Internationales Recht der Gegenwart 2

Joachim Dolezik

Narratives on Just War in International Law

Nomos

Internationales Recht der Gegenwart

herausgegeben von

Prof. Dr. Norman Weiß,
MenschenRechtsZentrum der Universität Potsdam
Prof. Dr. Andreas Haratsch,
FernUniversität in Hagen

Band 2

Joachim Dolezik

Narratives on Just War in International Law

Nomos

Onlineversion
Nomos eLibrary

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über http://dnb.d-nb.de abrufbar.

ISBN 978-3-7560-0706-6 (Print)

ISBN 978-3-7489-4296-2 (ePDF)

1. Auflage 2023

Meinem Onkel
Dr. Helmut Hess

Abstract*

When it comes to the question of the legal significance of the so called *bellum iustum* doctrine, i.e. the idea of a just war, international lawyers start to feel uneasy. A large part of contemporary legal scholarship maintains the opinion that this doctrine was never part of international law. However, the subject remains controversial. The work in hand casts a new light on the longstanding *bellum iustum – bellum legale* controversy while taking into account the more recent narrative turn in international law with particular consideration of its implications on international legal theory. It is shown that any categorical denial of the just war doctrine in international law is flawed from the outset, since law is value-related. The central overarching thesis tying the various parts is twofold: First, that the just war structure of the *ius ad bellum* never completely disappeared after 1600. It co-existed with *bellum legale* through the 19th century and co-exists until today. Second, that contemporary narratives of what just war means in international law and whether it is to be found in the Charter or contemporary international law (such as the *ius contra bellum*) rests not only on diverse and contradictory value propositions such as the primacy of peace versus the priority of defending other key principles, but on argumentative strategies to support or to contest a legal assertion brought forward in a particular context.

* The hypotheses presented in this book are based on my dissertation *Narrative zum Gerechten Krieg im Völkerrecht*, Duncker & Humblot, Schriften zum Völkerrecht (SVR), Band 255, 318 p., Berlin 2022.

Table of Contents

I. Introduction

International lawyers generally avoid referring to the so-called *bellum iustum* tradition, let alone uttering the emotive term "just war."[1] As Josef L. Kunz put it in 1951:

> "That this doctrine was not positive law in 1914 and long before, seems settled; even in earlier times it was hardly ever a norm of positive international law. It is of Catholic origin, anchored in natural law, a theological, not a legal concept. […] The League of Nations Covenant did not abolish war, but discriminated between different wars. The basis of distinction was not, as in the classic doctrine, between just and unjust wars, but between legal and illegal wars. The concept of *bellum legale* replaced the concept of *bellum justum*. The illegality of resort to war was not a function of the intrinsic injustice of the cause of war, but of the breach of a formal, procedural requirement. […] The Charter, therefore, distinguishes between legal and illegal use of force; the distinction is again based on the legality, not on the intrinsic justice of the cause."[2]

Yet, the question of a normative judgment on the resort to war and its correlation to the just war doctrine is still contested, both in "classical" and "modern" international law. Generally speaking, there exist two main schools of thought.[3] On the one hand, any postulated relevance of this doctrine for "modern" international law is met with objections, since any concept of just war is deemed to be irreconcilable with the established prohibition of the use of force, both in general international law as well

1 *See* e.g. Jost Delbrück & Klaus Dicke, *The Christian Peace Ethic and the Doctrine of Just War from the Point of View of International Law*, 28 German Yearbook of International Law, 203 (1985): "The number of interpretations of the existing law by international lawyers or others in the light of the Doctrine of *bellum iustum* is limited."

2 Josef L. Kunz, *Bellum Justum and Bellum Legale*, 45 American Journal of International Law, 529–33 (1951).

3 *See* HANS KELSEN, GENERAL THEORY OF LAW AND STATE, 331 (3d ed. 2009); Lynn H. Miller, *The Contemporary Significance of the Doctrine of Just War*, 16 World Politics, 276 (1964); WILHELM GREWE, THE EPOCHS OF INTERNATIONAL LAW, 677 (2nd ed. 2000); Chris Brown, *Justified: Just War and the Ethics of Violence and World Order*, in THE JUSTIFICATION OF WAR AND INTERNATIONAL ORDER: FROM PAST TO PRESENT, 442 (Lothar Brock & Hendrik Simon eds. 2021).

as under the United Nations Charter. On the other hand, some lawyers highlight the fact that the concept of legal war does not imply a rejection of the just war doctrine. Following this line of thought, the modern system of collective security is viewed in light of an adapted just war concept and the existing system regulating the use of force is reconciled with the *bellum iustum* doctrine: The *bellum justum* is equated with the *bellum legale*.[4]

To put it frankly: The academic fronts are hardened. On the one side, in his widely read *The Epochs of International Law*, Wilhelm Grewe states: "In 1951 Josef Kunz showed – with good reason – that the system based on the League Covenant, the Kellogg-Briand Pact and the United Nations Charter was not a system of *bellum iustum*, but of *bellum legale*."[5] In another standard reference work on international law and the use of force, Yoram Dinstein postulates, "Basically, J. L. Kunz was right in stating that the concept of *bellum justum* has been replaced by that of *bellum legale*: what counts is a breach of the norms of existing international law, rather than 'the intrinsic injustice of the cause of war.'"[6] In the primary English reference book on the UN Charter, Albrecht Randelzhofer and Oliver Dörr write in their commentary to Article 2.4: "Such a view, seeking to revive the idea of *bellum iustum* as an element of modern international law is incompatible with the relevant interpretation of Arts 2 (4) and 51 of the Charter."[7]

On the other side, subsequent to James Brown Scott, who "mobilized a liberal history of the law of nations to ground a corresponding liberal theory of just war,"[8] the former president of the American Society of International Law, Louis Henkin, argued "that international law has reintroduced concepts like 'just and unjust wars,' or at least just and unjust parties, although this time without any theological underpinning."[9] Two years after Kunz published his article, Quincy Wright, another former member of the

4 *See* ROBERT W. TUCKER, THE JUST WAR: A STUDY IN CONTEMPORARY AMERICAN DOCTRINE, 11 (1960).

5 Grewe, *supra* note 3, at 677.

6 YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, 72 (6th ed. 2017).

7 Albrecht Randelzhofer & Oliver Dörr, *Article 2.4 UN Charter*, in THE CHARTER OF THE UNITED NATIONS. A COMMENTARY, VOL. II, paras. 4, 62 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte & Andreas Paulus eds., 3d ed. 2012).

8 Joshua Smeltzer, *On the Use and Abuse of Francisco de Vitoria: James Brown Scott and Carl Schmitt*, 20 Journal of the History of International Law, 369 (2018).

9 Louis Henkin, *Force, Intervention, and Neutrality in Contemporary International Law*, 57 Proceedings of the American Society of International Law, 160 (1963).

board of editors of the prestigious American Journal of International Law, wrote: "As a result the Hague Convention on the Pacific Settlement of International Disputes, the League of Nations Covenant, the Kellogg-Briand Pact, and the United Nations Charter have manifested with progressively greater precision acceptance by virtually all states of the *bellum justum* theory."[10] According to Inis L. Claude, "The leaders of the international system set out, after World War I, to create the necessary international structures and procedures to give effect to a revived and revised just war idea."[11] In a similar vein, following Hans Kelsen and his former disciple Hersch Lauterpacht, Mary Ellen O'Connell concludes: "Nevertheless, only a minority of scholars and practitioners know both jus ad bellum and just war theory well. Lack of knowledge has led to the erroneous view that the two areas are in conflict."[12]

Hence, there is obviously no way around posing the crucial question: Which view is the correct one? Was Josef L. Kunz right to state that these assertions "are not tenable in law, but are only political ideologies or the consequence of a theoretically incorrect analysis?"[13] Or is it all relative, and is asking this kind of question, as Hans Kelsen noted, in itself naive?[14]

In this context, two aspects are of particular significance and are usually not placed in the foreground, if at all considered, when it comes to the task of locating the just war doctrine in international law:

(1) As already stated by Robert M. Cover in 1983: "No set of legal institutions or prescriptions exists apart from the narratives that locate it and

10 Quincy Wright, *The Outlawry of War and the Law of War*, 47 American Journal of International Law, 367 (1953).

11 Inis L. Claude, Jr., *Just Wars: Doctrines and Institutions*, 95 Political Science Quarterly, 92 (1980).

12 Mary Ellen O'Connell, *The Just War Tradition and International Law against War: The Myth of Discordant Doctrines*, 35 Journal of the Society of Christian Ethics, 33 (2015).

13 Kunz, *supra* note 2, at 529; *see* also *id.*, *Statisches und Dynamisches Völkerrecht*, in GESELLSCHAFT, STAAT UND RECHT: UNTERSUCHUNGEN ZUR REINEN RECHTSLEHRE. FESTSCHRIFT HANS KELSEN ZUM 50. GEBURTSTAGE GEWIDMET, 224 (Alfred Verdross ed. 1931).

14 *See* Kelsen, *supra* note 3, at 331: "Two diametrically opposed views exist as to the interpretation of war. [...] This is the theory of *bellum justum*. It would be naïve to ask which of these two opinions is the correct one. For each is sponsored by outstanding authorities and defended with weighty arguments. This fact in itself makes any clear decision, any definite choice between the two theories extremely difficult."

give it meaning."[15] International law is not only grounded in legal theory and doctrine, but "it also lives *in* and *from* its narratives."[16] Against this background, jurisprudence and historical science have adopted the idea of narratives from literary studies to capture the normative agency of narration for their disciplines, i.e. its impact on the struggle for authority and validity.[17] Within the scope of context-sensitive doctrinal work,[18] and due to the "openness of the concept of law,"[19] it seems reasonable to locate the discipline in a dynamic process of partly competing and contradictory, partly mutually-sustaining narratives with diverging theoretical underpinnings, which have a legitimizing function as well as a constitutive effect and which create meaning. Within the epistemological formation of these narratives and in communication processes with different levels of authority, facts are

15 Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 Harvard Law Review, 4–5 (1983).

16 Markus Kotzur, *Konstitutionelle Momente? Gedanken über den Wandel im Völkerrecht*, in VÖLKERRECHTSGESCHICHTE(N): HISTORISCHE NARRATIVE UND KONZEPTE IM WANDEL, 99 (Andreas von Arnauld ed. 2017) [transl. by the author]; *see* also Jochen von Bernstorff, *International Legal History and its Methodologies: How (Not) to Tell the Story of the Many Lives and Deaths of the ius ad bellum*, in VÖLKERRECHTSGESCHICHTE(N): HISTORISCHE NARRATIVE UND KONZEPTE IM WANDEL, 39–52 (Andreas von Arnauld ed. 2017); Surabhi Ranganathan, *The Value of Narratives: The India USA Nuclear Deal in Terms of Fragmentation, Pluralism, Constitutionalization, and Global Administrative Law*, 1 Erasmus Law Review, p. 17 (2013).

17 *See* Tzvetan Todorov, POÉTIQUE DE LA PROSE (1971); *id*., THÉORIES DU SYMBOLE (1977); *id*. LES GENRES DU DISCOURS (1978); JEAN-FRANÇOIS LYOTARD, LA CONDITION POSTMODERNE: RAPPORT SUR LE SAVOIR (1979); HAYDEN WHITE, METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH CENTURY EUROPE (1973); *id*., THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION (2d ed. 1989).

18 *See* Oliver Diggelmann & Tilmann Altwicker, *What Should Remain of the Critical Approaches to International Law? International Legal Theory as Critique*, 1 Swiss Review of International and European Law, 85 (2014).

19 Ulrich Fastenrath, *A Political Theory of Law: Escaping The Aporia of the Debate on the Validity of Legal Argument in Public International Law*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUN SIMMA, 62 (*id*., Rudolf Geiger, Daniel-Erasmus Khan, Sabine von Schorlemer, Andreas Paulus & Christoph Vedder eds. 2011); *see* also HARTMUT HENNINGER, MENSCHENRECHTE UND FRIEDEN ALS RECHTSPRINZIPIEN DES VÖLKERRECHTS, 28 (2013); Robert Alexy, *Recht und Richtigkeit*, in THE REASONABLE AS RATIONAL? ON LEGAL ARGUMENTATION AND JUSTIFICATION, 13 (Werner Krawietz, Robert S. Summers, Ota Weinberger & Georg Henrik von Wright eds. 2000).

interpretively adjusted and legal concepts or legal notions that use varying weighting and alternating prioritization are re- and forth-told. It is not only Clio who poetizes, Justitia does it as well.[20]

(2) Aside from the outlined narrative turn in international law, the inherent correlation between an adapted *bellum iustum* concept and the underlying theoretical legal concepts must be pointed out. Still, the stances taken on the role and significance of legal theory vary greatly. Why so? Tilmann Altwicker and Oliver Diggelmann offer one explanation: "[T]heory-skeptical positivism is still (and always was) dominant during the last decades, and [...] the reputation of an international lawyer does not depend on whether he or she pays particular attention to international legal theory."[21] Others like Wolfgang Friedmann point to "the pragmatic and empiristic character of Anglo-American Law."[22] Be that as it may, the significance of legal theory should not be underestimated. Not only do the varying concepts of law (*Rechtsbegriffe*) imply different views relating to the significance of the formal sources of law as well as to the aim of legal interpretation, they also determine the relationship between the wording and the normative content of legal propositions (*Rechtssätze*).[23] What allegedly appears to be "a profoundly philosophical question"[24] with little or no "great practical significance,"[25] especially regarding "serious problems of peace and war,"[26] does in fact have very concrete legal repercussions, not only upon how the

20 *See* the German translation of HAYDEN WHITE, TROPICS OF DISCOURSE: ESSAYS IN CULTURAL CRITICISM (1978): *id*., AUCH KLIO DICHTET ODER DIE FIKTION DES FAKTISCHEN (1986) [transl. by Brigitte Brinkmann-Siepmann and Thomas Siepmann].

21 Diggelmann & Altwicker, *supra* note 18, at 70.

22 WOLFGANG FRIEDMANN, LEGAL THEORY, 320 (2nd ed. 1949); *see* also Ulrich Scheuner, *Naturrechtliche Strömungen im heutigen Völkerrecht*, 13 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 585–86 (1951); *see* also on the "basic assumptions of pragmatism" MARCO STAAKE, WERTE UND NORMEN, 142 et seqq. (2018).

23 *See* ULRICH FASTENRATH, LÜCKEN IM VÖLKERRECHT: ZU RECHTSCHARAKTER, QUELLEN, SYSTEMZUSAMMENHANG, METHODENLEHRE UND FUNKTIONEN DES VÖLKERRECHTS, 158 (1991).

24 Ronald St. John Macdonald & Douglas Millar Johnston, *International Legal Theory: New Frontiers of the Discipline*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW, 5 (*id*. eds., 1983).

25 Oscar Schachter, *Towards a Theory of International Obligation*, 8 Virginia Journal of International Law, 302 (1968).

26 Martti Koskenniemi, *The Politics of International Law – 20 Years Later*, 20 European Journal of International Law, 8 (2009).

validity of a treaty is affected when diverging positions on the substance of the latter come to the fore – namely Article 2.4 and 51 of the UN Charter. It also concerns questions about the role of practice and *opinio juris* in the formation of customary law – in particular with regard to the right to self-defense under general international law.[27]

To make a long story short: "Validity is part of the dispute; […] and this seems especially true in the realm of the 'law of war.'"[28] All the same, the role of legal theory is not uncommonly portrayed "as abstract, little connected with the positive law and of little use, if not detrimental, to the tasks of the legal scholar."[29] It thus becomes evident that the topic demands further explanation.

A. Preliminary Remarks on the Significance of Legal Theory

First of all, considering modern philosophy of language, words do not have a determinate meaning, even in their nucleus.[30] Therefore, the word

27 *See* Olivier Corten, *The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate*, 16 European Journal of International Law, 804 (2005); Andrea Bianchi, *The International Regulation of the Use of Force: The Politics of Interpretive Method*, 22 Leiden Journal of International Law, 658, 671 (2009); Fastenrath, *supra* note 23, at 28, 91–100, 290; Schachter, *supra* note 25, at 302; ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT, 267 (1995): "There is no separating legal philosophy from substantive norms when it comes to problem-solving in particular cases."

28 Olivier Corten, *Formalization and Deformalization as Narratives of the Law of War*, in NEW APPROACHES TO INTERNATIONAL LAW: THE EUROPEAN AND THE AMERICAN EXPERIENCES, 256 (José María Beneyto & Kennedy, David eds. 2012); *see* also Higgins, *supra* note 27, at 251; v. Bernstorff, *supra* note 16, at 50.

29 Armin von Bogdandy & Sergio Dellavalle, *The Paradigms of Universalism and Particularism in the Age of Globalisation*, in COLLECTED COURSES OF THE XIAMEN ACADEMY OF INTERNATIONAL LAW, VOL. 2, 56 (2009); *see* also Schachter, *supra* note 25, at 302; *see* on the "unconscious methodological eclecticism in legal practice" Anne Peters, *There Is Nothing More Practical than a Good Theory: An Overview of Contemporary Approaches to International Law*, 44 German Yearbook of International Law, 36 (2001); Ulrich Fastenrath, *Relative Normativity in International Law*, 4 European Journal of International Law, 334 (1993).

30 *See* Fastenrath, *supra* note 23, at 63, 182; *id*., at 293–94: "The meaning of a word is not predetermined but varies with its context which is never homogeneous but always undergoing change."

"law" can be associated with very different legal concepts.[31] Hypothetically speaking, law could declare one legal concept to be the authoritative one.[32] But not least because of the required degree of flexibility, law does not exercise its competence to decide these meta-juridical questions concerning legal theory and doctrine. Hence, if one regards legal propositions as open-textured since they have no semantic autonomy, if a legal system does not decide on a particular legal theory as the authoritative one and if no legal concept generally succeeds in refuting the others, this leads to one specific conclusion: The legal system must remain open.[33]

If one then understands law not exclusively as a command of the sovereign or the statutes of a legislator, as behavioral expectations in a society, as a set of rules, as a product of ethics, or as a just order,[34] and concedes that it is not a matter of cognition as to which legal concept is the "correct" one,[35] it stands to reason to instead perceive law as a process,[36] as a communicative activity,[37] or to put it differently, as an argument[38] to support or to contest a legal assertion brought forward in a particular context.

31 *See* e.g. Schachter, *supra* note 25, at 301; Higgins, *supra* note 27, at 7 fn. 15 (1995); Staake, *supra* note 22, at 291 et seqq.; Fastenrath, *supra* note 23, at 36 et seqq., 287 et seqq.

32 *See id.*, at 160.

33 *See id.*, at 85, 163; *see* also *id.*, supra note 29, at 333.

34 *See id.*, *supra* note 23, at 290: "The various theories of law must not necessarily be seen as mutually exclusive. They rather reflect different perspectives on the law"; *see* also Peters, *supra* note 29, at 36.

35 *See* Fastenrath, *supra* note 19, at 64: "[…] legal concepts that can only claim to be valid. Consequently, they are […] from an epistemological point of view, utopian legal assertions, but not reality"; *id.*, *supra* note 23, at 81–82; *id.*, *supra* note 29, at 331 (1993): "[…] 'The term 'law' has no inherent claim, arising out of some conceptual myth, to 'mean' something well-defined and nothing else. What law should mean is a question of definition and definitions are only crutches for cognition.' Thus, all legal theories as well as the norms derived from them are nothing but claims"; Staake, *supra* note 22, at 446.

36 *See* Higgins, *supra* note 27, at 7.

37 *See* Fastenrath, *supra* note 23, at 294.

38 *See* Corten, *supra* note 28, at 253–54.

B. The Political Fight for the Law

Due to the fact that no legal concept can claim to be the predominant or the "correct" one, it further comes as no surprise that within the discipline of international law, the various legal concepts realize their validity interchangeably and that a persuasive legal argument "tries to open up to as many theoretical schools as possible."[39] But this implies not only that "[n]o canons of interpretation can be of absolute and universal utility."[40] Ultimately, it also signifies nothing less than a political fight for the law (*Kampf ums Recht*),[41] since it is not a matter of contingency as to which legal concepts prevail from case to case. In fact, their success is decided in a political process.[42]

To be sure, "this [political – A/N] reality has been regarded as anathema by many traditionalists."[43] It contradicts two "unconscious reflection[s]"[44] widely shared by international lawyers, namely the separation and neutrality thesis.[45] As Bruno Simma and Andreas Paulus have put it, "Positivism can also be understood as the strict separation of the law in force, as derived

39 Fastenrath, *supra* note 19, at 70; *id*., at 71: "That is why legal arguments are supported with references to the wording of treaty provisions, relevant case law, the discernible will of States, State practice, and to the fairness and equity of the solution, whereas deductions from specific schools of thought are missing to a large extent"; *id*., *supra* note 29, at 338: "Consequently, a normative contention will be best capable to assert itself if it is generated through a generally accepted source of law, and if it closely reflects the will and the practice of the States, as well as common perceptions of justice"; Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 American Journal of International Law, 356 (1999): "It was sometimes useful to argue as a strict positivist, fixing the law on a treaty interpretation. At other times it was better to conduct an instrumentalist analysis of the consequences of alternative ways of action – while at yet other times moral pathos seemed appropriate."

40 Comment on Harvard-Draft on the Law of Treaties, 29 American Journal of International Law, 946 (1935, Issue S2: Supplement. Research in International Law Part III & Index. Article 19. Interpretation of Treaties).

41 *See* already RUDOLF VON JHERING, DER KAMPF UMS RECHT (1872) and HERMANN KANTOROWICZ, (GNAEUS FLAVIUS), DER KAMPF UM DIE RECHTSWISSENSCHAFT (1906).

42 *See* Fastenrath, *supra* note 19, at 63.

43 Higgins, *supra* note 27, at 3; *see* also Fastenrath, *supra* note 19, at 58: "For lawyers trained in the continental law tradition the notion 'political theory of law' sounds strange, not to say scandalous."

44 Higgins, *supra* note 27, at 3; see also Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 Virginia Journal of International Law, 250–51(1968).

45 *See* Staake, *supra* note 22, at 308 et seqq.

from formal sources that are part of a unified system of law, from nonlegal factors such as natural reason, moral principles and political ideologies. […] This system of rules is an 'objective' reality and needs to be distinguished from law 'as it should be.'"[46]

An "objective reality", which is separated from "non-legal factors" and from "law as it should be." In short, a strict (Kelsian) separation of the *Ought* from the *Is*,[47] since otherwise the autonomy of the law would be endangered. Even the "enlightened positivists"[48] fear "arbitrariness or post-modern relativism."[49] Basically, all of the "traditional" positivist theories more or less hinge upon these convictions.[50] Thus, all international lawyers have to do is identify, that means to "uncover" the "actual" normative content of a "finished product," i.e. to "find" the rule and then apply it in a descriptive way.[51]

However, this view not only contradicts the outlined openness of the legal system. Since there is no verifiable "true" concept *of* law, there cannot be an "objective reality" *in* law that needs merely to be "unveiled." Legal concepts can only claim to be valid in a specific context. A "correct" legal

46 Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 American Journal of International Law, 304 (1999).

47 *See* Higgins, *supra* note 27, at 10; Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict*, 93 American Journal of International Law, 320 (1999); ARTHUR KAUFMANN & WINFRIED HASSEMER, GRUNDPROBLEME DER ZEITGENÖSSISCHEN RECHTSPHILOSOPHIE UND RECHTSTHEORIE, 50 (1971).

48 *See* Simma & Paulus, *supra* note 46, at 303, 307.

49 *Id.*, at 307; *see* also Michael Bothe, *Terrorism and the Legality of Pre-Emptive Force*, 14 European Journal of International Law, 239 (2003); Corten, *supra* note 27, at 815: "This critique of the subjectivism […] resembles a critique of natural law theories, to which this approach can ultimately be traced back. […] the need to maintain a clear distinction between law and politics or morals […], in conformity with one of the essential characteristics of formal positivism: 'Kelsen's insistence on the strict autonomy of the law […] constitute[s] an attempt to save the law from destruction through its instrumentalization for political purposes'"; SANDRA VOOS, DIE SCHULE VON NEW HAVEN, 258 (2000).

50 *See* Staake, *supra* note 22, at 310.

51 *See* Higgins, *supra* note 27, at 3; Ulrich Fastenrath, *Der juristische Wert einer Weltverfassung. Nur ein Glasperlenspiel oder Triebkraft eines Wandlungsprozesses? Zur Bedeutung des Weltbildes für das Recht*, in DIE VERFASSUNG DES POLITISCHEN: FESTSCHRIFT FÜR HANS VORLÄNDER, 221 (André Brodocz et al. 2014); *id.*, *supra* note 23, at 293: "[…] to outline in a descriptive way how the content of a rule, as indicated respectively by will, consent, sense of justice, or practice, could be identified."

solution can only be *argued* to be valid. There is no "objective validity" that could somehow be "proven" or "uncovered."[52]

To provide an example: Teleological reduction or extensive interpretation can be recognized as a methodological figure in determining the normative content of a legal proposition. They are not the deliberate or arbitrary abridgement of the "actual" normative content.[53]

So, to reduce the unavoidable question about the relationship between law and politics to its essence: It is authority, not truth that makes and sustains law. Borrowing from Thomas Hobbes, in international law the famous dictum "Auctoritas non veritas facit legem" holds every bit as true as "Auctoritas non veritas facit interpretationem,"[54] because "[i]n legal systems, contrary to philosophy, it is a matter of politics to decide on the validity [*and* the authority – A/N] of assertions."[55]

Why so? In contrast to other scientific disciplines, international law is not dedicated to the service of "pure knowledge,"[56] "the search for truth,"[57] or to gaining "a better understanding" of the world ("*Erkenntnis der Welt*"), since legal science does not relate to "found objects" ("*vorgefundene Gegenstände*"[58]). Legal science creates its own subject matter.[59] It does not repre-

52 *See id.*, *supra* note 29, at 333 *id.*, *supra* note 23, at 293; Corten, *supra* note 28, at 254, 256–57.

53 *See* Fastenrath, *supra* note 23, at 231 and 235 fn. 924.

54 THOMAS HOBBES, LEVIATHAN, CAP. 26; Fastenrath, *supra* note 23, at 165 fn. 645.

55 Fastenrath, *supra* note 19, at 64; *see* also *id.*, *supra* note 29, at 331; *id.*, *supra* note 23, at 194–99.

56 Hans Kelsen, *The Pure Theory of Law*, 51 Law Quarterly Review, 535 (1935): "[…] the Pure Theory of Law […] denies that it can ever be the task of legal science to justify anything. Justification implies judgment of value, and judgment of value is an affair of ethics and of politics, not, however, of *pure knowledge. To the service of that knowledge legal science is dedicated*" [emphasis added].

57 *Id.*, *Science and Politics*, 45 American Political Science Review, 641 (1951): "It is a commonplace to assert that science should be independent of politics. By this one usually means that *the search for truth*, *which is the essential function of science* [emphasis added], should not be influenced by political interests, which are the interests concerned with the establishment and maintenance of a definite social order or a particular social institution."

58 Fastenrath, *supra* note 51, at 227.

59 *Id.*; *see* also *id.*, *supra* note 23, at 16: "Because law does not belong to the material world, but to the realm of thought" [transl. by the author]; Stanley E. Fish, *The Law Wishes to Have a Formal Existence*, in THE FATE OF LAW, 197 (Thomas R. Kearns & Austin Sarat eds., 4th ed. 1994).

sent "a method which seeks to reconcile law with truth."[60] Instead, legal science represents "a method of operation," where "limited effectiveness of a legal theory implies limited normativity."[61]

Or, to put this differently: Law has no ontological center.[62] Law is no "manifestation of something unique and autonomous with an unchanging nature or essence."[63] It is a human enterprise that hinges on language (which can never completely eliminate its ambiguity) and methodology (which ultimately depends on fundamental jurisprudential assumptions).[64] What is more, every *Ought* is value-dependent and therefore inevitably implies relative normativity.[65] Whether the priority lies with a legal concept that is primarily determined in a descriptive or prescriptive method of operation, is a question of valuation (*Wertungsfrage*), not truth.[66]

The details of the so-called *Methodenstreit*, i.e. in simplified terms (1) the debate as to whether it is possible to speak objectively about the human condition, (2) the aim of science, (3) as well as its relationship to politics – which culminated in the 1960s in the so-called "positivism struggle" (*Positivismusstreit* / *Werturteilsstreit*) – need not be discussed here.[67] It

60 Fastenrath, *supra* note 29, at 331.

61 *Id.*

62 *See* Corrado Roversi, *Ontology of Law*, in ENCYCLOPEDIA OF THE PHILOSOPHY OF LAW AND SOCIAL PHILOSOPHY, *passim* (Mortimer Sellers & Stephan Kirste 2018); ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL?, 321 (2017); *see* also JAN VOLLMEYER, DER STAAT ALS RECHTSORDNUNG, 205 (2011); JOST DELBRÜCK & RÜDIGER WOLFRUM, VÖLKERRECHT, BAND I/1: DIE GRUNDLAGEN. DIE VÖLKERRECHTSSUBJEKTE, 41 (2nd ed. 1989).

63 McDougal, Lasswell & Reisman, *supra* note 44, at 251; *loc. cit.*: "[…] a concealed metaphysical notion about law. […] It is this elusive essence, and not the shared expectations of community members, which is the referent of 'law' for the analyticalist"; Fastenrath, *supra* note 51, at 221; *id.*, *supra* note 23, at 74: "[…] ein ideales Sein […] objektiver Erkenntnis zugänglich"; THOMAS FLEINER & LIDIJA R. BASTA FLEINER, ALLGEMEINE STAATSLEHRE: ÜBER DIE KONSTITUTIONELLE DEMOKRATIE IN EINER MULTIKULTURELLEN GLOBALISIERTEN WELT, 59 (3rd ed. 2004): "Das Recht bekam ein vom Sachverhalt unabhängiges Eigenleben."

64 Fastenrath, *supra* note 23, at 294.

65 *See* Staake, *supra* note 22, at 382, 422 et seqq.; Fastenrath, *supra* note 23, at 294–95; *id.*, *supra* note 19, at 62, 64; *id.*, *supra* note 29, at 311, 333; *id.*, *supra* note 51, at 227–28.

66 *See* Staake, *supra* note 22, at 359.

67 *See* on the role of *models* in the realm of epistemologies PHILIP ALLOTT, THE HEALTH OF NATIONS, 24 fn. 59 and at 254 fn. 41 (2002); *see* also on "the problem of historiography" (*Methodenstreit der Geschichtswissenschaft*) *loc. cit.*, 331 et seqq.; *see* on a strict *descriptive* role of science and its "independence of politics" e.g. Kelsen, *supra* note 57, at 641: "Science is a function of cognition; its aim is not

suffices to point to the problem of subjectivity in the realm of law. Any legal argument comes with underlying visions of society. There is no "pure doctrinal judicial logic," no possible categorical distinction between "objective" legal doctrinal work and "subjective" political thought.[68] There is no objectivity, neutrality or impartiality in law. As the meaning of "words, especially normative words […] may depend upon who is using them, and when and to whom,"[69] the consecutive question is not: "What does the law say" but "Whom does it empower?" – or rather, "What kind of (or whose) law, and what type of (and whose) preference?"[70]

On the other hand, this is not to be equated with realist determinism, i.e. postulating that "international law inevitably represent[s] the prevailing power structures in a particular historical context,"[71] or stating in a similar vein that rule compliance in the international sphere[72] is caused and should be explained by reference to a mere "coincidence of interest and coercion,"[73] as Jack Goldsmith and Eric Posner have put it forward in their seminal *The Limits of International Law* (2005). In this perspective, law does not represent a distinct autonomous societal discourse in international relations.[74]

---

to govern but to explain. To describe the world is its object. Its independence of politics means in the last analysis, that the scientist must not presuppose any value; consequently he has to restrict himself to an explanation and a description of his object without judging it as good or bad, i.e., as being in conformity with, or contrary to, a presupposed value"; *loc. cit.* at 643: "[…] for science can determine the means, but it cannot determine the ends"; *see* in contrast on the "interdependence between science and value, reason and politics" Martti Koskenniemi, *Enchanted by the Tools? An Enlightenment Perspective*, 35 American University International Law Review, 418 (2020).

68 *See* Diggelmann & Altwicker, *supra* note 18, at 76; Fastenrath, *supra* note 23, at 294: "Therefore, each interpretation is necessarily a subjective one."

69 Aleksander Peczenik, *Towards the Juristic Theory of Law*, 21 Österreichische Zeitschrift für öffentliches Recht, 179–80 (1971).

70 Koskenniemi, *supra* note 26, at 17.

71 v. Bernstorff, *supra* note 16, at 43; *see* also Martti Koskenniemi, *Histories of International law: Dealing with Eurocentrism*, 19 Rechtsgeschichte, 162–63 (2011).

72 *See* generally LOUIS HENKIN, HOW NATIONS BEHAVE (2nd ed. 1979); THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 The Yale Law Journal, 2600 (1997); MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT, 57 (2008).

73 JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW, 88 (2005).

74 *See* v. Bernstorff, *supra* note 16, at 43; Fastenrath, *supra* note 19, at 61–62 and 77; *see* also Peters, *supra* note 29, at 32: "[…] negating an independent and distinct normative

Instead, law is viewed as "an irrelevant decoration on what is merely a behavioral regularity,"[75] with no autonomous controlling force. In the end, this school of thought amounts to a continuation of a prominent line of the so-called deniers of international law (Hobbes, Austin, Weber, Hegel, Mill, Morgenthau).[76]

However, if one admits, in line with the empirical turn,[77] that international law has legal quality, not least because it is necessary,[78] and acknowledges its separate validity vis-à-vis politics, while not denying its various entanglements, i.e. the political impact on law-making and law-application,[79] it becomes evident that beyond this "law of power" (*Völkerrechtspolitik der Politik*), there also exists a more general "power of law" (*Völkerrechtspolitik des Rechts*).[80]

Moreover, it is not only the sovereign state that can use international law authoritatively. It can be used by *all* actors in the international arena in order to speak "truth to power" or simply to support their political positions. In other words: "Any deeper look at this interaction reveals that

---

quality of the law by deducing 'bindingness' (the 'ought') from 'control' (hence from the 'is')."

75 Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization*, 8 Theoretical Inquiries in Law, 14 (2007).

76 *See* Miloš Vec, *Sources of International Law in the Nineteenth-Century European Tradition: The Myth of Positivism*, in THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW, 133 (Samantha Besson & Jean D'Aspremont eds. 2017); Heinhard Steiger, *Völkerrecht*, in GESCHICHTLICHE GRUNDBEGRIFFE: HISTORISCHES LEXIKON ZUR POLITISCH-SOZIALEN SPRACHE IN DEUTSCHLAND, VOL. VII, 116, 130 (Otto Brunner, Werner Conze & Reinhart Koselleck eds. 1992); Bardo Fassbender, *Optimismus und Skepsis im Völkerrechtsdenken der Gegenwart: Zur Bedeutung von „Denkschulen" in der Völkerrechtswissenschaft*, 65 Die öffentliche Verwaltung, 41 (2012).

77 *See* Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 American Journal of International Law (2012); Gleider I. Hernández, *The Judicialization of International Law: Reflections on the Empirical Turn*, 25 European Journal of International Law, 931 (2014).

78 *See* Delbrück & Wolfrum, *supra* note 62, at 41.

79 *See* v. Bernstorff, *supra* note 16, at 43; *see* also Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 European Journal of International Law, 369–408 (2005).

80 *See* Corten, *supra* note 28, at 254; Andreas Fischer-Lescano & Philip Liste, *Völkerrechtspolitik. Zu Trennung und Verknüpfung von Politik und Recht der Weltgesellschaft*, 12 Zeitschrift für Internationale Beziehungen, 211, 226, 228, 233 (2005).

international law is *both* an instrument of power and an obstacle to its exercise; it is always apology *and* utopia."[81]

C. A Political Theory of Law

Besides, if one follows Ulrich Fastenrath and adopts a political theory of law, one can manage to escape the aporia of the debate on the validity of legal arguments in public international law.[82] This concerns the circular pattern of descending and ascending justification,[83] i.e. the dilemma "that from an Is does not follow an Ought and that the Ought lacks positivity,"[84] as well as the fact that the "truth" of a scholarly proposition always hinges on a specific theoretical system.[85] Again, the fundamental premise is to concede that "[l]egal science is not to be understood as a method which seeks to reconcile law with truth."[86] In international law, deciding on the

81 Krisch, *supra* note 79, at 371; *see* also MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT, 613 (3rd ed. 2009); Lothar Brock & Hendrik Simon, *The Justification of War and International Order: From Past to Present*, in THE JUSTIFICATION OF WAR AND INTERNATIONAL ORDER: FROM PAST TO PRESENT, 5–6 (id. eds. 2021): "[…] a 'gentle civilizer of nations', *and* at the same time as an instrument of power and domination"; *see* also Emmanuelle Jouannet, *Universalism and Imperialism: The True-False Paradox of Interna-tional Law?*, 18 European Journal of International Law 387 (2007): "[…] it is both one *and* the other, it is an instrument for universalization and a reflection of ambivalent particularities; a means of domination and a space for cooperation and emancipation"; GODEFRIDUS J. VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW, 28 (1983); Knut Ipsen, *Regelungsbereich, Geschichte und Funktion des Völkerrechts*, in VÖLKERRECHT: EIN STUDIENBUCH, § 3 para. 8 (Volker Epping & Wolff Heintschel v. Heinegg eds., 7th ed. 2018); Fastenrath, *supra* note 19, at 69, 76, 78; Rosalyn Higgins, *The Place of International Law in the Settlement of Disputes by the Security Council*, 64 American Journal of International Law, 3 (1970); *id*., *supra* note 23, at 12.

82 *See* Fastenrath, *supra* note 19, at 77: "The political theory of law is conceptualized here as an open system of norms. Neither its elements nor the meaning of its norms are fixed. [...] In fact, it is a political process which decides on the success of legal assertions."

83 *See* Koskenniemi, *supra* note 81, *passim*; *see* also Monica Hakimi & Jacob Katz Cogan, *The Two Codes on the Use of Force*, 27 European Journal of International Law, 260 et seqq. (2016).

84 Fastenrath, *supra* note 19, at 67–68.

85 *See id*., *supra* note 23, at 75–76; Koskenniemi, *supra* note 81, at 59.

86 Fastenrath, *supra* note 29, at 331.

validity as well as on the authority of legal assertions is a matter of politics. "Legal styles are styles of argument, of linguistic expression,"[87] not truth.

However, this finding does not imply that discourse on international law is "a conversation without content"[88] in a "prison-house of irrelevance."[89] Open-texturedness is not to be equated with meaninglessness or with arbitrary construction.[90] Philosophical relativism or the potentially infinite interpretability of legal texts does not imply the necessity of considering all possible interpretations as being of *equal* value, thus representing a *random* decision, whether in a "rationalist," "analytical," "logical," or "realist" system or school of thought, where the "decision-maker acts as a 'black-box.'"[91]

Within the framework of a communicative approach to law, the false premise of equal validity is ruled out, since "differing legal perceptions will receive varying degrees of support and hence be of varying normativity."[92]

What is more, relative normativity does not preclude prevalent legal conceptions (*herrschende Normverständnisse / Rechtsauffassungen*). Relative normativity is "no impediment for a sufficiently uniform inter-subjective understanding among the persons involved and, by implication, for consensual norm-application,"[93] nor does it exclude the possibility that a common denominator for what is "right," i.e. an understanding about the content and the strength of values, about what is reasonable or justified, can be found (inter-subjectively, *not* objectively).[94]

---

87 Koskenniemi, *supra* note 39, at 359; *see* also JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW, 33 (1985): "To define 'the law' […] as a set of resources for thought and argument […]."

88 David Kennedy, *Theses about International Law Discourse*, 23 German Yearbook of International Law, 376 (1980).

89 Koskenniemi, *supra* note 81, at 4.

90 *See* Fastenrath, *supra* note 19, at 59, 67, 78; *id.* at 65: "As a result of their openness to different interpretations, normative utterances have no determinate meaning, not even in their nucleus. However, this should not obscure the fact that law functions in general"; *id.*, *supra* note 29, at 312; Fish, *supra* note 59, at 194.

91 Fastenrath, *supra* note 29, at 310; *see* also *id.*, *supra* note 19, at 60: "[…] contrary to American Realism, the Pure Theory of Law, or the analytical theory of HLA Hart, it is not random what decision is taken within the limits of the margin"; *see* also Iain Scobbie, *Towards the Elimination of International Law*, 61 The British Yearbook of International Law, 346 (1990); Higgins, *supra* note 27, at 9.

92 Fastenrath, *supra* note 29, at 334.

93 *Id.*, *supra* note 19, at 65–66; *see* also Staake, *supra* note 22, at 383.

94 *See id.*, at 247; *id.*, at 255: "Therefore the question cannot be about overcoming value pluralism, but at most about establishing consensus on *certain* value questions" [transl. by the author]; *id.*, at 262: "The impossibility of absolute justifications does not lead to the equivalence of all possible justifications. The fact that there is no truth

Thus, acknowledging the fact that law has no specific object susceptible to cognition in line with the political viewpoint of considering one's own position as the "correct" one and to fight for it, which represents the essence of politics, resolves the dilemma of the legal aporia in international law.[95] Ultimately it is both a struggle for content, i.e. validity,[96] as well as a struggle for recognition, i.e. authority:[97] In order to have a social effect, the respective assertions of validity must succeed in the distinguished, but nonetheless interrelated forums of the autonomous legal system;[98] and needless to say, always on the condition that "accept[ance] […] can be expected from the States, who, after all, are politically responsible for the substance of international law."[99]

D. Outline

With these two central aspects in mind (narrative turn and legal theory), the work in hand elaborates on the longstanding *bellum justum* and *bellum legale* controversy by examining whether and to what extent the *bellum iustum* concept is shaped by different narratives and their varying theoretical underpinnings. In light of this task, it will not do to dismiss the contestations of potential just war correlations in international law with regard to the diverging theoretical preconceptions as mere "academic confessions of faith,"[100] nor to reduce the stated issues to the effect that modern interna-

regarding value questions (*Wertfragen*) does not mean that the answers to them are arbitrary" [transl. by the author]; Fastenrath, *supra* note 23, at 77; *id*., *supra* note 19, at 67; Henninger, *supra* note 19, at 48.

95 *See* Fastenrath, *supra* note 19, at 67–68; *id*., *supra* note 23, at 132; *id*., *supra* note 29, at 338; Higgins, *supra* note 27, at 9–10.

96 *See* Fastenrath, *supra* note 19, at 74.

97 *See id*., *supra* note 23, at 295; *id*., *supra* note 29, at 334; Henninger, *supra* note 19, at 44–45.

98 *See* Fastenrath, *supra* note 19, at 74–77.

99 *Id*., *supra* note 23, at 299; *see* also Hakimi & Cogan, *supra* note 83, at 264.

100 *See* e.g. Miller, *supra* note 3, at 264: "Whether or not the new doctrine transcends the old one or falls somewhat short of it depends, it would seem, upon one's point of view"; Oscar Schachter, *Just War and Human Rights*, 1 Pace Yearbook of International Law, 18 (1989): "One might consider defensive war as the contemporary equivalent of *just war* (as the Catholic bishops have done). But this is only a verbal point and does not change the legal principle."

tional law has "overcome"[101] the notion of a just war. Instead, it becomes apparent, in "classical" as well as in "modern" international law, that especially in the realm of the laws of war, interpretations of the always contested normative content of the respective legal rules and principles only appear to be convincing, i.e. valid, and are able to assert themselves, against the background of a particular or several interrelated narratives. The following sections thus focus on just war narratives in "classical" international law, namely the so-called narrative of indifference, as well as on the general implications for "modern" international law, i.e. contemporary concepts of just war. The final section summarizes the main findings, explains their importance and why they contribute to the existing literature regarding the *bellum iustum - bellum legale* controversy.

101 *See* e.g. Delbrück & Dicke, *supra* note 1, at 203: "The law of the prohibition of war has not been explicitly or implicitly developed in terms of the Doctrine of Just War, rather it was intended to overcome this doctrine."

II. The Narrative of Indifference

A large part of contemporary legal scholarship still relies on the so-called theory of indifference, which basically advocates a gradual displacement of the old natural law restraints from the just war tradition and eventually finds expression in an alleged *liberum ius ad bellum*.[102] According to this narrative, a moralist *bellum iustum* approach, which distinguished between just and unjust causes and parties to a conflict, was replaced in the eighteenth century by a (Gentilian) "detheologized" duel-like concept of war as a rational military conflict between two equals fighting for their strategic interests.[103] It is postulated that until the end of the First World War, there existed an unlimited "positivist" right of sovereign states to wage war, that states could freely resort to arms as ordinary means of state policy and that there were no legal restrictions concerning the *ius ad bellum* regime. The sovereign decision to resort to war was "the prerogative of policy, not of law."[104]

So what about it – is this story convincing? To start with, it is worth noting that accompanying the introduction of the concept of legal war, and in the course of the rise of the balance of power principle, a formal

102 *See* the more recent studies by Agatha Verdebout, REWRITING HISTORIES OF THE USE OF FORCE: THE NARRATIVE OF 'INDIFFERENCE' (2021); *id*., *The Contemporary Discourse on the Use of Force in the Nineteenth Century: A Diachronic and Critical Analysis*, 1 Journal on the Use of Force and International Law, 223 (2014); Hendrik Simon, *The Myth of liberum ius ad bellum: Justifying War in 19th-Century Legal Theory and Political Practice*, 29 European Journal of International Law, 114 (2018); but *see* only the current editions by ANDREAS VON ARNAULD, VÖLKERRECHT, para. 1044 (5th ed. 2023); STEPHAN HOBE, EINFÜHRUNG IN DAS VÖLKERRECHT, 21, 23, 28 (11th ed. 2020) and Michael Bothe, *Friedenssicherung und Kriegsrecht*, in VÖLKERRECHT, para. 3 (Wolfgang Graf Vitzthum & Alexander Proelß eds. 8th ed. 2019).

103 *See* v. Bernstorff, *supra* note 16, at 46; Verdebout, *supra* note 102, at 223.

104 STEPHEN NEFF, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY, 162 (2005); *see* also Miller, *supra* note 3, at 258–59 and 282: "[…] an international system arose which was forced to regard war as a natural, uncontrollable phenomenon […]. Just war doctrine survived, if at all, as an ethical and not a juridical force"; Josef L. Kunz, *Sanctions in International Law*, 54 American Journal of International Law, 325 (1960); Delbrück & Dicke, *supra* note 1, at 198: "International law during the 18th and 19th centuries was dominated by the notion of *liberum ius ad bellum*."

conception of *ius ad bellum* was undoubtedly on the upswing. However, this did not imply a repudiation of the just war concept, but merely neutralized its discriminating effects on the *ius in bello* and the *ius post bellum*.[105] The two concepts of war co-existed, both constantly shaping doctrine and diplomatic practice alike. Broadly speaking, when pre-modern states went to war, they went to a *just* war. But when they waged war, they waged it in *formal* terms and concluded a *formal* peace.[106] Accordingly, we need to question the prevailing view that confronts us in historical introductions in general international law manuals, which basically assumes that emerging states still relied on justifications when resorting to military force (war and intervention alike), but shifted the question of justification into the realm of morals, i.e. excluded it form legal considerations.

A. The Legal Significance of Early Modern Natural Law

First of all, this narrative denies the existence and legal significance of early modern natural law. In this context, the significance of religion and its particular importance for questions of justice in the realm of war should be highlighted, since its central role in the formation of human conscience only began to recede into the background from, at the earliest, the mid-eighteenth century.[107] One could say that "[a]lthough natural law may not have been enforceable in the courts of man, […] it was enforceable in the court of God."[108] In addition, it was generally accepted that the core of international law, *le droit des gens nécessaire*, defined its place in secularized natural law concepts until well into the nineteenth century.[109]

105 *See* Randall Lesaffer, *Too Much History*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW, 40 (Marc Weller ed. 2015).

106 *Id.*, *Peace Treaties and the Formation of International Law*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW, 88 (Bardo Fassbender & Anne Peters eds. 2012).

107 *Id.*

108 *Id.*, *supra* note 105, at 41.

109 *See* EMER DE VATTEL, LE DROIT DES GENS (1758), Préliminaires, § 8: "Puis donc que le droit des gens nécessaire consiste dans l'application que l'on fait aux états, du droit naturel, lequel est immuable, comme, étant fondé sur la nature des choses, et en particulier sur la nature de l'homme, il s'ensuit que le droit des gens nécessaire est immutable"; *see* also THILO RENSMANN, WERTORDNUNG UND VERFASSUNG: DAS GRUNDGESETZ IM KONTEXT GRENZÜBERSCHREITENDER KONSTITUTIONALISIERUNG, 366 (2007).

These jusnaturalistic ties of the sovereign could not simply be ignored. Natural law conceptions by no means implied an "anything goes morality" or "a distinction between law and morality."[110] To quote the famous Grotian dictum:

> "What we have been saying [about natural law – A/N] would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to him."[111]

To substantiate this finding, one could also refer to Emer de Vattel – the most widely read writer of international law in the eighteenth century – who held that

> "a sovereign has no right to command things contrary to the natural law."[112]

He subordinated positive law under the natural law of nations. In his seminal *Le Droit des Gens ou Principes de la Loi Naturelle* (1758), he advocated a secularized concept of just war, explicitly distinguishing between just and unjust causes *for* war[113] as well as rebuking unjust conduct *in* war,

> "prohibited by the law of nature, which does not allow us to multiply the evils of war beyond all bounds."[114]

B. The Dualism of Just and Legal War

Apart from these implications for natural law, and with regard to the prevailing dualistic method (*ius naturae et gentium*), i.e. "the duality of norms

110 Martti Koskenniemi, *International Law and the Emergence of Mercantile Capitalism: Grotius to Smith*, in THE ROOTS OF INTERNATIONAL LAW, 29 fn. 123 (Pierre-Marie Dupuy ed. 2014); *see* also Fastenrath, *supra* note 23, at 152–54, 293; Alexy, *supra* note 19, at 14, 16.

111 HUGO GROTIUS, DE JURE BELLI AC PACIS, Prologomena, XI, in THE CLASSICS OF INTERNATIONAL LAW, VOL. II, 13 (James Brown Scott ed. 1925).

112 EMER DE VATTEL, LE DROIT DES GENS (1758), Book III, Chap. 2, § 15, in THE CLASSICS OF INTERNATIONAL LAW, VOL. III, 241 (James Brown Scott ed. 1916).

113 *See id*., Book III, Chap. 3, § 24 et seqq., in THE CLASSICS OF INTERNATIONAL LAW, VOL. III, 243 (James Brown Scott ed. 1916).

114 *Id*., Book III, Chap. 8, § 156, in THE CLASSICS OF INTERNATIONAL LAW, VOL. II, 368 (James Brown Scott ed. 1916).

governing the conduct of sovereign States,"[115] and apart from the obvious role just war thinking played in the practice of early modern states,[116] the following needs to be highlighted: The immediate self-interest of states, the principle of reciprocity, the fear of reprisals as well as the role of the public conscience all refute the notion that the question of the justness of a war was excluded from legal considerations and banished into the realm of ethics. On top of this, adapted just war concepts were also frequently applied in a mercantile context.[117]

All in all, the dualism of just and legal war represented the realities of pre-modern state practice – "[t]he discourse on justifying war was caught between the political will to power, natural law and secular concepts of legalization."[118] In this context, special emphasis must be given to so-called "imperfect wars," i.e. a situation in which *acts* of war occurred without creating a *state* of war.[119] The justifications for imperfect war were all rooted in the just war tradition.[120] In early modernity, imperfect wars appeared primarily in the form of general and specific reprisals, as auxiliaries and as precursors of the concept of humanitarian interventions.[121] From the early

115 Emmanuelle Jouannet, *Emer De Vattel (1714–1767)*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW, 1119 (Bardo Fassbender & Anne Peters eds. 2012); *see* also Stephen Neff, A Short History of International Law, in INTERNATIONAL LAW, 10 (Malcolm D. Evans ed., 5th ed. 2018); THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS, 175–76 (2003).

116 *See Lesaffer*, *supra* note 105, at 43; Pärtel Piirimäe, *Just War in Theory and Practice: The Legitimation of Swedish Intervention in the Thirty Years War*, 45 Historical Journal, 499 (2002); *see* also ANUSCHKA TISCHER, OFFIZIELLE KRIEGSBEGRÜNDUNGEN IN DER FRÜHEN NEUZEIT, 20, 48, 74–75, 220 (2012).

117 *See* Koskenniemi, *supra* note 110, at 17–18; *id*., *Empire and International Law: The Real Spanish Contribution*, 61 University of Toronto Law Journal, 28, 32 (2011); *id*., *The Political Theology of Trade Law: The Scholastic Contribution*, in FROM BILATERALISM TO COMMUNITY INTEREST, 90–93 (*id*., Rudolf Geiger, Daniel-Erasmus Khan, Sabine von Schorlemer, Andreas Paulus & Christoph Vedder eds. 2011).

118 Simon, *supra* note 102, at 114.

119 *See* Neff, *supra* note 104, at 120.

120 *See id*., at 164, 215; Lesaffer, *supra* note 105, at 43–47; Grewe, *supra* note 3, at 525; Claud H. Waldock, *The Regulation of the Use Force by Individual States in International Law*, 81 The Hague Academy of International Law, 467, 471 (1952); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES, 45 (1963).

121 *See* Lesaffer, *supra* note 105, at 44; Oliver Diggelmann, *Die Entstehung des modernen Völkerrechts in der frühen Neuzeit*, in VÖLKERRECHTSPHILOSOPHIE DER FRÜHAUFKLÄRUNG, 13 (*id*., Tilmann Altwicker & Francis Cheneval eds. 2015); Neff, *supra* note 104, at 121; Grewe, *supra* note 3, at 201, 368.

modern distinction between "perfect" and "imperfect" wars, the concept of measures short of war emerged in the nineteenth century. These limited and targeted military actions on the territory of another state mainly comprised reprisals, armed interventions based on contractual title, humanitarian interventions and the defense of nationals.

C. The Right of Intervention

Moreover, it needs to be pointed out that in the nineteenth century a unanimously accepted theory of the law of intervention did not exist. Rather, one is confronted with a pluralism of principles (*Prinzipienpluralismus*).[122] Sovereign equality, independence, the principle of non-intervention, reciprocity, humanity, balance of power, political stability, self-preservation, auto-protection, intervention based on particular contractual rights, self-help, redress of torts, intervention for the sake of financial interests, and so forth, all functioned partly in cooperation, in other cases in competition with the right to intervene. There was no higher political or judicial rule, no "meta-norm" to regulate this pluralism.[123] Thus, the basic question concerning the right of intervention was "not whether exceptions existed but which exceptions did."[124]

122 *See* Vec, *Intervention/Nichtintervention: Verrechtlichung der Politik und Politisierung des Völkerrechts im 19. Jahrhundert*, in MACHT UND RECHT: VÖLKERRECHT IN DEN INTERNATIONALEN BEZIEHUNGEN, 136, 152, 157 (Ulrich Lappenküper & Reiner Marcowitz eds. 2010); Kunz, *supra* note 13, at 224–25.

123 *See* Vec, *supra* note 122, at 152, 156; *id.*, *supra* note 76, at 139; *see* also Jochen von Bernstorff, *The Use of Force in International Law before World War I: On Imperial Ordering and the Ontology of the Nation-State*, 29 European Journal of International Law, 235, 241, 248, 253, 255 (2018); ALFRED VERDROSS & BRUNO SIMMA, UNIVERSELLES VÖLKERRECHT: THEORIE UND PRAXIS, § 80 (3rd ed. 2012); Grewe, *supra* note 3, at 493–94.

124 Miloš Vec, *From the Congress of Vienna to the Paris Peace Treaties of 1919*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW, 661 (Bardo Fassbender & Anne Peters eds. 2012).

D. The Narrative of liberum ius ad bellum

In view of the outlined difficulty of limiting the recognized reasons for war ("standards" instead of "legal rules"),[125] along with a constant process of professionalization of the armed forces, and against the background of the conflicting and inconsistent elements of the *bellum iustum* doctrine (*quis iudicabit*?),[126] a more permissive ("deformalized") *ius ad bellum* regime undoubtedly became increasingly dominant.[127] Admittedly, at first glance it does not seem too far-fetched to conclude that "the step from basically allowing any justification related to important interests of a state, to saying that international law grants an unlimited sovereign right to wage war, is only a small one."[128] Yet on closer examination, this position seems rather debatable since the acknowledgement of an unlimited right of sovereign states to resort to war would ultimately postulate violence as a normative regime. In their treatise, *Précis du Droit des Gens*, first published in 1877, Théophile Funck-Brentano and Albert Sorel essentially made the same point when they stated:

> "Dire qu'elle est un droit pour les États équivaut à dire qu'il n'y a entre les Etats d'autre droit que la force."[129]

To advocate that, before 1914, states could *freely* resort to armed force ultimately amounts to the presumption that there was no international law before World War I. Consequently, following Hans Kelsen, Paul Guggenheim correctly concluded in 1954:

> "Selon une opinion très répandue, les Etats seraient autorisés à recourir à la guerre pour quelque motif que ce soit et même sans motif; leur

125 *See* Corten, *supra* note 28, at 261.

126 *See* e.g. Kunz, *supra* note 2, at 531; Kelsen, *supra* note 3, at 336–38; Simon, *supra* note 102, at 114; Diggelmann, *supra* note 110, at 12.

127 *See* Lesaffer, *supra* note 105, at 45; Simon, *supra* note 102, at 130; Verdebout, *supra* note 102, at 233; Corten, *supra* note 28, at 253, 261; v. Bernstorff, *supra* note 123, at 236 Fn 13.

128 *Id.* at 244.

129 THÉOPHILE FUNCK-BRENTANO & ALBERT SOREL, PRÉCIS DU DROIT DES GENS, 232 (3rd ed. 1900); *see* also KRISTINA LOVRIĆ-PERNAK, MORALE INTERNATIONALE UND HUMANITÉ IM VÖLKERRECHT DES SPÄTEN 19. JAHRHUNDERTS: BEDEUTUNG UND FUNKTION IN STAATENPRAXIS UND WISSENSCHAFT, 126 (2013); Verdebout, *supra* note 102, at 231; Dinstein, *supra* note 6, at 80.

> pouvoir d'appréciation ne serait limité par rien. Cette théorie (dite de l'indifférence) est inconciliable avec la conception du droit international en tant qu'ordre juridique. […] Le système entier du droit international s'écroulerait."[130]

Or to put this in simpler terms: The observation that the use of force was *de facto* "tolerated" or "accepted" does not necessitate the conclusion that it was *de jure* as well.[131] For, if one assumes *liberté à la guerre*, i.e. an unlimited *ius ad bellum* regime, it renders the following meaningless:[132] the obligation to recognize existing national borders (*uti possidetis*); the respect for existing contracts and their compliance (*pacta sunt servanda*), namely peace treaties; the right to neutrality;[133] the differentiation of the forms of war and their historical evolution;[134] the goal of maintaining peace as far as possible as a normative category;[135] the concept of a right to self-defense;[136] the understanding of measures short of war as exceptional rights;[137] and not least, the distinction between a state of war and a state of peace.[138] Irrespective of whether an objective or a subjective concept

130 PAUL GUGGENHEIM, TRAITÉ DE DROIT INTERNATIONAL PUBLIC, VOL II, 94 (1954); *see* also Kelsen, *supra* note 3, at 332 et seqq.

131 *See* Verdebout, *supra* note 102, at 224 Fn. 5.

132 *See* also Corten, *supra* note 28, at 261; Guggenheim, *supra* note 130, at 94; Krisch, *supra* note 79, at 385: "[…] maintaining international relations with another state implied at least some respect for its independence and autonomy in decision-making."

133 *See* v. Bernstorff, *supra* note 123, at 239, 242; Grewe, *supra* note 3, at 371, 373, 388, 535–36, 538, 540.

134 *See* Neff, *supra* note 104, at 102, 119.

135 *See* Lovrić-Pernak, *supra* note 129, at 84, 126, 137–39, 148, 151; Miloš Vec, *Verrechtlichung internationaler Streitbeilegung im 19. und 20. Jahrhundert?: Beobachtungen und Fragen zu den Strukturen völkerrechtlicher Konfliktaustragung*, in LES CONFLITS ENTRE PEUPLE: DE LA RÉSOLUTION LIBRE À LA RÉSOLUTION IMPOSÉE, 18 (*id.* & Serge Dauchy 2011); *see* exemplarily WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW, 342 (2nd ed. 1884).

136 *See* ROBERT KOLB, RÉFLEXIONS DE PHILOSOPHIE DU DROIT INTERNATIONAL: PROBLÈMES FONDAMENTAUX DU DROIT INTERNATIONAL PUBLIC: THÉORIE ET PHILOSOPHIE DU DROIT INTERNATIONAL, 31 (2003).

137 *See* Corten, *supra* note 28, at 261; v. Bernstorff, *supra* note 123, at 241.

138 *See* e.g. Verdebout, *supra* note 102, at 227: "[…] in the nineteenth century, war and more limited uses of armed force relied upon distinct legal regimes: war depended on the laws of war; and armed intervention, or 'measures short of war', depended on the laws regarding the state of peace."

of war was advocated (*animus belli gerendi*),[139] existing state borders, the Westphalian idea of complete and mutual sovereign equality ("*sit aequalitas exacta mutuaque*"[140]) between the "*nations et des souverains*,"[141] the principle of non-intervention (*affaires domestiques / par in parem non habet imperium*), and concluded peace treaties – all these institutions demanded a *legal* justification for war.

Hence, it is not surprising that a closer examination of doctrine as well as state practice of the nineteenth century does not seem to match with the theory of indifference,[142] i.e. a constant de-legalization ("Ent-Rechtlichung"[143]) of the *ius ad bellum* regime and a general de-moralization of the justifications for war ("Entmoralisierung der Kriegslegitimation"[144]).

Against this background, it becomes obvious that "[t]he problem at the time was therefore not the absence of legal limits on the right to resort to war, but the lack of any *control* over states' exercise of their option of subjectively interpreting the situation and therefore of deciding to resort to war."[145]

Remarkably enough, the reception of the indifference narrative in the variant of *liberum ius ad bellum* (war as an *extra-legal* phenomenon)[146] first emancipated itself only in the interwar period, and not in an uncontested

139 *See* e.g. Brownlie, *supra* note 120, at 38; Arnold McNair, *The Legal Meaning of War, and the Relations of War to Reprisals*, 11 Transactions of the Grotius Society, 29, 45 (1926).

140 Article 5, 1 *Instrumentum Pacis Osnabrugensis* (IPO); § 47 *Instrumentum Pacis Monasteriensis* (IPM), 1648.

141 EMER DE VATTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE AUX AFFAIRES DES NATIONS ET DES SOUVERAINS (1758).

142 *See* Simon, *supra* note 102, at 115, 119, 124, 128–29, 131, 133–34; Verdebout, *supra* note 102, at 224, 228–29, 232, 238; Lesaffer, *supra* note 105, at 36.

143 ANDREAS VON ARNAULD, VÖLKERRECHT, para. 1026 (3rd ed. 2016); *see* also Miller, *supra* note 3, at 258–59; Neff, *supra* note 104, at 162.

144 Lovrić-Pernak, *supra* note 129, at 130.

145 EMMANUELLE JOUANNET, THE LIBERAL-WELFARIST LAW OF NATIONS: A HISTORY OF INTERNATIONAL LAW, 130 (2012).

146 *See* e.g. Arnold D. McNair, *Collective Security*, 17 The British Yearbook of International Law, 152 (1936): "War itself was no illegality. […] It was extra-legal rather than illegal."

univocal manner. Prior to Alfred Verdross,[147] Arthur Nussbaum,[148] Hans Kelsen[149] and Paul Guggenheim,[150] Leo Strisower clarified in 1919:

> "The frequency of the opinion that war is never legally forbidden, must not, as there is sometimes a tendency for it, be exaggerated to the extent that this is the *prevailing* doctrine of our time: That is not the case."[151]

To avoid any misunderstanding: This is not to say that the theory of indifference was somehow "invented out of thin air" by interwar scholarship, portraying it "as a retrospective post-World War I construct by international legal scholars."[152] The historical evolution of *ius ad bellum* towards an arguably more permissive ("deformalized") regime of war and intervention through "ontological justifications for waging war,"[153] especially in the three decades before 1914, was undoubtedly the trend of development that contemporaries observed and which came to be known as the so-called "theory of indifference."[154] Moreover, the "indifference toward mechanized killing on a mass scale" in World War I certainly entailed "[t]he loss of reputation which international law experienced during the interwar years". Still, one cannot deny that "an intensive discourse about the lawfulness of wars and their limits already existed within the discipline of international law in the late 19th and early 20th centuries."[155] Tellingly, the terminology of the "freedom to wage war," "compétence de guerre," and "freies Kriegsführungsrecht" only became customary *after* 1919.[156]

Furthermore, it is noteworthy that the classic specialized literature on the subject, even after the Second World War, still had elaborated a more nuanced view on the complex theme of *ius ad bellum* in the *pre*-Versailles

147 Alfred Verdross, *Règles générales du droit international de la paix*, 30 The Hague Academy Collected Courses, 469 (1929).
148 Arthur Nussbaum, *Just War: A Legal Concept?*, 43 Michigan Law Review, 474 (1943).
149 Hans Kelsen, *Théorie du droit international public*, 84 Collected Courses of the Hague Academy of International Law, 42–46, 70–72 (1953).
150 Guggenheim, *supra* note 130, at 94.
151 LEO STRISOWER, KRIEG UND DIE VÖLKERRECHTSORDNUNG, 20 (1919) [transl. by the author].
152 v. Bernstorff, *supra* note 123, at 235.
153 *See id*. at 236–42.
154 *See id*. at 236 Fn. 13; Kunz, *supra* note 13, at 228–29.
155 Oliver Diggelmann, *Beyond the Myth of a Non-Relationship: International Law and World War I*, 19 Journal of the History of International Law, 98, 111 (2017); *see* also Simon, *supra* note 102, at 135; v. Bernstorff, *supra* note 16, at 46.
156 *See* Simon, *supra* note 102, at 115.

era.[157] All the same, the *liberté à la guerre* narrative became the dominant view. Strikingly, Wilhelm Grewe's monograph (first published in 1984), includes the following passage:

> "In recently revived debates over the idea and conception of the just war, a perception of Grotius is increasingly evident which is different from that which prevailed during the period between the two world wars. In contrast to the interpretations of that period, it looks at him as a thinker who paved the way to the classic laws of war, as they were effective until the beginning of the twentieth century."[158]

E. The Legitimizing Function of Progress Narratives

What reasons can be found to explain this narrative shift and its persistence against the backdrop of the obvious discrepancy between the "modern" debate on the nineteenth century *ius ad bellum* regime and the "legal reality" as it stems from the sources in doctrine as well as state practice?[159] Apart from "didactically simplified (or 'mythologised') account[s] of [international law's] history,"[160] the continuity of the indifference narrative can be located in the legitimizing function of progress narratives in international law and their underlying rhetorical structure, since such narratives usually rely on a devaluation of the previous period. Such a narrative reconstruction implicitly legitimizes the new regime.[161] The indifference narrative is part of one of the master narratives of international law, namely the idea of the "triumph of law over politics; of order over anarchy."[162] In fact, when it comes to the evolution of the prohibition of the use of force in international law, doctrine usually relies on a narrative of progress, which is organized

157 *See* e.g. Brownlie, *supra* note 120, at 38–44 and Verdross & Simma, *supra* note 123, at § 80–88.

158 Grewe, *supra* note 3, at 218.

159 *See* Verdebout, *supra* note 102, at 225; *see* also for "Grotius as Narrative" John D. Haskell, *Hugo Grotius in the Contemporary Memory of International Law: Secularism, Liberalism, and the Politics of Restatement and Denial*, in NEW APPROACHES TO INTERNATIONAL LAW: THE EUROPEAN AND THE AMERICAN EXPERIENCES, 124 (José María Beneyto & Kennedy, David eds. 2012).

160 Verdebout, *supra* note 102, at 244; *see* also v. Bernstorff, *supra* note 16, at 48; *id.*, *supra* note 123, at 235 Fn. 10; Simon, *supra* note 102, at 115, 125.

161 *See* Verdebout, *supra* note 102, at 238.

162 *Id.*

within a sequential approach: from *bellum iustum* to an era of *liberum ius ad bellum*, and finally arriving at a "modern" institutionalized *ius contra bellum*.[163]

F. Realist Narratives of International Law

In sum, "classical" international law is generally portrayed in overly *realistic* terms, whereby the twentieth century architecture of collective security is depicted in overly *idealistic* ones.[164] Or to put it a bit more bluntly: For the purpose of telling a progress story, i.e. from *political* balance of power to a *legal* system of collective security, and thus embracing the narrative of war as a "sovereign's prerogative" as well as taking the "law was powerless" position, left-wing scholars made strange bedfellows with right-wing realists.[165]

Having said that, the indifference narrative, read in line with a departure from Grotius's *belllum iustum* tradition and its demise in the eighteenth and nineteenth century, principally assuming that in the latter, "the golden age of positivism," the *ius ad bellum* was not really framed in a legal sense, and hence implying that when resorting to force, states invoked moral and political arguments without ever referring to international law, seems rather problematic as it ultimately corresponds with an ultra-realist school of thought.[166] Against this background, "the irritating legal and normative

163 *See* e.g. MALCOLM N. SHAW, INTERNATIONAL LAW, 851 (8th ed. 2017): "Law and Force from the 'Just War' to the United Nations"; ANTHONY C. AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM, 24 (1993); MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW, 322 (8th 2017); *see* also Verdebout, *supra* note 102, at 242; v. Bernstorff, *supra* note 16, at 39–40; Antje von Ungern-Sternberg, *Religion and Religious Intervention*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW, 303 (Bardo Fassbender & Anne Peters eds. 2012); DAVID KENNEDY, OF WAR AND LAW, 47 (2006).

164 *See* David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 65 Nordic Journal of International Law, 390 (1996); Simon, *supra* note 102, at 136; Verdebout, *supra* note 102, at 239; Lovrić-Pernak, supra note 129, at 136; Corten, *supra* note 28, at 261.

165 In reference to Koh, *supra* note 72, at 2629; *see* also Lothar Brock & Hendrik Simon, *Die deutsche Sprache des Rechts. Ein völkerrechtspolitischer Sonderweg?*, in FRIEDEN DURCH RECHT – RECHTSTRADITIONEN UND VERORTUNGEN, 44 (Sarah Jäger & Wolfgang Heinz eds 2020).

166 *See* Koskenniemi, supra note 75, at 162–63; v. Bernstorff, *supra* note 16, at 43, 45; Simon, *supra* note 102, at 136.

pluralism which can be found in international relations in all epochs"[167] and which affected first and foremost the *ius ad bellum* regime, should be highlighted.[168] Apart from the outlined *Prinzipienpluralismus* concerning the right to intervene (measures short of war; policing measures), this normative pluralism also reveals itself with regard to the invoked justifications for war, as they comprised "a sort of blend"[169] between moral, political and legal notions. As regards these "diverse narratives ranging from common European values and norms, positive law, unilateral rights and interests, Christian faith and natural law and national honour to international peace and security,"[170] no categorical differentiations could be discerned.

167 Vec, *supra* note 124, at 677; *see* also Fastenrath, *supra* note 23, at 34–35, 286.

168 *See* Simon, *supra* note 102, at 114: "Throughout the centuries, military force has been justified and criticized with reference to narratives framed from multiple normative spheres: politics, morality and law"; *id*., at 133: "[…] arguments originating from different spheres of justice (politics, morality, law)"; Corten, *supra* note 28, at 256: "When s State resorts to force, it will use several ranges of arguments, political […], moral […] but also legal, even in a defensive way […]."

169 *Id*., at 261.

170 Simon, *supra* note 102, at 133; *see* also v. Bernstorff, *supra* note 123, at 235–36, 241; *id*., *supra* note 16, at 46.

III. The Narrative of *bellum legale*

Joachim von Elbe concluded in 1939 that "the Versailles Treaty became the starting-point for a movement once more to distinguish between just and unjust wars."[171] Alongside Elbe, a very diverse group of authors (Strisower, Scott, Le Fur, Kelsen, Schmitt, Verdross, Wright, Lauterpacht, Guggenheim, Grewe) shared the opinion that the Covenant of the League of Nations epitomized a return to the concept of *bellum iustum* in international law.[172] The divergences between Hans Kelsen and Josef L. Kunz are exemplary for the basic controversy in this regard. Kunz criticized his former teacher for misjudging the decisive founding axiom of a *bellum legale*. According to Kunz, within the framework of the newly created collective security system, there was no room left for the concept of a just war.[173]

However, as already indicated in the introduction, the question of a normative judgment on the resort to war correlates primarily with one's preconception of legal theory. Depending on the respective horizon of understanding (*Verständnishorizont*),[174] different authors apply and adopt

171 Joachim von Elbe, *The Evolution of the Concept of Just War in International Law*, 33 American Journal of International Law, 687 (1939).

172 *See* CARL SCHMITT, DIE WENDUNG ZUM DISKRIMINIERENDEN KRIEGSBEGRIFF, 2, 38 (1938); *id.*, DER NOMOS DER ERDE IM VÖLKERRECHT DES JUS PUBLICUM EUROPAEUM, 232 (2nd ed. 1960); Kelsen, *supra* note 3, at 333–34; Hersch Lauterpacht, *The Grotian Tradition in International*, 23 The British Yearbook of International Law, 41 (1946); *see* also the further references at v. Elbe, *supra* note 171, at 687 fn. 169 and BERNHARD ROSCHER, DER BRIAND-KELLOGG-PAKT VON 1928, 22–29 (2004); *see* also Hans Wehberg, Krieg und Eroberung im Wandel des Völkerrechts, 19 et seqq. (1953); Neff, *supra* note 104, at 279; Delbrück & Dicke, *supra* note 1, at 201; Grewe, *supra* note 3, at 424; Lesaffer, *supra* note 105, at 50; *id.*, *supra* note 106, at 91; *id.*, *Conclusion*, in PEACE TREATIES AND INTERNATIONAL LAW IN EUROPEAN HISTORY: FROM THE LATE MIDDLE AGES TO WORLD WAR ONE, 410 (*id.* ed. 2004); Miller, *supra* note 3, at 261, 282.

173 *See* Kunz, *supra* note 2, at 529, 532; *id.*, *Kriegsbegriff*, in WÖRTERBUCH DES VÖLKERRECHTS, VOL. 2, 330 (Karl Strupp & Hans-Jürgen Schlochauer eds., 2nd ed 1961).

174 *See* Fastenrath, *supra* note 19, at 65: "[…] textual understanding depends on previous knowledge, fore-understanding, and the 'horizon' (*Verständnishorizont*) of the recipient. […] Legal methodology has little influence on the fore-understanding with which the recipients approach legal texts, ie the anticipation of the meanings with which they read texts and by which their understanding is fore-structured. The

different just war concepts. With this in mind, it would be misguided to postulate a "right" or a "wrong" use of language. It can be emphasized that today, a direct recourse to criteria of justice no longer seems appropriate (*Value Relativism / Werterelativismus*).[175] But this critique does not preclude the possibility of an adapted just war concept in international law, i.e. the compatibility of *bellum legale* and *bellum iustum*.

To be sure, the *bellum iustum - bellum legale* controversy continued as the UN Charter came into being. But eventually, what has been said about the Covenant of the League of Nations also applies to the Charter system. The *bellum iustum* concept was not "purged" from international law by the narrative of excluding "just" reasons for war from the collective security system, nor could it be eradicated. Rather, the variations of adapted just war conceptions became even more diverse. Some authors drew on a so-called Grotian tradition,[176] some on a Schmittian discriminatory concept of war,[177] others on a specific American doctrine.[178] Some make reference to an adapted concept of just peace, which is being perceived as a "significant

---

fore-understanding is strongly influenced by different theoretical legal concepts, legal traditions, and not least by the legal education in individual countries."

175 *See generally* ARNOLD BRECHT, POLITICAL THEORY: THE FOUNDATIONS OF TWENTIETH-CENTURY POLITICAL THOUGHT, 207, 231 et seqq. (1967); *see* also Fastenrath, *supra* note 29, at 330: "In the words of P. Reuter, there will always be '*plusieurs équités*'. […] As certainty of cognition has disappeared and pluralism is now reigning, one is forced, in recognizing the validity of other perceptions of social life, to admit the limited extent of one's own-perceptions. M. Koskenniemi designates these perceptions as visions of Utopia which according to D. Kennedy, convince only those who already believe"; *id.*, *supra* note 23, at 36–37, 75–76, 231, 287; Martti Koskenniemi, *The Police in the Temple: Order, Justice and the UN: A Dialectical View*, 6 European Journal of International Law, 343 (1995); NIKLAS LUHMANN, AUSDIFFERENZIERUNG DES RECHTS, 374 et. seqq. (1981); *id.*, DAS RECHT DER GESELLSCHAFT, 223 (1993); HANS WELZEL, AN DEN GRENZEN DES RECHTS: DIE FRAGE NACH DER RECHTSGELTUNG, 24–25 (1966); Staake, supra note 22, at 232 et seqq., 241, 247.

176 *See* Lauterpacht, *supra* note 172, at 41; *see* also Grewe, *supra* note 3, at 192.

177 *See* e.g. Schmitt, *supra* note 172; Grewe, *supra* note 3, at 416, 422, 424; *see* on Schmitt also MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960, 425–26 (5th ed. 2008); Smeltzer, *supra* note 8, at 360.

178 *See* e.g. Tucker, *supra* note 4, at 11; Miller, *supra* note 3, at 264; *see* also KNUD KRAKAU, MISSIONSBEWUSSTSEIN UND VÖLKERRECHTSDOKTRIN IN DEN VEREINIGTEN STAATEN VON AMERIKA, 337–42 (1967).

paradigm in international law."[179] Authors have adopted formal concepts of just war, i.e. a new form of procedural justice,[180] as well as material concepts, i.e. postulating that Article 2 (4) UNC implies the *positive* use of force in a manner *consistent* with the Purposes of the UN Charter.[181] Some take their cue from the idea of war as law enforcement,[182] some from the inherent right of self-defense,[183] others from a "combination of moral and legal arguments on which the early concepts of modern *ius contra bellum* were founded"[184] and point to the enforcement measures taken by the UN Security Council. For them, "[p]olice actions by the Security Council would be just wars of the purest kind, for the countering of aggression and the upholding of community values."[185] Others stress that "[t]oday's *jus ad bellum*, especially the peremptory norm against aggression, is not only the law; it also forms the minimum threshold of a just war under just war

179 Markus Kotzur, *Frieden und soziale Gerechtigkeit – droht ein Paradigmenwechsel im Völkerrecht?*, 1 Berliner Online-Beiträge zum Völker- und Verfassungsrecht, 5 (Heike Krieger ed. 2007) [transl. by the author].

180 *See* Corten, *supra* note 28, at 266; *see* also Eugene V. Rostow, *Competent Authority Revisited*, in CLOSE CALLS: INTERVENTION, TERRORISM, MISSILE DEFENSE, AND 'JUST WAR' TODAY, 44 (Elliott Abrams ed. 1998); Roda Mushkat, *How useful is the concept of the just war in international law?*, Revue de Droit International de Sciences Diplomatiques et Politiques, 163 (1988).

181 *See* UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, VOL. VI, 346; Patrick M. Butchard, *Back to San Francisco: Explaining the Inherent Contradictions of Article 2(4) of the UN Charter*, 23 Journal of Conflict & Security Law, 243, 249 (2018).

182 *See* Neff, *supra* note 104, at 57; Strisower, *supra* note 151, at 20, 42, 128; HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW, 40 (1952); *id.*, *Unrecht und Unrechtsfolge im Völkerrecht*, 12 Zeitschrift für öffentliches Recht, 484, 561 (1932); PAUL GUGGENHEIM, TRAITÉ DE DROIT INTERNATIONAL PUBLIC, VOL I, 590 (1953).

183 *See* Neff, *supra* note 104, at 326; Lesaffer, *supra* note 105, at 50; *id.*, *supra* note 106, at 91; *id.*, *supra* note 178, at 410.

184 Simon, *supra* note 102, at 128; *see* also Miller, *supra* note 3, at 282; JESSICA JENSEN, KRIEG UM DES FRIEDENS WILLEN: ZUR LEHRE VOM GERECHTEN KRIEG, 268 et seqq. (2015).

185 Neff, *supra* note 104, at 281; *see* also Ivan Shearer, *A Revival of the Just War Theory?*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES. ESSAYS IN HONOUR OF YORAM DINSTEIN, 7, 13 (Schmitt & Jelena Pejic eds. 2007); *Jensen*, supra note 184, at 280.

theory."[186] Some rely on a natural law reading,[187] especially in the context of humanitarian interventions,[188] others prefer a strict positivist adoption of the *bellum iustum* concept.[189]

So, what can be inferred from all these adaptations is this: A reasoned repudiation of a respective use of language based on the narrative that considerations of justice have been expelled from the modern collective security system is not to be equated with a "general overcoming"[190] of the legal notion of a just war. On the contrary, the normative theme of *bellum iustum* is still very much alive in international law. Moreover, it seems misleading to reduce this long-standing controversy to different legal

186 O'Connell, *supra* note 12, at 33; *see* also Tucker, *supra* note 4, at 11: "[…] a legal expressions of the moral law."

187 *See* e.g O'Connell, *supra* note 12, at 33; *id.* & Caleb M. Day, *Sources in Natural Law Theories: Natural Law as Source of Extra-Positive Norms*, in THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW, 572–73 (Samantha Besson & Jean D'Aspremont eds. 2017); *id.*, *Self-Defence, Pernicious Doctrines, Peremptory Norms*, in SELF-DEFENCE AGAINST NON-STATE ACTORS, 236 (id., Christian J. Tams & Dire Tladi eds., 2019); Benedetto Conforti, *The Doctrine of "Just War" and Contemporary International Law*, in TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY, 712 (Ronald MacDonald & Douglas M. Johnston eds. 2005): "My only purpose is […] to affirm that the problem of the right to make war cannot be solved unless we resort to natural law"; Nigel Biggar, *Just War and International Law: A Response to Mary Ellen O'Connell*, 35 Journal of the Society of Christian Ethics, 53 (2015): "However, whereas I use this to argue that sometimes natural law trumps positive law, O'Connell argues that positive law incorporates natural law completely and that no gap remains between them."

188 *See* e.g. Fernando R. Tesón, *The Liberal Case for Humanitarian Intervention,* in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS, 93 (Jeff L. Holzgrefe & Robert O. Keohane eds. 2003); Gregory Reichberg, & Henrik Syse, *Humanitarian Intervention: A Case of Offensive Force?*, 33 Security Dialogue, 313 (2002); Francesco Francioni, *Balancing the Prohibition of Force with the Need of Protect Human Rights: A Methodological Approach*, in CUSTOMARY INTERNATIONAL LAW ON THE USE OF FORCE: A METHODOLOGICAL APPROACH, 269 (Enzo Cannizzaro ed. 2005); Anne Peters & Simone Peter, *Lehren vom „gerechten Krieg" aus völkerrechtlicher Sicht*, in DER GERECHTE KRIEG: ZUR GESCHICHTE EINER AKTUELLEN DENKFIGUR, 86 (Georg Kreis ed. 2006).

189 *See* Kelsen, *supra* note 3, at 331–34; *see* also Wright, *supra* note 10, at 367; Guggenheim, *supra* note 182, at 590–93; LOTHAR KOTZSCH, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW, 291 (1956); Demetrios S. Constantopoulos, *Bellum justum et bellum legale*, 1 Internationales Recht und Diplomatie, 236 (1956).

190 *See* exemplarily Delbrück & Dicke, *supra* note 1, at 205–06.

cultures (*Civil* and *Common Law*)[191] or to a "tension between formalism and anti-formalism,"[192] which causes some authors to detect a "methodological schism"[193] in the legal sphere. It will not do to simplify the debate by "contrasting European and American approaches or conservative and progressive scholarly stances."[194] There is no uniform or consistent European or American approach regarding the *bellum iustum - bellum legale* controversy. On top of this, the *bellum iustum* concept manifests itself in both "formalist" and "anti-formalist" approaches, and either type can be used to justify or oppose the use of force in a specific political context.[195]

To buttress this view, the following aspects can be highlighted: (1) Apart from Paul Guggenheim[196] and Hans Kelsen, "the bitter antagonist of natural law," who advocated a pure theory of law and who according to Josef L. Kunz became "the principal champion of the doctrine of *bellum justum*,"[197] it will suffice to point to the various European authors who take recourse to an adopted just war concept in international law.[198]

(2) As previously implied, when it comes to the justifications for the use of force in international law, it stands to reason to consider doctrinal changes and methodological trends as context-dependent scholarly strategies in order to strengthen or to contest the authority of respective legal claims.[199] To argue on the basis of particular theoretical schools and in favor of a certain narrative is a matter of choice.

---

191 *See* e.g. Grewe, *supra* note 3, at 677; Corten, *supra* note 27, at 803–22; *id.*, LE DROIT CONTRE LA GUERRE: L'INTERDICTION DU RECOURS À LA FORCE EN DROIT INTERNATIONAL CONTEMPORAIN, 9 (2014); *see* also Scheuner, *supra* note 22, at 585–86; Holger P. Hestermeyer, *Die völkerrechtliche Beurteilung des Irakkrieges im Lichte transatlantischer Rechtskulturunterschiede*, 64 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 316–18 (2004).

192 Corten, *supra* note 28, at 269.

193 *See* e.g. Bianchi, *supra* note 27, at 651–53, 658, 671 (2009); Corten, *supra* note 27, at 803, 822; Rensmann, *supra* note 109, at 361.

194 Bianchi, *supra* note 27, at 652–53.

195 *See* also Corten, *supra* note 27, at 822; *id.*, *supra* note 28, at 266; v. Bernstorff, *supra* note 123, at 236.

196 *See* Guggenheim, *supra* note 182, at 590–93.

197 Kunz, *supra* note 2, at 529.

198 *See* e.g. Grewe, *supra* note 3, at 416, 422, 424; Peters & Peter, *supra* note 188, at 93; Corten, *supra* note 28, at 266–67; Lesaffer, *supra* note 105, at 54.

199 *See* v. Bernstorff, *supra* note 123, at 260; Paulina Starski, *The Silent State and Normative Dynamics of the Prohibition on the Use of Force – Legislative Responsibility in Situations of Enhanced Normative Volatility*, 4 Journal on the Use of Force and International Law, 33, 35, 59 (2017): "[…] legality claims."

To add complexity, this choice cannot be made *in abstracto*. It will always depend on the concrete situation at hand, the respective horizon of understanding (idiosyncratic legal cultures, representations and faiths, philosophical traditions), prevailing power constellations, as well as the interests of the states concerned.[200] What is more, the spirit of the times (*Zeitgeist* und *Zeitumstände*) co-determines the concept of law. "Within culture the worldview alters and alongside the spirit of the age the law changes."[201]

To give an example: Such doctrinal shifts between (restrictive) "static formalism" and a more "dynamic approach" could be observed when the Federal Republic of Germany became a non-permanent member of the Security Council in 1977[202] as well as in the post-9/11 legal debate about a right of self-defense against non-state actors.[203]

(3) To postulate that a "typical" extensive American "anti-formalist" approach basically implies that moral and other "*non-legal* considerations" will be taken into account, i.e. "values or objectives that supposedly lie behind the rules, or even in referring to natural law notions such as that of the 'just war,'"[204] ignores the fact that law is value-related. Ultimately, legal norms are nothing else than values congealed into bindingness ("*zu Verbindlichkeit geronnene Werte*"[205]). They are "the result of a political contradiction," i.e. the result of different value conceptions (*Wertvorstellungen*) and they "express this contradiction without resolving it."[206] Not surprisingly, this contradiction

200 v. Bernstorff, *supra* note 123, at 237; Corten, *supra* note 28, at 264, 266; Thilo Rensmann & Matthias Herdegen, *Is There a Specific German Approach to the Prohibition of the Use of Force?*, 50 GERMAN YEARBOOK OF INTERNATIONAL LAW, 373 (2007).

201 REINHOLD ZIPPELIUS, DAS WESEN DES RECHTS: EINE EINFÜHRUNG IN DIE RECHTSTHEORIE, 52 (6th ed.2012) [transl. by the author].

202 *See* Rensmann & Herdegen, *supra* note 200, at 363.

203 *See* e.g. Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 American Journal of International Law, 839 (2002); Christopher J. Greenwood, *International law and the "War against Terrorism"*, 78 International Affairs, 301 (2002); Claus Kreß, *Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force*, 1 Journal on the Use of Force and International Law, 11 (2014); Federica Paddeu, *Use of Force against Non-State Actors and the Circumstance PrecludingWrongfulness of Self-Defence*, 30 Leiden Journal of International Law , 93 (2017).

204 Corten, *supra* note 27, at 809.

205 Staake, *supra* note 22, at 276; *see* also Jouannet, *supra* note 81, at 387: "All law transcribes the values of those that create it; it is not a substance-less form, but the translation of the values of the society it regulates."

206 Corten, *supra* note 28, at 254; *see* also Staake, *supra* note 22, at 276; Brock & Simon, *supra* note 165, at 35–36; W. MICHAEL REISMAN, THE QUEST FOR WORLD

also finds consecutive expression on the level of norm interpretation, most notably with regard to Article 2 (4) and 51 of the UN Charter.[207]

Thus, the positivist narrative, which denies the values that lie behind legal norms and insists on the necessity of differentiating law from politics and morality, is flawed from the outset.[208] Or to put it differently: "There is no avoiding the essential relationship between law and politics,"[209] i.e. "the political dimension of law,"[210] for even such a denial of inherent political and social factors "is not without political and social consequence."[211] It only results in goals and preferences being introduced indirectly and covertly, while "laying claim to a spurious purity"[212] of "the majesty of positive law."[213]

However, to refer in this context solely to open-texturedness – since the meaning of a legal proposition is not limited to its semantic content and thus ethical, political and social aspects can be included in the inter-

---

ORDER AND HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY, 97 (2013).

207 *See* e.g. Corten, *supra* note 28, at 254–55: "Article 51 of the UN Charter, for example, does not put an end to the contradictions among the different conceptions of self-defence"; Diggelmann & Altwicker, *supra* note 18, at 83: "[…] To provide an example: One may interpret the notion of 'armed attack' in Art. 51 of the UN Charter either by referring to State practice or by invoking a vision about the international legal community and the role of self-defense therein. Whatever position one adopts, though, it will always be possible to come up with an argument of the other category, leading to a *regressus ad infinitum*."

208 *See* exemplarily HANS KELSEN, WAS IST GERECHTIGKEIT?, 40 (1953); Fastenrath, *supra* note 23, at 293: "By contrast, from a positivist point of view the content of legal norms is entirely irrelevant"; *see* also McDougal, Lasswell & Reisman, *supra* note 44, at 250: "[…] questions such as the policy content [that means *value* content – A/N] of the regulation, the degree of its effectiveness and so on, are […] beyond the perimeters of juristic operations"; *id.*, at 256 (1968): "[…] the Viennese school, for example, has been militant in its peculiar *value relativism*. […] Kelsen totally rejects the relevance of […] the clarification of goals and attempts"; Henninger, *supra* note 19, at 43–44.

209 Rosalyn Higgins, *Integrations of Authority and Control*, in TOWARDS WORLD ORDER AND HUMAN DIGNITY, 85 (Burns H. Weston & William Michael Reisman eds. 1976).

210 Fastenrath, *supra* note 19, at 68.

211 Higgins, *supra* note 209, at 85: "Policy considerations, although they differ from 'rules', are an integral part of that decision making process which we call international law; the assessment of so-called extralegal considerations is *part of the legal process*, just as is reference to the accumulation of past decisions and current norms. A refusal to acknowledge political and social factors cannot keep law 'neutral', for even such a refusal is not without political and social consequence."

212 Fish, *supra* note 59, at 162.

213 Franck, *supra* note 115, at 177.

pretation process – would only scratch the surface. As already indicated, "Normativity is part of the political sphere"[214] for the simple reason that every *Ought* is based on a value judgment about a political *Is*.[215] "Values do not stand *next* to legal norms. Values are the *basis* of legal norms."[216] This is also why value relativism by no means implies the need "to create a syntactical construct of norms without regard to their value content"[217] (as Kelsen did), nor would that be desirable or even possible. In legal reality (*Rechtswirklichkeit*), the *Is* and the *Ought* cannot be artificially separated.[218] A conceptual dichotomy between the *Is* and the *Ought*, i.e. the fact that a *logical* distinction must be made between descriptive and prescriptive utterances,[219] does not also presuppose a *functional* dichotomy,[220] as Kelsen and his positivist followers erroneously assumed.[221]

Therefore, it needs to be highlighted that no modern legal theory still relies on the naive standpoint that a categorical distinction between law, politics and morality would be possible.[222] Regardless of "however much the law wishes to have a formal existence, it cannot succeed in doing so,"[223] since every norm creation and application signifies a constructive endeavor, which necessarily implies value judgements. As a consequence, legal interpretation simply cannot be detached from political and moral considerations. Today, a static method of interpretation is irreconcilable with modern philosophy of lan-

214 Fastenrath, *supra* note 19, at 68; *see* also Alexy, *supra* note 19, at 13–14.
215 *See* Delbrück & Wolfrum, *supra* note 62, at 41; Staake, *supra* note 22, at 264 and 380.
216 *Id*., at 275 [transl. by the author].
217 McDougal, Lasswell & Reisman, *supra* note 44, at 256.
218 See Delbrück & Wolfrum, *supra* note 62, at 41; HEINRICH HENKEL, EINFÜHRUNG IN DIE RECHTSPHILOSOPHIE, 455 (1964); Fastenrath, *supra* note 19, at 58 et seqq., 67; *id*., *supra* note 23, at 85, 130, 139; Henninger, *supra* note 19, at 29, 33; Higgins, *supra* note 27, at 3 et seqq.; Wolfgang Graf Vitzthum, Begriff, Geschichte und Rechtsquellen des Völkerrechts, in VÖLKERRECHT, para. 26 (id. & Alexander Proelß eds., 8th ed. 2019).
219 *See* e.g. Philip Allott, *Language, Method and the Nature of International Law*, 45 The British Yearbook of International Law, 101 (1971).
220 *See* also Staake, *supra* note 22, at 379.
221 *See* Kelsen, *supra* note 208, at 38; *id*., REINE RECHTSLEHRE, 5, 60–71 (2nd ed. 1960); *id*., *Was ist juristischer Positivismus?*, 20 Juristenzeitung, 468 (1965); Bruno Simma, *Bemerkungen zur Methode der Völkerrechtswissenschaft*, in FESTSCHRIFT FÜR ERNST KOLB ZUM SECHZIGSTEN GEBURTSTAG, 340 (Herma v. Bonin ed. 1971); Voos, *supra* note 49, at 249.
222 *See* Fastenrath, *supra* note 23, at 71–81, 85, 130, 190, 231, 293; *id*., *supra* note 19, at 60; Corten, *supra* note 27, at 809; Henninger, *supra* note 19, at 26–27; Lescano & Liste, *supra* note 80, at 222; Staake, *supra* note 22, at 292, 310 et seqq., 446.
223 Fish, *supra* note 59, at 162.

guage and modern legal theory. Relative normativity in international law and a dynamic understanding of legal rules is inevitable.[224]

So, instead of contrasting alleged "characteristic" European and American approaches or "traditional-conservative positivist" and "dynamic-progressive anti-positivist" scholarly stances, it seems worthwhile to take a closer look at the basic objections regarding contemporary just war concepts in international law.

224 *See* Fastenrath, *supra* note 23, at 190, 295; *id.*, *supra* note 29, at 306–07, 312.

IV. The Narrative of the Antinomy of Peace / Security and Justice in the Collective Security System

One of the main objections concerns the narrative of the antinomy of peace / security and justice in the collective security system. According to Josef L. Kunz:

> "Two world wars and the fear of more catastrophic wars have made the avoidance of war more important than the achievement of justice. The first aim in the preamble of the United Nations Charter is 'to save succeeding generations from the scourge of war.' The first purpose in Article 1 is not to achieve and maintain justice, but to 'maintain international peace and security'. Again, we are faced with the antinomy between the two juridical values of security and justice. Security is the lower, but most basic value. […] First to establish security is the philosophy of recent developments, in the conviction that security is the indispensable pre-condition of later achieving justice. This philosophy may be wholly justified, but it is not the philosophy underlying the bellum justum doctrine."[225]

To put this briefly: It is claimed that "under the Charter, peace takes precedence over justice."[226] Or in Josef L. Kunz's words: "[…] the problem of peace overshadowed and overshadows today the problem of justice."[227] Furthermore, one reads that in spite of the commonly used description as "sanctions," enforcement measures taken under Chapter VII of the UN Charter do not possess the character of "real sanctions" against a law-breaker – according to Kunz, they are "not necessarily sanctions in a juridical sense."[228] They rather serve to enforce peace and may also be directed at states that have neither violated international law nor are threatening to do so.[229] In this regard, any "Kelsian" interpretation of war as a general

225 Kunz, *supra* note 2, at 533–34.
226 Nico Krisch, *Introduction to Chapter VII: The General Framework*, in THE CHARTER OF THE UNITED NATIONS. A COMMENTARY, VOL. II, para. 41 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte & Andreas Paulus eds., 3d ed. 2012).
227 Kunz, *supra* note 104, at 326.
228 *Id.*, *supra* note 2, at 533.
229 *See* Krisch, *supra* note 226, at para. 17; *see* also Kunz, *supra* note 104, at 331, 337.

sanction, i.e. as a lawful response against a delict constituting a violation of international law, seems inconsistent, if not contradictory – at least with regard to the system of collective security.

However, this critique does not hold weight with respect to a just war concept viewed as law enforcement in general international law. In that regard, Dinstein's objection "of the obvious inadequacy immanent in the role of war as a general sanction"[230] relativizes, but does not disprove Kelsen's theory. This is for the simple reason that the United Nations Charter has not essentially changed the nature of international law. It is still characterized by the basic *self-assessment* of existing rights and obligations and by the *self-enforcement* of the respective legal claims under international law.[231] Even Kunz admitted that

> "general international law *has* sanctions: reprisals and war. […] There are no collective but only individual sanctions, carried out by way of self-help; there is no monopoly of force at the disposal of a central law-enforcing organ; […] Where collective security is absent, the states, for their individual security, follow the policy of armaments, alliances and the balance of power."[232]

In addition, following Derek Bowett, one can point to the fact that armed reprisals are still present in the reality of international relations:

> "[…] while reprisals remain illegal *de jure*, they become accepted *de facto*. Indeed, it may be that the more relevant distinction today is not between self-defense and reprisals but between reprisals which are likely to be condemned and those which, because they satisfy some concept of 'reasonableness', are not."[233]

---

230 Dinstein, *supra* note 6, at 72.

231 *See* Verdross & Simma, *supra* note 123, at § 41; *Fastenrath*, *supra* note 29, at 334; *id.*, *supra* note 23, at 263–64, 276, 284, 287.

232 Kunz, *supra* note 104, at 325; *see* also Nigel D. White & Ademola Abass, *Countermeasures and Sanctions*, in INTERNATIONAL LAW, 522 et seqq. (Malcolm D. Evans ed., 5th ed. 2018); Leo Gross, *States as Organs of International Law and the Problem of Autointerpretation*, in LAW AND POLITICS IN THE WORLD COMMUNITY, 59 et seqq. (George A. Lipsky ed. 1953).

233 Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 American Journal of International Law, 11 (1972); *see* also Hakimi & Cogan, *supra* note 83, at 275; Reisman, *supra* note 206, at 391; Andrea Bianchi, *Enforcing International Law Norms against Terrorism*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM, 506 (id. ed. 2004): "[…] armed reprisals risk sneakingly making their

Furthermore, the objections raised in reference to the narrative of the antinomy of peace / security and justice have no bearing on the fact that the Security Council incorporates or relies on considerations of justice within the scope of its political decisions. The judgments of the UN Security Council are naturally based on an evaluative assessment of the conflicting parties,[234] as this is an inherent part of the *bellum iustum* concept. The determination of a threat or a breach of the peace is a political decision, not to mention the result of an evaluation of an act of aggression. It is a political, not a judicial finding.[235] Given that the Security Council has the power to bring about an end to hostilities without having to consider whether one side could legally have recourse to armed force,[236] in order to take effective collective measures for the prevention and removal of threats to the peace (Art. 1 (1) UNC), accordingly illustrates that the Charter relies on a political, not on a legal approach to peace maintenance.[237]

Although, this does not necessitate a sequential approach according to which the Organization can find the latitude to apply the principles of justice and international law only when it has used the power given to it and the force at its disposal to stop war.[238] An *idealist* view of international politics does not automatically relegate considerations of justice to secondary means. The *la securite d'abord* narrative does not preclude the Security Council from incorporating considerations of justice when deciding on enforcement measures.

---

way back into the reality of international relations if not in its illusive representation."

234 *See* e.g. MARTTI KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW, 84 (2011); Bothe, *supra* note 102, at para. 44: "The Security Council has hesitated for a long time to identify a threat to peace in Syria" [transl. by the author]; Albrecht Randelzhofer, *Neue Weltordnung durch Intervention?*, in WEGE UND VERFAHREN DES VERFASSUNGSLEBENS: FESTSCHRIFT FÜR PETER LERCHE ZUM 65. GEBURTSTAG, 60 (Peter Badura & Rupert Scholz eds. 1993).

235 *See* Nico Krisch, *Article 39*, in THE CHARTER OF THE UNITED NATIONS. A COMMENTARY, VOL. II, para. 44 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte & Andreas Paulus eds., 3d ed. 2012).

236 *See* Krisch, *supra* note 226, at para. 41; Higgins, *supra* note 84, at 4.

237 *See* also Rüdiger Wolfrum, *Article 1*, in THE CHARTER OF THE UNITED NATIONS. A COMMENTARY, VOL. II, para. 22 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte & Andreas Paulus eds., 3d ed. 2012).

238 UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, VOL. VI, 453; *see* also Butchard, *supra* note 181, at 253; Wolfrum, *supra* note 237, at para 22 Fn 39; Kunz, *supra* note 2, at 533–34; Higgins, *supra* note 84, at 9.

Aside from that, it can be argued that contemporary international law formalized the concept of a just war, which basically is another way of describing the equation of *bellum iustum* and *bellum legale*. According to this line of interpretation, legality implies a decision by the Security Council that follows a particular procedure, not a substantive assessment.[239] Justice is understood in an extrinsic-formal way. It is a purely formal concept, which is completely independent of the substantial claims put forward by the respective states.[240] The "Who fires the first shot" principle is viewed in light of an adapted just war concept. "Just war" means individual or collective self-defense against an aggressor who has violated positive rules concerning the prohibition of the use of force, whereby the party first resorting to arms is to be regarded as the aggressor.[241] To illustrate this point, one could make reference to the famous dictum coined by Arnold D. McNair:

> "On the one hand, war in breach of the Charter is made illegal [= *unjust* – A/N]; on the other, force which is collectivized and placed at the service of the international community is made legal [=*just* – A/N]."[242]

In view of this new form of procedural justice, sociological and legal objections ("völkerrechtssoziologische Einwände"[243]) against a "modern" just war concept, referring to an *auctoritas* that no longer exists,[244] especially with regard to a pluralistic international society ("heterogenous value systems"[245]), are met with opposition, since the legality, i.e. the justness of war, is based on a (relative) procedural criterion, namely a multilateral decision

239 *See* Corten, *supra* note 28, at 266; *see* also *id.*, *supra* note 27, at 816.
240 *See* Krakau, *supra* note 178, at 338–42.
241 *See* e.g. Grewe, *supra* note 3, at 677.
242 McNair, *supra* note 146, at 155; *see* on McNair also Grewe, *supra* note 3, at 603–04.
243 THOMAS M. MENK, GEWALT FÜR DEN FRIEDEN: DIE IDEE DER KOLLEKTIVEN SICHERHEIT UND DIE PATHOGNOMIE DES KRIEGES IM 20. JAHRHUNDERT, 358 (1992).
244 *Id.*; *see* also PETER SCHMIDT, BELLUM IUSTUM: GERECHTER KRIEG UND VÖLKERRECHT IN GESCHICHTE UND GEGENWART, 429 (2010); KATHARINA ZIOLKOWSKI, GERECHTIGKEITSPOSTULATE ALS RECHTFERTIGUNG VON KRIEGEN, 65 (2008).
245 Delbrück & Dicke, *supra* note 1, at 205: "[…] but this is only in *seeming* conformity with the Doctrine of Just War because international society is pluralistic, adhering to heterogenous value systems and, therefore, is not in a position to prescribe objective ethical criteria for the embarking on a defensive war."

of the Security Council, in contrast to an (absolute) unilateral decision by a state or a group of states.[246]

Again, it will not do to reduce this line of reasoning to the existence of different legal cultures, i.e. "the equation of justice with peace in the American doctrine."[247] Drawing on conceptual history it can be argued that the concept of peace has always been received as a qualified value, implying a certain form of peace, a certain notion of an international and domestic order.[248] In this perspective, "justice" and "order" are the concepts from which the value of peace is ultimately derived. In other words, there is no concept of peace without a concept of justice.

246 *See* Corten, *supra* note 28, at 267; *id*., *supra* note 27, at 816.

247 Miller, *supra* note 3, at 265; *see* also Krakau, *supra* note 178, at 340.

248 *See* Miloš Vec & Thomas Hippler, *Peace as a Polemic Concept: Writing the History of Peace in Nineteenth Century Europe*, in PARADOXES OF PEACE IN NINETEENTH CENTURY EUROPE, 8 (*id*. eds. 2015).

V. The *ius contra bellum* Narrative

Another main objection regarding contemporary just war concepts in international law concerns the fact that a legal *bellum iustum* concept is considered "either irrelevant or dangerous since it assumes a *jus ad bellum* rather than a *jus contra bellum*."[249] With regard to the "outlawry of war"[250] as enshrined in the Kellogg–Briand Pact and later in Article 2.4 of the UN Charter, a large part of the legal scholarship maintains the opinion that the *ius ad bellum*, i.e. the legally-bound sovereign right to resort to war, was replaced by the newly established *ius contra bellum*.[251] Since it is commonly held that the concept of *bellum iustum* implies the existence of an *ius ad bellum*, it is considered to be irreconcilable with modern international law.

A. The Inherent Right of Self-defense

Yet, with regard to the Kellogg–Briand Pact, the attached interpretative notes, especially the American one, need to be highlighted. It famously states:

> "There is nothing in the American draft of an anti-war treaty to restrict or impair in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and *regardless of treaty provisions* [emphasis added] to defend

249 Miller, *supra* note 3, at 276; *see* also Grewe, *supra* note 3, at 677; Corten, *supra* note 28, at 265.

250 *See* e.g. Wright, *supra* note 10, at 47; OLIVIER CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW, 550 (2010); JAN KLABBERS, INTERNATIONAL LAW, 204–05 (2nd ed. 2017); Bothe, *supra* note 102, at para. 6; Higgins, *supra* note 27, at 238.

251 *See* e.g. Delbrück & Dicke, *supra* note 1, at 201; Lesaffer, *supra* note 105, at 52; Shearer, *supra* note 185, at 7; Hobe, *supra* note 102, at 239.

its territory from attack or invasion, and it, alone, is competent to decide whether circumstances require recourse to war in self-defense."[252]

Furthermore, in Article 51 UNC we can read that "*nothing* in the present Charter *shall impair* the *inherent right* of individual or collective self-defence" [emphasis added]. Against this background, Stephen Neff concludes that "self-defence was expressly described in the Charter in a thoroughly medieval, natural-law manner as an 'inherent right' of states, exercisable without *auctoritas* from any superior body."[253] Other authors reject such an interpretation and postulate that the wording would represent "a mere reminiscent natural law notion"[254] and identify it "as anachronistic residue from an era in which international law was dominated by ecclesiastical doctrines."[255] They point to the ICJ Nicaragua judgment, which established "that Art. 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defence, and it is hard to see how this can be other than of a *customary nature* [emphasis added], even if its present content has been confirmed and influenced by the Charter."[256]

But does this actually refute Neff's theory? Obviously, the Court acknowledged the existence of a right to self-defense under general international law, comprising individual as well as collective self-defense. However, to conceive of a separate and distinctly applicable customary law on the use of force, which according to the Court corresponds in content and scope almost completely to the right of self-defense under Art. 51 of the Charter,[257] says nothing about replacing the sovereign *ius ad bellum* or about excluding considerations of justice when recourse is taken to this inherent right.

252 *See* The General Pact for the Renunciation of War, text of the Pact as signed, notes and other papers, U.S., Government Printing Office, 37 (1928); *see* on this also Quincy Wright, *The Meaning of the Pact of Paris*, 27 The American Journal of International Law, 43 (1933); Randall Lesaffer, *Kellogg-Briand Pact (1928)*, in THE LAW OF ARMED CONFLICT AND THE USE OF FORCE: THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 619 (Frauke Lachenmann & Rüdiger Wolfrum eds. 2017).

253 Neff, *supra* note 104, at 326.

254 MARTIN KUNDE, DER PRÄVENTIVKRIEG: GESCHICHTLICHE ENTWICKLUNG UND GEGENWÄRTIGE BEDEUTUNG, 116 (2007) [transl. by the author].

255 Dinstein, *supra* note 6, at 198.

256 *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986, 14 (94, para. 176).

257 *See* Albrecht Randelzhofer & Georg Nolte, *Article 51 UN Charter*, in THE CHARTER OF THE UNITED NATIONS. A COMMENTARY, VOL. II, para. 63 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte & Andreas Paulus eds., 3d ed. 2012).

To put this straightforwardly: Throughout the centuries, a war fought in self-defense has always been perceived not only as a *sovereign* right but also as a *just* endeavor.[258] Besides, take the contemporary debate on an extensive interpretation of the right to self-defense in the light of changing circumstances and needs, allowing self-defensive measures against non-state actors acting autonomously from within a state:[259] No considerations of justice involved?[260]

What is more, *whether* a state resorts to war in self-defense basically remains within the decision-making power of the individual member state of the UN. It cannot be denied that the exercise of the right to self-defense amounts to undertaking a defensive war.[261] Consequently, one has to admit

258 *See* e.g. JÜRGEN VON UNGERN-STERNBERG, DER AUFRUF „AN DIE KULTURWELT!": DAS MANIFEST DER 93 UND DIE ANFÄNGE DER KRIEGSPROPAGANDA IM ERSTEN WELTKRIEG, 119–20 (2nd ed. 2014); HANS-JÜRGEN WOLFF, KRIEGSERKLÄRUNG UND KRIEGSZUSTAND NACH KLASSISCHEM VÖLKERRECHT: MIT EINEM BEITRAG ZU DEN GRÜNDEN FÜR EINE GLEICHBEHANDLUNG KRIEGFÜHRENDER, 26 fn. 41 (1990).

259 *See* Michael N. Schmitt, *Responding to Transnational Terrorism under the Jus ad Bellum*, in INTERNATIONAL LAW AND ARMED CONFLICT, 157, 167 (id. & Jelena Pejic eds. 2007); Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 American Journal of International Law, 770 (2012); Olivier Corten, *The "Unwilling or Unable" Test: Has it Been, and Could It Be, Accepted?*, 29 Leiden Journal of International Law, 777 (2016); Christian Marxsen & Anne Peters, *Introduction: Dilution of Self-Defence and its Discontents*, in SELF-DEFENCE AGAINST NON-STATE ACTORS, 7 et seqq. (Mary Ellen O'Connell, Christian J. Tams & Dire Tladi eds. 2019).

260 *See* e.g. JAMES LESLIE BRIERLY, THE LAW OF NATIONS, 23–24 (6th ed. 1963): "Law cannot and does not refuse to solve a problem because it is new and unprovided for; it meets such situations by resorting to a principle, outside formulated law, whose presence is not always admitted. [...] perpetually appealing to reason as the justification for its decisions, asking what is a reasonable time, or what is a reasonable price, or what a reasonable man would do in given circumstances. We do not suppose that our answers to those questions will be scientific truths; *it is enough if they are approximately just. [...] But this appeal to reason is merely to appeal to a law of nature*" [emphasis added]; McDougal, Lasswell & Reisman, *supra* note 44, at 256; Wiessner & Willard, *supra* note 47, at 320 fn. 7: "[…] [law] has a present and future dimension […], and it involves making choices. The issue is: where does the author receive guidance for making such choices?"; Henninger, *supra* note 19, at 43–44; Fastenrath, *supra* note 23, at 71 et seqq., 231, 293; Franck, *supra* note 115, at 177: "Words in legal texts […] had no fixed meaning. They needed always to be interpreted, and interpretation must inevitably introduce a degree of value subjectivity. Where does this subjectivity look for its inspiration, if not to a common intuition of natural justice?"

261 *See* Delbrück & Dicke, *supra* note 1, at 204–05.

that a conditioned right of self-defense or a procedural restriction of the *ius ad bellum* ("[…] *until* the Security Council has taken measures") does not correspond to its replacement, let alone its abolition.

Aside from that: Instead of interpreting Article 2 (4) of the Charter as prohibiting *all* uses of force, with the powers of the Security Council and the right of self-defense as "exceptions" to this prohibition, it can be argued that the prohibition was only ever one that outlawed *unilateral* uses of force. Thus, the so called "exceptions" are actually "circumstances that were never precluded by the prohibition in the first place."[262] In this line of interpretation, Article 2.4 of the Charter is "not entirely negative but implies the *positive* use of force."[263]

Last but not least, many authors reject the notion of an *ius ad bellum* with reference to the changed conditions of war since the advent of the nuclear age. As Grewe puts it, "These weapons had rendered invalid all of the limitations on war, which had been an essential aspect of the traditional *bellum iustum* doctrine."[264] But even in this context, it must be kept in mind that international law does not recognize a general ban on the use of nuclear weapons. In its famous advisory opinion, the ICJ stated "[…] that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake."[265]

B. The Narrative of the UN Security Council's Monopoly on the Use of Force

What is more, the Charter's narrative of the UN Security Council's monopoly on the use of force – which basically corresponds to the outlined replacement narrative of the sovereign right to resort to war – does not appear to be convincing, neither from a legal nor from a factual viewpoint.

---

262 Butchard, *supra* note 181, at 229.

263 *Id.* at 243, 249, with reference to UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, VOL. VI, 346; *see* also Claude, *supra* note 11, at 93.

264 Grewe, *supra* note 3, at 677; *see* also Delbrück & Dicke, *supra* note 1, at 205; Otto Kimminich, *Der gerechte Krieg im Spiegel des Völkerrechts*, in DER GERECHTE KRIEG: CHRISTENTUM, ISLAM, MARXISMUS, 214 (Reiner Steinweg ed. 1980); RICHARD A. FALK LAW, MORALITY, AND WAR IN THE CONTEMPORARY WORLD, 53 (1963).

265 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), ICJ Reports 1996, 226 (para. 97).

This becomes apparent when considering the veto option of the permanent members under Article 27 III of the UN Charter, so that a conflict would fall outside the jurisdiction of the United Nations. In Josef L. Kunz's words, "If the Security Council is paralyzed by the veto, we are back to general international law."[266] But does this not imply that "contrary to the conception of the UN Charter, the collective use of military force is not really concentrated at the Security Council, but is in fact subject to the basic principles of self-help and reciprocity, that shape general international law outside the United Nations system"[267]?

Additionally, a conflict can arise between the UN Security Council's main field of responsibility, namely the establishment and maintenance of international peace and security (Art. 24 I, 26 of the UN Charter), and an attacked state's right to self-defense when the UN Security Council takes no measures at all, or the ones taken prove to be ineffective or inadequate.[268]

Also, apart from the debate about *when* the Security Council has taken appropriate measures necessary to maintain international peace and security:[269] Even *if* the UN Security Council adopts a resolution authorizing "all necessary measures," because of the lack of implementation of Article 43 UN Charter, states and regional organizations remain *free* to decide whether to dispatch forces in a particular situation.[270] Hence, even in its

266 Kunz, *supra* note 2, at 533.

267 Oliver Dörr, *Gewalt und Gewaltverbot im modernen Völkerrecht*, 43 Aus Politik und Zeitgeschichte, 20 (2004) [transl. by the author]; *see* also Verdross & Simma, *supra* note 123, at § 41; Kunz, *supra* note 104, at 325.

268 *See* Higgins, *supra* note 27, at 261–62; Thomas M. Franck, *Rethinking Collective Security*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES. ESSAYS IN HONOUR OF YORAM DINSTEIN, 23 (Schmitt & Jelena Pejic eds. 2007); TORSTEN STEIN, CHRISTIAN VON BUTTLAR & MARKUS KOTZUR, VÖLKERRECHT, § 46 para. 798 (14th ed. 2017).

269 *See* Dinstein, *supra* note 6, at 257: "However, what is the legal status if the Council follows the middle of the road and abstains from issuing detailed instructions to the Parties, merely calling upon them, say, to conduct negotiations aimed at settling their dispute? Does such a resolution terminate the entitlement of a Member State to the right of self-defence?"; NICO KRISCH, SELBSTVERTEIDIGUNG UND KOLLEKTIVE SICHERHEIT, 217 (2001).

270 *See* Nico Krisch, *Article 43*, in THE CHARTER OF THE UNITED NATIONS. A COMMENTARY, VOL. II, para. 13 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte & Andreas Paulus eds., 3d ed. 2012); *id.*, *supra* note 226, at para. 67; Gregor Novak & August Reinisch, *Article 48*, in THE CHARTER OF THE UNITED NATIONS. A COMMENTARY, VOL. II, para. 3 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte & Andreas Paulus eds., 3d ed. 2012): "[…] the clear meaning of Art. 43, which is to make sure that the SC cannot draw on members' military resources

most basic range of duty, i.e. peace enforcement and peacekeeping, the Security Council cannot rely on states' contributions. Considering the Council's neglect of Article 26, 43 and 45, the UN Charter represents a *lex imperfecta*. Notwithstanding the Charter's political approach to peace maintenance, and contrary to the drafters' idea of UN peace enforcement, the organization has no military power of its own. It is rather dependent on the military power of others – basically the P5, NATO, EU and regional organizations. Thus, in cases of emergency, instead of entering into time-consuming negotiations, it seems far more likely that "coalitions of the willing" will be formed to address them.[271]

So, in spite of the master narrative of the "triumph of law over politics; of order over anarchy"[272] – which is essentially just another way of describing the *ius contra bellum* narrative – it is evident that international law has never "overcome" or "replaced"[273] the political balance of power principle: it is omnipresent inside (the P5) as well as outside the UN system.[274]

Moreover, it should be emphasized that by mandating various states with the implementation of coercive measures, the Security Council has largely relinquished control of enforcement measures.[275] In sum, whatever des-

---

without their consent"; Franck, *supra* note 270, at 23; Butchard, *supra* note 181, at 237; Higgins, *supra* note 27, at 261 and 265: "[…] that the consequence of the failure to conclude agreements under Article 43 was that UN members could not be compelled to provide forces and assistance under Article 42."

271 *See* Krisch, *supra* note 272, para. 13; Sabine von Schorlemer, *The United Nations*, in RESEARCH HANDBOOK ON THE LAW OF INTERNATIONAL ORGANIZATIONS, 473, 476 (Jan Klabbers & Åsa Wallendahl eds. 2011); Stefan Oeter, *Legitimationsfragen rechtserhaltender Gewalt im globalen Staatensystem. Eine völkerrechtliche Perspektive*, in RECHT IN DER BIBEL UND IN KIRCHLICHEN TRADITIONEN, 108 (Sarah Jäger & Arnulf von Scheliha eds. 2018).

272 Verdebout, *supra* note 102, at 238.

273 *See* e.g. Miller, *supra* note 3, at 254: "[…] a new international system has come into being, replacing the European balance-of-power system of the recent past"; *Kunde*, *supra* note 254, at 80: "In 1919 the balance of power principle, which had failed to guarantee peace for Europe, was replaced by the system of collective security of the League of Nations" [transl. by the author]; *see* also Bardo Fassbender, *Die Gegenwartskrise des völkerrechtlichen Gewaltverbotes vor dem Hintergrund der geschichtlichen Entwicklung*, 31 Europäische Grundrechte-Zeitschrift, 244 (2004); Koskenniemi, *supra* note 234, at 77 et seqq.

274 *See* Kunz, *supra* note 104, at 325; ADAM ROBERTS & DOMINIK ZAUM, SELECTIVE SECURITY, 19, 24 (2008): "[…] the continuation of all the classical institutions of the international system: great powers, alliances, spheres of interest, balances of power and bilateral diplomacy"; Oeter, *supra* note 273, at 114.

275 *See* Higgins, *supra* note 27, at 266; Koskenniemi, *supra* note 234, at 84–85.

cription is chosen for this mechanism ("Gewaltlegitimierungsmonopol"[276]; "collective security or unilateral action in (collective) self-defence – or *excès de pouvoir*?"[277]), it seems reasonable to conclude that international law limits the exercise of military force, but does not monopolize it at central organs.

C. The Narrative of the Outlawry of War

To end this section with a reference to Louis Henkin: Of course, "the reports of the death of Article 2(4) are greatly exaggerated."[278] But one cannot fail to note that the "outlawry of war,"[279] "no loopholes"[280] and "*ius contra bellum*"[281] narratives create some "blind spots."[282] As Alf Ross already pointed out at the annual meeting of the American Society of International Law in 1950:

> "[…] there is a kind of idealism […] an idealism that is verbose, full of rhetoric and always proclaiming high-sounding principles, but lacking in sincerity. It is a nuisance to international law because it creates false aspirations and expectations, and, when these aspirations are not fulfilled, an attitude of dissatisfaction and distrust. Examples of this type of idealism are: the Kellogg-Briand Pact outlawing war at the same time as no state sincerely was willing to abandon this weapon or take effective steps to conquer the causes of war; the Nuremberg principles, pretending to set

276 Andreas L. Paulus, *Zur Zukunft der Völkerrechtswissenschaft in Deutschland*, 67 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 700 (2007); v. Arnauld, *supra* note 143, at para. 1052.

277 Koskenniemi, *supra* note 234, at 85.

278 Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 The American Journal of International Law, 544 (1971); [in reference to Thomas M. Franck, Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States, 64 American Journal of International Law, 809 (1970), and alluding to an expression coined by Mark Twain: "The report of my death was an exaggeration" (1897)].

279 *See* e.g. Roscher, *supra* note 172, at 58–62, 89; Brock & Simon, *supra* note 165, at 51 ("transformation of international law from the law of war to the law of peace") [transl. by the author].

280 *See* e.g. O'Connell, *supra* note 187, at 184.

281 *See* e.g. Daniel-Erasmus Khan, *Der Krieg: Ein menschenrechtlicher Ausnahmezustand?*, in ZUR PRAXIS DER MENSCHENRECHTE: FORMEN, POTENZIALE UND WIDERSPRÜCHE, 68 (Michael Reder & Mara-Daria Cojocaru eds. 2015).

282 *See* also v. Bernstorff, *supra* note 16, at 40.

> up an impartial administration of justice at the same time as the victors are and must remain outside the reign of this justice; and the Genocide Convention, a parody of a legal instrument. A study of conventions and instruments of this kind often struck one by the lack of care with which they were drafted. The same lack of care would never occur [...] in a treaty of commerce. The explanation for this is that nobody, not even the states signing these instruments, really takes them seriously. [...] international law of this kind has little to do with true idealism which must – if nothing else – be realistic."[283]

Quite apart from Scandinavian and American legal realists, who deny the existence of an international normative order, i.e. the *Ought*,[284] it is obvious that neither the Kellogg–Briand Pact nor the United Nations Charter have "outlawed" war in the true sense of the word. Irrespective of whether one agrees or disagrees with Inis L. Claude, according to whom the "collective security theory divides military activity into three categories: the prohibited, the permitted, and the prescribed,"[285] and regardless of whether one acknowledges that there is more than one way of interpreting the "no loopholes"-narrative,[286] it is safe to say that, like the Kellogg–Briand Pact,[287] the UN Charter does not categorically prohibit war or the use of force in general, but permits it in numerous cases:[288] Obviously according to Article 42, or in the event of a veto in the Security Council, under Article 51 and Article 53. But there are two further aspects that are not so self-evident. First of all, one can refer to large-scale fighting in the case of civil wars, which are within the domestic jurisdiction of the state (Article 2 (7)). As long as the Security Council does not consider civil wars as posing a threat to peace, and no decisions pursuant to Art. 25 and 39 UNC are being made,

283 Julius Stone, Alf Ross, Charles G. Fenwick & William C. Dennis, *What Price Effectiveness?*, 50 Proceedings of the American Society of International Law, 208 (1956); *see* also Verdross & Simma, *supra* note 123, at § 433 and § 442.

284 *See* Fastenrath, *supra* note 23, at 33, 286.

285 Claude, *supra* note 11, at 93.

286 *See Butchard, supra* note 181, at 249.

287 *See* v. Bernstorff, *supra* note 123, at 258: "This treaty did not cover measures short of war and did not attempt to outlaw order-related justifications for military interventions"; Roscher, *supra* note 172, at 280.

288 *See* Josef L. Kunz, *The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision*, 45 American Journal of International Law, 54 (1951); v. Bernstorff, *supra* note 123, at 258; Verdebout, *supra* note 102, at 236; Krakau, *supra* note 178, at 321–322.

they are not illegal under general international law nor under the United Nations Charter. In this context it should also be taken into account that foreign interventions in an internal armed conflict by invitation of the respective government are, as a general rule, considered to be permissible.[289]

Secondly, although the so-called "enemy state" clauses in Articles 53, 77 and 107 of the Charter have become obsolete, as they no longer have any legal or practical effect, it is worth mentioning that the UN Charter, similar to the Covenant of the League of Nations, was originally founded upon the distinction between victorious and defeated states.[290] Under Article 107, the Charter provides members with a right to use force against the enemy states of the Second World War.[291]

More importantly, Article 51's range of application is highly contested. It is worthwhile recalling that in its famous Nicaragua Judgment, the ICJ provided no reasons why the customary right of self-defense corresponds in content and scope almost completely to Art. 51 UNC.[292] In a way, Josef Kunz foreshadowed the Bowett–Brownlie debate[293] when he concluded in 1951:

> "[…] the right of self-defense under general international law […] is broader than the right granted under Article 51. The latter avails only 'if an armed attack occurs against a Member of the United Nations,' whereas the right of self-defense under general international law is also given against an 'imminent attack'."[294]

289 See only Georg Nolte, *Intervention by Invitation*, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 27 (Rüdiger Wolfrum ed. 2010).

290 *See* Jürgen Bröhmer, Georg Ress & Christian Walter, *Article 53*, in THE CHARTER OF THE UNITED NATIONS. A COMMENTARY, VOL. II, para. 96 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte & Andreas Paulus eds., 3d ed. 2012); *see* also Bothe, *supra* note 102, at para. 33; Helmut Rumpf, *Der Unterschied zwischen Krieg und Frieden*, 2 Archiv des Völkerrechts, 46 (1950).

291 *See* also Rensmann & Herdegen, *supra* note 200, at 349: "By virtue of the 'enemy State clause' military action against Germany was explicitly exempted from the restraints of Art. 2 (4) of the UN Charter."

292 *See* Randelzhofer & Nolte, *supra* note 257, at para. 63.

293 *See* Mary Ellen O'Connell, *The Prohibition of the Use of Force*, in RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW: JUS AD BELLUM, JUS IN BELLO, AND JUS POST BELLUM, 115–16 (Nigel D. White & Christian Henderson eds. 2013); Butchard, *supra* note 181, at 251; Bianchi, *supra* note 27, at 661; Corten, *supra* note 27, at 806.

294 Kunz, *supra* note 288, at 54.

Irrespective of whatever position is taken in this regard. Particularly in view of an expanded interpretation of this inherent right, considerations of justice come to the fore, not least because – as Thomas M. Franck has put it – "no law – and certainly not Article 51 – should be interpreted to compel the *reductio ad absurdum* that states invariably must await a first, perhaps decisive, military strike before using force to protect themselves."[295] Because, if nothing else, the UN Charter is certainly "not a suicide pact."[296] Accordingly, in his Separate Opinions in the Oil Platforms as well as the Armed Activities case, Judge Bruno Simma stated that

> "there are two levels to be distinguished: there is, first, the level of 'armed attacks' in the substantial, massive sense of amounting to 'une agression armée', to quote the French authentic text of Article 51. Against such armed attacks, self-defence in its not infinite, but still considerable, variety would be justified. But we may encounter also a lower level of hostile military action, not reaching the threshold of an 'armed attack' within the meaning of Article 51 of the United Nations Charter. Against such hostile acts, a State may of course defend itself, but only within a more limited range and quality of responses (the main difference being that the possibility of collective self-defence does not arise, cf. Nicaragua) and bound to necessity, proportionality and immediacy in time in a particularly strict way."[297]

And two years later he advocated that:

> "[s]uch a restrictive reading of Article 51 might well have reflected the state, or rather the interpretation, of the international law on self-defence for a long time. However, in the light of more recent developments not only in State practice but also with regard to accompanying *opinio juris*, it ought urgently to be reconsidered, also by the Court."[298]

But we could also refer to the controversies surrounding a qualified or conditioned prohibition of the use of force. It is argued that the use of force

295 Franck, *supra* note 115, at 98.

296 Eyal Benvenisti, "Iraq and the Bush Doctrine of Pre-Emptive Self-Defence," Crimes of War Project, Expert Analysis, August 20, 2002; available at: https://web.archive.org/web/20110509101731/http://www.crimesofwar.org/expert/bush-benvenisti.html; *see* also Brown, *supra* note 3, at 436.

297 *Oil Platforms* (Separate Opinion Judge Simma), ICJ Reports 2003, 161 (para 13).

298 *Armed Activities on the Territory of the Congo* (Separate Opinion Judge Simma), ICJ Reports 2005, 334 (para 11).

is lawful if (1) the territorial integrity of the state is not violated, (2) the political independence of the state is not compromised, and (3) if the use of force itself is executed in a manner consistent with the purposes of the UN Charter.[299] Again, from the perspective of legal theory there is no "correct" solution to these matters. What exactly is an "armed attack"? What does "imminent" mean? What is a "threat to the peace"? Was it "self-defense" or an "act of aggression"? In the end, one is confronted with a political fight for the law – a struggle for validity and recognition.

If one acknowledges that there is no semantic autonomy in legal propositions (*open-texturedness*) and that no legal concept generally succeeds in refuting the others (*relative normativity*); and if one further takes the various justification narratives into account, not only under general international law (war on terror, anticipatory/preemptive self-defense, forcible countermeasures), but also anthropocentric ones, i.e. human rights-based intervention narratives (humanitarian and pro-democratic intervention),[300] as well as narratives concerning the UN Security Council's monopoly on the use

299 *See* Butchard, *supra* note 181, at 234, 254–61; Shearer, *supra* note 185, at 8, 11, 13 with further references; *see* also Corten, *supra* note 27, at 809, 815; Bianchi, *supra* note 27, at 654, 669; Randelzhofer & Nolte, *supra* note 234, at paras. 13, 38, 49, 57; Christopher Greenwood, *Self-Defence*, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, paras. 9, 51 (Rüdiger Wolfrum ed. 2011); CHRISTINE D. GRAY, INTERNATIONAL LAW AND THE USE OF FORCE, 58, 134 (4th ed 2018); *id.*, The Limits of Force, 376 Collected Courses of the Hague Academy of International Law, 113, 120 (2014); Dinstein, *supra* note 6, at 195, 261, 293; W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 American Journal of International Law, 525 (2006).

300 *See* e.g. Franck, *supra* note 208, at 820; *id. The Emerging Right to Democratic Governance*, 86 American Journal of International Law, 46 (1992); *id.*, *supra* note 115, at 174; Reisman, *supra* note 206, at 381 et seqq.; Michael Byers & Simon Chesterman, *"You, the People": Pro-Democratic Intervention in International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, 259 et seqq. (Gregory H. Fox & Brad R. Roth eds. 2000); Tesón, *supra* note 188, at 93; *id.*, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (2005); Erika de Wet, *The United Nations Collective Security System in the 21st Century: Increased Decentralization through Regionalization and Reliance on Self-Defence*, in COEXISTENCE, COOPERATION AND SOLIDARITY, VOL. II, 1562 (Holger P. Hestermeyer ed. 2012); *id.*, & Ioannis Georgiadis, *From Communitas Orbis to a Community of States – and Back?*, in VÖLKERRECHTSGESCHICHTE(N): HISTORISCHE NARRATIVE UND KONZEPTE IM WANDEL, 119 (Andreas von Arnauld ed. 2017); Delbrück & Dicke, *supra* note 1, at 207; Shearer, *supra* note 185, at 11, 13; *see* also Kunde, *supra* note 254, at 126–27; Anna Geis & Wolfgang Wagner, *'What We Are Fighting For': Democracies' Justifications of Using Armed Force since the End of the Cold War*, in THE JUSTIFICATION OF WAR AND IN-

of force (material breach-doctrine, *ex post authorizations*; authorizations by regional organizations),[301] it stands to reason to consider "law and more generally legal discourse, both as an argument and as a narrative generating particular representations and ideologies."[302]

Obviously, the 20th century discussion about the UN Charter as reviving (or not) the *bellum iustum* concept, rests on a set of theoretical assumptions which reflect diverging narratives about the nature of international law, not least in order to legitimize or delegitimize different claims for normativity. In other words, the question is not only "*how* we interpret Security Council resolutions and treaties, [...] *how* we create and change rules of customary international law, and [...] *how* we understand the relationship between customary international law and treaties,"[303] but rather, "Whose interpretation of the law will, in fact, prevail, and before what audience?'"[304] Which narrative is directed at which audience in which context ("myth system" vs "operational code"[305])? And in particular: Which narrative is hidden from view?

TERNATIONAL ORDER: FROM PAST TO PRESENT, (Lothar Brock & Hendrik Simon eds. 2021); Ziolkowski, *supra* note 244, at 280, 285.

301 *See* Krisch, *supra* note 226, at para. 60; Ruth Wedgwood, *NATO's Campaign in Yugoslavia*, 93 American Journal of International Law, 830 (1999); Corten, *supra* note 27, at 807; de Wet, *supra* note 300, at 1559; Burkhard Schöbener, *Die humanitäre Intervention im Konstitutionalisierungsprozeß der Völkerrechtsordnung*, 33 Kritische Justiz, 570 (2000); Lescano & Liste, *supra* note 80, at 231.

302 Corten, *supra* note 28, at 268–269; *see* also v. Bernstorff, *supra* note 123, at 235, 260; Ranganathan, *supra* note 16, at p. 23, 31; Kennedy, *supra* note 164, at 99 et seqq.; ANNE ORFORD, READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW, 36 (2003).

303 Michael Byers, *The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq*, 13 European Journal of International Law, 41 (2002); *see* also Shearer, supra note 185, at 19–20.

304 Kennedy, *supra* note 164, at 35; *see* also Koskenniemi, *supra* note 26, at 9, 13, 17 (2009); v. Bernstorff, *supra* note 16, at 50; *see* also Pierre Bourdieu, *La force du droit: Éléments pour une sociologie du champ juridique*, 64 Actes de la Recherche en Sciences Sociales, 3–19 (1986); Kotzur, *supra* note 16, at 116.

305 *See* W. Michael Reisman, *The Quest for World Order and Human Dignity in the Twenty-first Century*, 351 Collected Courses of the Hague Academy of International Law, 303–322 (2010).

To provide an example: In an article published in the German Yearbook of International Law 2007, Matthias Herdegen and Thilo Rensmann draw attention to the German Government's reaction to the invasion of Iraq, which

> "puzzled German scholars. On the one hand the Federal Government openly denounced the invasion and refused any direct assistance. As a member of the Security Council, Germany also opposed an authorization of the use of force. On the other hand, the German Government allowed military bases in Germany and the German airspace to be used for military action against Iraq."[306]

306 Rensmann & Herdegen, *supra* note 200, at 372.

VI. The Narrative of a "Positive" Peace

Another point of contention within the exclusion narrative of contemporary just war concepts in international law concerns the practice of the UN Security Council with regard to an adopted "positive" peace concept. The move towards an expanded concept of peace found expression in an UN Security Council Presidential Statement in 1992:

> "The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. The United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solutions of these matters."[307]

This statement is to be located in line with a general development in international law, increasingly illuminating the sovereign state's black box. Hence, the point of issue primarily concerns the extension of a threat to the peace to situations of solely domestic character,[308] along with the objective of protecting "basic norms and values of the international system."[309] Subsequent to Carl Schmitt,[310] Jost Delbrück recognizes in the Security Council's expanded jurisdiction a trend of increasing value-orientation of international law and moreover, "a danger of a fateful return of the international community to the *bellum iustum* doctrine."[311] Does he have a point there?

First of all, it must be taken into account that the extended interpretation of the concept of peace is based primarily on the insight that international

307 UN-Doc. S/PV.3046, at 143 – UN-Doc. S/23500 (1992), at 3.

308 *See* Franck, *supra* note 115, at 13–14.

309 URS SAXER, DIE INTERNATIONALE STEUERUNG DER SELBSTBESTIMMUNG UND DER STAATSENTSTEHUNG: SELBSTBESTIMMUNG, KONFLIKTMANAGEMENT, ANERKENNUNG UND STAATENNACHFOLGE IN DER NEUEREN VÖLKERRECHTSPRAXIS, 508 (2010) [transl. by the author].

310 *See* Peters & Peter, *supra* note 188, at 91 et seqq., with further references.

311 JOST DELBRÜCK, DIE KONSTITUTION DES FRIEDENS ALS RECHTSORDNUNG: ZUM VERSTÄNDNIS RECHTLICHER UND POLITISCHER BEDINGUNGEN DER FRIEDENSSICHERUNG IM INTERNATIONALEN SYSTEM DER GEGENWART, 31 (1996) [transl. by the author].

peace is endangered not only by a threat of armed conflict. Furthermore, even though the protection of civilians has gained prominence in Security Council authorizations, these authorizations were generally adopted with reference to situations that threatened "traditional" state security interests in the form of international or non-international armed conflict.[312] Human rights, democratic participation and the right to self-determination are usually mentioned together with the basic peacekeeping function of the Council. They are associated with, but subordinate to the basic peacekeeping function and are related to a "positive" concept of peace. Within this idealistic view of collective security, these values and norms are supposed to materially influence the way in which conflict resolution is managed once jurisdiction is established.[313] For instance, violations of democratic standards as such do not constitute a threat to peace. Undemocratic change accounts for authorizations through the Security Council only if coupled with a conflict situation that *in itself* constitutes a threat to the peace.[314]

As a consequence, regarding the normative connection of value-based objectives as justification for enforcement measures with the basic peacekeeping function of the Security Council, a doctrinal relatedness to the *bellum iustum* concept does not stand to reason *prima facie*. However, *de facto* an "evident" or "reasonable" threat to international peace, i.e. a situation that threatened "traditional" state security interests in the form of international or non-international armed conflict, often seemed of peripheral importance to the establishment of the Security Council's jurisdiction.[315] Rather, the international community endeavors to create material conditions for peace by addressing certain domestic humanitarian requirements for the international order.[316] Against this background, legal scholarship

312 *See* de Wet, *supra* note 300, at 1556.

313 *See* Saxer, *supra* note 309, at 433–34.

314 *See* Krisch, *supra* note 226, at para. 28.

315 *See* Saxer, *supra* note 309, at 435; Kolb, *supra* note 135, at 272; TONIO GAS, GEMEINWOHL UND INDIVIDUALFREIHEIT IM NATIONALEN RECHT UND VÖLKERRECHT, 494 (2012); ANDREAS SCHÄFER, DER BEGRIFF DER „BEDROHUNG DES FRIEDENS" IN ARTIKEL 39 DER CHARTA DER VEREINTEN NATIONEN: DIE PRAXIS DES SICHERHEITSRATS, 264 (2006).

316 *See* Diggelmann & Altwicker, *supra* note 18, at 88; Steiger, *supra* note 76, at 139; Fastenrath, *supra* note 51, at 223, 230; Bruno Simma, *Internationaler Menschenrechtsschutz durch die Vereinten Nationen*, in INTERNATIONALER SCHUTZ DER MENSCHENRECHTE: ENTWICKLUNG, GELTUNG, DURCHSETZUNG, AUSSÖHNUNG DER OPFER MIT DEN TÄTERN, 59 (Ulrich Fastenrath ed. 2000); Rensmann, *supra* note 109, 371; FRITHJOF EHM, DAS

points to a return of the *bellum iustum* concept within the positive peace narrative[317] as well as to this development's ambivalence.[318] This is not least because – similar to the narratives of "outlawry of war" and *ius contra*

VÖLKERRECHTLICHE DEMOKRATIEGEBOT: EINE UNTERSUCHUNG ZUR SCHWINDENDEN WERTNEUTRALITÄT DES VÖLKERRECHTS GEGENÜBER DEN STAATLICHEN BINNENSTRUKTUREN, 291, 313 (2013); Peter Hilpold, *Die bedingte Menschlichkeit: Der gerechte Krieg, die Sicherung der Menschenrechte und die „vicinity" als Voraussetzung für Empathie und Aktion*, in VÖLKERRECHT UND DIE DYNAMIK DER MENSCHENRECHTE: LIBER AMICORUM WOLFRAM KARL, 317 (Gerhard Hafner, Franz Matscher & Kirsten Schmalenbach eds, 2012); Tobias Bunde, *Das Völkerrecht der Demokratien – Ambivalenzen einer liberalen Weltordnung*, in WELTORDNUNGSMODELLE FÜR DAS 21. JAHRHUNDERT: VÖLKERRECHTLICHE PERSPEKTIVEN, 115 (Christian Tomuschat ed. 2009).

317 *See* Delbrück, *supra* note 311, at 31; Albrecht Randelzhofer, *Der normative Gehalt des Friedensbegriffs im Völkerrecht der Gegenwart: Möglichkeiten und Grenzen seiner Operationalisierung*, in VÖLKERRECHT UND KRIEGSVERHÜTUNG: ZUR ENTWICKLUNG DES VÖLKERRECHTS ALS RECHT FRIEDENSSICHERNDEN WANDELS, 28, 35, 39 (Jost Delbrück ed. 1979); Josef Isensee, Weltpolizei für Menschenrechte: Zur Wiederkehr der humanitären Intervention, 50 JuristenZeitung, 425 (1995); Schmidt, *supra* note 244, at 427; Skadi Krause, *Gerechte Kriege, ungerechte Feinde – Die Theorie des gerechten Krieges und ihre moralischen Implikationen*, in HUMANITÄRE INTERVENTION. EIN INSTRUMENT AUßENPOLITISCHER KONFLIKTBEARBEITUNG: GRUNDLAGEN UND DISKUSSION, 139 (Herfried Münkler & Karsten Malowitz eds. 2008).

318 *See* e.g. Higgins, *supra* note 27, at 254: "Notwithstanding the risk that unilateral intervention for humanitarian purposes is open to abuse, it is far from clear that such action can properly be authorized by the United Nations"; *id*., at 257: "It is clear that opening the door to military intervention for humanitarian purposes around the world will place an unbearable burden on the UN enforcement mechanisms, whether through direct UN action or through UN-authorized action"; Bruno Simma & Andreas L. Paulus, *The "International Community": Facing the Challenge of Globalization*, 9 European Journal of International Law, 275 (1998): "[…] the Security Council is still sailing between the apologism of hand-wringing exercises and an activism which endangers both its legitimacy and effectiveness"; Theodora Christodoulidou & Kalliopi Chainoglou, *The Principle of Proportionality from a jus ad bellum Perspective*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW, 1202 (Marc Weller ed. 2015); Tim Wihl, *Freiheit als Unwert? Verwandlungen des Völkerrechts aus liberaler Perspektive*, in WELTORDNUNGSMODELLE FÜR DAS 21. JAHRHUNDERT: VÖLKERRECHTLICHE PERSPEKTIVEN, 78 (Christian Tomuschat ed. 2009); Schmidt, *supra* note 244, at 499, 541; Randelzhofer, *supra* note 238, at 51; ANDREAS F. BAUER, EFFEKTIVITÄT UND LEGITIMITÄT: DIE ENTWICKLUNG DER FRIEDENSSICHERUNG DURCH ZWANG NACH KAPITEL VII DER CHARTA DER VEREINTEN NATIONEN UNTER BESONDERER BERÜCKSICHTIGUNG DER NEUEREN PRAXIS DES SICHERHEITSRATS, 208 (1996).

bellum – the positive peace narrative creates some "blind spots," not only with respect to the *bellum iustum* concept, but also regarding the following four aspects.

First of all, it is self-evident that the notion of an ideal state of international affairs, where security *and* justice are realized, represents an objective that can never be achieved but only be striven for. This is for the simple reason that in a pluralistic world, perceptions of justice diverge considerably and that, ultimately, some kind of a utopian world government (*Weltstaat*) with the respective competences would be required.[319]

Secondly: As was already indicated earlier, from the standpoint of conceptual history, it is not only the case that the concept of peace has been perceived as a qualified value through the ages. In addition, peace has always been understood in the context of dichotomous figures of thought and asymmetrical counter-concepts. To the extent that peace is conceived as a social condition between human collectives, it is not only inevitable that there is a boundary between these collectives. Corresponding constructions of demarcation also imply the attribution of positive characteristics to one's own society and negative characteristics to "the others." These attributions impinge upon the interaction process, undermine mutual expectation of peacefulness, and ultimately create enemy stereotypes, which result in the emergence of new conflicts.[320]

The third point concerns the "disjunction of conflict containment and legal function,"[321] as it represents a widespread yet nonetheless naive dogmatic worldview of the conditions and modes of operation of the law, claiming that legal norms guarantee world peace in the service of humanity. Instead, it needs to be pointed out that legal norms constitute *the basis* for legitimizing the use of military force and that force is an inherent aspect of every conception of law regarding its enforceability. As Robert M. Cover

319 *See* e.g. EMERY REVES, THE ANATOMY OF PEACE, 237 et seqq (1946); RUDOLF GEIGER, STAATSRECHT III, § 63 I. (7th ed. 2018).

320 See Reinhart Koselleck, *Zur historisch-politischen Semantik asymmetrischer Gegenbegriffe*, in VERGANGENE ZUKUNFT: ZUR SEMANTIK GESCHICHTLICHER ZEITEN, VOL. 2, 259 (*id.* ed 2013); CHRISTIAN SCHWAABE, POLITISCHE THEORIE, 296 (2018); Harald Müller, *Frieden*, in HANDBUCH DER POLITISCHEN PHILOSOPHIE UND SOZIALPHILOSOPHIE, VOL 1, 348–49 (Stefan Gosepath, Wilfried Hinsch & Beate Rössler eds. 2008); Vec & Hippler, *supra* note 248, at 8–10; Krisch, *supra* note 79, at 392; v. Bernstorff, *supra* note 123, at 236; Simma & Paulus, *supra* note 323, at 268.

321 Lescano & Liste, *supra* note 80, at 214 [transl. by the author].

put it: "Legal interpretation takes place in a field of pain and death. [...] Between the idea and the reality of common meaning falls the shadow of the violence of law, itself."[322]

On top of this, it needs to be taken into account that law, generally speaking, does not principally serve to resolve conflicts or to ensure behavioral conformity. Its primary function is to be seen in the counterfactual stabilization of expectations so that lack of effectiveness does not turn into a gap of normativity, and that contingency does not become anomy.[323]

The fourth aspect concerns the correlation between peace and resources[324] as well as the so-called "logic of capital,"[325] since in the international system "real conflicts,"[326] meaning those conflicts that originate in resource scarcity, ultimately cannot be avoided. Therefore, the question

322 Robert M. Cover, *Violence and the Word*, 95 The Yale Law Journal, 1601 and 1629 (1986); *id.* at 1601: "Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur"; *see* also Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority"*, in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE, 6 (Drucilla Cornell, Michel Rosenfeld & David G. Carlson eds. 1992): "The word 'enforceability' reminds us that there is no such thing as law (*droit*) that doesn't imply *in itself*, *a priori*, *in the analytic structure of its concept*, the possibility of being enforced, applied by force"; *Koskenniemi*, *supra* note 26, at 17; Brock & Simon *supra* note 165, at 35; *id.*, *Die Selbstbehauptung und Selbstgefährdung des Friedens als Herrschaft des Rechts. Eine endlose Karussellfahrt?*, 59 Politische Vierteljahresschrift, 269 et seqq. (2018).

323 *See* Luhmann, *supra* note 175, at 135, 156–57; *id.*, *Die juristische Rechtsquellenlehre aus soziologischer Sicht*, in SOZIOLOGIE: SPRACHE, BEZUG ZUR PRAXIS, VERHÄLTNIS ZU ANDEREN WISSENSCHAFTEN, 394 (Günter Albrecht ed. 1973); *id.*, *supra* note 175, at 118; Fastenrath, *supra* note 23, at 94, 161, 256 f., 263; Lescano & Liste, *supra* note 80, at 214–15; *see* also Higgins, *supra* note 27, at 1: "It is not, as is commonly supposed, only about resolving disputes. If a legal system works well, then disputes are in large part *avoided*. The identification of required norms of behaviour, and techniques to secure routine compliance with them, play an important part."

324 *See* Cord Jakobeit & Hannes Meißner, *Frieden und Ressourcen*, 609 et seqq. (Hans J. Gießmann & Bernhard Rinke eds. 2019); *see* also on the relationship between "peace and economy" Michael Brzoska, Frieden und Wirtschaft, 773 et seqq., 778 (Hans J. Gießmann & Bernhard Rinke eds. 2019).

325 *See* BHUPINDER S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES, 34, 45, 55, 448, 504 (2nd ed. 2017).

326 In reference to the terminology used by LEWIS A. COSER, FUNCTIONS OF SOCIAL CONFLICT, 48–49, 50, 52, 54 (1964) ("realistic conflicts").

arises as to whether and to what extent the concept of "positive peace" or a so-called "international social law" ("*soziales Völkerrecht*"[327]), i.e. an international legal infrastructure oriented towards welfare considerations, can alleviate or even remedy these conditions, which lead to conflict in the first place. In this context, reference should be made to the research into the causes of war (*Kriegsursachenforschung*),[328] which rejects "functionalist hopes" with regard to a monocausal connection between a "perfect welfare system under international law" and a "perfect state of international non-violence."[329] In addition to that, reference could also be made to world system theory and its core/semi-periphery/periphery categorization, which originally stems from Immanuel Wallerstein.[330]

327 Bruno Simma, *Völkerrecht und Friedensforschung*, 57 Die Friedenswarte 71 (1974).
328 *See* Klaus Jürgen Gantzel, *Kriegsursachenforschung*, in LEXIKON DER INTERNATIONALEN POLITIK, 292 (Ulrich Albrecht & Helmut Volger eds. 1997).
329 Simma, *supra* note 327, at 71 [transl. by the author].
330 *See* IMMANUEL WALLERSTEIN, WORLD SYSTEMS ANALYSIS (2004).

VII. The Narrative of Secularization

"One of the master narratives of international law is the idea of secularization."[331] Since the emergence of the early modern state, so the story goes, the basis of political organization was no longer rooted in the idea of a just order, i.e. the idea of a just peace. Instead, according to Thomas Hobbes, only a social contract and rule by an absolute sovereign could end the "solitary, poore, nasty, brutish, and short"[332] state of nature, the *bellum omnium contra omnes*,[333] as "it is manifest, that the measure of Good and Evil actions, is the Civil Law; and the Judge the Legislator, who is always Representative of the Commonwealth."[334] Or, to put it with Martti Koskenniemi in more forthright terms: This signified the rise of positivism: "Just shut up and obey."[335]

Within the framework of this secularization narrative, the *bellum iustum* doctrine is depicted as a theological rather than a legal concept. The *bellum iustum* doctrine is understood as a *pre*-sovereign thought. Although, this secularization narrative can certainly be contested, considering from a conceptual history viewpoint "that peace has never been, nor can it be, independent value."[336] It always implied a certain form of peace, a certain notion of a domestic and international order. This becomes even more ap-

331 Vec, *supra* note 76, at 135; *see* e.g. JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 7–11 (9th ed. 2019).

332 THOMAS HOBBES, LEVIATHAN, 115 (Minneapolis, MN: First Avenue Editions 2018).

333 *Id.*, DE CIVE (1642), Praefatio, XIV, 81 (Howard Warrender ed. 1983): "Immoto igitur quod jeci fundamento, Ostendo primò conditionem hominum extra societatem civilem (quam conditionem appellare liceat statum naturae) aliam non esse quam bellum omnium contra omnes; atque in eo bello jus esse omnibus in omnia."

334 *Id.*, LEVIATHAN, Chap. 29 para. 168 (Oxford 1929, reprint from the edition of 1651).

335 Koskenniemi, *supra* note 67, at 399; with reference to the famous quote from MICHEL DE MONTAIGNE, ESSAIS, 1203 (1950): "Or les loix se maintiennent en credit, non par ce qu'elles sont justes, mais par ce qu'elles sont loix. C'est le fondement mystique de leur authorité; elles n'en ont poinct d'autre"; *see* also Fastenrath, *supra* note 23, at 20–21 and *Derrida*, supra note 322, at 12: "Laws are not just *as* laws. One obeys them not because they are just but because they have authority."

336 Vec & Hippler, *supra* note 248, at 8.

parent in view of the varying narratives of international law's normativity, i.e. the oscillating strands between natural law and positivism throughout history.[337] Thus, Emmanuelle Tourme-Jouannet is on to something when she writes:

> "Even so, while the new positivist spirit was transforming international law into science, that did not mean that natural law was left by the wayside. Vattelian dualism of the law of nations between natural law and positive law was to continue up until the Second World War. In correlation, the discourse of international law remained deeply attached to justice. Classical international law was a law that was still entirely ordered around the end-purpose of justice."[338]

337 *See* e.g. Steiger, *supra* note 76, at 97–140; Vec, *supra* note 76, at 140; *id*., *From Invisible Peace to the Legitimation of War: Paradoxes of a Concept in 19th Century International Law Doctrine*, in PARADOXES OF PEACE IN NINETEENTH CENTURY EUROPE, 19–36 (*id*. & Thomas Hippler eds. 2015); Grewe, *supra* note 3, at 349, 493, 603; Lovrić-Pernak, *supra* note 129, at 126, 131, 139; Peter Haggenmacher, *On The Doctrinal Origins of Ius in Bello: From Rights of War to the Laws of War*, in UNIVERSALITY AND CONTINUITY IN INTERNATIONAL LAW, 325 (Thilo Marauhn & Heinhard Steiger eds. 2011); Koskenniemi, *supra* note 114, at 29 fn. 123; *id*., *supra* note 182, at 96: "[…] 'positivists' or 'naturalists'. They were always both at the same time […]"; *id*., *The Legacy of the Nineteenth Century*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW, 147 (James D. Armstrong ed. 2009).

338 Jouannet, *supra* note 145, at 114; *see* also *id*., *supra* note 84, at 388.

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-

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

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

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

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.

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'."

IX. Constitutionalization Narratives

Another narrative strand concerning state sovereignty, and in which the *bellum iustum* concept comes to the fore, can be located in the following. Due to shared interests in peacekeeping, and during the course of international cooperation, regional integration and processes of institutionalization, the level of dependency among states has increased significantly. Additionally, as part of the horizontal and vertical differentiation of international law and within the framework of a multipolar world order, a growing part of non-state actors *co*-determines international law through different forms of participation.[364] More and more of international law is being set and exercised beyond traditional state jurisdiction. As a result, constitutionalization narratives gain prominence, as the Westphalian narrative of unfettered state sovereignty no longer seems to match these developments. "The new world calls for a new narrative to justify and to limit state sovereignty,"[365] a new central narrative of legitimation.[366]

Against this background, the thematic connections to progress narratives as well as to adapted just war concepts can be addressed: from "*value-neutral*" coexistence to "*value-oriented*" (Friedmannian) cooperation and constitutionalization, so to speak.[367] The abandonment of a state-centered system of international law, which privileged "the iron *Gehäuse* of the nation state"[368] in favor of a more global and people-oriented approach, as

364 *See* e.g. GUNTHER TEUBNER, GLOBAL LAW WITHOUT A STATE, (1996); Susan K. Sell, *Structures, Agents and Institutions: Private Corporate Power and the Globalisation of Intellectual Property Rights*, in NON-STATE ACTORS AND AUTHORITY IN THE GLOBAL SYSTEM, 91 et seqq. (Richard A. Higgott, Geoffrey R. Underhill & Andreas Bieler eds. 2000).

365 Kotzur, *supra* note 16, at 102 [transl. by the author].

366 *See* also Ranganathan, *supra* note 16, at p. 31.

367 *See* e.g. Simma & Paulus, *supra* note 323, at 271; Wihl, *supra* note 318, at 72; *Schöbener*, *supra* note 301, at 567; Kotzur, *supra* note 16, at 100.

368 Jochen von Bernstorff & Philipp Dann, *The Battle for International Law: An Introduction*, in THE BATTLE FOR INTERNATIONAL LAW: SOUTH-NORTH PERSPECTIVES ON THE DECOLONIZATION ERA, 13 (*id.* eds. 2019).

well as the enforcement of human rights, are associated with the idea of progress.[369]

Aside from that, it seems noteworthy that the theme of "positive" peace and of a consolidating international community are arising not only with regard to the creation of international institutions, juridification and treaty-making, but also in the area of law enforcement. Hence, it is hardly surprising that adapted just war concepts are gaining influence in accordance with constitutionalization narratives. It is within the scope of value-oriented constitutional approaches that a qualified or conditioned reading of Art. 2 (4), as well as extensive interpretations of permitted uses of force conducted in a manner "consistent with the purposes of the UN Charter," find their dogmatic underpinnings.[370]

369 *See* Oliver Diggelmann & Tilmann Altwicker, *How is Progress Constructed in International Legal Scholarship?*, 25 European Journal of International Law, 434 (2014): "Human rights are treated as universal ethical imperatives whose expansion means progress"; *see* also Verdebout, *supra* note 102, at 246; Koskenniemi, *supra* note 75, at 156; *id.*, Miserable Comforters: International Relations as New Natural Law, 15 European Journal of International Relations, 403 (2009); Liliana Obregón, *The Civilized and the Uncivilized*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW, 928 et seqq. (Bardo Fassbender & Anne Peters eds. 2012); Chimni, *supra* note 325, at 301.

370 *See* e.g. Rensmann & Herdegen, *supra* note 200, at 370; Shearer, *supra* note 185, at 20: "Moreover, the UN Charter should be viewed similarly to a constitution. […] In the present writer's view a wider interpretation must be given to article 2(4) in order to make the Charter relevant to the present and foreseeable future needs of the international community."

X. Conclusion

Within the framework of the master narratives of secularization, juridification and progress – "the legacy of the 19th century"[371] – ever since attempts have been made to rid international law of the just war concept. Olivier Corten points to "'European formalism,' given the emphasis placed on legal forms as separated from – even if these forms remain interlinked with – moral and political factors."[372] Marry Ellen O'Connell refers to the reduction of international law "to a system solely of positive law stripped of moral content" and to the "heavy influence of the political science theory of realism with its reliance on military force." According to O'Connell, "realism's normative support of war has filled the gap left by reliance on amoral positivism."[373] And of course, there is some truth to that. But it also creates "blind spots." The *bellum iustum* concept continues to manifest itself in positivist as well as in realist narratives.[374]

Furthermore, as has been shown, the mere comparison and contrast of "European formalist" and "American anti-formalist" approaches does not seem convincing. Any closer look at the history of international law reveals that the just war doctrine has been alive within the discipline since time immemorial.[375] Although history shines a light upon the inherent ambivalence of the *bellum iustum* doctrine, as "sorry comforters" (*leidige*

371 *See* Koskenniemi, *supra* note 342, at 141; Diggelmann & Altwicker, *supra* note 374, at 444; Vec, *supra* note 76, at 135.

372 Corten, *supra* note 28, at 263; *see* also *id*., *supra* note 27, at 815; v. Bernstorff, *supra* note 16, at 46; Franck, *supra* note 115, at 175.

373 O'Connell, *supra* note 12, at 34.

374 *See* e.g. Schmitt, *supra* note 172; Grewe, *supra* note 3, at 416, 422, 424; W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 The American Journal of International Law, 642–45 (1984); *id*., *supra* note 206, at 394–95; Kelsen, *supra* note 3, at 331–34; Wright, *supra* note 10, at 367; Knud Krakau, *Bellum iustum v. bellum legale*, in DEUTSCHLAND UND DIE USA IN DER INTERNATIONALEN GESCHICHTE DES 20. JAHRHUNDERTS, 147 (Manfred Berg & Philipp Gassert eds. 2004).

375 *See* e.g. Lovrić-Pernak, *supra* note 129, at 123–36; Simon, *supra* note 102, at 115–34; Verdebout, *supra* note 102, at 224–38; v. Bernstorff, *supra* note 123, at 244; Lesaffer, *supra* note 105, at 36; Neff, *supra* note 104, at 277; Grewe, *supra* note 3, at 416, 422, 424, 677; KARL-HEINZ ZIEGLER, VÖLKERRECHTSGESCHICHTE: EIN STUDIENBUCH, 41, 106 (2nd ed. 2007).

Tröster), i.e. "highly respected if not iconic scholars,"[376] always were and still are "dutifully quoted in *justification* of military aggression," and "yet there is no instance of a state ever having been moved to desist from its purpose by arguments supported by the testimonies of such notable men."[377] As *the* "correct solution" does not exist from a postmodern standpoint in legal theory,[378] there is certainly no "correct" narrative when it comes to an adapted just war concept in light of the existing collective security system and beyond. To postulate that the *bellum iustum* concept was never positive law, implying that this doctrine represents only a theological or ethical, but not a legal concept, as Josef L. Kunz and his followers did, stands in the tradition of an "old-fashioned–positivist way of thinking"[379] and corresponds to circular reasoning in legal theory.

Why so? First of all, it is primarily a question of definition as to where and when the history of international law begins and to what extent it captures legal phenomena of a certain period, or not.[380] One may take the position that the medieval-canonical reception of the *bellum iustum* doctrine was not a matter of "true" positive international law.[381] But this kind of argument carries a particular burden of proof, namely with respect to the close connection between jurisprudence and theology at the time.[382]

---

376 v. Bernstorff, *supra* note 16, at 50; *see* also Brock & Simon, *supra* note 84, at 9.

377 Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (1795), in POLITICAL WRITINGS, 103 (Hans Reiss ed., 2nd ed. 1991).

378 *See* Koskenniemi, *supra* note 81, *passim.*; Fastenrath, *supra* note 29, at 333; Staake, *supra* note 22, at 382; Higgins, *supra* note 27, at 4–5.

379 Corten, *supra* note 28, at 264; *see* also Koskenniemi, *supra* note 70, at 399 fn. 6: "One of the reasons for the outdated and unhelpful character of much of modern legal theory is that it tends to assume a fundamental opposition between 'positivism' and 'natural law'."

380 *See* Steiger, *supra* note 76, at 98; *id.*, *Das Ius Publicum Europaeum und das Andere*, in VÖLKERRECHTSGESCHICHTE(N): HISTORISCHE NARRATIVE UND KONZEPTE IM WANDEL, 80 (Andreas von Arnauld ed. 2017); Diggelmann, *supra* note 110, at 3 et seqq; Vitzthum, *supra* note 218, at para. 88, 92.

381 *See* e.g. Randelzhofer & Dörr, *supra* note 7, at 4: "The medieval theory of *bellum iustum* had been developed by theologians and was never a valid rule of public international law."

382 *See* v. Elbe, *supra* note 171, at 670–71: "The limitation and regulation of wars between the members of the Empire thus becomes a matter of positive law; it is treated by secular lawyers of the Middle Ages in the familiar terms of the *Corpus Iuris*"; Miller, *supra* note 3, at 282: "The traditional Western theory of the *bellum justum* originated as an ethical and a moral doctrine of the Christian church which for centuries – because of the closeness of the ties between church and state – sought expression in positive law"; Delbrück & Dicke, *supra* note 1, at 197: "Legal

Needless to say, the same reasoning applies just as well to secularized natural law concepts and to the dual applicability of the *ius naturae et gentium*.[383]

Secondly: If one assumes that "in Western culture, the Just War tradition is the tradition for addressing moral questions about when and how to use force"[384] and recognizes "that on the level of the *ius in bello* elements of the Doctrine of Just War – i.e. the notion of the protection of non-combatants and the principle of proportionality – have been introduced into international law and shaped its aims and scope,"[385] the well-known Martens clause comes to mind, which is claimed to have become the "Archimedean point for the humanization of international law in the 20th century."[386] It was introduced in the Hague Conventions of 1899/1907 and famously stated:

> "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as

and moral authority, legal and ethical argument had not been distinguished"; Kaius Tuori, *The Reception of Ancient Legal Thought in Early Modern International Law*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW, 1018 (Bardo Fassbender & Anne Peters eds. 2012); Schmidt, *supra* note 244, at 132–31; Jensen, *supra* note 184, at 298–99; Grewe, *supra* note 3, at 111; Steiger, *supra* note 76, at 103 et seqq.; Peter Haggenmacher, *Sources in the Scholastic Legacy: Ius Naturae and Ius Gentium Revisited by Theologians*, in THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW, 45 (Samantha Besson & Jean D'Aspremont eds. 2017): "The most obvious reason for this is that international law hardly existed as a separate legal discipline before the middle of the seventeenth century, when the creative impetus of scholasticism was largely spent."

383 *See* Neff, *supra* note 115, at 10; Jouannet, *supra* note 115, at 1119.

384 Mona Fixdal & Dan Smith, *Humanitarian Intervention and Just War*, 42 Mershon International Studies Review, 285 (1998).

385 Delbrück & Dicke, *supra* note 1, at 206; *see* also Mary Ellen O'Connell, *Historical Development and Legal Basis*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, 18 (Dieter Fleck ed., 3rd ed. 2013).

386 Thilo Rensmann, *Die Humanisierung des Völkerrechts durch das ius in bello – Von der Martens'schen Klausel zur "Responsibility to Protect"*, 68 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 113 (2008) [transl. by the author]; *see* also Corten, *supra* note 28, at 263.

> they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."[387]

Thirdly: How can it be ruled out that the idea of a just war finds itself in a positivist adaptation in the form of a presumed justification for war?[388] Even if one adheres to a positivist narrative, which strictly separates legal from moral and political factors, this does not exclude the possibility of a positivist adoption of the *bellum iustum* concept in legal theory. To illustrate this point in view of "classic" international law: The 3rd Hague Convention from 18.10.1907 concerning the opening of hostilities demanded a reasoned declaration of war in Art. 1:

> "The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war."[389]

To put it bluntly: Is this not *positive* international law? According to Hersch Lauterpacht and Yoram Dinstein, this has nothing to do with it: "Article 1 explicitly mentions that reasons for a declaration of war must be given. But the causes of wars cannot be seriously established on the basis of a self-serving unilateral declaration."[390] In fact, "[s]uch one-sided declarations, frequently made in notorious disregard of the law, cannot properly be regarded as a sufficient basis for the view, held by many writers, that according to positive International Law war was admissible only as a remedy against a legal wrong."[391] But such a point of view only leads us back to the *liberum ius ad bellum* narrative and thus to a path of interpretation that implies the denial of international law. Borrowing from the "realist" school of thought,[392] it ultimately surrenders to the "sociological-empirical

387 Convention (II) with respect to the laws and customs of war on land, The Hague 29 July 1899, preamble.

388 *See* also v. Bernstorff, *supra* note 123, at 241; Lesaffer, *supra* note 105, at 36, 43; Lovrić-Pernak, *supra* note 129, at 122, 128.

389 Convention (III) relative to the Opening of Hostilities, The Hague, 18 October 1907, Art. 1.

390 Dinstein, *supra* note 6, at 32.

391 HERSCH LAUTERPACHT, INTERNATIONAL LAW: A TREATISE, VOL. 2: DISPUTES, WAR AND NEUTRALITY, 178 fn. 1 (7th ed. 1952).

392 *See* EDWARD H. CARR, THE TWENTY YEARS CRISIS 1919–1939, first published in 1940; Hans Morgenthau, *Positivism, Functionalism, and International Law*, 34 American Journal of International Law, 275–76 (1940): "In the international field

'factuality' of war"[393] rather than presuming that "[…] the fact that the deviant tries to rationalise its behaviour and hide its real motives behind legal pretexts amounts to recognising the authority of the rule."[394] David Hume is still not mistaken. From an "*Is*" does not follow an "*Ought*."[395] There is a significant difference between acknowledging the decentralized ("primitive") nature of international law (*Koordinationsrecht* / *Genossenschaftliches Recht*)[396] accompanied by the difficulty to limit the recognized reasons for war ("standards" instead of "legal rules"),[397] and saying that there basically was no international law before World War I.[398]

International law was never "indifferent" to war, nor could it be, because, if nothing else, international law represents the rights of war and peace, *de jure belli ac pacis*.[399] Hence, if one assumes that the former was left in the sole political sphere ("*Sphäre des Nur-Politischen*"[400]), what is the point of it being an *Ought*? Postulating that "[p]rior to the twentieth century, no prohibition of the use of force existed, so that States were free to resort to war,"[401] inevitably leads to the problem that originally an "anarchy of sovereignty" ("*Souveränitätsanarchie*"[402]) must have prevailed, a situation that never actually existed.[403]

---

the authoritative decision is replaced by the free interplay of political and military forces. […] Here a competitive contest for power will determine the victorious social forces, and the change of the existing legal order will be decided, not through a legal procedure provided for by this same legal order, but through a conflagration of conflicting social forces which challenge the legal order as a whole"; *id.*, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE, first published 1948.

393 Simon, *supra* note 102, at 127.

394 Verdebout, *supra* note 102, at 232; *see* also on the "specific legal code" as an *autonomous* substructure of the social system Luhmann, *supra* note 175, at 67, 69, 135; Staake, *supra* note 22, at 296.

395 *See* DAVID HUME, A TREATISE OF HUMAN NATURE, Book III, Part I, Section I.

396 *See* Verdross & Simma, *supra* note 123, at § 40.

397 *See* Corten, *supra* note 28, at 261; v. Bernstorff, *supra* note 123, at 244; Vec, *supra* note 124, at 661.

398 *See* Verdebout, *supra* note 102, at 237.

399 HUGO GROTIUS, DE JURE BELLI AC PACIS, first published 1625.

400 v. Arnauld, *supra* note 143, at para. 1025.

401 Randelzhofer & Dörr, *supra* note 7, at para. 4.

402 Hobe, *supra* note 102, at 22.

403 *See* Fastenrath, *supra* note 23, at 244–45: "The representatives of an original, unrestricted freedom of the sovereign states are then confronted with the problem that

Concerning "modern" international law, with the prohibition of the use of force in the UN Charter, apparently formal declarations of war have become rather unusual.[404] Yet, considering contemporary state practice, justifications for war are still advanced, albeit with adapted terminology ("a hypocritical use of language"[405]). Instead of war, there is talk of peace enforcement, stabilization measures, security zones, mandates of the UN Security Council, necessity and proportionality,[406] humanitarian interventions, self-defense, "extraterritorial law enforcement,"[407] forcible countermeasures, and so forth.

Even if such a positivist reading of the just war concept is rigorously rejected, one cannot help but admit that the recourse to notions of natural law ("*naturrechtliche Gedanken*"[408]) cannot be ruled out, since law is value-related and therefore open to political and moral considerations.[409] In fact, there is no way around the basic insight that international law cannot be reduced to a purely positivist concept, whether in terms of its basis (*Geltungsgrund*),[410] in view of the underlying concept of law (*Rechtsbegriff*),[411]

originally there must have prevailed anarchy – a situation that never really existed" [transl. by the author]; Fixdal & Smith, *supra* note 384, at 289.

404 *See* e.g. Peter Hilpold, *Intervening in the Name of Humanity: R2P and the Power of Ideas*, 17 Journal of Conflict and Security Law, 59–60 (2012); Corten, *supra* note 28, at 258; *Lesaffer*, *supra* note 106, at 91.

405 Vec & Hippler, *supra* note 248, at 10.

406 *See* Bianchi, *supra* note 27, at 671.

407 See Dinstein, *supra* note 6, at 294.

408 v. Arnauld, *supra* note 143, at para. 301; *see* also *Koskenniemi*, *supra* note 81, at 403; Ipsen, *supra* note 84, at § 1 para 18; Vitzthum, *supra* note 223, at para. 26: "[…] naturrechtlicher Wertbezüge"; Klabbers, *Contending Approaches to International Organizations: Between Functionalism and Constitutionalism*, in RESEARCH HANDBOOK ON THE LAW OF INTERNATIONAL ORGANIZATIONS, 23 (id. & Åsa Wallendahl eds. 2011).

409 *See* Fastenrath, *supra* note 23, at 85, 289; *id.*, *supra* note 19, at 62; Corten, *supra* note 27, at 809: "Legal interpretation cannot claim to be removed from political and moral considerations."

410 *See* Martti Koskenniemi, *International Legal Theory and Doctrine*, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 17 (Rüdiger Wolfrum ed. 2007); *id.*, *supra* note 84, at 310; Ipsen, *supra* note 81, at § 1 para. 32; Lescano & Liste, *supra* note 80, at 216; Fastenrath, *supra* note 29, at 322.

411 *See* Fastenrath, *supra* note 23, at 54, 60–64, 120, 130, 296; *id.*, *supra* note 29, at 323.

or with regard to its circular argumentative structure "between normativity and concreteness, utopia and apology."[412]

International law and its narratives cannot "overcome" the *bellum iustum* concept. At best, they can shape or, with moderate success, try to shape it. Because, as has already been stated, at its core international law represents the rights of war and peace.[413] Accordingly, in addition to the concept of war, the concept of peace comes into focus. In view of conceptual history, it becomes clear that any concept of peace – as well as any concept of freedom –[414] has always been received as a dependent value.[415]

The idea of justice is an inherent part of any peace concept. *Non ergo ut, sit pax nolunt, sed ut ea sit quam volunt*. Not that one shuns peace, but that each seeks his own peace.[416] Whether from a "Kantian" or "Hobbesian" perspective:[417] If peace is understood as a concept founded or striven for in the here and now, it inevitably implies a more or less distinct notion of social order. Whether within the framework of the balance of power principle or under the prohibition of the use of force: It is always a question of a *just* order as well, one about preserving or changing the *status quo*.[418] In this line of reasoning, any normative judgment on the use of force, in self-defense or to maintain respectively restore international peace and security, necessarily implies an adapted just war concept.

412 Koskenniemi, *supra* note 81, at 565; *see* also Kennedy, *supra* note 88, at 383: "One may imagine law to be either critical *of* or grounded *in* State behavior, and neither understanding is sufficient."

413 *See* also Steiger, *supra* note 385, at 80.

414 *See* Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buffalo Law Review, 211–12 (1979); referring to *Duncan Kennedys* "contradiction thesis" Diggelmann & Altwicker, *supra* note 18, at 76–77: "[…] that the fundamental problem with freedom is that relations with others are *both* indispensable to freedom and incompatible with it. 'The others' are at the same time a prerequisite of freedom and a threat to it."

415 *See* Vec & Hippler, *supra* note 248, at 8; Wilhelm Janssen, *Friede*, in GESCHICHTLICHE GRUNDBEGRIFFE: HISTORISCHES LEXIKON ZUR POLITISCH-SOZIALEN SPRACHE IN DEUTSCHLAND, VOL. 2, 590 (Otto Brunner, Werner Conze & Reinhart Koselleck eds. 2004); Koselleck, *supra* note 320, at 259; Müller, *supra* note 325, at 348–49.

416 ST. AUGUSTINE, DE CIVITATE DEI, XIX, 12.

417 *See* Reinhard Meyers, *Krieg und Frieden*, in HANDBUCH FRIEDEN, 25 (Hans J. Gießmann & Bernhard Rinke eds. 2019); Janssen, *supra* note 415, at 543, 557, 568; WOLFGANG HUBER & HANS-RICHARD REUTER, FRIEDENSETHIK, 27 et seqq. (1990).

418 *See* Krakau, *supra* note 178, at 341–42; *see* also Morgenthau, *supra* note 392, at 275.

"One would like to evade the last decision on justice and to avoid it personally – but in the end this endeavor appears to be impossible."[419] Hence, it is understandable when Yoram Dinstein concludes that "confusion between *bellum legale* and *bellum justum* can be hazardous, given the disparate and occasionally irreconcilable perceptions of justice, compared to the relative ascertainability of the law."[420] However, as has been shown, this view relies on an "old-fashioned–positivist way of thinking" and is thus, ultimately, incorrect. Law is value-related.

419 Erik Wolf & Hellmuth Hecker, *Das Naturrechtsproblem nach der Topik von Erik Wolf*, in Völkerrecht – Gewohnheitsrecht – Naturrecht: Referate zweier Seminare über die Problematik des Gewohnheitsrechts und seine Bedeutung als Völkerrechtsquelle, 19 (Herbert Krüger ed. 1967) [transl. by the author].

420 Dinstein, *supra* note 6, at 72.

Bibliography

Allott, Philip, Language, Method and the Nature of International Law, The British Yearbook of International Law 45 (1971), pp. 79–136.

Arend, Anthony C. / *Beck*, Robert J., International Law and the Use of Force: Beyond the UN Charter Paradigm, London 1993.

Arnauld, Andreas von, Recht, Völkerrecht, 5th edition, Heidelberg 2023.

— Völkerrechtsgeschichte(n). Einleitende Überlegungen, in: id., Völkerrechtsgeschichte(n): Historische Narrative und Konzepte im Wandel, Berlin 2017, pp. 10–19.

Alexy, Robert, Recht und Richtigkeit, in: Krawietz, Werner / Summers, Robert S. / Weinberger, Ota /Wright, Georg Henrik von, The Reasonable as Rational? On Legal Argumentation and Justification. Festschrift for Aulis Aarnio, Berlin 2000, pp. 3–20.

Allott, Philip, The Health of Nations: Society and Law beyond the State, Cambridge 2002.

Bauer, Andreas F., Effektivität und Legitimität: Die Entwicklung der Friedenssicherung durch Zwang nach Kapitel VII der Charta der Vereinten Nationen unter besonderer Berücksichtigung der neueren Praxis des Sicherheitsrats, Berlin 1996.

Bernstorff, Jochen von, International Legal History and its Methodologies: How (Not) to Tell the Story of the Many Lives and Deaths of the *ius ad bellum*, in: Arnauld, Andreas von, Völkerrechtsgeschichte(n): Historische Narrative und Konzepte im Wandel, Berlin 2017, pp. 39–52.

— The Use of Force in International Law before World War I: On Imperial Ordering and the Ontology of the Nation-State, European Journal of International Law29 (2018), S. 233–260.

Bernstorff, Jochen von / *Dann*, Philipp, The Battle for International Law: An Introduction, in: id., The Battle for International Law: South-North Perspectives on the Decolonization Era, Oxford 2019, pp. 1–34.

Bethlehem, Daniel, Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors, American Journal of International Law 106 (2012), pp. 770–777.

Bianchi, Andrea, Enforcing International Law Norms against Terrorism: Achievements and Prospects, in: id.., Enforcing International Law Norms against Terrorism, London 2004, pp. 491–534.

— The International Regulation of the Use of Force: The Politics of Interpretive Method, Leiden Journal of International Law 22 (2009), pp. 651–676.

Bielefeldt, Heiner, Philosophie der Menschenrechte: Grundlagen eines weltweiten Freiheitsethos, Darmstadt 1998.

Brierly, James Leslie, The Law of Nations, 6th edition, Oxford 1963.

Bröhmer, Jürgen / *Ress*, Georg / *Walter*, Christian, Article 53, in: Simma, Bruno / Khan, Daniel-Erasmus / Nolte, Georg / Paulus, Andreas, The Charter of the United Nations: A Commentary, 3rd edition, Oxford 2012.

Biggar, Nigel, Just War and International Law: A Response to Mary Ellen O'Connell, Journal of the Society of Christian Ethics 35 (2015), pp. 53–62.

Bogdandy, Armin von / *Dellavalle*, Sergio, The Paradigms of Universalism and Particularism in the Age of Globalisation: Western Perspectives on the Premises and Finality of International Law, in: Collected Courses of the Xiamen Academy of International Law, Vol. II, Leiden 2009, pp. 45–127.

Bothe, Michael, Friedenssicherung und Kriegsrecht, in: Vitzthum, Wolfgang Graf / Proelß, Alexander, Völkerrecht, 8th edition, Berlin 2019.

— Terrorism and the Legality of Pre-Emptive Force, European Journal of International Law 14 (2003), pp. 227–240.

Bourdieu, Pierre, La force du droit: Éléments pour une sociologie du champ juridique, Actes de la Recherche en Sciences Sociales 64 (1986), pp. 3–19.

Bowett, Derek, Reprisals Involving Recourse to Armed Force, American Journal of International Law 66 (1972), pp. 1–36.

Brecht, Arnold, Political Theory: The Foundations of Twentieth-Century Political Thought, Princeton, 1967.

Brock, Lothar / *Simon*, Hendrik, Die deutsche Sprache des Rechts. Ein völkerrechtspolitischer Sonderweg?, in: Jäger, Sarah / Heinz, Wolfgang S., Frieden durch Recht – Rechtstraditionen und Verortungen, Wiesbaden 2020, pp. 33–66.

— Die Selbstbehauptung und Selbstgefährdung des Friedens als Herrschaft des Rechts. Eine endlose Karussellfahrt?, Politische Vierteljahresschrift 59 (2018), pp. 269–291.

— The Justification of War and International Order: From Past to Present, in: id., The Justification of War and International Order: From Past to Present, New York 2021, pp. 3–28.

Brown, Chris, Justified: Just War and the Ethics of Violence and World Order, in: Brock, Lothar / Simon, Hendrik, The Justification of War and International Order: From Past to Present, New York 2021, pp. 435–448.

Brownlie, Jan, International Law and the Use of Force by States, Oxford 1963.

Brzoska, Michael, Frieden und Wirtschaft, in: Gießmann, Hans J. / Rinke, Bernhard, Handbuch Frieden, Wiesbaden 2019, pp. 773–788.

Bunde, Tobias, Das Völkerrecht der Demokratien – Ambivalenzen einer liberalen Weltordnung, in: Tomuschat, Christian, Weltordnungsmodelle für das 21. Jahrhundert: Völkerrechtliche Perspektiven, Baden-Baden 2009, pp. 99–162.

Butchard, Patrick M., Back to San Francisco: Explaining the Inherent Contradictions of Article 2(4) of the UN Charter, Journal of Conflict & Security Law 23 (2018), pp. 229–267.

Byers, Michael, The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq, European Journal of International Law, 13 (2002), pp. 21–41.

Byers, Michael / *Chesterman*, Simon, "You, the People": Pro-Democratic Intervention in International Law, in: Fox, Gregory H. / Roth, Brad R., Democratic Governance and International Law, Cambridge 2000, pp. 259–292.

Carr, Edward H., The Twenty Years Crisis 1919–1939, London 1940.

Chimni, Bhupinder S., International Law and World Order: A Critique of Contemporary Approaches, 2nd edition, Cambridge 2017.

Christodoulidou, Theodora / *Chainoglou*, Kalliopi, The Principle of Proportionality from a *jus ad bellum* Perspective, in: Weller, Marc, The Oxford Handbook of the Use of Force in International Law, Oxford 2015, pp. 1187–1208.

Claude, Jr., Inis L., Just Wars: Doctrines and Institutions, Political Science Quarterly 95 (1980), pp. 83–96.

Conforti, Benedetto, The Doctrine of "Just War" and Contemporary International Law, in: MacDonald, Ronald /Johnston, Douglas M., Towards World Constitutionalism: Issues in the Legal Ordering of the World Community, Leiden 2005, pp. 705–713.

Constantopoulos, Demetrios S., Bellum justum et bellum legale, Internationales Recht und Diplomatie 1 (1956), pp. 236–240.

Corten, Oliver, Formalization and Deformalization as Narratives of the Law of War, in: Beneyto, José María / Kennedy, David, New Approaches to International Law: The European and the American Experiences, Den Haag 2012, pp. 251–272.

— La Référence au Droit International Comme Justification du Recours à la Force: Vers une Nouvelle Doctrine de la "Guerre Juste"?, in: Dillens, Anne-Marie, La Guerre et l'Europe, Brüssel 2001, pp. 69–94.

— Le Droit Contre la Guerre: L'Interdiction du Recours à la Force en Droit International Contemporain, Paris 2014.

— The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate, European Journal of International Law 16 (2005), pp. 803–822.

— The Law Against War: The Prohibition on the Use of Force in Contemporary International Law, Oxford 2010.

— The "Unwilling or Unable" Test: Has it Been, and Could It Be, Accepted?, Leiden Journal of International Law 29 (2016), pp. 777–799.

Coser, Lewis A., Functions of Social Conflict, New York 1964.

Cover, Robert M., The Supreme Court, 1982 Term – Foreword: Nomos and Narrative, Harvard Law Review 97 (1983), pp. 4–68.

— Violence and the Word, The Yale Law Journal 95 (1986), pp. 1601–1629.

Crawford, James, Brownlie's Principles of Public International Law, 9th edition, Oxford 2019.

Delbrück, Jost, Die Konstitution des Friedens als Rechtsordnung: Zum Verständnis rechtlicher und politischer Bedingungen der Friedenssicherung im internationalen System der Gegenwart, Aufsatzsammlung, Berlin 1996.

Delbrück, Jost / *Dicke*, Klaus, The Christian Peace Ethic and the Doctrine of Just War from the Point of View of International Law, German Yearbook of International Law 28 (1985), pp. 194–208.

Delbrück, Jost / *Wolfrum*, Rüdiger, Völkerrecht, Band I/1: Die Grundlagen. Die Völkerrechtssubjekte, 2d edition, Berlin 1989.

Dembour, Marie-Benedicte, Critiques, in: Moeckli, Daniel, International Human Rights Law, 2nd edition, Oxford 2014, pp. 41–59.

Deng, Francis M., Frontiers of Sovereignty: A Framework of Protection, Assistance, and Development for the Internally Displaced, Leiden Journal of International Law 8 (1995), pp. 249–286.

Derrida, Jacques, Force of Law: The "Mystical Foundation of Authority", in: Cornell, Drucilla / Rosenfeld, Michel / Carlson, David G., Deconstruction and the Possibility of Justice, London 1992, pp. 3–67.

Diggelmann, Oliver, Beyond the Myth of a Non-Relationship: International Law and World War I, Journal of the History of International Law 19 (2017), pp. 93–120.

— Die Entstehung des modernen Völkerrechts in der frühen Neuzeit, in: id., / Altwicker, Tilmann / Cheneval, Francis, Völkerrechtsphilosophie der Frühaufklärung, Tübingen 2015, pp. 1–26.

Diggelmann, Oliver / *Altwicker*, Tilmann, How is Progress Constructed in International Legal Scholarship?, European Journal of International Law 25 (2014), pp. 425–444.

— Is There Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 68 (2008), pp. 623–650.

— What Should Remain of the Critical Approaches to International Law? International Legal Theory as Critique, Swiss Review of International and European Law 1 (2014), pp. 69–92.

Dinstein, Yoram, War, Aggression and Self-Defence, 6th edition, Cambridge 2017.

Dixon, Martin, Textbook on International Law, 8th edition, Oxford 2017.

Dörr, Oliver, Gewalt und Gewaltverbot im modernen Völkerrecht, Aus Politik und Zeitgeschichte 43 (2004), pp. 14–20.

Ehm, Frithjof, Das Völkerrechtliche Demokratiegebot: Eine Untersuchung zur Schwindenden Wertneutralität des Völkerrechts gegenüber den Staatlichen Binnenstrukturen, Hamburg 2013.

Elbe, Joachim von, The Evolution of the Concept of Just War in International Law, American Journal of International Law 33 (1939), pp. 665–688.

Fassbender, Bardo, Optimismus und Skepsis im Völkerrechtsdenken der Gegenwart: Zur Bedeutung von „Denkschulen" in der Völkerrechtswissenschaft, Die öffentliche Verwaltung 65 (2012), pp. 41–48.

— Die Gegenwartskrise des völkerrechtlichen Gewaltverbotes vor dem Hintergrund der geschichtlichen Entwicklung, Europäische Grundrechte-Zeitschrift 31 (2004), pp. 241–256.

Fastenrath, Ulrich, A Political Theory of Law: Escaping The Aporia of the Debate on the Validity of Legal Argument in Public International Law, in: id. / Geiger, Rudolf / Khan, Daniel-Erasmus / Schorlemer, Sabine von / Paulus, Andreas / Vedder, Christoph, From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma, Oxford 2011, pp. 58–78.

— Der juristische Wert einer Weltverfassung. Nur ein Glasperlenspiel oder Triebkraft eines Wandlungsprozesses? Zur Bedeutung des Weltbildes für das Recht, in: Brodocz, André / Herrmann, Dietrich / Schmidt, Rainer / Schulz, Daniel / Wessel, Julia Schulze, Die Verfassung des Politischen: Festschrift für Hans Vorländer, Wiesbaden 2014, pp. 219–234.

— Einheit der Menschenrechte: Universalität und Unteilbarkeit, in: Dupuy, Pierre-Marie / Fassbender, Bardo / Shaw, Malcom N. / Sommermann, Karl-Peter, Völkerrecht als Wertordnung: Festschrift für Christian Tomuschat, Kehl 2006, pp. 153–180.

— Entwicklung und gegenwärtiger Stand des internationalen Menschenrechtsschutzes, in: id., Internationaler Schutz der Menschenrechte: Entwicklung, Geltung, Durchsetzung, Aussöhnung der Opfer mit den Tätern, Dresden 2000, pp. 9–50.

— Lücken im Völkerrecht: Zu Rechtscharakter, Quellen, Systemzusammenhang, Methodenlehre und Funktionen des Völkerrechts, Berlin 1991.

— Relative Normativity in International Law, European Journal of International Law 4 (1993), pp. 305–340.

Fischer-Lescano, Andreas / *Liste*, Philip, Völkerrechtspolitik. Zu Trennung und Verknüpfung von Politik und Recht der Weltgesellschaft, Zeitschrift für Internationale Beziehungen 12 (2005), pp. 209–249.

Fish, Stanley E., The Law Wishes to Have a Formal Existence, in: Kearns, Thomas R. / Sarat, Austin, The Fate of Law, 4th edition, Ann Arbor 1994, pp. 159–208.

Fixdal, Mona / *Smith*, Dan, Humanitarian Intervention and Just War, Mershon International Studies Review 42 (1998), pp. 283–312.

Fleiner, Thomas / *Fleiner*, Lidija R. Basta, Allgemeine Staatslehre: Über die konstitutionelle Demokratie in einer multikulturellen globalisierten Welt, 3rd edition, Berlin 2004.

Francioni, Francesco, Balancing the Prohibition of Force with the Need of Protect Human Rights: A Methodological Approach, in: Cannizzaro, Enzo, Customary International Law on the Use of Force: A Methodological Approach, Leiden 2005, pp. 269–292.

Franck, Thomas M., Fairness in International Law and Institutions, Oxford 1995.

— Recourse to Force: State Action against Threats and Armed Attacks, Cambridge 2003.

— Rethinking Collective Security, in: Schmitt, Michael N. / Pejic, Jelena, International Law and Armed Conflict: Exploring the Faultlines. Essays in Honour of Yoram Dinstein, Leiden 2007, pp. 21–27.

— The Emerging Right to Democratic Governance, American Journal of International Law 86 (1992), pp. 46–91.

— Terrorism and the Right of Self-Defense, American Journal of International Law 95 (2002), pp. 839–843.

— Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States, American Journal of International Law 64 (1970), pp. 809–837.

Friedmann, Wolfgang, Legal Theory, 2nd edition, London 1949.

— The Changing Structure of International Law, London 1964.

Funck-Brentano, Théophile / *Sorel*, Albert, Précis du Droit des Gens, 3rd edition, Paris 1900.

Gantzel, Klaus Jürgen, Kriegsursachenforschung, in: Albrecht, Ulrich / Volger, Helmut, Lexikon der Internationalen Politik, München 1997, pp. 291–293.

Gas, Tonio, Gemeinwohl und Individualfreiheit im nationalen Recht und Völkerrecht, Hamburg 2012.

Geiger, Rudolf, Staatsrecht III: Bezüge des Grundgesetzes zum Völker- und Europarecht: Ein Studienbuch, 7th edition, München 2018.

Geis, Anna/ *Müller*, Harald / *Wagner*, Wolfgang, "What We Are Fighting For": Democracies' Justifications of Using Armed Force since the End of the Cold War, in: Brock, Lothar/Simon, Hendrik, The Justification of War and International Order: From Past to Present, New York 2021, pp. 293–310.

Goldsmith, Jack L. / *Posner*, Eric A., The Limits of International Law, Oxford 2005.

Gray, Christine, International Law and the Use of Force, 4th edition, Oxford 2018.

— The Limits of Force, Recueil des Cours de l'Académie de Droit International de la Haye / Collected Courses of the Hague Academy of International Law 376 (2014), pp. 93–197.

Greenwood, Christopher, International law and the "War against Terrorism", International Affairs 78 (2002), pp. 301–317.

Grewe, Wilhelm G., The Epochs of International Law, 2nd edition, Berlin 2000.

Gross, Leo, States as Organs of International Law and the Problem of Autointerpretation, in: Lipsky, George A., Law and Politics in the World Community: Essays on Hans Kelsen's Pure Theory and Related Problems in International Law, Berkeley 1953, pp. 59–88.

Grotius, Hugo, De Jure Belli ac Pacis, in: Scott, James Brown, The Classics of International Law, transl. by Francis W. Kelsey, Washington 1913, Vol. I – Reproduction of the edition of 1646, Vol. II – English translation, Oxford 1925.

Guggenheim, Paul, Traité de Droit International Public, Vol. I and II, Genf 1953/54.

Haggenmacher, Peter, On The Doctrinal Origins of Ius in Bello: From Rights of War to the Laws of War, in: Marauhn, Thilo / Steiger, Heinhard, Universality and Continuity in International Law, Den Haag 2011, pp. 325–358.

— Sources in the Scholastic Legacy: Ius Naturae and Ius Gentium Revisited by Theologians, in: Besson, Samantha / D'Aspremont, Jean, The Oxford Handbook on The Sources of International Law, Oxford 2017, pp. 45–63.

Hakimi, Monica / *Cogan*, Jacob Katz, The Two Codes on the Use of Force, European Journal of International Law 27 (2016), pp. 257–291.

Hall, William Edward, A Treatise on International Law, 2nd edition, Oxford 1884.

Haskell, John D., Hugo Grotius in the Contemporary Memory of International Law: Secularism, Liberalism, and the Politics of Restatement and Denial, in: Beneyto, José María / Kennedy, David, New Approaches to International Law: The European and the American Experiences, Den Haag 2012, pp. 123–150.

Henkel, Heinrich, Einführung in die Rechtsphilosophie: Grundlagen des Rechts, München 1964.

Henkin, Louis, Force, Intervention, and Neutrality in Contemporary International Law, Proceedings of the American Society of International Law 57 (1963), pp. 147–163.

— The Reports of the Death of Article 2(4) Are Greatly Exaggerated, The American Journal of International Law, 65 (1971), pp. 544–548.

Henninger, Hartmut, Menschenrechte und Frieden als Rechtsprinzipien des Völkerrechts: Das Handeln der Vereinten Nationen in der Konfliktnachsorge aus der Perspektive einer völkerrechtlichen Prinzipienlehre, Tübingen 2013.

Herdegen, Matthias, Völkerrecht, 15. Auflage, Bonn 2016.

Hernández, Gleider I., The Judicialization of International Law: Reflections on the Empirical Turn, European Journal of International Law 25 (2014), pp. 919–934.

Hestermeyer, Holger P., Die völkerrechtliche Beurteilung des Irakkrieges im Lichte transatlantischer Rechtskulturunterschiede, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 64 (2004), pp. 315–341.

Higgins, Rosalyn, Integrations of Authority and Control: Trends in the Literature of International Law and Relations, in: Weston, Burns H. / Reisman, William Michael, Towards World Order and Human Dignity, New York 1976, pp. 79–94.

— Problems and Process: International Law and How We Use It, Oxford 1995.

— The Place of International Law in the Settlement of Disputes by the Security Council, American Journal of International Law 64 (1970), pp. 1–18.

Hilpold, Peter, Die bedingte Menschlichkeit: Der gerechte Krieg, die Sicherung der Menschenrechte und die „vicinity" als Voraussetzung für Empathie und Aktion, in: Hafner, Gerhard / Matscher, Franz / Schmalenbach, Kirsten, Völkerrecht und die Dynamik der Menschenrechte: Liber Amicorum Wolfram Karl, Wien 2012, pp. 313–323.

— Intervening in the Name of Humanity: R2P and the Power of Ideas, Journal of Conflict and Security Law 17 (2012), pp. 49–79.

Hobbes, Thomas, Leviathan, Minneapolis, MN: First Avenue Editions 2018.

Hobbes, Thomas, De Cive (1642), published by Howard Warrender, Oxford 1983.

— Leviathan (1651), Minneapolis, MN: First Avenue Editions 2018.

Hobe, Stephan, Einführung in das Völkerrecht, 11th edition, Stuttgart 2020.

Hoof, Godefridus J. van, Rethinking the Sources of International Law, Deventer 1983.

Huber, Wolfgang / *Reuter*, Hans-Richard, Friedensethik, Stuttgart 1990.

Hucke, Matthias, Der Schutz der Menschenrechte im Lichte von Guantánamo: Die Behandlung der Gefangenen und die Begründung von Menschenrechten, Saarbrücken 2008.

Hume, David, A Treatise of Human Nature (1739–40), 2nd edition, Oxford 1978.

Ipsen, Knut, Regelungsbereich, Geschichte und Funktion des Völkerrechts, in: Epping, Volker / Heinegg, Wolff Heintschel v., Völkerrecht: Ein Studienbuch, 7th edition, München 2018, pp. 1–46.

Isensee, Josef, Weltpolizei für Menschenrechte: Zur Wiederkehr der humanitären Intervention, JuristenZeitung 50 (1995), pp. 421–430.

Jakobeit, Cord / *Meißner*, Hannes, Frieden und Ressourcen, in: Gießmann, Hans J. / Rinke, Bernhard, Handbuch Frieden, Wiesbaden 2019, pp. 609–623.

Janssen, Wilhelm, Friede, in: Brunner, Otto / Conze, Werner / Koselleck, Reinhart, Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland, Vol. II, Stuttgart 2004, pp. 543–591.

Jensen, Jessica, Krieg um des Friedens willen: Zur Lehre vom gerechten Krieg, Baden-Baden 2015.

Jhering, Rudolf von, Der Kampf ums Recht, Wien 1872.

Jouannet, Emmanuelle, Emer De Vattel (1714–1767), in: Fassbender, Bardo / Peters, Anne, The Oxford Handbook of the History of International Law, Oxford 2012, pp. 1118–1121.

— The Liberal-Welfarist Law of Nations: A History of International Law, Cambridge 2012.

— Universalism and Imperialism: The True-False Paradox of International Law?, European Journal of International Law 18 (2007), pp. 379–407.

Kant, Immanuel, Perpetual Peace: A Philosophical Sketch (1795), in: Reiss, Hans, Political Writings, 2nd edition, Cambridge 1991.

Kantorowicz, Hermann (Gnaeus Flavius), Der Kampf um die Rechtswissenschaft, Heidelberg 1906.

Kaufmann, Arthur / *Hassemer*, Winfried, Grundprobleme der zeitgenössischen Rechtsphilosophie und Rechtstheorie, Frankfurt a.M. 1971.

Kelsen, Hans, General Theory of Law and State (1945), 3d edition, Clark 2009.

— Principles of International Law (1952), Clark 2010.

— Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik (1934), published by Matthias Jestaedt, Tübingen 2008.

— Unrecht und Unrechtsfolge im Völkerrecht, Zeitschrift für öffentliches Recht 12 (1932), pp. 481–608.

— Science and Politics, American Political Science Review 45 (1951), pp. 641–661.

— The Pure Theory of Law, Law Quarterly Review 51 (1935), pp. 517–535.

— Théorie du droit international public, Recueil des Cours de l'Académie de Droit International de la Haye / Collected Courses of the Hague Academy of International Law 84 (1953), pp. 1–203.

— Was ist Gerechtigkeit?, Wien 1953.

— Was ist juristischer Positivismus?, Juristenzeitung 20 (1965), S. 465–469.

Kennedy, David, International Law in the Nineteenth Century: History of an Illusion, Nordic Journal of International Law 65 (1996), pp. 385–420.

— Theses about International Law Discourse, German Yearbook of International Law, 23 (1980), pp. 353–391.

Kennedy, Duncan, The Structure of Blackstone's Commentaries, Buffalo Law Review 28 (1979), pp. 205–382.

Khan, Daniel-Erasmus, Der Krieg: Ein menschenrechtlicher Ausnahmezustand?, in: Reder, Michael / Cojocaru, Mara-Daria, Zur Praxis der Menschenrechte: Formen, Potenziale und Widersprüche, Stuttgart 2015, pp. 66–84.

Kimminich, Otto, Der gerechte Krieg im Spiegel des Völkerrechts, in: Steinweg, Reiner, Der gerechte Krieg: Christentum, Islam, Marxismus, Frankfurt a. M. 1980, pp. 206–223.

Klabbers, Jan, Contending Approaches to International Organizations: Between Functionalism and Constitutionalism, in: id. / Wallendahl, Åsa, Research Handbook on the Law of International Organizations, Cheltenham 2011, pp. 3–32.

— International Law, 2nd edition, Cambridge 2017.

Kolb, Robert, Réflexions de Philosophie du Droit International: Problèmes Fondamentaux du Droit International Public: Théorie et Philosophie du Droit International, Brüssel 2003.

Koselleck, Reinhart, Zur historisch-politischen Semantik asymmetrischer Gegenbegriffe, in: id., Vergangene Zukunft: Zur Semantik geschichtlicher Zeiten, Frankfurt a.M. 2013, Vol. II, pp. 211–259.

Koskenniemi, Martti, Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization, Theoretical Inquiries in Law 8 (2007), pp. 9–36.

— Empire and International Law: The Real Spanish Contribution, University of Toronto Law Journal 61 (2011), pp. 1–36.

— Enchanted by the Tools? An Enlightenment Perspective, American University International Law Review 35 (2020), pp. 397–426.

— From Apology to Utopia: The Structure of International Legal Argument, 3rd edition, Cambridge 2009.

— Histories of International law: Dealing with Eurocentrism, Rechtsgeschichte 19 (2011), pp. 152–176.

— International Law and the Emergence of Mercantile Capitalism: Grotius to Smith, in: Dupuy, Pierre-Marie, The Roots of International Law, Leiden 2014, pp. 3–37.

— International Legal Theory and Doctrine, in: Wolfrum, Rüdiger, The Max Planck Encyclopedia of Public International Law (2007).

— Letter to the Editors of the Symposium, American Journal of International Law 93 (1999), pp. 351–361.

— Miserable Comforters: International Relations as New Natural Law, European Journal of International Relations 15 (2009), pp. 395–422.

— The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960, 5th edition, Cambridge 2008.

— The Legacy of the Nineteenth Century, in: Armstrong, James D., Routledge Handbook of International Law, London 2009, pp. 141–153.

— The Police in the Temple: Order, Justice and the UN: A Dialectical View, European Journal of International Law 6 (1995), pp. 325–348.

— The Political Theology of Trade Law: The Scholastic Contribution, in: Fastenrath, Ulrich / Geiger, Rudolf / Khan, Daniel-Erasmus / Paulus, Andreas / Schorlemer, Sabine von / Vedder, Christoph, From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma, Oxford 2011, pp. 90–112.

— The Politics of International Law, Oxford 2011.

— The Politics of International Law – 20 Years Later, European Journal of International Law 20 (2009), pp. 7–19.

Kotzsch, Lothar, The Concept of War in Contemporary History and International Law, Genf 1956.

Kotzur, Markus, Frieden und soziale Gerechtigkeit – droht ein Paradigmenwechsel im Völkerrecht?, in: Krieger, Heike, Berliner Online-Beiträge zum Völker- und Verfassungsrecht, 1 (2007), pp. 2–15.

— Konstitutionelle Momente? Gedanken über den Wandel im Völkerrecht; in: Arnauld, Andreas von, Völkerrechtsgeschichte(n): Historische Narrative und Konzepte im Wandel, Berlin 2017, pp. 99–118.

Krakau, Knud, *Bellum iustum* v. *bellum legale*: Zum Gewaltdiskurs in der amerikanischen Außenpolitik, in: Berg, Manfred / Gassert, Philipp, Deutschland und die USA in der Internationalen Geschichte des 20. Jahrhunderts, Festschrift für Detlef Junker, Stuttgart, 2004, pp. 137–155.

— Missionsbewußtsein und Völkerrechtsdoktrin in den Vereinigten Staaten von Amerika, Frankfurt am Main 1967.

Krause, Skadi, Gerechte Kriege, ungerechte Feinde – Die Theorie des gerechten Krieges und ihre moralischen Implikationen, in: Münkler, Herfried / Malowitz, Karsten, Humanitäre Intervention. Ein Instrument außenpolitischer Konfliktbearbeitung: Grundlagen und Diskussion, Wiesbaden 2008, pp. 113–142.

Kreß, Claus, Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force, Journal on the Use of Force and International Law 1 (2014), pp. 11–54.

Krisch, Nico, Article 39, in: Simma, Bruno / Khan, Daniel-Erasmus / Nolte, Georg / Paulus, Andreas, The Charter of the United Nations: A Commentary, 3rd edition, Oxford 2012.

— Article 43, in: Simma, Bruno / Khan, Daniel-Erasmus / Nolte, Georg / Paulus, Andreas, The Charter of the United Nations: A Commentary, 3rd edition, Oxford 2012.

— International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order, European Journal of International Law 16 (2005), pp. 369–408.

— Introduction to Chapter VII, in: Simma, Bruno / Khan, Daniel-Erasmus / Nolte, Georg / Paulus, Andreas, The Charter of the United Nations: A Commentary, 3rd edition, Oxford 2012.

— Selbstverteidigung und kollektive Sicherheit, Heidelberg 2001.

Kunde, Martin, Der Präventivkrieg: Geschichtliche Entwicklung und gegenwärtige Bedeutung, Frankfurt am Main 2007.

Kunz, Josef L., Bellum Justum and Bellum Legale, American Journal of International Law 45 (1951), pp. 528–534.

— Kriegsbegriff, in: Strupp, Karl / Schlochauer, Hans-Jürgen, Wörterbuch des Völkerrechts, Zweiter Band, 2nd edition, Berlin 1961, pp. 329–332.

— Sanctions in International Law, American Journal of International Law 54 (1960), pp. 324–347.

— Statisches und Dynamisches Völkerrecht, in: Verdross, Alfred, Gesellschaft, Staat und Recht: Untersuchungen zur reinen Rechtslehre; Festschrift Hans Kelsen zum 50. Geburtstage gewidmet, Wien 1931, pp. 217–251.

— The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision, American Journal of International Law 45 (1951), pp. 37–61.

Lauterpacht, Hersch, International Law: A Treatise, Vol. 2: Disputes, War and Neutrality, 7th edition, London 1952.

— The Grotian Tradition in International Law, The British Yearbook of International Law 23 (1946), pp. 1–53.

Lesaffer, Randall, Conclusion, in: id., Peace Treaties and International Law in European History: From the Late Middle Ages to World War One, Cambridge 2004, S. 399–411.

— Kellogg-Briand Pact (1928), in: Wolfrum, Rüdiger, The Max Planck Encyclopedia of Public International Law (2010).

— Peace Treaties and the Formation of International Law, in: Fassbender, Bardo / Peters, Anne, The Oxford Handbook of the History of International Law, Oxford 2012, pp. 71–94.

— Too Much History, in: Weller, Marc, The Oxford Handbook of the Use of Force in International Law, Oxford 2015, pp. 35–55.

Lovrić-Pernak, Kristina, *Morale internationale* und *humanité* im Völkerrecht des späten 19. Jahrhunderts: Bedeutung und Funktion in Staatenpraxis und Wissenschaft, Baden-Baden 2013.

Luhmann, Niklas, Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie, Frankfurt am Main 1981.

— Das Recht der Gesellschaft, Frankfurt am Main 1993.

— Die juristische Rechtsquellenlehre aus soziologischer Sicht, in: Albrecht, Günter, Soziologie: Sprache, Bezug zur Praxis, Verhältnis zu anderen Wissenschaften; René König zum 65. Geburtstag, Opladen 1973, pp. 387–399.

Macdonald, Ronald St. John / *Johnston*, Douglas Millar, International Legal Theory: New Frontiers of the Discipline, in: id., The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory, Dordrecht 1983, pp. 1–14.

Marxsen, Christian / *Peters*, Anne, Introduction: Dilution of Self-Defence and its Discontents in: O'Connell, Mary Ellen / Tams, Christian J. / Tladi, Dire, Self-defence against non- state actors, Cambridge 2019, pp. 1–13.

McDougal, Myres PP. / *Lasswell*, Harold D. / *Reisman*, W. Michael, Theories about International Law: Prologue to a Configurative Jurisprudence, Virginia Journal of International Law 8 (1968), pp. 188–299.

McNair, Arnold D., Collective Security, The British Yearbook of International Law 17 (1936), pp. 150–164.

— The Legal Meaning of War, and the Relations of War to Reprisals, Transactions of the Grotius Society 11 (1926), pp. 29–51.

Mégret, Frédéric, Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes, in: Beneyto, José María / Kennedy, David, New Approaches to International Law: The European and the American Experiences, Den Haag 2012, pp. 3–40.

Menk, Thomas M., Gewalt für den Frieden: Die Idee der kollektiven Sicherheit und die Pathognomie des Krieges im 20. Jahrhundert, Berlin 1992.

Meyers, Reinhard, Krieg und Frieden, in: Gießmann, Hans J. / Rinke, Bernhard, Handbuch Frieden, Wiesbaden 2019, pp. 1–44.

Miller, Lynn H., The Contemporary Significance of the Doctrine of Just War, World Politics 16 (1964), pp. 254–286.

Montaigne, Michel de, Essais, published by Albert Thibaudet, Paris 1950.

Morgenthau, Hans Joachim, Politics Among Nations, New York 1954.

— Positivism, Functionalism, and International Law, American Journal of International Law 34 (1940), pp. 260–284.

Müller, Harald, Frieden, in: Gosepath, Stefan / Hinsch, Wilfried / Rössler, Beate, Handbuch der Politischen Philosophie und Sozialphilosophie, Vol. I, Berlin 2008, pp. 345–350.

Mushkat, Roda, How Useful is the Concept of Just War in International Law?, Revue de Droit International de Sciences Diplomatiques et Politiques 66 (1988), pp. 163–190.

Neff, Stephen, A Short History of International Law, in: Evans, Malcolm D., International Law, 5th edition, Oxford 2018, pp. 3–27.

— War and the Law of Nations: A General History, Cambridge 2005.

Nolte, Georg, Intervention by Invitation, in: Wolfrum, Rüdiger, in: The Max Planck Encyclopedia of Public International Law (2010).

Nolte, Georg / *Randelzhofer*, Albrecht, Article 51, in: Simma, Bruno / Khan, Daniel-Erasmus / Nolte, Georg / Paulus, Andreas, The Charter of the United Nations. A Commentary, 3rd edition, Oxford 2012.

Nussbaum, Arthur, Just War: A Legal Concept?, Michigan Law Review 43 (1943), pp. 453–479.

Obregón, Liliana, The Civilized and the Uncivilized, in: Fassbender, Bardo / Peters, Anne, The Oxford Handbook of the History of International Law, Oxford 2012, pp. 917–939.

O'Connell, Mary Ellen, Historical Development and Legal Basis, in: Fleck, Dieter, The Handbook of International Humanitarian Law, 3rd edition, Oxford 2013, pp. 1–42.

— The Just War Tradition and International Law against War: The Myth of Discordant Doctrines, Journal of the Society of Christian Ethics 35 (2015), pp. 33–51.

— Self-Defence, Pernicious Doctrines, Peremptory Norms, in: id. / Tams, Christian J. / Tladi, Dire, Self-defence against non-state actors, Cambridge 2019, pp. 174–257.

— The Prohibition of the Use of Force, in: White, Nigel D. / Henderson, Christian, Research Handbook on International Conflict and Security Law: jus ad bellum, jus in bello, and jus post bellum, Cheltenham 2013, pp. 89–119.

O'Connell, Mary Ellen / *Day*, Caleb M., Sources in Natural Law Theories: Natural Law as Source of Extra-Positive Norms, in: Besson, Samantha / D'Aspremont, Jean, The Oxford Handbook on The Sources of International Law, Oxford 2017, pp. 562–582.

Oeter, Stefan, Legitimationsfragen rechtserhaltender Gewalt im globalen Staatensystem. Eine völkerrechtliche Perspektive, in: Jäger, Sarah / Scheliha, Arnulf von, Recht in der Bibel und in kirchlichen Traditionen, Wiesbaden 2018, pp. 97–119.

Orford, Anne M., Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law, Cambridge 2003.

Paddeu, Federica, Use of Force against Non-State Actors and the Circumstance Precluding Wrongfulness of Self-Defence, Leiden Journal of International Law 30 (2017), pp. 93–115.

Paulus, Andreas L., Zur Zukunft der Völkerrechtswissenschaft in Deutschland: Zwischen Konstitutionalisierung und Fragmentierung des Völkerrechts, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 67 (2007), pp. 695–719.

Peczenik, Aleksander, Towards the Juristic Theory of Law, Österreichische Zeitschrift für öffentliches Recht 21 (1971), pp. 167–182.

Peters, Anne, There Is Nothing More Practical than a Good Theory: An Overview of Contemporary Approaches to International Law, German Yearbook of International Law 44 (2001), pp. 25–37.

Peters, Anne / *Peter*, Simone, Lehren vom „gerechten Krieg" aus völkerrechtlicher Sicht, in: Kreis, Georg, Der gerechte Krieg: Zur Geschichte einer aktuellen Denkfigur, Basel 2006, pp. 43–96.

Piirimäe, Pärtel, Just War in Theory and Practice: The Legitimation of Swedish Intervention in the Thirty Years War, Historical Journal 45 (2002), pp. 499–523.

Randelzhofer, Albrecht, Der normative Gehalt des Friedensbegriffs im Völkerrecht der Gegenwart: Möglichkeiten und Grenzen seiner Operationalisierung, in: Delbrück, Jost, Völkerrecht und Kriegsverhütung: Zur Entwicklung des Völkerrechts als Recht friedenssichernden Wandels, Berlin 1979, pp. 13–39.

— Neue Weltordnung durch Intervention?, in: Badura, Peter / Scholz, Rupert, Wege und Verfahren des Verfassungslebens: Festschrift für Peter Lerche zum 65. Geburtstag, München 1993, pp. 51–63.

Randelzhofer, Albrecht / *Dörr*, Oliver, Article 2.4 UN Charter, in: Simma, Bruno / Khan, Daniel-Erasmus / Nolte, Georg / Paulus, Andreas, The Charter of the United Nationpp. A Commentary, 3d edition, Oxford 2012.

Ranganathan, Surabhi, The Value of Narratives: The India USA Nuclear Deal in Terms of Fragmentation, Pluralism, Constitutionalization, and Global Administrative Law, Erasmus Law Review 1 (2013), pp. 17–31.

Reichberg, Gregory / Syse, Henrik, Humanitarian Intervention: A Case of Offensive Force?, Security Dialogue 33 (2002), pp. 309-322.

Reinisch, August / *Novak*, Gregor, Article 48, in: Simma, Bruno / Khan, Daniel-Erasmus / Nolte, Georg / Paulus, Andreas, The Charter of the United Nations. A Commentary, 3rd edition, Oxford 2012.

Reisman, W. Michael, Coercion and Self-Determination: Construing Charter Article 2(4), American Journal of International Law 78 (1984), pp. 642–645.

Reisman, W. Michael, The Quest for World Order and Human Dignity in the Twenty-first Century: Constitutive Process and Individual Commitment, Pocketbooks of the Hague Academy of International Law, Band 16, Leiden 2013.

— The Quest for World Order and Human Dignity in the Twenty-first Century: Constitutive Process and Individual Commitment, Recueil des Cours de l'Académie de Droit International de la Haye/Collected Courses of the Hague Academy of International Law 351 (2010), pp. 9–381.

Reisman, W. Michael / *Armstrong*, Andrea, The Past and Future of the Claim of Preemptive Self-Defense, American Journal of International Law 100 (2006), pp. 525–550.

Rensmann, Thilo, Die Humanisierung des Völkerrechts durch das *ius in bello* – Von der Martens'schen Klausel zur "Responsibility to Protect", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 68 (2008), pp. 111–128.

— Wertordnung und Verfassung – Das Grundgesetz im Kontext grenzüberschreitender Konstitutionalisierung, Tübingen 2007.

Rensmann, Thilo / *Herdegen*, Matthias, Is There a Specific German Approach to the Prohibition of the Use of Force?, German Yearbook of International Law 50 (2007), pp. 349–374.

Reves, Emery, The Anatomy of Peace, New York 1946.

Roberts, Adam / *Zaum*, Dominik, Selective Security: War and the United Nations Security Council since 1945, Abingdon 2008.

Roberts, Anthea, Is international law international?, New York 2017.

Roscher, Bernhard, Der Briand-Kellogg-Pakt von 1928: Der „Verzicht auf den Krieg als Mittel nationaler Politik" im völkerrechtlichen Denken der Zwischenkriegszeit, Baden-Baden 2004.

Rostow, Eugene V., Competent Authority Revisited, in: Abrams, Elliott, Close Calls: Intervention, Terrorism, Missile Defense, and 'Just War' Today, Washington 1998.

Roversi, Corrado, Ontology of Law, in: Sellers, Mortimer / Kirste, Stephan, Encyclopedia of the Philosophy of Law and Social Philosophy, Dordrecht 2018.

Rumpf, Helmut, Der internationale Schutz der Menschenrechte und das Interventionsverbot, Baden-Baden 1982.

— Der Unterschied zwischen Krieg und Frieden, Archiv des Völkerrechts 2 (1950), pp. 40–50.

Saxer, Urs, Die internationale Steuerung der Selbstbestimmung und der Staatsentstehung: Selbstbestimmung, Konfliktmanagement, Anerkennung und Staatennachfolge in der neueren Völkerrechtspraxis, Berlin 2010.

Schachter, Oscar, Towards a Theory of International Obligation, Virginia Journal of International Law 8 (1968), pp. 300–322.

Schäfer, Andreas, Der Begriff der „Bedrohung des Friedens" in Artikel 39 der Charta der Vereinten Nationen: Die Praxis des Sicherheitsrats, Frankfurt a.M. 2006.

Scheuner, Ulrich, Naturrechtliche Strömungen im heutigen Völkerrecht, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 13 (1951), pp. 556–614.

Schlag, Pierre, Law as the Continuation of God by Other Means, California Law Review, 85 (1997), pp. 427–440.

Schmidt, Peter, Bellum iustum: Gerechter Krieg und Völkerrecht in Geschichte und Gegenwart, Frankfurt am Main 2010.

Schmitt, Carl, Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum, 2nd edition, Berlin1960.

— Die Wendung zum diskriminierenden Kriegsbegriff (1938), 2nd edition, Berlin 1988.

Schmitt, Michael N., Responding to Transnational Terrorism under the Jus ad Bellum: A Normative Framework, in: id. / Pejic, Jelena, International Law and Armed Conflict: Exploring the Faultlines. Essays in Honour of Yoram Dinstein, Leiden 2007, pp. 157–195.

Schöbener, Burkhard, Die humanitäre Intervention im Konstitutionalisierungsprozeß der Völkerrechtsordnung, Kritische Justiz33 (2000), pp. 557–579.

Schorlemer, Sabine von, The United Nations, in: Klabbers, Jan / Wallendahl, Åsa, Research Handbook on the Law of International Organizations, Cheltenham 2011, pp. 466–506.

Schwaabe, Christian, Politische Theorie – von Platon bis zur Postmoderne, Paderborn 2018.

Scobbie, Iain, Towards the Elimination of International Law, The British Yearbook of International Law, 61 (1990), pp. 339–362.

Sell, Susan K., Structures, Agents and Institutions: Private Corporate Power and the Globalisation of Intellectual Property Rights, in: Higgott, Richard A. / Underhill, Geoffrey R. / Bieler, Andreas, Non-State Actors and Authority in the Global System, London 2000, pp. 91–106.

Shaffer, Gregory / *Ginsburg*, Tom, The Empirical Turn in International Legal Scholarship, American Journal of International Law 106 (2012), pp. 1–46.

Shaw, Malcolm N., International Law, 8th edition, Cambridge 2017.

Shearer, Ivan, A Revival of the Just War Theory?, in: Schmitt, Michael / Pejic, Jelena, International Law and Armed Conflict: Exploring the Faultlines. Essays in Honour of Yoram Dinstein, Leiden 2007, pp. 1–20.

Simma, Bruno, Bemerkungen zur Methode der Völkerrechtswissenschaft, in: Bonin, Herma v., Festschrift für Ernst Kolb zum sechzigsten Geburtstag, Innsbruck 1971, pp. 339–350.

— Internationaler Menschenrechtsschutz durch die Vereinten Nationen, in: Fastenrath, Ulrich, Internationaler Schutz der Menschenrechte: Entwicklung, Geltung, Durchsetzung, Aussöhnung der Opfer mit den Tätern, Dresden 2000, pp. 51–68.

— Völkerrecht und Friedensforschung, Die Friedenswarte 57 (1974), pp. 65–83.

Simma, Bruno / *Paulus*, Andreas L., The 'International Community': Facing the Challenge of Globalization, European Journal of International Law 9 (1998), pp. 266–277.

— The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View, American Journal of International Law 93 (1999), pp. 302–316.

Simon, Hendrik, The Myth of *liberum ius ad bellum*: Justifying War in 19th-Century Legal Theory and Political Practice, European Journal of International Law 29 (2018), pp. 113–136.

Smeltzer, Joshua, On the Use and Abuse of Francisco de Vitoria: James Brown Scott and Carl Schmitt, Journal of the History of International Law 20 (2018), pp. 345–372.

Staake, Marco, Werte und Normen, Baden-Baden 2018.

Starski, Paulina, The Silent State and Normative Dynamics of the Prohibition on the Use of Force – Legislative Responsibility in Situations of Enhanced Normative Volatility, Journal on the Use of Force and International Law 4 (2017), pp. 14–65.

Steiger, Heinhard, Das Ius Publicum Europaeum und das Andere: A Global History Approach, in: Arnauld, Andreas v., Völkerrechtsgeschichte(n) Historische Narrative und Konzepte im Wandel, Berlin 2017, pp. 54–99.

— Völkerrecht, in: Brunner, Otto / Conze, Werner / Koselleck, Reinhart, Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland, VOL. VII, Stuttgart 1992, pp. 97–140.

Stein, Torsten / *Buttlar*, Christian von / *Kotzur*, Markus, Völkerrecht, 14th edition, Köln 2017.

Strisower, Leo, Der Krieg und die Völkerrechtsordnung, Wien 1919.

Tesón, Fernando R., Humanitarian Intervention: An Inquiry into Law and Morality, New York 2005.

— Humanitarian Intervention: An Inquiry into Law and Morality, New York 2005.

— The Liberal Case for Humanitarian Intervention, in: Holzgrefe, Jeff L. / Keohane, Robert O., Humanitarian Intervention: Ethical, Legal and Political Dilemmas, Cambridge, 2003, pp. 93–129.

Teubner, Gunther, Global Law Without A State, Aldershot 1996.

Tischer, Anuschka, Offizielle Kriegsbegründungen in der Frühen Neuzeit: Herrscherkommunikation in Europa zwischen Souveränität und korporativem Selbstverständnis, Berlin 2012.

Tucker, Robert W., The Just War: A Study in Contemporary American Doctrine, Baltimore 1960.

Tuori, Kaius, The Reception of Ancient Legal Thought in Early Modern International Law, in: Fassbender, Bardo / Peters, Anne, The Oxford Handbook of the History of International Law, Oxford 2012, pp. 1012–1033.

Ungern-Sternberg, Antje von, Religion and Religious Intervention, in: Fassbender, Bardo / Peters, Anne, The Oxford Handbook of the History of International Law, Oxford 2012, pp. 294–316.

Ungern-Sternberg, Jürgen von, Der Aufruf „An die Kulturwelt!": Das Manifest der 93 und die Anfänge der Kriegspropaganda im Ersten Weltkrieg, 2nd edition, Frankfurt a.M. 2014.

Vattel, Emer de, Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite aux Affaires des Nations et des Souverains, in: Scott, James Brown, The Classics of International Law, transl. by Charles G. Fenwick, Washington 1916, Vol. I and II – Reproduction of the edition of 1758, Vol. III – English translation.

Vec, Miloš, From Invisible Peace to the Legitimation of War: Paradoxes of a Concept in 19th Century International Law Doctrine, in: id. / Hippler, Thomas, Paradoxes of Peace in Nineteenth Century Europe, Oxford 2015, pp. 19–36.

— From the Congress of Vienna to the Paris Peace Treaties of 1919, in: Fassbender, Bardo / Peters, Anne, The Oxford Handbook of the History of International Law, pp. 654–678.

— Intervention/Nichtintervention: Verrechtlichung der Politik und Politisierung des Völkerrechts im 19. Jahrhundert, in: Lappenküper, Ulrich / Marcowitz, Reiner, Macht und Recht: Völkerrecht in den internationalen Beziehungen, Paderborn 2010, pp. 135–160.

— Sources of International Law in the Nineteenth-Century European Tradition: The Myth of Positivism, in: Besson, Samantha / D'Aspremont, Jean, The Oxford Handbook on The Sources of International Law, Oxford 2017, pp. 121–145.

— Verrechtlichung internationaler Streitbeilegung im 19. und 20. Jahrhundert?: Beobachtungen und Fragen zu den Strukturen völkerrechtlicher Konfliktaustragung, in: id. / Dauchy, Serge, Les Conflits Entre Peuple: De la Résolution Libre à la Résolution Imposée, Baden-Baden 2011, pp. 1–21.

Vec, Miloš / *Hippler*, Thomas, Peace as a Polemic Concept: Writing the History of Peace in Nineteenth Century Europe, in: id., Paradoxes of Peace in Nineteenth Century Europe, Oxford 2015.

Verdebout, Agatha, Rewriting Histories of the Use of Force: The Narrative of 'Indifference', Cambridge 2021.

— The Contemporary Discourse on the Use of Force in the Nineteenth Century: A Diachronic and Critical Analysis, Journal on the Use of Force and International Law 1 (2014), pp. 223–246.

Verdross, Alfred, Règles générales du droit international de la paix, Recueil des Cours de l'Académie de Droit International de la Haye/Collected Courses of the Hague Academy of International Law 30 (1929), pp. 271–518.

Verdross, Alfred / *Simma*, Bruno, Universelles Völkerrecht: Theorie und Praxis, 3rd edition, Berlin 2010.

Vitzthum, Wolfgang Graf, Begriff, Geschichte und Rechtsquellen des Völkerrechts, in: id. / Proelß, Alexander, Völkerrecht, 8th edition, Berlin 2019.

Vollmeyer, Jan, Der Staat als Rechtsordnung: Hans Kelsens Identitätsthese und ihre Bedeutung für den europäischen Konstitutionalisierungsprozess, Baden-Baden 2011.

Voos, Sandra, Die Schule von New Haven: Darstellung und Kritik einer amerikanischen Völkerrechtslehre, Berlin 2000.

Waldock, Claud H. M., The Regulation of the Use Force by Individual States in International Law, Recueil des Cours de l'Académie de Droit International de la Haye / Collected Courses of the Hague Academy of International Law 81 (1952), pp. 451–517.

Wedgwood, Ruth, NATO's Campaign in Yugoslavia, American Journal of International Law 93 (1999), pp. 828–834.

Wehberg, Hans, Krieg und Eroberung im Wandel des Völkerrechts, Frankfurt a.M. 1953.

Weigelt, Katja, Die Auswirkung der Bekämpfung des internationalen Terrorismus auf die staatliche Souveränität, Berlin 2016.

Weller, Marc, The Real Utopia: International Constitutionalism and the Use of Force, in: Schütze, Robert, Globalisation and Governance: International Problems, European Solutions, Cambridge 2018, pp. 131–147.

Welzel, Hans, An den Grenzen des Rechts: Die Frage nach der Rechtsgeltung, Wiesbaden 1966.

Wet, Erika de, The United Nations Collective Security System in the 21st Century: Increased Decentralization through Regionalization and Reliance on Self-Defence, in: Hestermeyer, Holger P., Coexistence, Cooperation and Solidarity, Vol. 2, Leiden 2012, pp. 1553–1568.

Wet, Erika de / *Georgiadis*, Ioannis, From Communitas Orbis to a Community of States – and Back?, in: Arnauld, Andreas von, Völkerrechtsgeschichte(n): Historische Narrative und Konzepte im Wandel, Berlin 2017, pp. 119–146.

White, James Boyd, Heracles' Bow: Essays on the Rhetoric and Poetics of the Law, Wisconsin 1985.

White, Nigel D. / *Abass*, Ademola, Countermeasures and Sanctions, in: Evans, Malcolm D., International Law, 5th edition, Oxford 2018, pp. 521–547.

Wiessner, Siegfried / *Willard*, Andrew R., Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity, American Journal of International Law 93 (1999), pp. 316–334.

Wihl, Tim, Freiheit als Unwert? Verwandlungen des Völkerrechts aus liberaler Perspektive, in: Tomuschat, Christian, Weltordnungsmodelle für das 21. Jahrhundert: Völkerrechtliche Perspektiven, Baden-Baden 2009, pp. 65–98.

Wolf, Erik / *Hecker*, Hellmuth, Das Naturrechtsproblem nach der Topik von Erik Wolf, in: Krüger, Herbert, Völkerrecht – Gewohnheitsrecht – Naturrecht: Referate zweier Seminare über die Problematik des Gewohnheitsrechts und seine Bedeutung als Völkerrechtsquelle, Frankfurt a.M. 1967, pp. 16–43.

Wolff, Hans-Jürgen, Kriegserklärung und Kriegszustand nach klassischem Völkerrecht: mit einem Beitrag zu den Gründen für eine Gleichbehandlung Kriegführender, Berlin 1990.

Wolfrum, Rüdiger, Article 1, in: Simma, Bruno / Khan, Daniel-Erasmus / Nolte, Georg / Paulus, Andreas, The Charter of the United Nations: A Commentary, 3rd edition, Oxford 2012.

Wright, Quincy, The Meaning of the Pact of Paris, American Journal of International Law 27 (1933), pp. 39–61.

— The Outlawry of War and the Law of War, American Journal of International Law 47 (1953), pp. 365–376.

Ziegler, Karl-Heinz, Völkerrechtsgeschichte: Ein Studienbuch, 2nd edition, München 2007.

Ziolkowski, Katharina, Gerechtigkeitspostulate als Rechtfertigung von Kriegen: Zum Einfluss moderner Konzepte des Gerechten Krieges auf die völkerrechtliche Zulässigkeit zwischenstaatlicher Gewaltanwendung nach 1945, Berlin 2008.

Zippelius, Reinhold, Das Wesen des Rechts: Eine Einführung in die Rechtstheorie, 6th edition, Stuttgart 2012.

Index

Italic numbers indicate main findings, superscripts refer to footnotes.