II. The Narrative of Indifference

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

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

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

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

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

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

A. The Legal Significance of Early Modern Natural Law

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

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

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

107 *Id.*

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

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

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

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

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

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

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

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

B. The Dualism of Just and Legal War

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. The Right of Intervention

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

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

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

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

D. The Narrative of liberum ius ad bellum

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

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

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

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

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

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

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

128 *Id*. at 244.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. The Legitimizing Function of Progress Narratives

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

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

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

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

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

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

162 *Id.*

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

F. Realist Narratives of International Law

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

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

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

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

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

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

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

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

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

169 *Id*., at 261.

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