

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 iustum*. 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 iustum* 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 iustum* 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*, II (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 Arnould 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 Arnould 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 Koskeniemi, *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 argument³⁸ 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 HOBBS, 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 Rovorsi, *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 analytical”; 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 sphere⁷² 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 Koskeniemi, *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 Koskeniemi, *supra* note 26, at 17.

71 v. Bernstorff, *supra* note 16, at 43; see also Martti Koskeniemi, *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 Koskeniemi, *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 International 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 HOOFF, 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

I. Introduction

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.”

