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Veröffentlichungsversion / Published Version  
Zeitschriftenartikel / journal article

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#### Empfohlene Zitierung / Suggested Citation:

Simon, H. (2018). The myth of liberum ius ad bellum : justifying war in 19th-century legal theory and political practice. *European Journal of International Law*, 29(1), 113-136. <https://doi.org/10.1093/ejil/chy009>

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# *The Myth of Liberum Ius ad Bellum: Justifying War in 19th-Century Legal Theory and Political Practice*

Hendrik Simon\*

## **Abstract**

*The proposition of so-called liberum ius ad bellum claims that European states in the 19th century were no longer bound by the moral criteria of just war (bellum iustum) but that they held a sovereign right to go to war. This thesis is widely accepted among scholars of the history of international law and international relations alike. Nevertheless, the realist perspective on international relations was challenged in 19th-century international legal discourse. Several contemporary international lawyers were in favour of the legalization of international relations in order to legally ban unilateral war. Not much attention has so far been paid to the controversial debate on liberum ius ad bellum, which appears particularly in late 19th-century legal treatises. In the present article, this dispute will be analysed by comparing different normative justifications and criticism of war in 19th-century international legal doctrine. As will be shown, by confronting legal doctrine with contemporary state practice, the narrative of liberum ius ad bellum constitutes a myth in the history of international law.*

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# 1 Introduction: Reconstructing a Myth: From *Bellum Iustum* to *Liberum Ius ad Bellum*?

The notion of a Right to go to war, cannot be properly conceived as an element in the Right of Nations. For it would be equivalent to a Right to determine what is just not by universal external laws limiting the freedom of every individual alike, but through one-sided maxims that operate by means of force.

– Immanuel Kant<sup>1</sup>

[W]ar is simply the continuation of policy with the addition of other means.

– Carl von Clausewitz<sup>2</sup>

The history of war is also a history of its justification. Throughout the centuries, military force has been justified and criticized with reference to narratives framed from multiple normative spheres: politics, morality and law.<sup>3</sup> At the heart of this scholarly search for the normative foundations of international order lie the theories of just war (*bellum iustum*).<sup>4</sup> In early modernity, the theory of *bellum iustum* was contested – in particular, the idea of the just cause (*causa iusta*) – the normative core of the doctrine of the ‘just war’ – had lost its plausibility for many lawyers against the background of confessional disputes and the formation of the modern nation-state and its monopoly of power.<sup>5</sup> The discourse on justifying war was caught between the political will to power, natural law and secular concepts of legalization.<sup>6</sup>

Following Wilhelm G. Grewe (1911–2000), an overwhelming scholarly majority believes that there has been a turn in legal treatises in the early modern times as part of a historical process of overcoming the moral theological approach of just war (*bellum iustum*).<sup>7</sup> This process, argues Grewe, was finally completed in the 19th century; Grewe and his followers therefore support the theory of so-called *liberum ius ad bellum*. It suggests that, in the 19th century, European states were no longer bound by the moral criteria of *bellum iustum* but that they held the sovereign right to go to war. ‘Whenever the problem of war was seriously discussed from an international law perspective,’ writes Grewe, ‘the principle of the freedom to wage war ... emerged.’<sup>8</sup>

<sup>1</sup> I. Kant, *Project for a Perpetual Peace: A Philosophical Essay* (1795, reprinted 1891), at 99.

<sup>2</sup> C. von Clausewitz, *On War* (1832, reprinted 1976), at 605.

<sup>3</sup> Benjamin, ‘Critique of Violence’, reprinted in P. Demetz (ed.), *Walter Benjamin, Reflections: Essays, Aphorisms, Autobiographical Writings* (1978) 277; H. Bull, *The Anarchical Society: A Study of Order in World Politics* (2nd edn, 1995), at 180–183; S.C. Neff, *War and the Law of Nations: A General History* (2005); O’Connell, ‘Peace and War’, in B. Fassbender and A. Peters (eds), *Oxford Handbook of the History of International Law* (2nd edn, 2014) 272; Brock, ‘Frieden durch Recht: Anmerkungen zum Thema im historischen Kontext’, in P. Becker, R. Braun and D. Deiseroth (eds), *Frieden durch Recht?* (2010) 15; Lesaffer, ‘Too Much History: From War as Sanction to the Sanctioning of War’, in M. Weller (ed.), *Oxford Handbook of the Use of Force in International Law* (2015) 35.

<sup>4</sup> S.C. Neff, *Justice among Nations: A History of International Law* (2014), at 67.

<sup>5</sup> O. Asbach and P. Schröder (eds), *War, the State and International Law in Seventeenth-Century Europe* (2010).

<sup>6</sup> I. Brownlie, *International Law and the Use of Force by States* (1963), at 5; O’Connell, *supra* note 3, at 275; A. Tischer, *Offizielle Kriegsbegründungen in der Frühen Neuzeit: Herrscherkommunikation in Europa zwischen Souveränität und korporativem Selbstverständnis* (2012), at 22, 220ff.

<sup>7</sup> W.G. Grewe, *The Epochs of International Law*, translated and revised by Michael Byers (2000).

<sup>8</sup> *Ibid.*, at 531.

Consequently, *bellum iustum* would have lost its relevance as a normative framework during the 19th century. This thesis is widely accepted,<sup>9</sup> whereas some scholars have argued that the justification of war in the 19th century has been an extra-legal phenomenon.<sup>10</sup> Only recently, the continuing importance of natural law for the justification of the use of force has been problematized.<sup>11</sup>

Interestingly enough, the 19th century does not seem to have been of great scientific interest to research concerning the *bellum iustum* theory and, more generally, the justification of war so far. Questions regarding the 'just war', the resort to war, *ius ad bellum* and its justification have widely been ignored. This is puzzling. Only since World War I has the just war doctrine gradually been rediscovered,<sup>12</sup> while it seems to have been 'in the shadows', though not fully forgotten, during the 19th century.<sup>13</sup>

There is some evidence that so far not enough attention has been paid to the doctrine and the legal treatises of the 19th century with respect to the question of a normative judgment on the resort to war. Grewe's argumentation seems to support this impression. As Grewe shows, the terms that describe the emergence of the 'principle of the freedom to wage war' – *freies Kriegsführungsrecht*, *Kriegsfreiheit*, *liberté à guerre* and *compétence de guerre* – only became customary after 1919.<sup>14</sup> As it appears, Stephen C. Neff's assumption that the 19th century, 'extraordinarily, is the least explored area of the history of international law' is particularly true with respect to the justification of war.<sup>15</sup> A differentiated analysis of the normative status of war in international legal discourse is absent not only in classical works like Grewe's *Epochs* but also in more recent treatises.

Although offering one of the most detailed treatises on the subject in contemporary discourse, Grewe primarily cites contemporary authors and research literature, which

<sup>9</sup> See the differentiating analysis of Kunz, 'Bellum Justum and Bellum Legale', 45 *American Journal of International Law (AJIL)* (1951) 528; Brownlie, *supra* note 6, at 19; Q. Wright, *A Study of War* (2nd edn, 1965), at 685ff; Grewe, *supra* note 7, at 530ff; K.H. Ziegler, *Völkerrechtsgeschichte* (1994), at 230; Neff, *supra* note 3, at 197; Peters and Peter, 'Lehren vom "gerechten Krieg" aus völkerrechtlicher Sicht', in G. Kreis (ed.), *Der 'gerechte Krieg': Zur Geschichte einer aktuellen Denkfigur* (2006) 43; B. Buzan and G. Lawson, *The Global Transformation: History, Modernity and the Making of International Relations* (2015), at 86; C. Chinkin and M. Kaldor, *International Law and New Wars* (2017), at 133.

<sup>10</sup> J. von Elbe, 'The Evolution of the Concept of the Just War in International Law', 33 *AJIL* 665, at 684; C. Billfinger, 'Vollendete Tatsache und Völkerrecht. Eine Studie', 15 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1953–1954) 453, at 456; Miller, 'The Contemporary Significance of the Doctrine of Just War', 16 *World Politics* (1964) 254, at 259; Brock, *supra* note 3, at 20; Lesaffer, *supra* note 3, at 44.

<sup>11</sup> Carty, 'The Evolution of International Legal Scholarship in Germany during the Kaiserreich and the Weimarer Republik (1871–1933)', 50 *German Yearbook of International Law* (2007) 29, at 45–55; M.-E. O'Connell, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement* (2008), at 38–40; Simon, 'Über das "freie Recht zum Krieg" in Politik und Völkerrecht des 19. Jahrhunderts' (Public lecture, Max Planck Institute for European Legal History, Frankfurt, Germany, 2010); Verdebout, '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* (2014) 223; See already Nussbaum, 'Just War: A Legal Concept?', 43 *Michigan Law Review* (1943) 453, at 474.

<sup>12</sup> Neff, *supra* note 3, at 277.

<sup>13</sup> Lesaffer, *supra* note 3, at 46.

<sup>14</sup> Grewe, *supra* note 7, at 531.

<sup>15</sup> Neff, 'A Short History of International Law', in M.D. Evans (ed.), *International Law* (4th edn, 2014), at 12. In a similar vein, an 'absence of the 19th century' in the discipline of international relations has been criticized by Buzan and Lawson, *supra* note 9.

seem to support his thesis of a free right to wage war in the 19th century. Of particular importance in Grewe's presentation of *liberum ius ad bellum*, which, according to him, was of continental origin, is German lawyer Karl Lueder (1834–1895), who 'rejected the qualification of war as a means of legal appeal'.<sup>16</sup> Grewe briefly mentions a second group of authors who understood war as 'a procedure which was provided for and regulated by international law for the enforcement of legally protected claims and interests'.<sup>17</sup> However, according to Grewe, neither they nor Anglo-American interpretations of *bellum iustum* theories made a 'substantive difference to the freedom to wage war'.<sup>18</sup>

A more differentiated view on the 19th-century discussion of war has been offered by Neff. Neff identifies remnants of just war thinking in the ideas of Johann Caspar Bluntschli (1808–1881), H.W. Halleck (1815–1872) and Traver Twiss (1809–1897) but, to Neff, just war principles were 'somewhat disembodied' and replaced by the 'positivist synthesis' of the '*laissez-faire* era' in international politics.<sup>19</sup> 'War was now forthrightly seen as an instrument for the advancement of rival national interests', writes Neff: 'The idea of law governing the resort to war – the *ius ad bellum* of lawyers – shrivelled into virtual nothingness in the face of the positivist challenge. The decision to resort to war ... was the prerogative of policy, not of law.'<sup>20</sup>

While Grewe and his followers identify dissident voices, they marginalize the discursive importance of *bellum iustum* and the criticism of war in 19th-century legal discourse. Thus, the acceptance of *liberum ius ad bellum* takes the place of a deeper analysis of contemporary legal thinking, while dissenting histories are silenced. As becomes obvious, a detailed study of the so-called *liberum ius ad bellum* and the importance of *bellum iustum* in the 19th century is missing, raising the question: how far is this basic assumption of Grewe and his followers true or false? In what follows, Grewe's thesis will be contested by a detailed look at the relevance of *bellum iustum* and *ius ad bellum* in 19th-century international legal discourse. Therefore, the continuous connection between moral, political and legal narratives regarding the resort to war in 19th-century international legal doctrine will be thoroughly investigated, and concepts of political legitimations of war, attempts at the legal prevention of war and existing approaches of *bellum iustum* in the so-called 'positive century' will be confronted.<sup>21</sup>

To anticipate the findings of my comparative analysis, let me indicate that there are some convincing arguments in favour of Grewe's thesis that *liberum ius ad bellum* existed. As Grewe suggests, this thesis was widespread in German legal doctrine after the German unification in 1871. It was held by authors who argued in a *realist* tradition, here described as Clausewitzian. Thus, one focus will be on German legal

<sup>16</sup> Grewe, *supra* note 7, at 532ff.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, at 533.

<sup>19</sup> Neff, *supra* note 3, at 161, 168.

<sup>20</sup> *Ibid.*, at 161, 162.

<sup>21</sup> Neff, *supra* note 3, at 215; A. Nussbaum, *A Concise History of the Law of Nations* (2nd edn, 1954), at 232, 257.

discourse in the late 19th century. Nevertheless, the seeming confirmation of the thesis of *liberum ius ad bellum* should not obscure another contemporary legal theory: the legal doctrine of those scholars who were in favour of a legal prohibition of war. Both strands of thought drew from contrary concepts of law (positivistic versus natural law concepts).

Moreover it will be illustrated that the analytical combination of contemporary legal theory and political practice may enrich the debate in the sense of a critical legal history of the politics of justifying war.<sup>22</sup> An analysis of the role of law in 19th-century war discourses of state practice is missing so far, but it may be decisive for the theoretical debate between Clausewitzians and Kantians. The fundamental argument of the article, therefore, is that the justification of war in 19th-century legal doctrine and state practice has to be investigated more carefully than before. The present article contributes to this task. It posits that the so-called *liberum ius ad bellum* constitutes a myth of international legal doctrine.

## 2 The Dialectics of a Normative Dichotomy: War and Peace in 19th-Century Legal Discourse

In terms of 'war' and 'peace', the 19th century was a century of great ambivalence, shaped by normative paradoxes. It has been argued that the 19th century was the most peaceful century in modern European history.<sup>23</sup> In fact, between 1815 and 1914 only five wars between great powers took place. The Congress of Vienna (1814–1815) sounded the bell for a century of political cooperation via congresses, conferences and multilateral diplomacy.<sup>24</sup> The legal institute of 'neutrality' appears to simultaneously support the findings that war had become a political affair beyond general community interests, on the one hand, and the idea of an establishment of international peace through law, on the other.<sup>25</sup> However, the 'long peace' between the European great powers in the 19th century<sup>26</sup> was by no means a non-violent order.<sup>27</sup> Rather, it was a precarious armistice between the great powers, based on their diplomatic cooperation and military intervention in weaker states as well as expansion and (informal)

<sup>22</sup> For the role of just war thinking in early modern state practice, see Piirimäe, 'Just War in Theory and Practice: The Legitimation of Swedish Intervention in the Thirty Years War', 45 *Historical Journal* (2002) 499; Tischer, *supra* note 6; Lesaffer, *supra* note 3.

<sup>23</sup> J. Levy, *War in the Modern Great Power System. 1494–1975* (1983), at 90, 138; M. Schulz, *Normen und Praxis: Das Europäische Konzert der Großmächte als Sicherheitsrat, 1815–1860* (2009), at 5.

<sup>24</sup> P.W. Schroeder, *The Transformation of European Politics, 1763–1848* (1994), at vii; M. Vec, *Recht und Normierung in der Industriellen Revolution: Neue Strukturen der Normsetzung in Völkerrecht, staatlicher Gesetzgebung und gesellschaftlicher Selbstnormierung* (2006), at 104; H.B. Oppenheim, *System des Völkerrechts* (1845), at 1–7.

<sup>25</sup> M. Abbenhuis, *An Age of Neutrals: Great Power Politics, 1815–1914* (2014), at 45.

<sup>26</sup> Levy, *supra* note 23; Schulz, *supra* note 23.

<sup>27</sup> Vec, 'From the Congress of Vienna to the Paris Peace Treaties of 1919', in Fassbender and Peters, *supra* note 3, 654, at 660.

imperialism in non-European territories.<sup>28</sup> Peace went hand in hand with military force, violent suppression and control.<sup>29</sup>

The paradoxes and ambivalences of war and peace in 19th-century Europe clearly can be identified in contemporary political practice and legal doctrine. Both were divided between the aims of preventing and, more importantly, humanizing war, on the one hand, and an acceptance of war as a political instrument – an *ultima ratio* for self-help in the Hobbesian tradition – on the other hand.<sup>30</sup> Though mostly ignored in the history of international law, the legitimacy of war became a controversial dispute in contemporary legal discourse. Important intellectual resources for the differing theoretic evaluations were (and are) the philosophers Immanuel Kant (1724–1804), Georg Wilhelm Friedrich Hegel (1770–1831) and a military theorist, Carl von Clausewitz (1780–1831).

Both Kant and Hegel rejected the horrors of war, but they held contrasting views on the value of international law. In his proposal on ‘Perpetual Peace’, published in the turmoil of the French Revolution (1795), Kant demanded complete legalization and institutionalization of national, international and global human relations via positive law in order to overcome war with an eternal legal peace (*ewiger Friede*).<sup>31</sup> He refused the notion of a right to go to war because of ‘the one-sided maxims that operate by means of force’.<sup>32</sup> Instead, Kant outlined a legal prohibition of war (*ius contra bellum*) derived from practical reason.<sup>33</sup>

Unlike Kant, Hegel argued against the binding power of international law. Highlighting the centrality of state sovereignty, Hegel rejected Kant’s project for a universal perpetual peace. For Hegel, law required a power to execute it; without an earthly judge – a *praetor* – over self-sufficient states, war was part of the right beyond the state (*das äußere Staatsrecht*) and a legitimate mechanism for dispute settlement. The only higher *praetor* in the Hegelian sense was the world spirit (*Weltgeist*).<sup>34</sup>

While Kant and Hegel were discussing the relationship between war and law, Clausewitz took another route of argumentation. He understood war as a ‘clash between major interests that is resolved by bloodshed’ and added: ‘[T]hat is the only way in which it differs from other conflicts.’<sup>35</sup> Clausewitz’s main argument was the dominance of politics with regard to war. From this perspective, war was not a question of legality or legitimacy but, rather, a political instrument, ‘simply the continuation of policy with the admixture of other means’.<sup>36</sup> For Clausewitz, war did not take the form

<sup>28</sup> J. Fisch, *Die europäische Expansion und das Völkerrecht: Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart* (1984); A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005).

<sup>29</sup> M. Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002), at 11; A. Zamoyski, *Rites of Peace: The Fall of Napoleon and the Congress of Vienna* (2007), at 554.

<sup>30</sup> Cf. Neff, *supra* note 3, at 162ff.

<sup>31</sup> Kant, *supra* note 1, at 11–33.

<sup>32</sup> *Ibid.*, at 99.

<sup>33</sup> Cf. Habermas, ‘Kant’s Idea of Perpetual Peace, with the Benefit of Two Hundred Years’ Hindsight’, in J. Bohman and M. Lutz-Bachmann (eds), *Perpetual Peace: Essays on Kant’s Cosmopolitan Ideal* (1997) 113.

<sup>34</sup> G.W.F. Hegel, *The Philosophy of Right* (1820 [2002]), at 262–264.

<sup>35</sup> Clausewitz, *supra* note 2, at 146.

<sup>36</sup> *Ibid.*, at 69, 605; Cf. Neff, *supra* note 3, at 162.



of law enforcement in the sense of *bellum iustum* but, instead, was seen as ‘nothing but a duel on a larger scale’ – ‘an act of [physical, HS] force’.<sup>37</sup>

In 19th-century legal discourse, the impact of these different perspectives on peace and war can be identified clearly. Legal opinions diverged sharply. Russian crown jurist Fedor Fedorovich Martens (1845–1909) aptly described the range of normative judgments in modern war discourses expressed by philosophers (he mentioned Baruch Spinoza, Kant, Joseph de Maistre, John Stuart Mill, Pierre-Joseph Proudhon, Théophile Funck-Brentano, Adolf Lasson), lawyers (Robert Phillimore and himself), military authors (Clausewitz, Wilhelm Rüstow, Gustav Ratzenhofer, Julius von Hartmann), political publicists (Richard Cobden, Heinrich W. Wiskemann, Heinrich Treitschke, Carlo Fiorilli) and a journalist (Émile de Girardin) as follows: ‘Everyone knows what war is, but it is clearly not easy to define it scientifically. Former definitions show greatest variations.’<sup>38</sup>

In fact, a precise scientific definition was not easily achieved in 19th-century legal theory, even if the current omnipresence of Grewe’s thesis of *liberum ius ad bellum* may let one think differently. What was virtually unambiguous was the definition of the sovereign, ‘civilized’ (that is, European) state as the primary subject of war, even if some exceptions were considered.<sup>39</sup> Nevertheless – and this is a basic argument of the present article – the normative evaluation of war was controversially discussed among legal scholars. Superficially, their opinions can be categorized into two competing viewpoints distinguished by legal and political perspectives: first, ‘war’ as law enforcement in the broader sense of *bellum iustum* and, second, ‘war’ as an armed duel between sovereign states in the sense of *liberum ius ad bellum*.

Some international lawyers defined ‘war’ in the style of Clausewitz, as a natural force, which often occurs as a political instrument – *Fortsetzung der Politik in anderer Form* – as German lawyer Karl Lueder (1834–1895) expressed it.<sup>40</sup> For Lueder, war was an empirical fact of physical force.<sup>41</sup> He therefore rejected any definition of war as a legal term. This Clausewitzian school of thought among lawyers evolved particularly in Imperial Germany, where some jurists were in close proximity to the military. After German unification in 1870–1871, German lawyers felt the pressure to combine the new geopolitical power of the *Kaiserreich* under Otto von Bismarck (1815–1898) with international legal obligations. In this context, the idea of the will of the state became an important narrative.<sup>42</sup>

<sup>37</sup> Clausewitz, *supra* note 2, at 75; Cf. Tashjean, ‘The Clausewitzian Definition: From Just War to the Duel of States’, 17 *Revue européenne des sciences sociales* (1979) 79, at 81.

<sup>38</sup> F. von Martens, *Völkerrecht: Das internationale Recht der civilisirten Nationen*, vol. 2 (2nd edn, 1886), at 476 (my translation).

<sup>39</sup> J.C. Bluntschli, *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt* (1868), at 287.

<sup>40</sup> Lueder, ‘Krieg und Kriegsrecht im Allgemeinen’, in F. von Holtzendorff (ed.), *Handbuch des Völkerrechts* (1889) 169, at 180; see also Ullmann, ‘Völkerrecht’, in E. Ullmann (ed.), *Handbuch des Oeffentlichen Rechts* (2nd edn, 1898), at 313; R.R. Foulke, *A Treatise on International Law* (1920), at 130ff. Lueder also quoted W. Rüstow, *Die Feldherrnkunst des neunzehnten Jahrhunderts: Zum Selbststudium und für den Unterricht an höheren Militärschulen* (1857), at 1.

<sup>41</sup> Lueder, *supra* note 40, at 180–184.

<sup>42</sup> Cf. Koskeniemi, *supra* note 29, at 204ff.



War was understood as a historical constant, which in spite of its brutality and terror had the meaning of an exponent of progress, a necessary instrument for the further development of civilization – *ein wahrer nothwendiger Culturträger*.<sup>43</sup> War was consequently the normal condition of international relations, which was in harmony with 'divine order' (*göttliche Weltordnung*). It was not only a law of the world (*Weltgesetz*) – here one may suspect the impact of Hegel – but also a political instrument to gain national honour, power and the independence of the sovereign state in its own right – here, one can clearly see the impact of Clausewitz.<sup>44</sup>

However, these *realistic* views on the historical dialectics of war and order were by no means simply taken for granted in legal discourse, as Grewe and his followers claim. On the contrary, they were challenged by liberal lawyers, who were in favour of a legal prohibition of war.<sup>45</sup> Legal authorities like the famous Swiss lawyer Johann Caspar Bluntschli, a co-founder of the (Nobel Peace Prize winning) Institut de Droit International, as well as Henry Bonfils (1835–1897), a professor in Toulouse who considered war a scandal because of its inhuman brutality. Following Bonfils, war, conducted for whatever reason, was an evil. Even justified wars were therefore morally reprehensible.<sup>46</sup> From these moral scruples, Bluntschli, Bonfils and others concluded in normative opposition to Lueder and his colleagues that peace was the normal condition of international relations.<sup>47</sup> In times of peace, assumed Bluntschli, law ruled, not force.<sup>48</sup> While the Clausewitzians took war for granted, liberal lawyers like Bluntschli believed in the possibility of international peace through law.

Still one can find a curious paradox in Bluntschli's treatise regarding the dialectics of war and order. Citing Friedrich Schiller's (1759–1805) 'Die Weltgeschichte ist das Weltgericht' ('World History Is the World's Tribunal') from the poem 'Resignation' (1786), Bluntschli admitted that under the existing natural conditions and an inexorable desire to overcome outdated law, war could sometimes be seen as an irresistible necessity.<sup>49</sup> Being a supporter of Bismarck's unification policy,<sup>50</sup> Bluntschli argued in favour of the 'holy, natural and important right' of a *Volk* to national unity; even if this 'natural right' required a resort to violence.<sup>51</sup> Bluntschli's argument was based on legal, not power-political or military progress; however, some form of a dialectic understanding of the relationship between war and order was present both in Clausewitzian and liberal legal thought. Peace and war were seen as being historically interwoven.

<sup>43</sup> Lueder, *supra* note 40, at 203.

<sup>44</sup> *Ibid.*

<sup>45</sup> Cf. Koskeniemi, *supra* note 29; Vec, *supra* note 27.

<sup>46</sup> H. Bonfils, *Lehrbuch des Völkerrechts: Für Studium und Praxis* (3rd edn, 1904), at 538ff.

<sup>47</sup> Rotteck, 'Krieg', in C. von Rotteck and C. Welcker (eds), *Staatslexikon oder Enzyklopädie der Staatswissenschaften* (1840) 491, at 492; Bluntschli, *supra* note 39, at 9; Bonfils, *supra* note 46, at 538; D. Woolsey, *Introduction to the Study of International Law: Designed as an Aid in Teaching, and in Historical Studies* (1879 [2003]), at 183; L. Strisower, *Krieg und Völkerrechtsordnung* (1919), at 4.

<sup>48</sup> Bluntschli, *supra* note 39, at 9.

<sup>49</sup> *Ibid.*, at 10; Schiller, 'Resignation', 2 *Thalia* (1786) 64.

<sup>50</sup> Koskeniemi, *supra* note 29, at 64.

<sup>51</sup> Bluntschli, *supra* note 39, at 291.

Bluntschli and his followers' scandalization of war was taken up and heavily criticized by some contemporary legal scholars. Many of the lawyers, who criticized Bluntschli, could be labelled as Clausewitzians: 'War is fighting, and there is nothing abnormal about a fighting man, so why should men fighting in a body be abnormal?', wrote American lawyer Roland R[oberts] Foulke from Philadelphia.<sup>52</sup> For Clausewitzians, war was a fact, not an object for philosophical reflections. Referring to Kant and liberal lawyers, Karl Lueder argued that the realization of perpetual peace was unthinkable and impossible. For him, it was *ein unerreichbares Ideal* – and not even the right ideal at all – because war was natural and necessary.<sup>53</sup> These were realists' answers to the liberal project of a legal prohibition of war, favouring a turn from the universal vocabulary of justice to the empirical facts of history.

To sum up, within the legal discourse, there were contradicting voices concerning the status of war in history. Some judged it morally evil in the Kantian sense, others legitimated it as the normal – indeed, honourable – procedure of international relations in a Hobbesian or Clausewitzian sense. Consequently, it is possible to identify competing normative arguments derived from political, legal and moral spheres in the treatment of war in 19th-century legal discourse, which make it plausible to use the term of 'multi-normativity' in this topic area.<sup>54</sup> Based on these research results, the next section will unveil the impact of these different normative statements on the question of a legitimate or legal use of force in international relations – that is, the dualism of *liberum ius ad bellum* in the sense of war as a political duel and just war thinking (*bellum iustum*) in contemporary legal discourse. As will be shown, a passionate dispute arose around the legitimacy of war in 19th-century legal doctrine, especially after 1870, as both legal positivism and natural law thinking were faced with a particularly poorly regulated policy field. Did lawyers claim *liberum ius ad bellum* within this framework?

### 3 Multiple Justifications of War: *Bellum iustum*, *ius ad bellum* and *ius contra bellum* in 19th-Century Legal Discourse

Whereas war had been a central topic in every treatise of international law, there were hardly any comprehensive or concluding investigations of the legitimacy of resort to war in 19th-century legal doctrine. This is an observation I share with German lawyer Heinrich Rettich. In 1888, Rettich criticized contemporary international lawyers for not having come up with a widely shared positivist understanding of war and its functions in history. As the former chapter has revealed, Rettich's argument had some plausibility. However, even more unsatisfying – *bei manchen höchst unklar und unlogisch*,

<sup>52</sup> Foulke, *supra* note 40.

<sup>53</sup> Lueder, *supra* note 40, at 196–199, 203.

<sup>54</sup> Vec, 'Multinormativität in der Rechtsgeschichte', in *Berlin-Brandenburgische Akademie der Wissenschaften (vormals Preußische Akademie der Wissenschaften) Jahrbuch 2008 (2009)* 155, at 162–165.

as Rettich wrote polemically – was the scientific treatment of the justifying causes of war – *die Lehre von den rechtfertigenden Kriegsursachen*.<sup>55</sup> From his overview of 19th-century international legal discourse, Rettich argued, in accordance with Grewe's thesis of *liberum ius ad bellum*, that there was a positive right to wage war – *ein Recht zum Kriege* – based on a state's interests and necessities.<sup>56</sup> However, at this point, my agreement with Rettich ends.

In fact, there was a respectable group of lawyers in the 19th century who understood war as a legally irrelevant, but valid, political instrument. They thereby supported the idea of the free right of the state to go to war as the acme of state sovereignty.<sup>57</sup> For instance, Emanuel Ullmann (1841–1913), former professor of public and criminal law in Vienna and successor of Franz von Holtzendorff (1829–1889) in Munich from 1889, argued that every war was legal because a sovereign state accepted only its own politics as legally significant.<sup>58</sup> Not surprisingly, many of these advocates of a *realist* view on international war were the same authors who had already argued in favour of the civilizing and regulative value of war in history. German lawyer Paul Heilborn (1861–1932) agreed with Ullmann by characterizing war as 'absolutely permitted in inter-State relations'.<sup>59</sup> In treatises of jurists such as Heilborn and Ullmann, therefore, one can identify contemporary sources for Grewe's thesis of a free right to wage war. How was this *liberum ius ad bellum* reasoned in Clausewitzian international legal theory?

One of the most precise descriptions of war in the sense of the Clausewitzian state duel was given by John Westlake (1828–1913), then professor for international law at Cambridge University in England.<sup>60</sup> Westlake argued that a war between 'civilized states' was begun because of some demand or some complaint of one state against another. Still, for Westlake, when it came to the legitimacy of war, international law 'says its last word on that point when it pronounces the demand or the complaint to be legitimate or illegitimate, and if possible, offers arbitration'.<sup>61</sup> However, on a second level, he argued that the question of the legitimacy of war could be put aside if states were not content with peaceful conflict offered by international law: '[T]he want of organisation in the world of states compels the law which was concerned with their dispute to stand aside while they fight the quarrel out, in obedience not to the natural law of philosophers, which is a rule prescribing conduct, but to that of the natural historian, which is a record of the habits of the species, good or bad.'<sup>62</sup>

<sup>55</sup> H. Rettich, *Zur Theorie und Geschichte des Rechts zum Kriege* (1888), at 39, 67.

<sup>56</sup> *Ibid.*, at xiii.

<sup>57</sup> C. Gareis, *Institutionen des Völkerrechts* (1888), at 192; especially Lueder, *supra* note 40, at 179ff; Ullman, *supra* note 40, at 313; P. Heilborn, *Handbuch des Völkerrechts* (1912), vol. 1, at 23; A. Quaritsch, *Völkerrecht und Auswärtige Politik* (9th edn, 1913), at 150ff; J. Westlake, *International Law*, vol. 2: *War* (1907), at 1; K. Strupp, *Grundzüge des positiven Völkerrechts* (4th edn, 1928), at 212; L. Oppenheim, *International Law: A Treatise* (3rd edn, 1921), at 79ff; A. Lasson, *Princip und Zukunft des Völkerrechts* (1871), at 68.

<sup>58</sup> Ullmann, *supra* note 40, at 313.

<sup>59</sup> Heilborn, *supra* note 57, at 23.

<sup>60</sup> Cf. Koskeniemi, *supra* note 29, at 86.

<sup>61</sup> Westlake, *supra* note 57, at 56.

<sup>62</sup> *Ibid.*

Three aspects of Westlake's definition of war between states make it a particularly interesting summary of the Clausewitzian approach. First, there is the assumption that two states could jointly decide to ignore questions of the legitimacy of war in order to solve their 'quarrel' by resorting to armed force instead. For Clausewitzians, war became a duel between two states over opposing political interests. Like Clausewitz, Lueder and Alphonse Rivier (1835–1898) argued that the definition of 'war' presupposed violent acts on both sides.<sup>63</sup> Here, one may remember Clausewitz's famous definition of the beginning of a state duel: 'War begins only with defence' (*'Der Krieg beginnt mit der Verteidigung'*).<sup>64</sup>

Second, there was the claim that international law was to 'stand aside' during a duel, as argued by Westlake. The normative power of right was to be subordinated to factual might. The legitimacy of war was to be ignored since, for Clausewitzians, war was not law enforcement but, instead, each belligerent simply strove 'to break down the resistance of the other to the terms which he requires for peace'.<sup>65</sup> This definition clearly goes beyond the concept of war that is limited to sanctions in the sense of *bellum iustum*. Wars were not necessarily limited 'to the concession of the demand or the satisfaction of the complaint out of which the war arose' but, rather, could include cession of territory or even the extinction of the weaker state by conquest.<sup>66</sup>

For Clausewitzians, normative limitations in the sense of just war theory and, with it, the very idea of justice with respect to war were parts of the past and belonged to the medieval *bellum iustum* theory. According to them, states had never differentiated between just and unjust war in the legal sense; the distinction thus had no effect on the fact of war.<sup>67</sup> Where sovereign states decided to fight a duel, law could not prevent them from seeing war as a necessity. Thus, the concept of 'military necessity' took the discursive place of morality and law. As we can clearly reconstruct, Clausewitzians declined the just war doctrine as being incompatible with a political, demoralized 'right of the stronger'. In order to avoid a regulation of the 'necessity of war', these lawyers denied the theory of *bellum iustum* as well as the positivistic legalization of war (*ius contra bellum*). For them, the *ius ad bellum* was, exactly as Kant had criticized it in 1795, a prerogative of sovereignty.<sup>68</sup> Law was seen as providing mitigating rules; thus, only the *ius in bello* was accepted as legally binding by Clausewitzians.<sup>69</sup> However, in the German *Kaiserreich*, lawyers like pro-military Lueder and Ullmann were particularly taken with the idea of a selective use of the normative force of *ius in bello* in light of military needs<sup>70</sup> – *Kriegsräson geht vor Kriegsrecht* (the *raison* of war overrides the laws of war).<sup>71</sup>

<sup>63</sup> Lueder, *supra* note 40, at 175ff; A. Rivier, *Lehrbuch des Völkerrechts* (1889), at 378.

<sup>64</sup> C. von Clausewitz, *Vom Kriege* (1832 [1980]), at 644.

<sup>65</sup> Westlake, *supra* note 57, at 57; Lueder, *supra* note 40, at 176.

<sup>66</sup> Westlake, *supra* note 57, at 57.

<sup>67</sup> *Ibid.*; Strupp, *supra* note 57, at 211ff.

<sup>68</sup> Kant, *supra* note 1, at 99.

<sup>69</sup> Strupp, *supra* note 57, at 211ff.

<sup>70</sup> Lueder, *supra* note 40, at 186ff; Rivier, *supra* note 63, at 376; Ullmann, *supra* note 40, at 317.

<sup>71</sup> I.V. Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (2014), at 211–239.

Third, the Clausewitzians' neglect of the legitimacy of war as well as their denial of *bellum iustum* was clearly based on a purely positivist-empirical concept of law. It fell on fertile ground in the German context after 1870–1871, when international lawyers forged ahead with the transformation of their science into positivism. Here, the claim for *liberum ius ad bellum* was particularly strong. Some parts of German legal doctrine were shaped by a turn to a sociological language, which can be identified in Ullmann's *Völkerrecht*.<sup>72</sup> Clausewitzian lawyers argued in favour of war as a physical fact – a *lex lata naturae* – which was not to be judged normatively.<sup>73</sup> The just war doctrine was to be overcome. In Clausewitzian positivism, *bellum iustum* was an outdated natural law conception. In contrast to the 'natural law of philosophers', Clausewitzians only accepted empirically demonstrable, as well as enforceable, law as 'true law': '[T]hat of the natural historian, which is a record of the habits of the species, good or bad.'<sup>74</sup> For them, natural law was inappropriate as a source of law.

Given the fact that there was no prohibition of war and 'no rule concerning when war may be waged' by the second half of the century, it appeared to Clausewitzians that international law could only be enforced to a small extent.<sup>75</sup> From their strictly factual-positivist standpoint, the legitimacy of war was not a relevant question of international law but, if at all, one of international morality.<sup>76</sup> 'But modern International Law knows nothing of these moral questions', argued British lawyer Thomas Joseph Lawrence (1849–1920), lecturer at Cambridge University in England and in Chicago in the USA, in his perfect summary of this perspective on war and law: 'It does not pronounce upon them: it simply ignores them. To it war, whether just or unjust, right or wrong, is a fact which alters in a great variety of ways the relations of the parties concerned.'<sup>77</sup> To some extent, it was a capitulation before the 'reality' of war.

Does this mean that *bellum iustum* had been forgotten in the 19th century? Not at all! Whereas the discrimination between just and unjust wars was central to moral theological and legal writings in pre-modern Europe, the terms 'just war', *gerechter Krieg* and *guerre juste* can, interestingly enough, still be found in legal writings of the 19th century. The first piece of evidence is that Clausewitzian writers felt the need to distance themselves from *bellum iustum* arguments.<sup>78</sup> Thus, it still had a discursive meaning in 19th-century legal doctrine, even for Clausewitzians. In 1888, Rettich assumed that he was writing against a mainstream legal discourse dominated by *bellum iustum*;<sup>79</sup> from a genealogical perspective, Rettich's assumption is particularly interesting as it strongly supports the thesis that *liberum ius ad bellum* was fully developed only in the last third of the 19th century by Clausewitzians. For these lawyers,

<sup>72</sup> Cf. Koskeniemi, *supra* note 29, at 224; Carty, *supra* note 11, at 51.

<sup>73</sup> Lueder, *supra* note 40, at 176.

<sup>74</sup> Westlake, *supra* note 57, at 56.

<sup>75</sup> Heilborn, *supra* note 57, at 23.

<sup>76</sup> Lueder, *supra* note 40, at 182; Ullmann, *supra* note 40, at 313.

<sup>77</sup> T.J. Lawrence, *The Principles of International Law* (2nd edn, 1895), at 292.

<sup>78</sup> Lueder, *supra* note 40, at 182, 195.

<sup>79</sup> Rettich, *supra* note 55, at xiii; Cf. Carty, *supra* note 11, at 45.

*bellum iustum* was – or, at least, should have been – replaced by *liberum ius ad bellum*. Furthermore, in their positivist outlook, *bellum iustum* and *liberum ius ad bellum* could not coexist as separate legal theories (that is, in the sense of a distinction as the first belonging to natural law, the second to positive law). For them, a moral perspective on war was fully inappropriate for international law. Most importantly, as they constantly cited the just war tradition, it now becomes obvious that their idea of *liberum ius ad bellum* was actually a historical modification of the *bellum iustum* tradition, overcoming right intention and just cause but focusing on the right authority – that is, the sovereign state.<sup>80</sup> For Clausewitzian lawyers, not only was war to be freed from *bellum iustum* limitations but also, even more, *liberum ius ad bellum* had emerged from the *bellum iustum* theory during the early modern times.<sup>81</sup> According to them, the pursued transformation from *bellum iustum* to *liberum ius ad bellum* was also a shift from natural law to a sociological positivism of military necessity, which was finally completed in the last third of the 19th century.

However, there is a second, even more striking piece of evidence that supports the thesis that the just war tradition, albeit in a broader sense, still had an important impact on international legal theory – namely, the Clausewitzian perspective on the free resort to war by states was contested through moral and legal arguments derived from the just war theory. Before the dispute between the Clausewitzians and liberals reached its climax in the second half of the century, a well-known 19th-century lawyer, the German August Wilhelm Heffter (1796–1880), professor of law in Berlin, had already referred to a just war – *gerechter Krieg* – from a positivistic perspective. His *Das Europäische Völkerrecht der Gegenwart* was praised by European lawyers as one of the best legal treatises on positive international law.<sup>82</sup> Heffter defined ‘war’ solely as the use of utmost, even destructive, force in favour of the realization of legal purposes: ‘Ein Rechtsbegriff wird der Krieg erst, wenn man sich ihn als Anwendung des äußersten selbst vernichtenden Zwanges wider einen Andern denkt, zur Realisirung rechtlicher Zwecke bis zur Erreichung derselben.’<sup>83</sup> For Heffter, who shared some similarities with Hegel, war was, ‘with other words’, the ultimate self-help.<sup>84</sup>

However, in accordance with many scholars with a legal background – and in total contrast to the definition of war as a pure fact used by German lawyers later in the century, whom I call Clausewitzians – Heffter distinguished between defensive wars to ward off an unjust attack and offensive wars, which were waged for the purpose of satisfaction.<sup>85</sup> Here, Heffter identified the boundary line between war and justice – a war was only just to the extent that self-help was allowed.<sup>86</sup> For Heffter, an unjust war – *der ungerechte Krieg* – was actually equal in its effects to a just war; *da er*, argued Heffter,

<sup>80</sup> Cf. Tashjean, *supra* note 37, at 82.

<sup>81</sup> For early modern debates, see Neff, *supra* note 3, at 132–140.

<sup>82</sup> Cf. Rivier, *supra* note 63, at 61; Nussbaum, *supra* note 21, at 243.

<sup>83</sup> A.W. Heffter, *Das Europäische Völkerrecht der Gegenwart* (1844), at 195.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*; C. Calvo, *Dictionnaire de Droit International Public et Privé* (1885), at 366.

<sup>86</sup> Heffter, *supra* note 83, at 196; Bluntschli, *supra* note 39, at 287.



dem gerechten thatsächlich gleichsteht.<sup>87</sup> In an analogy to Hegel (and Alberico Gentili), Heffter explained this factual non-difference between just and unjust wars with the lack of an earthly judge, by whom justice or injustice of a war could be sentenced.

This contradiction between the factuality of war and a pursued positivist international legal order reflects the liberal challenge to integrate *bellum iustum* as a moral theory into 19th-century legal discourse; political scientist Robert von Mohl (1799–1875), professor in Tübingen, agreed with Heffter. For him, war was *ultima ratio regum* in order to defend the law and save the international legal order from violent anarchy. For Mohl, the ultimate reason for war was the restoration of law and peace.<sup>88</sup> This was a definition of war as legal enforcement, which can also be found, with even stronger reference to classical, moral theological concepts of *bellum iustum*, in contemporary legal discourse on ‘measures short on war’ like ‘reprisals’<sup>89</sup> and ‘(humanitarian) intervention’.<sup>90</sup> For Martens, an intervention could be justified in the name of ‘international community’, with recourse to the ‘commonality of religious interests and the commandments of humanity, that is the principles of natural law [sic!].’<sup>91</sup> Thus, natural law was still alive at the end of the 19th century. However, for liberal lawyers, the binding power of law was not just limited to ‘measures short of war’ but was also applied to the legal justification of war.

Robert Phillimore (1810–1885) called war a ‘terrible litigation’ between states, and Martens rightly acknowledged Phillimore’s legal position to be in total contradiction to Clausewitz’s concept of war as a state duel.<sup>92</sup> Other lawyers also argued likewise, with recourse to *bellum iustum*, by the second half of the century, when the Clausewitzian legal doctrine was in full bloom. Like Heffter, Bluntschli identified a war to be just (*gerecht*) if armed self-help could be justified by international law and unjust (*ungerecht*) if it was in contradiction with the rules of international law: ‘Der Krieg ist gerecht, wenn und soweit die bewaffnete Rechtshilfe durch das Völkerrecht begründet ist, ungerecht, wenn dieselbe im Widerspruch mit den Vorschriften des Völkerrechts ist.’<sup>93</sup>

Argentinian lawyer Carlo (‘Charles’) Calvo (1824–1906), another co-founder of the Institut de Droit International, agreed in 1885 that war could be considered just if international law authorized the recourse to arms, and, therefore, it could be considered unjust if it was against the principles of law: ‘*Légitimation de la guerre: ... En résumé, une guerre peut être considérée comme juste, lorsque le droit international autorise le recours aux armes; comme injuste lorsqu’elle est contraire aux principes de ce droit.*’<sup>94</sup> And August von Bulmerincq (1822–1890) argued that a state that was harmed in its

<sup>87</sup> Heffter, *supra* note 83, at 195.

<sup>88</sup> R. von Mohl, *Encyklopädie der Staatswissenschaften* (1859), at 453ff.

<sup>89</sup> Neff, *supra* note 3, at 225–227.

<sup>90</sup> For 19th-century international political theory, see Jahn, ‘Humanitarian Intervention: What’s in a Name?’, 49 *International Politics* (2012) 36.

<sup>91</sup> F. von Martens, *Völkerrecht: Das internationale Recht der civilisirten Nationen* (2nd edn, 1883), vol. 1, at 302.

<sup>92</sup> Martens, *supra* note 38, at 476.

<sup>93</sup> Bluntschli, *supra* note 39, at 290.

<sup>94</sup> Calvo, *supra* note 85, at 366ff.



fundamental rights by another state was justified to use war as a *Rechtsmittel*. To him, only a war waged in order to defend its right was justified: ‘Nur der Vertheidigungskrieg ist völkerrechtlich gerechtfertigt.’<sup>95</sup> Moreover, in the tradition of *bellum iustum*, a war was only legitimate for the purposes of restoring violated rights and achieving compensation; war was not a political instrument but, rather, one of law. Therefore, recourse to the coercive violence of war is not justified by the Clausewitzian necessity of war but only by the necessity of law (*Rechtsnothwendigkeit*; *Rechtsgründe*<sup>97</sup>).

For Bluntschli, it was not only a question of morality but also an imperative of law – *nicht bloß ein moralischer, sondern ein wirklicher Rechtssatz*.<sup>98</sup> Legal reasons for a war, he argued, were (a serious threat of) infringements of rights, trespasses against a state or a grave breach against the world order. Similar to early modern just war theory, a violation of rights was the central criterion to Bluntschli’s legal conception of war, but, in contrast to it, the *causa iusta* was to be legalized – in other words, to be transformed into positive law. In the legal writings of the 19th century, if the legitimization of war had been described in terms of just and unjust, then ‘just’ or ‘unjust’ meant generally the same thing as ‘legal’ or ‘illegal’.<sup>99</sup> Thus, it appears that the conception of war found in Bluntschli’s treatise can be understood as an early attempt at a modern *ius contra bellum*, based on the idea of peace through law.<sup>100</sup> Here, one can see the influence of Kant’s legal philosophy and his concepts of international and global legal society (*Völkerrecht/Weltbürgerrecht*).<sup>101</sup>

Nevertheless, as Bluntschli admitted, a legal limitation of the resort to war was, for the time being, of little practical importance because there was no impartial judge to differ between just/legal and unjust/illegal wars.<sup>102</sup> Since no treaty generally prohibited war, Bluntschli understood that there was a long way to go for international law to transform violent international conflicts (*violentia*) into truly legal conflicts (*potestas*). The early modern question ‘*quis iudicabit?*’ was still lacking an answer in positivistic terms, and, along with it, the theoretical and methodical problems of the concept and sources of international law had arisen. In contrast to the Clausewitzians, who turned (and surrendered) to the sociological-empirical ‘factuality’ of war, liberal lawyers did not take the lack of a positivist legalization as immutable. Bluntschli and his followers therefore combined two normative spheres in their criticism of war as a political instrument: law and morality. Bluntschli argued that it was in the interest of humanity (*großes humanes Interesse*) to outlaw the ‘barbaric view’ of war (*barbarischen Standpunkt*) as violent self-help in the sense of the medieval feud.<sup>103</sup> For Bluntschli, a

<sup>95</sup> A. von Bulmerincq, *Das Völkerrecht oder das internationale Recht* (2nd edn, 1889), at 357; cf. Carty, *supra* note 11, at 49.

<sup>96</sup> Bulmerincq, *supra* note 95, at 357.

<sup>97</sup> Bluntschli, *supra* note 39, at 290.

<sup>98</sup> *Ibid.*

<sup>99</sup> Rivier, *supra* note 63, at 361.

<sup>100</sup> Bluntschli, *supra* note 39, at 287ff.

<sup>101</sup> *Ibid.*, at 26ff; cf. Koskeniemi, *supra* note 29, at 50; B. Stråth, *Europe’s Utopias of Peace: 1815, 1919, 1951* (2016), at 194ff.

<sup>102</sup> Bluntschli, *supra* note 39, at 26.

<sup>103</sup> *Ibid.*, at 288.

prohibition of war was a legal and moral imperative for the civilizing progress of the international normative order.

The combination of moral and legal arguments on which these early concepts of modern *ius contra bellum* were founded resulted in a debate about legal methodology. German lawyer Carl Gareis (1844–1923), a lecturer in Königsberg and Munich, wrote in 1888 that Bluntschli had spoken *de lege ferenda* – about the law to be – not *de lege lata* – about the current law.<sup>104</sup> This was a critique similar to the more general one of English legal theorist John Austin (1790–1859), for whom law was the sovereign's command backed by a sanction. Since international law lacked a reliable enforcement system, for Austin, it was not law but, rather, 'positive morality'.<sup>105</sup> These considerations were widespread in Clausewitzian theory. Similar to Gareis, Rettich in 1888 criticized Heffter, Bluntschli and Bulmerincq for their views on war as law enforcement; to Rettich, Blumerincq's argument, drawing from the *bellum iustum* tradition, was 'pure philosophy' based on natural law thinking and, therefore, technically inappropriate in a legal sense.<sup>106</sup>

On the contrary, lawyers like Bluntschli and Bulmerincq were influenced by the historical school of law of Friedrich Carl von Savigny (1779–1861). Admiring Savigny's 'supra-national historicism',<sup>107</sup> international law for liberals was a narrative of human progress and of 'moral and civilizing forces'.<sup>108</sup> In contrast to Austin's command theory, liberals founded their concept of law not on enforceability but, rather, on 'historical jurisprudence, linked with liberal-humanitarian ideals and theories of natural evolution of European societies'.<sup>109</sup> It was not primarily to be derived from contracts but, instead, from the 'legal conscience of the civilized world'.<sup>110</sup> Consequently, Bluntschli referred to the concepts of 'law to come' (*werdendes Recht*) and 'living law' (*lebendiges Recht*).<sup>111</sup>

While the Clausewitzians' positivism referred to absolute sociological-empirical 'facticity' and was thus in strong contrast to natural law, for liberal idealists like Bluntschli and other members of the Institut de Droit International (the 'men of 1873'), positive law was part of law as a 'living institution',<sup>112</sup> an 'empirical underpinning' that had to be developed from the 'overall world view' of natural law.<sup>113</sup> Since there was not (yet) a legal sanction for unjustified wars in positivistic terms, the Clausewitzian theory of 'law' that was derived from absolute sovereignty led to *liberum ius ad bellum*. In contrast, liberal legal doctrine based on the concept of an international community – that

<sup>104</sup> C. Gareis, *Institutionen des Völkerrechts* (1888), at 37.

<sup>105</sup> O'Connell, *supra* note 11, at 40.

<sup>106</sup> Rettich, *supra* note 55, at 49; cf. Carty, *supra* note 11, at 46.

<sup>107</sup> Koskenniemi, *supra* note 29, at 45.

<sup>108</sup> Koskenniemi, 'The Legacy of the Nineteenth Century', in D. Armstrong (ed.), *Routledge Handbook of International Law* (2009) 141, at 147.

<sup>109</sup> Koskenniemi, *supra* note 29, at 51.

<sup>110</sup> *Ibid.*; cf. Bluntschli, *supra* note 39, at vi.

<sup>111</sup> Bluntschli, *supra* note 39, at viii.

<sup>112</sup> Cf. *ibid.*; Koskenniemi, *supra* note 29, at 51.

<sup>113</sup> Stråth, *supra* note 101, at 194.

is, common European values, traditions and norms – led to the theories of *bellum iustum* and to natural law. Different spheres of normativity were still highly interwoven in the last third of the ‘positive century’.<sup>114</sup> Natural law thinking still played a strong role in parts of international legal doctrine, even in the German *Kaiserreich*,<sup>115</sup> where Clausewitzian thinking was particularly strong.

Thus, in view of the justification of military force, the 19th century was a century of ‘multi-normativity’.<sup>116</sup> Two international legal viewpoints evolved in the second half of the century that did not simply coexist but, rather, referred to each other and, thereby, proved to be irreconcilable. In this methodological dispute between ‘realists’ and ‘moralists’, authors like Carl Bergbohm (1849–1927) saw a serious difficulty for the creation of a formal international law, based on the self-legislation of states.<sup>117</sup> For both sides, the Franco-Prussian War (1870–1871) constituted a caesura; the German *Kaiserreich* became a fruitful context for Clausewitzian conceptions of law. However, the brutality of the war also confirmed ‘the men of 1873’ in their belief that peace through law was necessary.<sup>118</sup> For Clausewitzians, war was simply a fact – *Fortsetzung der Politik mit anderen Mitteln* – that was permitted at all times.<sup>119</sup> Kantian scholars understood that such a right to go to war was ‘equivalent to a Right to determine what is just not by universal external laws limiting the freedom of every individual alike, but through one-sided maxims that operate by means of force’. Therefore, it could not ‘be properly conceived as an element in the Right of Nations’.<sup>120</sup> While the existence of this dualism already does question the thesis of *liberum ius ad bellum*, a decision on whether Clausewitzian *realists* or Kantian *idealists* offered the more adequate international legal doctrine cannot easily be made. A look at the justification discourses in political practice, however cursory, may help to tackle this problem.

## 4 Between Might and Right: The Politics of Justifying War in 19th-Century State Practice

When examining the practical proximity of legal war theories in the 19th century, some fundamental challenges arise. Both concepts of ‘war’ in international legal doctrine – as a Clausewitzian duel and as legal enforcement – were theoretical constructions – ‘ideal types’ (*Idealtypen*), to borrow the terminology of Max Weber (1864–1920). As such, they can only capture to some extent the historical ‘reality’ of warfare

<sup>114</sup> Neff, *supra* note 3, at 215; cf. Vec, ‘Sources in the 19th Century European Tradition: The Myth of Positivism’, in S. Besson and J. d’Aspremont (eds), *Oxford Handbook on the Sources of International Law* (2017) 121.

<sup>115</sup> Cf. Carty, *supra* note 11, at 49.

<sup>116</sup> Vec, *supra* note 54.

<sup>117</sup> C. Bergbohm, *Staatsverträge und Gesetze als Quellen des Völkerrechts* (1876), at 7.

<sup>118</sup> Koskeniemi, *supra* note 29, at 12–19; Stråth, *supra* note 101, at 194.

<sup>119</sup> Lueder, *supra* note 40, at 180.

<sup>120</sup> Kant, *supra* note 1, at 99.

and, even less, the ‘real’ motives of the war parties. This problem is reinforced by the fact that the empirical material – that is, the number of wars in the (European) 19th century – is limited. ‘History’, as Neff has put it correctly, ‘is no subject for purists’.<sup>121</sup>

A war that most likely would feature as a duel may be the Austro-Prussian War (1866). It was waged with a precise political goal (a decision on the process of German unification); furthermore, the war’s outcome resulted largely from a decisive battle near Königgrätz on 3 July 1866.<sup>122</sup> Helmuth Graf von Moltke (1800–1891), Prussian chief of the general staff and a disciple of Clausewitz, thus saw in it the ideal of a cabinet war, defined by limited, short and decisive fighting as well as by the absence of ideological public debates.<sup>123</sup> However, even if one accepts the 1866 war as a Clausewitzian state duel, it appears to be an exception to the rule – both with regard to 19th-century warfare as well as to war discourse (there were no official declarations of war in 1866).

However, it is highly problematic to apply the duel concept to the next war – the Franco-Prussian War (1870–1871). The Franco-Prussian War can be understood as a hybrid war between the 18th-century ‘cabinet wars’ and the 20th-century ‘total wars’. Analogously to the 1866 war, this war began with a limited goal (preventing or fulfilling German unification), but after the French defeat at Sedan, it was transformed into an industrialized ‘people’s war’, shaped by public nationalism, violence against civilians and partisan attacks against the Prussian invaders performed by *Francs-tireurs*.<sup>124</sup> Moltke, in turn, denied the *Francs-tireurs* the status of combatants and ordered summary executions.<sup>125</sup> In fact, the Franco-Prussian War pointed to the end of the duel war in the Clausewitzian sense as well as to the rise of total war. ‘The age of cabinet’s war is behind us, – now we have only people’s war’, Moltke would express in his last speech in the Reichstag on 14 May 1890.<sup>126</sup>

Furthermore, and clearly against the thesis of *liberum ius ad bellum*, the Franco-Prussian War was accompanied by discourses on its legitimacy both in domestic and foreign arenas. Public opinion had quite literally urged the French government to declare war against Prussia in 1870 after Bismarck had intentionally provoked it by shortening the *Emser Depesche* (making the French believe that King Wilhelm I had harshly rejected the demand for a further renunciation of a Hohenzollern candidate for the Spanish throne).<sup>127</sup> The war was not only an instrument of sovereign policy

<sup>121</sup> Neff, *supra* note 3, at 164.

<sup>122</sup> Cf. *ibid.*; J. Leonhard, *Die Büchse der Pandora: Geschichte des Ersten Weltkrieges* (2014), at 30.

<sup>123</sup> Leonhard, *supra* note 122, at 30.

<sup>124</sup> Förster, ‘Facing “People’s War”: Moltke the Elder and Germany’s Military Options after 1871’, 10 *Journal of Strategic Studies* (1987) 209, at 209.

<sup>125</sup> Leonhard, *supra* note 122, at 30ff.

<sup>126</sup> S. Förster and J. Nagler (eds), *On the Road to Total War: The American War and the German Wars of Unification, 1861–1871* (1997), at 1. It should be noted here that Clausewitz was the first to analyse the mobilization of the people in the context of the French Revolutionary Wars. Cf. Förster, ‘The Prussian Triangle of Leadership in the Face of a People’s War: A Reassessment of the Conflict between Bismarck and Moltke, 1870–71’, in *ibid.*, at 118.

<sup>127</sup> Cf. Neff, *supra* note 3, at 164.

but also depended on public legitimacy. Napoleon III was correct to note in his speech of 21 July 1870 that it was 'the whole nation which has, by its irresistible impulse, dictated our decisions [to go to war]'.<sup>128</sup>

France considered it necessary to stress that it was not waging a war out of political ambitions but, rather, that it was 'a war of equilibrium' – a 'defence of the weak against the strong, the reparation of great iniquities, the chastisement of unjustifiable acts'.<sup>129</sup> Thus, Napoleon III (1808–1873) literally emphasized the 'just cause' of his 'defence' against 'Prussian egotism', upon which Europe should pronounce – a prime example of the justifications for 19th-century *bellum iustum* doctrine!<sup>130</sup> Even though Clausewitzian lawyers claimed an unlimited sovereign right to go to war, justifications in state practice spoke a different language, pointing at international peace, stability and the preservation of national rights. Echoing these sentiments, the French official account of the origin of the war held 'that the rights of each nation, like the rights of each individual, are limited by the rights of others, and it is not permissible [*sic*] that one nation, under the pretext of exercising its own sovereignty, should menace the existence or the security of a neighbouring nation'.<sup>131</sup> Military necessity was denied status as a just cause of war. Here, one can find a clear rejection of any notion of *liberum ius ad bellum*.

Discursive legitimacy was also important for Bismarck, who had waited for the French declaration of war (19 July 1870) in order to make France appear to be the aggressor: 'The whole civilised world will acknowledge that the grounds for war assigned by France do not exist, and are nothing but pretence and invention.' Bismarck wrote this the very same day, and he added that both the North German Confederation and the allied governments of the South German states would defend the 'unprovoked attack' (*nicht provocierten Ueberfall*) with all the means that '[p]rovidence has placed at their disposal'.<sup>132</sup> Bismarck had successfully generated national and international sympathy for Prussia and its war aims. However, this changed immediately when Prussia decided to annex parts of Alsace and Lorraine after its decisive victory at Sedan (1 September 1870).<sup>133</sup> As can be seen, in 19th-century war discourse, not only was publicity of the utmost importance, but an unlimited freedom to conquer another state's territory was also seen as illegitimate, although it was permitted in Clausewitzian legal scholarship.

Contrary to the thesis of *liberum ius ad bellum*, we observe a communicative practice of constantly justifying the use of force during the entire century.<sup>134</sup> In his *realist* approach, Grewe claims that 19th-century justifications of war were nothing

<sup>128</sup> C. Abel, *Letters on International Relations before and during the War of 1870* (1871), vol. 2, at 137.

<sup>129</sup> *Ibid.*, at 225.

<sup>130</sup> *Ibid.*, at 190.

<sup>131</sup> *Ibid.*, at 175.

<sup>132</sup> *Ibid.*, at 165.

<sup>133</sup> W. Baumgart, *Europäisches Konzert und nationale Bewegung: Internationale Beziehungen 1830–1878* (2nd edn, 2007), at 399.

<sup>134</sup> Lesaffer, *supra* note 3, at 46. An obligation to declare war was legalized at the Second Hague Convention (1907).

more than propaganda – that is, political rhetoric without any normative meaning.<sup>135</sup> However, by examining the discursive practices more precisely (little research has been conducted in this field so far),<sup>136</sup> Grewe's thesis is scarcely tenable. The Concert of Europe developed a regulative order of peace constituted by power and norms; although this precarious order of peace was based on (military) coercion, the Concert established some form of a diplomatic 'culture of peace' (*Friedenskultur*) between the great powers.<sup>137</sup> It was built on international moderation, multipartite diplomacy and behavioural norms derived from the former.<sup>138</sup> As mentioned above, the Concert of Europe did not legally prohibit war. There was no 'undeviating rule applicable to all ... cases', as Lord Russell had put it in 1841.<sup>139</sup> However, 'the preservation of the peace of Europe' became a desired norm between right and might, which was applied in practice.

A state's resort to war was judged by the Concert (just as Napoleon III had asked for in the context of the Franco-Prussian War) and could, if it was not seen as legitimate, result in moderate measures like the withdrawal of the Concert's diplomatic support, as was the case when Austria ignored Russian and British attempts of mediation in 1859 and instead declared war on Piedmont-Sardinia.<sup>140</sup> However, it could also result in the authorization of armed measures such as military intervention to maintain or restore international peace and security. Thus, Matthias Schulz's suggestion that the Concert of Europe was a '19th century Security Council' is not implausible.<sup>141</sup> For instance, in the Crimean War (1853–1856), an alliance of the Ottoman Empire, England, France and Piedmont-Sardinia took action against Russia, in a form, which could be labelled an intervention authorized by the Concert of Europe against a Russian 'crusade'.<sup>142</sup> The Treaty of Paris (1856) created an international sub-system in Europe by denying Russian responsibility for the protection of Christian citizens in the Ottoman Empire under threat of armed sanction (Articles 7 and 9).<sup>143</sup> Still, in 1877, Russian foreign minister Alexander Gorchakov (1798–1883) stated that the independence of Turkey 'must be subordinated to the guarantees demanded by humanity, the sentiments of Christian Europe, and the general peace in Europe'.<sup>144</sup> He thus combined arguments from the discourses on 'humanitarian intervention' and the restoration of the European peace – Russia (successfully) broke the treaty of 1856 by referring to natural law!

The politics of justifying war in 19th-century state practice lay exactly between the precarious normative peace architecture of the Concert of Europe and unilateral

<sup>135</sup> Grewe, *supra* note 7, at 531.

<sup>136</sup> Cf. Tischer, *supra* note 6, at 15.

<sup>137</sup> Schulz, *supra* note 23, at 4.

<sup>138</sup> *Ibid.*, at 615; Vec, *supra* note 27, at 658.

<sup>139</sup> Schulz, *supra* note 23, at 617.

<sup>140</sup> *Ibid.*, at 481, 617.

<sup>141</sup> *Ibid.*, at 521.

<sup>142</sup> O. Figes, *Crimea: The Last Crusade* (2010).

<sup>143</sup> W.E. Mosse, *The Rise and Fall of the Crimean System, 1855–71: The Story of a Peace Settlement* (1963).

<sup>144</sup> E. Hertslet, *The Map of Europe by Treaty* (1891), vol. 4, at 2524.



interests of sovereign states. Not surprisingly, the discourses were shaped by 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. Here, one can rediscover the 19th-century 'multi-normativity' that has been identified in contemporary legal discourse.<sup>145</sup> There was no clear positive law ordering *ius ad bellum*, though, at the end of the century, in the face of rising nationalism, some cautious approaches towards further legalization like the 1907 Drago-Porter Convention were implemented.<sup>146</sup>

Taking these discourses of justification more seriously with respect to the history of war may therefore help to correct the wrong perception of the Clausewitzian notions on Realpolitik and military necessity, and it may help to deconstruct *liberum ius ad bellum* as an academic myth. Since what can be asserted in analysing the 19th-century politics of justifying war is that states refrained from claiming *liberum ius ad bellum*. This was even the case when international relations became more contentious after 1870 and when the dispute between Clausewitzians and liberals was fully developed. The fact that Bismarck praised himself in his memoirs for bypassing the Concert of Europe in his unification policy underlines his awareness of the Concert's normative coercion. However, after Bismarck's retirement in 1890, this awareness of the European normative order seems to have been lost within the *Kaiserreich's* political discourse. The political context favoured arguments offered by the Clausewitzian school of legal thinking. Isabel Hull recently has emphasized the grave German violations of international law in the Great War: 'It is as if Imperial Germany could not speak the same legal language as the rest of Europe.'<sup>147</sup> After two World Wars, the idea of war as a political instrument in the Clausewitzian sense was finally replaced by an international rule of law in the Kantian tradition, which was present in parts of the 19th-century legal discourse, as illustrated above.

## 5 Deconstructing a Myth: The Justification of War as a Forgotten Dispute about Law, Morality and Politics

The 19th century saw the emergence of complex political and legal discourses on the legitimacy of war. Contrary to what Wilhelm Grewe and his followers have claimed, the justification of war and military force in international legal discourse was highly controversial. There was no single, consistent approach or theory in legal thinking about war and its legitimacy; instead, war became a contested area in international legal doctrine, caught between the theories of *bellum iustum*, *liberum ius ad bellum* and *ius contra bellum*. The passionate dispute about justifying war was characterized by arguments originating from different spheres of justice (politics, morality, law). Legal

<sup>145</sup> Vec, *supra* note 54.

<sup>146</sup> Hague Convention 2 on the Limitations of the Employment of the Use of Force for the Recovery of Contract Debts 1907, 36 Stat. 2241; cf. Vec, *supra* note 27, at 660.

<sup>147</sup> Hull, *supra* note 71, at 331.



discourse and state practice were therefore shaped by ‘multi-normativity’, despite positivism.<sup>148</sup>

Two schools of thinking emerged in 19th-century legal doctrine, differentiated by political and legal mentalities. One school argued against a normative term of war and in favour of war as a political instrument, a duel between states. Lawyers with a political outlook legitimated war as the normal, de facto progressive and honourable status of international relations, not to be condemned as morally reprehensible in the Kantian sense. For them, war was not a term of law or justice but, rather, *ein nothwendiger Culturträger*, as expressed by Lueder. Clausewitzian lawyers therefore argued in favour of the unlimited right of the sovereign state to go to war, *liberum ius ad bellum*, and against the need for a legal justification of war. For these lawyers, *bellum iustum* no longer played a role for waging war. It was replaced by the concept of ‘military necessity’. This denial of *bellum iustum* and natural law was based on a purely positivist-empirical concept of law, shaped by a sociological language. Here we can find contemporary advocates for Grewe’s thesis.

However, what often has been ignored in the history of international law is the fact that there was another bloc of lawyers for whom war was morally and legally forbidden – an evil to be overcome through legalization. For them, war was a legal dispute (*ein Rechtsstreit*) over public international law; thus, war needed a legal justification.<sup>149</sup> *Bellum iustum* still played an important role in this perspective, as war had to be justified in terms of ‘just war’, even if ‘just’ more or less meant the same as ‘legal’. However, these lawyers referred both to morality and natural law, as positivism alone seemed yet unable to adequately order the justification of war.

With regard to Grewe’s thesis, one has to emphasize the intensive disputes between different normative and scientific views on war; the thesis of *liberum ius ad bellum* was by no means taken for granted in the entire 19th-century legal discourse. While there were voices in favour of war as a political instrument (*liberum ius ad bellum*), others wanted to prohibit war with recourse to moral and legal arguments (*ius contra bellum*). The two schools of legal thinking did not simply coexist; lawyers with political and legal perspectives competed with one another over authority in international legal discourse. In fact, even contemporary proponents of the unlimited sovereign right to war grappled with opposite opinions and their multi-normative foundations.

Consequently, one has to ask why the history of international law has focused on a *realist* perspective on war and law in the 19th century to this point. One possible answer has been given in this article – namely, the historical context of the violent German unification in 1870–1871 was a turning point for dealing with the question of the legitimacy of war. This is not to say that the idea of *liberum ius ad bellum* was only common in German legal discourse; authors from other countries shared the idea of war as an extra-legal phenomenon, and many prominent critics of *liberum ius ad bellum* were Germans. Still, a case can be made for the argument that *liberum ius*

<sup>148</sup> Vec, *supra* note 54.

<sup>149</sup> Bluntschli, *supra* note 39, at 287, 290.

*ad bellum* and ‘military necessity’ were particularly significant in the legal discourse of the German *Kaiserreich*. The Clausewitzian tradition in legal thinking prevailed even after World War I, with Carl Schmitt (1888–1985) being its main exponent. In Schmitt’s conception of state sovereignty as a precondition of (international) law (*ein Rechtsvoraussetzungsbegriff*),<sup>150</sup> the sovereign was authorized to use military force; for Schmitt, he therefore had a ‘free right to go to war’.<sup>151</sup>

But also in this context, the thesis of *liberum ius ad bellum* in the 19th century had been contested by scholars like Arthur Nussbaum (1877–1964) and Hans Kelsen (1881–1973). For Kelsen, war was a coercive sanction of the universal legal order.<sup>152</sup> Remarkably, Nussbaum criticized that Lueder’s refutation of a just war, and the thesis of *liberum ius ad bellum* suffered from ‘the infusion of arguments which smack of enthusiasm for war’.<sup>153</sup> However, this *realist* tradition in German legal doctrine has been revitalized by a 20th-century German lawyer, who was deeply influenced by Carl Schmitt and would become the author of a standard book on the history of international law. This author was Wilhelm G. Grewe, whose *Epochs of International Law* is a history of international law as a history of political fights for hegemony and supremacy.<sup>154</sup> Therefore, it is not surprising to find the thesis of *liberum ius ad bellum* in Grewe’s treatise. To some extent, the German, Clausewitzian tradition thereby continued in the history of international law.

Since there were two competing viewpoints in 19th-century international doctrine, a closer look at political practice seems to be appropriate.<sup>155</sup> In contemporary state practice, *liberum ius ad bellum* was not claimed. Justifications of war were caught between unilateral aims and the normative framework of the Concert of Europe. Thus, what seems to be central in writing histories of the politics of international law is the plurality of normative rules and a critical understanding of their (mis-)use in political practice. This plurality calls for interdisciplinary research; norms are disputed in discourses, their authority increases and vanishes throughout history. A ‘deconstructionist’,<sup>156</sup> critical ‘history of normativity’<sup>157</sup> has to dissect the formation and enforcement of normative orders understood as contested systems of knowledge.<sup>158</sup> A quasi-genealogical access to the relationship between political practice and legal

<sup>150</sup> Cf. M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), at 227; Teschke, ‘Carl Schmitt’s Concepts of War: A Categorical Failure’, in J. Meierhenrich and O. Simon (eds), *Oxford Handbook of Carl Schmitt* (2014) 1.

<sup>151</sup> C. Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff* (2nd edn, 1988).

<sup>152</sup> H. Kelsen, *Staatslehre* (1925), at 125; H. Kelsen, *Peace through Law* (1944); cf. V. Neumann, *Carl Schmitt als Jurist* (2015), at 425.

<sup>153</sup> Nussbaum, *supra* note 11, at 474.

<sup>154</sup> Fassbender, ‘Stories of War and Peace: On Writing the History of International Law in the “Third Reich” and After’, 13 *European Journal of International Law* (2002) 479, at 511ff.

<sup>155</sup> Tischer, *supra* note 6; Carty, ‘Doctrine versus State Practice’, in Fassbender and Peters, *supra* note 3, 972.

<sup>156</sup> A. Carty, *Philosophy of International Law* (2007), at 9.

<sup>157</sup> Renn, ‘The Globalization of Knowledge in History and Its Normative Challenges’, 22 *Rechtsgeschichte* (2014) 52.

<sup>158</sup> M. Foucault, *The Archaeology of Knowledge* (1969 [2002]).

theory may help to deconstruct one-sided narratives as academic myths, presenting only a suitable section of the more complex historical truth. An example of such a genealogical approach has been presented in this article. The proposition of so-called *liberum ius ad bellum* leans on a one-sided, *realist* tradition in the history of international law, which has been revitalized by Wilhelm G. Grewe. Faced with the highly controversial legal disputes in the 19th century, and with the complex justification discourses in state practice, it seems to be justified to formulate the thesis that *liberum ius ad bellum* constitutes a myth in the history of international law.