VI. The Narrative of a "Positive" Peace

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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327 Bruno Simma, *Völkerrecht und Friedensforschung*, 57 Die Friedenswarte 71 (1974).

328 *See* Klaus Jürgen Gantzel, *Kriegsursachenforschung*, in LEXIKON DER INTERNATIONALEN POLITIK, 292 (Ulrich Albrecht & Helmut Volger eds. 1997).

329 Simma, *supra* note 327, at 71 [transl. by the author].

330 *See* IMMANUEL WALLERSTEIN, WORLD SYSTEMS ANALYSIS (2004).

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