of right and wrong" with concomitant indifferent judges, and a power to support sentences. These are needed for the law of nature to be executed in a reliable way. With settled laws that can be appealed to, and judges that are not prejudiced, there is a guarantee that the enforcement will fit the law of

nature. The right or power to execute the law of nature has to be given up in order to make the law of nature into a stable standard:

> "There and there only is political society, where every one of the members hath quitted his natural powers, resigned it up into the hands of the community in all cases that excludes him not from appealing for protection to the law established by it. […] the community comes to be umpire by settled standing rules, indifferent, and the same to all parties; and by men having authority from the community, for the execution of those rules, decides all the differences that may happen between any members of that society concerning any matter of right"[1] (VII, 87, 337)

Giving up the power and right to judge and punish breaches of the law of nature does not mean giving up the entitlements and privileges / rights of the law of nature. It means that the political society will now establish the standard through law by which breaches should be punished. Giving up the right to punish crimes against the 'rights and privileges of the law of nature' and transferring it to the state should ensure that the law of nature is now enforced properly. The social contract establishes which conditions the state should meet in the use of the power it has gained in the transfer. These conditions are designed to ensure that the law of nature is enforced with the right measure and equally towards all.

Notice that Locke states the natural powers are handed over to the community "in all cases that excludes him not from appealing for protection to the law established by it". In cases where there is no appeal to a law established by the community, persons retain the power to execute the law of nature.

Enforcement is for Locke an essential part of the law of nature, since without an effective enforcement mechanism the law of nature would not function as it should. The fact that the rights and privileges are threatened by corrupt men turns on this need for enforcement. But, since the right to punish offences in the hands of everyone also does not ensure a just system, there is need of a political society that can judge and punish offences without prejudice. The transference of the right to punish to the state is the main part of the social contract. This transfer gives the state the right to punish, but also makes it its main task and duty. The contract establishes a duty to enforce the law of nature that was lacking in the state of nature.

The law of nature forms a guideline for the establishment of the contract according to Locke:

[1]

> [T]he fundamental law of nature being the preservation mankind, no human sanction can be good or valid against it" (XI, 135, 353)

The power of the state is legitimized because it promises a better enforcement of the law of nature than would exist in the state of nature. The contract is designed so that the state will enforce human rights. It establishes the duties of the state concerning human rights. These duties are therefore contractual and consist in:

> "The legislative or supreme authority […] is bound to dispense justice, and decide the rights of the subject, by promulgated, standing laws, and known authorised judges" (XI, 136, 353)

The reason for these duties however does not lie with the contract. They are based on the law of nature. The legislative authority is bound in this way because:

> [T]he law of nature being unwritten, and so no-where to be found, but in the minds of men; they who through passion, or interest, shall miscite, or misapply it, cannot so easily be convinced of their mistake, where there is no established judge; and so it serves not as it ought, to determine the rights, and fence the properties of those that live under it" (XI, 136, 353)

The law of nature is a moral law, and the state is guided and bound by it. The contract determines that the duty of the sovereign is to dispense justice. In other words the state has an obligation to enforce the law of nature indifferently. The privileges of the law of nature, to which every man has a title, have to be protected by the state, or else it would not serve 'as it ought'. Without the establishment of the state in this way, the execution of the law cannot be guaranteed to be just. If the state did not protect these privileges it would not use its power legitimately, not only because it would break the contract, but moreover because it would go against the proper enforcement of the law of nature.

The contract itself is moral in its nature. The fact that without the state the law of nature cannot be guaranteed to be obeyed is the reason for the contract to be established. The contract determines the institution and the method for the enforcement of human rights. We can therefore say that the state has a moral obligation to protect these privileges.

We have seen that the privileges of the law of nature are held equally by all members of the human species, that they give rise to obligations on the part of others. And we have seen that they are they are not given up in the establishment of the political society. According to Locke these pre-political universal rights form an obligation for every state:

> "The obligations of the law of nature cease not in society, but only in a many cases are drawn closer, and have by human laws known penalties annexed to them, to enforce their observation. Thus the law of nature stands as an eternal rule to all men, legislators as well as others." (XI, 135, 353)

The rights and privileges of the law of nature do not 'cease in society,' in fact they 'stand as an eternal rule,' we can therefore say these rights are also inalienable.

The question still remains, to whom does this duty apply? We have seen that the subject of the law of nature is all of mankind. Even though the state is guided by this law in its duties, we should still look at the limits defined by the contract of state power. The state has these duties, at least, towards the own citizens:

> [T]he power of the society or legislative constituted by them [the people] can never be supposed to extend farther than the common good [which is] the better to preserve himself, his liberty and property [and] the peace, safety, and public good of the people". (IX, 131, 351)

The people give up their power to the state because it serves to better preserve these goals. Establishing a political society with common and indifferent judges means that the rights of the members of the community are protected and differences between the members are judged without discrimination. Having formed a community with a common judge to appeal to, the law of nature is now executed towards the members of the own society by the state apparatus, through human laws. The state judges infringements of human rights in the name of the community and in the interest of the people who make up the community.

In the next segment I will answer the question if we should interpret Locke's statements about "the peace, safety and public good of the people" and about the duty to preserve "the rest of mankind" so that it includes a duty towards non-members.

Obligations towards non-citizens

We have seen two different arguments for the sovereign powers of the state. Both start from a pre-political state in which all persons are equally endowed with certain rights, but they represent widely different positions on the obligations of the state. Hobbes argues that there is no moral duty other than that of self-preservation and that there is no appeal to moral obligations unless there is a common power that can establish and enforce laws. Human rights, in this view, oblige persons and states to respect them only when there is a powerful authority that can demand this respect through law, to the extent that all persons would feel their self-interest served if they followed this law. Respect for the obligations arising from human rights would be secondary to the obligations arising from the maxim of self-preservation. For this reason we can conclude that in Hobbes's theory, states do not accept the concept of human rights as a guideline for national policies. The obligations of the state for the own citizens are very limited. The only restriction on the freedom of the sovereign of the state in Hobbes's theory is when the self-preservation of the population is worse of than in a state of war of all against all. Making sure that the situation under the sovereign power of the state is better than in the state of nature is a contractual obligation. It is a minimal condition for the sovereign power to be legitimate, not a moral duty of the sovereign towards the own citizens.

Locke argues that all persons have a duty concerning human rights. In a pre-political state the moral obligations concerning human rights are enforced by individuals. In certain societies the authority required to enforce the moral obligations, i.e. the executive power, is given over to the state. When this happens, the state is granted sovereign powers and obligations to judge and punish breaches of human rights. These judgements have to be done by indifferent judges through an established law. The state then has a duty to ensure the protection of human rights. In this theory it is both a contractual obligation which determines that the moral law is now executed through human laws and a moral obligation to follow the moral law of nature.

The main duty of the state with both authors, if any, lies with the own citizens. The effect in both views is that human rights are primarily claims against the own government. These rights are therefore effectively transformed to citizens' rights. The pre-political rights are used as an instrument to define the obligations of the state. The universal demands of the pre-political rights seem to get lost in the process of the formation of the sovereign state. It is

doubtful if these views about the formation of the state can be reconciled with a responsibility of the state for the human rights of non-citizens.

Hobbes is very clear with respect to an obligation towards the citizens of other countries. Without a common power on this scale, the sovereign may wage war with other countries for self-interested reasons. States may wage war against each other:

> "But because they uphold thereby [waging war], the industry of their subjects, there does not follow from it, that misery, which accompanies the liberty of particular men". (XIII, p. 171)

States are free to do this, because war against other states may be in the interest of the own state and its citizens and because the freedom of states in this respect is not as detrimental as the freedom of each person would be. The state only has a duty towards the own citizens.

Non-citizens outside of the state are in the state of nature with respect to those inside the state. They may have more rights, but significantly less security and no appeal to justice. This kind of contract-thinking does not determine many moral obligations on the part of the state towards the own citizens, and none towards non-citizens. The obligation that the state has is argued with the assumption of natural rights and natural obligations, but these are markedly different from the concept of human rights. With Hobbes, obligation arise out of the own interests of self-protection. Laws oblige people insofar as they see their interest served by following the law. In Hobbes' argument, the sovereign powers of the state have few limits and can be used by the sovereign with great liberty at the cost of the liberty of its citizens. With so little duty for the protection of the rights of the own citizens, it comes as no surprise that the state has virtually no obligation towards non-citizens, let alone a moral obligation for the protection of their human rights.

Hobbes does not accept the concept of human rights as a guideline for states. However, he does give room for a political interpretation of the concept. In Hobbes' thinking, to make states morally obliged to act for the sake of the human rights of person would require that it be made a provisions to enter such unions of states like the European Union, the NATO or UN. States would be obliged through international law or international treaties that have an enforcement procedure that would make offences against human rights. States would be morally obliged towards their own citizens as well as non-citizens when this would be in the interest of the state.

What are the implication of Locke's theory for the obligations of the state outside of the borders of the own community? Occasionally, according to Locke, the power of the community is used to judge and punish offences from outside:

> "the original of the legislative and executive power of civil society, which is to judge by standing laws, how far offences are to be punished, when committed within the commonwealth; and also to determine, by occasional judgements founded on the present circumstances of the fact, how far injuries from without are to be vindicated" (VII, 81, 335)

But he is not clear on what these 'injuries from without' could be. From the following remark I conclude that the power of the state should be used abroad only to the extent that the injuries affect the own community:

> "And so whoever has the legislative […] power of any commonwealth, is bound to govern by established standing laws […] and to employ the force of the community […] abroad to prevent or redress foreign injuries, and secure the community from inroads and invasion. And all this is to be directed to no other end, but the peace, safety, and public good of the people. (IX, 131, 351)

This quote is particularly important because of the use of the word 'bound'. From this we can infer that the state has a certain duty. Locke states that a duty is to secure the community from others. Also he says that to prevent and punish injuries is directed at the public good of the people. His use of the word people instead of mankind, as he did earlier in the phrase "the law of nature […] which willeth the peace and preservation of all mankind," suggests that the execution of the law of nature has lost the scope it had over the "great and natural community" of the state of nature when the community has been established. With the transference of the executive power of the law of nature from the people to the state, the rest of mankind – those falling outside of the political society – are no longer part of the responsibility of the political society. All judgements of the state are for the benefit and public good of the own community.

Persons outside of the community without their own common judge are still in the state of nature, until they themselves consent to become member of a political society. Those who live in country or community without a standing law with indifferent judges, for instance those living within a dictatorship, where the dictator still holds the executive power of the law of nature, are also in the state of nature according to Locke:

> "[Every absolute prince is in the state of nature] in respect to those who are under his dominion" (VII, 89, 338)

The law of nature to preserve all of mankind holds eternally, so it still obligates everyone inside the state after the establishment of the political society. Paradoxically, the executive duty of the state is towards its own members by virtue of the contract that establishes it. State officials are thus both bound by the law of nature to preserve all of mankind, and by the executive duty of the state to preserve only the subjects of the own state.

A right, not a duty

So far we have talked about obligations towards the own citizens and non-citizens. We can conclude that in the transference of the executive power of the state of nature from the individuals to the state, the state has an obligation to enforce the rights of the own citizens but not of non-citizens. But there is evidence that in Locke's theory that, although there is no duty, the state does have the freedom to enforce the rights of non-citizens.

According to Locke "the law of nature stands as an eternal rule to all men, legislators as well as others" and everyone is therefore obliged to preserve all of mankind "when his own preservation comes not in competition." The executive powers of people are handed over to the state and with it the duty to enforce human rights: "in all cases that excludes him not from appealing for protection to the law established by [the community]". In international affairs of states facing states or states facing non-citizens concerning human rights, there are no 'indifferent and common judges' to appeal to and no "settled standing laws, indifferent and to all the same" to be judged by. Active engagement in foreign policy towards non-citizens is usually directed at the citizens of countries outside of such bonds[2]. In these cases the executive power is not handed over to the state, and the moral obligations are not the duties of states, but of individual persons, as in the state of nature. All persons, including legislators, retain their original power to execute the law of nature outside the sphere of the law established by the community. The law of nature states that those who are in a safe position and who have the power ought to punish offences against human rights if they are outside the sphere of the civil society, when punishing would help to preserve mankind. The governors of a state, just as all other persons, are under a moral obligation to do this if it would be to the

[2] It can be argued that the European Union is a community that has established a common law with indifferent judges and powers of enforcement, but then the question remains if member states of the EU, or the EU itself can sit in judgement over non-EU states or citizens.

benefit of the preservation of all mankind. Nevertheless, the contract that establishes the institution of the state determines its duty to enforce human rights only towards the own citizens.

However, the power of the state may be used to punish injuries against the law of nature, even if it is not a duty; We noticed that according to Locke the state has a right "to determine, by occasional judgements […] how far injuries from without are to be vindicated". There we concluded that to punish these injuries would be a duty if they affected the own community. Those in power are bound to act for the sake of the own community, but they are free to enforce the law of nature and to better the rest of mankind in cases outside of the own community. When Locke argues that in the state of nature every man has the executive power to enforce the law of nature, he uses the example of the right of states to punish aliens for offences against the law of nature:

> "if by the law of nature every man hath not a power to punish offences against [the law of nature], as he soberly judges the case to require, I see not how the magistrates of any community can punish an alien of another country; since in reference to him, they can have no more power, than what every man naturally may have over another" (II, 9, 314)

The magistrate of a community can punish non-citizens for their offences of human rights because they hold the executive power of the law of nature just as any other man holds in the state of nature. In Locke's theory, even if states do not have a duty to enforce the rights of non-citizens, they do have a right to interfere concerning the human rights of non-citizens. Since states are not under a moral obligation to enforce these rights, it is likely that when a state meddles in the human rights of non-citizens, there are secondary interests that motivate a concern for these human rights.

Obligations when enforcing the human rights of non-citizens

We are faced with a practical problem. As I mentioned in the introduction, I assume that states are the most influential actors on a world-scale. In the contract theory of Locke the state is not assigned the power and duty for their enforcement. It has problems with the effective assignment of duties concerning non-citizens. The state is such a powerful actor in international relations, that the initiatives of individuals are insignificant in comparison to

those of states. Because the state has become such a powerful entity through the transference of the executive powers of its members, the individuals who have the moral obligations towards non-citizens do not have the power to enforce human rights in a manner that could have a significant effect. If the citizens give up their power to execute the law of nature in matters concerning members of the community and transfer those powers to the state, the effect is that the powers to execute the law of nature where there is no common law to appeal to are lost.

Paradoxically, human rights are the guideline for the establishment of the powers and duties of the state, but the duty towards all of mankind arising from human rights is lost in the process. With the birth of the state, the moral obligations arising from human rights are diminished for the state, to moral obligations concerning citizens' rights. The practical consequence is that there is no effective enforcement mechanism for the human rights of people living in countries where they are not enforced, or deliberately trespassed.

If states have a right to enforce human rights outside of the borders of their own community, another problem must be faced. The enormous influence of states makes them the most obvious target for the assignment of responsibilities with respect to the enforcement of human rights wherever they are not enjoyed. When states act on their right to enforce the law of nature towards the rest of mankind, how do we ensure that their judgements are legitimate? If states and legislators do act on their obligation to secure all of mankind outside of their sphere of sovereignty, we are faced with the same risks that were present in the state of nature. These risks are the fact of the "corruption and viciousness of degenerate men" as well as the "ill nature, passion and revenge" of those who use the executive power, that could lead to unjust punishments. When states are judging cases outside of the state, they sit in judgement over cases without common and indifferent judges. The state is not likely to be an indifferent judge over cases that affect non-citizens, since it is some interest that sparked the concern for the offence against the rights of these persons. There is no way to test the legitimacy of judgements and punishments for offences against human rights outside of the own state, since the state has not received the executive power from those it is ruling on. The primary responsibility lies with the own state.

What is missing with judgements on the infringements of the rights of non-citizens is an institution that is granted the power of enforcement by those affected, as well as a common law with indifferent judges. In the context of international affairs, human rights enforcement is subject to the same problems that are present for Locke in the state of nature. Human rights are not written in a common accepted standing law. Even if we agree that they are, in

documents such as the Universal Declaration, they are enforced without an institution that has the authority from the community that is affected by its judgements. Therefore judgments of individual states or a community of states over the citizens outside of this community could still be done by those "who through passion, or interest, shall miscite, or misapply" human rights law.

In facing this problem the state has certain duties concerning human rights towards non-citizens. Whereas the state can be perfectly fulfilling al its duties concerning human rights when they only enforce them towards the own community, the moment the state uses its right and power to interfere outside of its borders, it is obligated to make sure the interference is in line with human rights. With these judgements there is a need for a common law to appeal to, just as there is a law for the enforcement of the rights of citizens. If states accept the concept of human rights as the guideline for national policies, they accept that their legitimacy is dependant on fulfilling this task towards their own citizens. When states accept the concept as a guideline for foreign policies, which they do if they decide to interfere outside of their own borders with respect to human rights, they are faced with certain obligations towards non-citizens as well.

Locke and Hobbes agree that an obligation would be in vain if there is no enforcement mechanism to it. Locke feels that even if the obligations arising from human rights do not have an enforcement mechanism, they still ought to be respected, whereas Hobbes' argues that if in vain then the obligation disappears. If a state accepts the concept of human rights, it has to accept that the moral obligation is still present even though it is not executed. In Locke's natural law this would mean that when the preservation of the own citizens comes not in danger, someone should ensure the protection of the human rights of the rest of mankind, to the best of its abilities.

If we accept, as Western states do, that there is a moral obligation to secure human rights of all people, and we also accept, with Hobbes and Locke, that a moral obligation would be in vain without an enforcement mechanism, we should find out which mechanism would be appropriate for the enforcement of human rights outside of the state, just as Locke attempts to find the legitimate enforcement of them within the boundaries of the state.

Locke argues that the state is a legitimate holder of the executive power of the law of nature i.e. the power of enforcement of human rights concerning the own citizens, when it judges indifferently on infringements of the rights of the citizens and uses standing laws as the measure for the punishments of these breaches; a procedure to which appeal must be possible.

The judgements of the state concerning the rights of the own citizens is legitimated not only by the use of this procedure, but also through the transference of the power from the citizens to the state, by which the people make enforcement of their human rights, the duty of the state. Similarly, the judgements on the international level should also be open to appeal, have a common standing law, and breaches of the law should be judged by indifferent judges that have no interest other than the just enforcement of the law, and who have authority from the community that its judgements affect.

Conclusion

Most western states legitimize the power of the state with the idea of a social contract. In contract-theories the people come together to form a binding contract that installs the state with sovereign powers and obligations. The obligations of the state are limited; instead of all members of the human species, the state has them mainly towards the citizens of the state. It is therefore doubtful whether a commitment to human rights can be united with such a view about the formation of the state. This thesis researched if accepting human rights as a guide for the national policies of a state morally obligates the state towards non-citizens with respect to human rights.

Contract-theories can be used to explain that human rights are a precondition to the rights of the citizen. As we have seen with Hobbes, without the idea that all humans are by their nature endowed with human rights, the state would have no obligation to secure these rights under the contract. In Locke's contract theory the powers of the state are legitimized by its duty to enforce the human rights of its citizens. But if the powers and obligations of the state are justified in this way, there are insufficient reasons to say that states have a moral duty to enforce the human rights of non-citizens.

The contract theories of Thomas Hobbes and John Locke provide two ends of the spectrum regarding obligations of states towards their own citizens. With both I discussed three questions in order to answer the main question of this thesis: Do human rights morally oblige states? - What are the obligations of states towards the own citizens? And, - What are the obligations towards non-citizens?

I concluded with Hobbes's contract theory, that even though it uses a concept of pre-political rights that are shared by all humans to define the powers and duties of the state, his theory does not use human rights as a guideline for national policies. In Hobbes theory a moral obligation only comes with the establishment of a power that can establish and enforce laws. The state is not morally obliged, but provides the minimal conditions for moral obligations of others. All moral obligations ultimately rest on the maxim of self-preservations, whereas with human rights persons are also morally obliged towards others in virtue of the right. In this theory, the state has a strictly contractual obligation towards its citizens to ensure that there is no state of war of all against all, and the contract is broken for individual citizens only when the state threatens their self-preservation. With respect to non-citizens the state has no obligations.

In Locke's theory human rights do form the guideline for national policies. The social contract that establishes the state is brought about by the need for the just enforcement of human rights. The duty of the state is a moral duty to enforce human rights. But, the contract determines that the duty of the state is limited to the enforcement of human rights towards the own members. The responsibility for the enforcement of human rights remains, as in the state of nature, with the individuals. However, the state is free to enforce human rights outside of its borders. The huge influence of states not only makes them a target for the assignment of duties regarding human rights. The transference of power of the individuals to the state also makes it difficult for others to enforce human rights. If states do interfere outside of its borders to enforce the human rights of non-citizens, the same obligations apply internationally that apply nationally. In order to ensure that the judgements are just, there needs to be an institution that is legitimized by a procedure that ensures that the interferences are in accord with human rights.

Herein lies a duty that states have when they accept human rights as a guide for national policies. Accepting human rights means that all people, citizens, as well as non-citizens are equal in certain rights. This means that when a state interferes with the human rights of non-citizens, it is obligated to ensure that its judgements are legitimized by a procedure that makes them as just as its judgements concerning the own citizens.

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[i] Taken from "Universal Declaration of Human Rights" in Hayden, Patrick (ed.), *The Philosophy of Human Rights*, Paragon House, 2001, p. 353-359