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.