VIII. Narratives of Responsible Sovereignty

A. The Narrative of an International Responsibility to Protect

Regarding the correlation of international law, justice and state sovereignty, two more recent narrative strands of "conditioned sovereignty" can be addressed. The first narrative concerns the *internal* "responsibility to protect." In this respect, the increasing role attributed to human rights in the international sphere since the end of World War II is of particular relevance.[339] The military protection of human rights was explicitly referred to as a war aim in the Atlantic Charter.[340] At the San Francisco Conference, their protection was mentioned as a potential basis for the use of enforcement measures.[341] Since the end of the Cold War, anthropocentric theories of international law have continued to gain importance, recognizing the sovereign state only as an "instrumental institution," conditioned by the ability to ensure the protection of its people.[342]

In spite of that, it is argued that these anthropocentric notions about the basis of international law and the limits of state sovereignty, accompanied by a discourse about human security, ignore the nature of international law, which, at its core, is the law between states (*Zwischenstaatenrecht*). The promotion of a utopian world state law (*Weltstaatsrecht*) with a liber-

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[339] *See* e.g. GEORGES SCELLE, DROIT INTERNATIONAL PUBLIC (1944); *id.*, MANUEL DE DROIT INTERNATIONAL PUBLIC (1948); JAMES L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE (6th ed. 1963); WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW, 365 (1964).

[340] *See* Ulrich Fastenrath, *Entwicklung und gegenwärtiger Stand des internationalen Menschenrechtsschutzes*, in INTERNATIONALER SCHUTZ DER MENSCHENRECHTE: ENTWICKLUNG, GELTUNG, DURCHSETZUNG, AUSSÖHNUNG DER OPFER MIT DEN TÄTERN, 12, 43 (*id.* ed. 2000).

[341] Krisch, *supra* note 226, at para. 22.

[342] *See* e.g. Kofi Annan, *The Secretary-General Address to the United Nations General Assembly*, SG/SM/7136 (20 September 1999): "States are now widely understood to be instruments at the service of their peoples, and not vice versa"; Ranganathan, *supra* note 16, at p. 27: "[…] gradual replacement of 'sovereignty' with 'humanity' as the foundational principle, the at least partial replacement of state consent by majoritarian decision-making […]", with reference to Anne Peters, *The Merits of Global Constitutionalism*, 16 Indiana Journal of Global Legal Studies, 397 (2009).

al-individualistic constitution is therefore met with rejection.[343] The critics point to a judgment of the U.K. House of Lords in 2006, where it was explicitly stated that international law is based upon the common consent of nations and that it is "not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states."[344]

Aside from that, it has to be taken into account that from a legal theory perspective, perceiving international law as an expression of an objective order of values seems to be outdated.[345] Due to the fact that international law is no longer based on a natural law concept, the search for a minimum of shared "core values" has become obsolete.[346] Positive law is not dependent on a set of commonly shared values. Nor is the universalism of human rights based on such an assumption.[347] On the contrary, there is

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[343] *See* HELMUT RUMPF, DER INTERNATIONALE SCHUTZ DER MENSCHENRECHTE UND DAS INTERVENTIONSVERBOT, 19–20 (1982).

[344] House of Lords, *Jones v. the Kingdom of Saudi Arabia*, 45 International Legal Materials, 1123 (2006).

[345] *See* e.g. MATTHIAS HERDEGEN, VÖLKERRECHT, § 5 paras. 8–12 (15th ed. 2016); Marc Weller, The Real Utopia: International Constitutionalism and the Use of Force, in Globalisation and Governance: International Problems, European Solutions, 141 (Robert Schütze ed. 2018); Simma & Paulus, *supra* note 323, at 273: "[…] the development of common values which not only express the interests of the powerful. […] *peace*, a healthy environment, *human rights*, economic solidarity, sustainable development. […] *a minimal set of common values*" [emphasis added].

[346] *See* Fastenrath, *supra* note 23, at 38–44 and 287: "Consequently, since the identity of values is irrelevant, there is no need to require a minimum of shared values in international law, to take recourse in the concept of a developing 'new global culture' an all-embracing common ideology of mankind which is rooted in the 'humanité ouverte' and allegedly overcomes ideological differences, or to ask for a common language which is to be established in the development of a world society"; *id.*, *Einheit der Menschenrechte: Universalität und Unteilbarkeit*, in VÖLKERRECHT ALS WERTORDNUNG: FESTSCHRIFT FÜR CHRISTIAN TOMUSCHAT, 166 (Pierre-Marie Dupuy, Bardo Fassbender, Malcom N. Shaw & Karl-Peter Sommermann eds. 2006).

[347] *See* Marie-Benedicte Dembour, *Critiques*, in INTERNATIONAL HUMAN RIGHTS LAW, 41 (Daniel Moeckli ed. 2014); Frédéric Mégret, *Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes*, in NEW APPROACHES TO INTERNATIONAL LAW: THE EUROPEAN AND THE AMERICAN EXPERIENCES, 7 (José María Beneyto & Kennedy, David eds. 2012); Fastenrath, *supra* note 34, at 17; HEINER BIELEFELDT, PHILOSOPHIE DER MENSCHENRECHTE: GRUNDLAGEN EINES WELTWEITEN FREIHEITSETHOS, 45, 115, 150 (1998).

"far-reaching disagreement on the commitment to and the implications of shared global values,"[348] especially when it comes to human rights and the extent of the prohibition of the use of force. Even with regard to torture, a prevalent repudiation seems doubtful.[349]

Eventually, in-depth comparisons of value orders tend to lead to negative results in terms of a claimed congruent content of individual ("core") values.[350] This becomes particularly evident with regard to diverging understandings of peace. Although the value of peace is generally recognized, there is only agreement on the principle, not on the substance of this value, to which the various *bellum iustum* doctrines, which are constantly revived with different normative content, manifestly testify.[351]

Last but not least, it needs to be emphasized that the various natural law conceptions have exposed their contradictory deductions throughout history and have thus disavowed their claims to normativity. No doubt, certainty of cognition has vanished.[352] Due to the non-provability of any value judgements ("*Unbeweisbarkeit aller Werturteile*"[353]) relativistic pluralism reigns today. Be that as it may, both natural law narratives of universal and inalienable human rights and of an international community that shares certain "core values" are still very much alive in international law. "God might be dead, but I continue worshipping."[354] Thomas Franck, for instance, spoke

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[348] Oliver Diggelmann & Tilmann Altwicker, *Is There Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism*, 68 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 649 (2008).

[349] Fastenrath, *supra* note 351, at 166.

[350] *Id., supra* note 23, at 40; *see* also MATTHIAS HUCKE, DER SCHUTZ DER MENSCHENRECHTE IM LICHTE VON GUANTÁNAMO: DIE BEHANDLUNG DER GEFANGENEN UND DIE BEGRÜNDUNG VON MENSCHENRECHTEN, 396 et seqq. (2008).

[351] *See* Fastenrath, *supra* note 23, at 40–41.

[352] *Id.*, *supra* note 29, at 330; *see* also Simma & Paulus, *supra* note 46, at 307: "[…] the time when the claim of positive science to objective knowledge remained largely unchallenged is over, and there is no way back to yesterday's certainties behind the insights of critical theory, be it late- or postmodern."

[353] Welzel, *supra* note 175, at 24.

[354] In reference to Pierre Schlag, *Law as the Continuation of God by Other Means*, 85 California Law Review, 440 (1997): "It is no more possible to continue doing law in an intellectually respectable way once the metaphysic is gone, than to continue worship once God is dead. Law is like God – here. And once you say that God is just a bunch of conventions, he loses a great deal of his appeal. Correspondingly, worship comes to lack a certain seriousness. The same goes for law"; *see* also Staake, *supra* note 22, at 242.

of an "emerging triumph of individualism"[355] and saw the "foundations of universal constitutional democracy."[356] Others point to the "evolutions of international relations today,"[357] i.e. the emergence of values of democracy, human rights, moralization of international law and so forth, which bear witness to this so-called "renaissance of natural law"[358] and corresponds not least with the endeavor of establishing a right to humanitarian intervention if a state fails to fulfill the responsibility of protecting its population.[359]

In this regard, the World Summit Outcome Document (2005) comes to mind.[360] Although this resolution delegates the right of intervention exclusively to the UN Security Council and does not put forward an adapted just war concept in the form of criteria for military intervention (as was recommended in the 2001 ICISS Report and in the 2004 High-Level Panel Report),[361] the recourse taken to core crimes ("genocide, war crimes, ethnic cleansing and crimes against humanity"[362]), as well as the reference

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[355] THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS, 281 (1995).

[356] *Id.* at. 285: "A new democratic impulse, together with growing respect for individual rights and an awakening sense of international social responsibility; together these can build foundations of universal constitutional democracy."

[357] Corten, *supra* note 28, at 265.

[358] *See* e.g. Olivier Corten, *La Référence au Droit International Comme Justification du Recours à la Force: Vers une Nouvelle Doctrine de la "Guerre Juste"?,* in LA GUERRE ET L'EUROPE, 69 (Anne-Marie Dillens ed. 2001); *id.*, *supra* note 27, at 815; Grewe, *supra* note 3, at 604; O'Connell, *supra* note 12, at 38; Peters & Peter, *supra* note 188, at 86; Ipsen, *supra* note 81, at § 1 para. 31; Andreas von Arnauld, *Einleitende Überlegungen*, in VÖLKERRECHTSGESCHICHTE(N): HISTORISCHE NARRATIVE UND KONZEPTE IM WANDEL, 15 (*id.* ed. 2017).

[359] *See* e.g. Tesón, *supra* note 188; Francis M. Deng, *Frontiers of Sovereignty: A Framework of Protection, Assistance, and Development for the Internally Displaced*, 8 Leiden Journal of International Law, 249 (1995); *see* also Simma & Paulus, *supra* note 323, at 270: "The systemic value promoted by these authors is justice, which may entail a justification of community intervention for the protection of Individuals against their own state"; *id.*, at 273: "[…] 'Kantian' arguments in favour of unilateral military intervention."

[360] *See* Resolution adopted by the General Assembly on 16 September 2005, UN Doc. A/RES/60/1.

[361] *See* GARETH J. EVANS & MOHAMED SAHNOUN, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, para. 4.16 (2001); The Secretary-General's High-level Panel Report on Threats, Challenges and Change (2004), UN Doc. A/59/565, para. 207; *see* also Christodoulidou & Chainoglou, *supra* note 318, at 1204–05.

[362] *See* UN Doc. A/RES/60/1, para. 139.

to the sole jurisdiction of the UN Security Council can be viewed as an anthropocentric-positivist adoption of the *bellum iustum* concept.

B. The Narrative of an International Responsibility to Control

The second narrative of interest concerns an *external* "responsibility to control" respectively a "responsibility to contain." It is brought forward that states are no longer accepted as they were in the world of the "Westphalian system." Rather, they would have to meet the requirements set out in the Friendly Relations Declaration.[363] While the concept of a "responsibility to protect" implies an *inward* understanding of responsibility, i.e. the responsibility of a state to protect its own population, the "responsibility to control" or "responsibility to contain" represents an *outward* responsibility, i.e. the obligation to prevent dangers that originate within a country's borders and expand beyond them. This requires a state being able to effectively control its territory. As a consequence, states have the obligation of ensuring that no violent attacks on other states emanate from their territory, regardless of whether the state concerned is willing or able to do so. States that do not fulfill this responsibility would lose their right to territorial integrity.

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[363] Fastenrath, *supra* note 51, at 230; *see* also KATJA WEIGELT, DIE AUSWIRKUNG DER BEKÄMPFUNG DES INTERNATIONALEN TERRORISMUS AUF DIE STAATLICHE SOUVERÄNITÄT, 133 (2016); *see* also on a "revamped 'unable-and-unwilling' doctrine of the USA" v. Bernstorff, *supra* note 123, at 260 and 251: "Sovereignty came with responsibilities, disregard of which justified unilateral intervention by (US) 'police power'."