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.

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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.

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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-

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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.