

A Legal Turn: Democratic Peace Meets International Law

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We can see tendencies of an emerging world society where the freedom and ability of state actors to get under control the totality of international relations, i.e. to bring the principle of the territorial state to the fore, is in decline. We assume that the probability of interstate wars declines with a continuing socialisation (*Vergesellschaftung*) of the international system (increasingly blurred borders, declining danger of an international polarisation of interest).¹

1. Introduction²

In the course of the recent debate about a global “war on terror” legal arguments displayed a glaring prominence. But, obviously, societal discourses refer to norms of international law in a varying fashion. Regarding the so-called operation “Iraqi freedom”, it is assumed that while the German hegemonic “contra-war” discourse integrated international legal norms, the American hegemonic “pro-war” discourse contested them.³ However, in both cases international legal norms were used as an argumentative surface. In contrast to the normative explanations of Democratic Peace (DP) theories, the emphasis, in this regard, lays on norms of a sphere beyond the state instead of national (democratic) norms.⁴ In the face of the public contestation of “Bush’s war”, particularly in European capitals, the European philosophers Jürgen Habermas and Jacques Derrida interpreted the process as an emergence of an European public sphere.⁵ But this idea is far from new. As Immanuel Kant puts it,

The intercourse, more or less close, which has been everywhere steadily increasing between the nations of the earth, has now extended so enormously that a violation of right in one part of the world is felt all over. Hence the idea of a cosmopolitan right is no fantastical, high-flown notion of right, but a complement of the unwritten code of law—constitutional as well as international law—necessary for the public rights of mankind in general and thus for the realisation of perpetual peace.⁶

¹ Brock, Lothar/Albert, Mathias 1995: *Entgrenzung der Staatenwelt*, *Zeitschrift für Internationale Beziehungen* 2: 2, p. 278 (my transl.).

² I am grateful to Michael Bothe, Lothar Brock, Karen Guttieri, Harald Müller, Natalino Ronziti and the participants of the PRIF PhD colloquium for comments on an earlier version.

³ For “contested norms”, see Wiener, Antje 2004: *Contested Compliance: Interventions on the Normative Structures of World Politics*, *European Journal of International Relations* 10: 2, pp. 189-234.

⁴ see Maoz, Zeev/Russett, Bruce 1993: *Normative and Structural Causes of Democratic Peace, 1946-1986*, *American Political Science Review* 87: 3, pp. 624-638; Owen, John 1994: *How Liberalism Produces Democratic Peace*, *International Security* 19: 2, pp. 87-125.

⁵ Habermas, Jürgen/Derrida, Jacques 2003: *Unsere Erneuerung: Nach dem Krieg: Die Wiedergeburt Europas*, *Frankfurter Allgemeine Zeitung*, March 31, 2003.

⁶ Kant, Immanuel 1792 (1795): *Perpetual Peace: A Philosophical Essay* (Garland Publishing, Inc: New York/London), p. 142.

According to “compulsory” citations of Kant in the DP literature, it is surprising that scholars have left this passage behind and have taken a more indirect path via an emphasis on “national” norms of the democratic nation state’s political conduct. To paraphrase Kant, it is exactly this “fantastical, high-flown notion of right” to be taken into consideration in this paper in order to function as a necessary complement to previous work on the DP. The aim is to open up a *world society perspective* on the DP by integrating notions of international law. Scholars regularly explicate the phenomenon of the more or less “peace-loving” democracies in its monadic and/or dyadic variant. To cope with a normative penetration of the territorially differentiated spaces of states, it becomes necessary to explore an additional systemic level of analysis. Although criticising IR-realism, critics of realism (including DP scholars), too, conceptualise the international sphere as a “political realm *sui generis* [... But] to the extent that state and society are changing under the pressure of [...] globalization, theory building on state and society has to live up to the challenge of coping with the global”.⁷ Increasing “legalization” can be understood as only one facet of what Lothar Brock here terms as “globalization”.⁸

Up to now, the DP literature has only reluctantly addressed international law or world society.⁹ My argumentation proceeds as follows. Reflecting the absence of legal norms in the research program, I will give a brief overview of the role of norms in the theoretical explanations of the DP.¹⁰ Focussing on international law, this overview remains uncompleted without mentioning recent attempts of international legal scholars to base their considerations on the empirical results of the DP. It is exactly this overlap of research desiderata that tantalises to enter an interdisciplinary dialogue. However, as the aim of legal scholars like Anne-Marie Slaughter is to

⁷ Brock, Lothar 2004: *World Society From the Bottom Up*, in: Mathias Albert/Lena Hilkermeier (eds.): *Observing International relations: Niklas Luhmann and World Politics* (London/New York: Routledge), p. 86 (emphasis in orig.).

⁸ For the concept of “legalization”, see Abbot, Kenneth W./Keohane, Robert O./Moravcsik, Andrew/Slaughter, Anne-Marie/Snidal, Duncan 2000: *The Concept of Legalization*, *International Organization* 54: 3, pp. 401-419; Goldstein, Judith/Kahler, Miles/Keohane, Robert O./Slaughter, Anne-Marie 2000: *Introduction: Legalization and World Politics*, *International Organization* 54: 3, pp. 385-399. For critical positions, see Finnemore, Martha and Stephen Toope. 2001. *Alternatives to “Legalization”: Richer Views of Law and Politics*, *International Organization* 55: 3, pp. 743-758; Fischer-Lescano, Andreas/Liste, Philip 2005: *Völkerrechtspolitik: Zu Trennung und Verknüpfung von Politik und Recht der Weltgesellschaft*, *Zeitschrift für Internationale Beziehungen* 12: 2 (forthcoming); List, Martin/Zangl, Bernhard 2003: *Verrechtlichung internationaler Politik*, in: Hellmann, Gunther/Wolf, Klaus Dieter/ Zürn, Michael (Hrsg.): *Die neuen Internationalen Beziehungen: Forschungsstand und Perspektiven in Deutschland*, Baden-Baden, pp. 361-400.

⁹ see John Owen’s contribution to Fox/Roth, Owen, John 2000: *International Law and the “Liberal Peace”*, in: Fox, Gregory H./Roth, Brad R. (eds.): *Democratic Governance and International Law* (Cambridge: Cambridge UP), pp. 343-388 (Though the title refers to “international law” there is no real consideration of international law, let alone a substantial examination of the role of international legal norm. For DP and globalisation, see only Barkawi, Tarak/Laffey, Mark 1999: *The Imperial Peace: Democracy, Force and Globalization*, *European Journal of International Relations* 5: 4, pp. 403-434; Teusch, Ulrich/Kahl, Martin 2001: *Ein Theorem mit Verfallsdatum? Der Demokratische Frieden im Kontext der Globalisierung*, *Zeitschrift für Internationale Beziehungen* 8: 2, pp. 287-320.

¹⁰ For the differentiation of legal norms and social norms, see Finnemore, Martha 2000: *Are Legal Norms Distinctive?*, *Journal of International Law and Politics* 32: 3, pp. 699-705.

refer to DP as a basis for their normative liberal theory of international law, this potential is, firstly, not deployed in order to enrich the theoretical explanation of the DP and, secondly, does not open up the chance to take international public law into consideration. Rather, the focus is on a process of an *inter-democratic norm genesis* (section 2). Aiming at a shift from a “theory of the democratic peace” to one of “democratic wars”, i.e. its scope conditions, such an analytical layout is far from satisfying. For this reason, I will draft a discursive frame analogous to the concept of transnational legal process (TLP) well elaborated by Harold Koh¹¹ (section 3). Subsequently, I will examine the discourse on a military engagement in Iraq in the course of a preliminary discourse analytical survey (section 4). I will conclude with a brief reflection on an integration of notions of world society into the DP research (section 5).

2. Can We Jump on the Bandwagon?

2.1. Separate Peace by Separate Norms?

Early in the debate,¹² scholars pointed at a normative explanation of the DP phenomenon,¹³ arguing that states *externalise* their internal patterns of political conduct. Respectively, domestic political processes in democracies are characterised by a norm of peaceful conflict resolution. As Zeev Maoz and Bruce Russett put it, “this norm allows for an atmosphere of ‘live and let live’”.¹⁴ Because democracies are obviously not peaceful in general, this model can give no sufficient explanation. Therefore, the proponents of the normative model often offer additional assumptions whereby, given the fact that a potential opponent in the international realm is not a democracy, the mechanism of externalisation is invalidated.¹⁵ Following the model in its monadic version, certain patterns of behaviour, especially the peaceful resolution of conflicts, are internalised by political actors in the course of their political and social practice. What was learned internally, then, becomes relevant to the external behaviour of foreign policy decision-makers.¹⁶ In sum, these norms are norms of the domestic political process, i.e. *national* norms.

¹¹ Koh, Harold 1996: Transnational Legal Process, Nebraska Law Review 75, pp. 181-208.

¹² This is not the place to review the body of DP literature. For an excellent overview, see Chan, Steve 1997: In Search of Democratic Peace: Problems and Promise, in: Mershon International Studies Review 41, pp. 59-91.

¹³ To prevent confusion: These DP models are “normative” in the sense that they refer to the role of norms.

¹⁴ Maoz/Russett, Normative and Structural (Fn. 4), p. 625.

¹⁵ Due to the prominence of the model, I will not go into the details. See, Dixon, William J. 1994: Democracy and the Peaceful Settlement of International Conflict, in: American Political Science Review 88:1, pp. 14-32; Dixon, William J./Senese, Paul D. 2002: Democracy, Disputes, and Negotiated Settlements, Journal of Conflict Resolution 46: 4, pp. 547-571; Maoz/Russett, Normative and Structural (Fn. 4); Owen, How Liberalism Produces Democratic Peace (Fn. 4).

¹⁶ Dixon/Senese, Democracy, Disputes, and Negotiated Settlements (Fn. 15), p. 549.

In the context of a more elaborated attempt to cope with the separate peace problematique, authors added the assumption of mutual *perception*.¹⁷ Democratic leaders expect of each other that peaceful patterns of behaviour are externalised. Accordingly, the argument is similarly based on the analogy: “Internally peaceful, externally as well”. Democratic state actors proceed as follows: “We think that *they* (another democracy) think that *we* think that *they* think ...”. The phenomenon becomes a self-fulfilling prophecy. As Alexander Wendt puts it in the context of an elaboration of his concept of intersubjectivity on an international level:

These beliefs need not to be true, just believed to be true. Knowledge of a proposition P is ‘common’ to a group G if the members of G all believe that P, believe that the members of G believe that P, believe that the members of G believe that the members of G believe that P, and so on.¹⁸

Jürgen Habermas describes such a description of human interaction as a “monadologic production of the lifeworld’s intersubjectivity”.¹⁹ Back to the DP, this explanation is further on based on the monadic level, as is still deduces from an assumption about the state’s individuality.²⁰ Thomas Risse takes a step towards attributing the causal mechanism to the dyadic interaction level. Emphasising the *anomaly of inter-democratic relations*, he argues that the mutual trust in the peacefulness of political processes offers democracies the chance to use particular communicative channels of conflict resolution. While emphasising mutual perception in Risse’s social-constructivist approach, scholars frequently neglect this idea of democratic intersubjectivity, affiliated to Friedrich Kratochwil’s *discourse theory of international relations*.²¹ “[N]orms serve as communication devices that enable interactions in the first place by providing a framework of shared and collective understandings”.²² The role Risse attaches to democratic norms differs from that of the monadic model. Norms do not *cause* political decisions, they rather *structure* communicative fora. Mutual understanding, i.e. the “special relationship” of democratic states, is based on a previously built intersubjectivity. In the course of Risse’s model, the

¹⁷ see especially Risse-Kappen, Thomas 1995: Democratic Peace – Warlike Democracies? A Social Constructivist Interpretation of the Liberal Argument, *European Journal of International Relations* 1: 4, pp. 491-517.

¹⁸ Wendt, Alexander 1999: *Social Theory of International Politics* (Cambridge University Press: Cambridge), pp. 159-60.

¹⁹ Habermas, Jürgen 1981: *Theorie des kommunikativen Handelns*, Band 2: Zur Kritik der funktionalistischen Vernunft (Surkamp: Frankfurt/Main), p. 197 (my transl.).

²⁰ For problems of this inter-relatedness of monadic and dyadic arguments, see Müller, Harald/Wolff, Jonas 2004: *Dyadic Democratic Peace Strikes Back: Reconstructing the Social Constructivist Approach After the Monadic Renaissance*, Paper prepared for presentation at the 5th Pan-European International Relations Conference, The Hague, September 9-11, 2004, pp. 14-15; Oren, Ido 1995: The Subjectivity of the “Democratic” Peace, *International Security* 20: 2, pp. 147-184.

²¹ Kratochwil, Friedrich V. 1989: *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press: Cambridge).

²² Risse-Kappen, Democratic Peace (Fn. 17), p. 500.

attachment of norms to state territories tends to be abandoned. The national (democratic) norms are transformed into particularistic international norms shared *only* by democracies (*inter-democratic norm genesis*). To the extent that interstate crises can be prevented from escalating to interstate war, intersubjective understanding becomes only possible between democratic actors. In a nutshell, the separate peace is a result of a process of the (re)production of an “inter-democratic lifeworld”.

2.2. Democracies are More Likely to Do Law with One Another

The most obvious attempt to combine DP and International Legal Studies has been formulated by Anne-Marie Slaughter in her “thought experiment”²³ of an *international law in a world of liberal states*. Following Andrew Moravcsik, the main argument behind her liberal theory is that IR realism and traditional international law are founded on the same core assumption about the international system, that is, states are the primary actors in world politics. While this assumption has been impressively challenged by liberalists in IR, it is, following Slaughter, up to the discipline of International Legal Studies to find answers of their own. Otherwise, international law might run the risk of getting out of touch with the realities of world politics. Explicitly, Slaughter refers to the findings of the DP debate. As Koh aptly puts it, “flipping the now-familiar political science maxim that ‘democracies don’t fight one another,’ Slaughter posits, in effect, that *liberal democracies are more likely to do law with one another*”.²⁴ Of special concern, in this regard, are the “correlative attributes” of the DP that Slaughter specifies. Accordingly, peace obviously correlates with liberal democratic government, dense networks of transactions, channels of communication as well as a decline of the borders between domestic and foreign policy issues.²⁵ While this catalogue apparently parallels the aspects given by DP scholars, some of the attributes presumably range beyond the scope of the IR debate. This especially holds true for the emphasis of networks and the declining domestic-foreign issue distinction.

Deriving from these attributes, in a noteworthy step, Slaughter hypothesises a world of liberal states in order to “capture more of the legal and political reality of relations among these countries [democracies, PL]”.²⁶ Following liberalism in IR, she rejects the concept of states as

²³ Slaughter, Anne-Marie 1995: *International Law in a World of Liberal States*, *European Journal of International Law* 6, pp. 503-538, p. 14 (page numbers refer to the online version of the article, see www.ejil.org).

²⁴ Koh, *Transnational* (Fn. 11), pp. 201-2 (emph., PL).

²⁵ Slaughter, *International Law* (Fn. 23), p. 9.

²⁶ Slaughter, *International Law* (Fn. 23), p. 15.

unitary actors in world politics and assumes that the legal relations of democratic states are characterised by a special form of *disaggregation*. Thus, the sovereignty of states is challenged. In particular, the network aspect of Slaughter's theory points to such a *disaggregated sovereignty*. While she holds that "the State is disaggregated, but remains the State",²⁷ sovereignty is to be redefined. In the course of a "transnational polity", it is not the state as a unitary actor but rather the state's institutions that assert sovereignty. In the course of the establishment of horizontal as well as vertical networks,²⁸ the principal of institutional checks—known from the domestic realm—is transferred to the transnational arena, i.e. the concept of *disaggregated sovereignty* amounts to a decentralised and/or de-bordered version of democratic checks and balances.

Slaughter's liberal theory experiences more or less harsh critique.²⁹ Some sceptical author's concerns focus on the normative implications of her "liberal" theory. As Slaughter's agenda tends to withdraw attention from public international law and, simultaneously, emphasises the legal development of inter-democratic relations, relations between liberal and illiberal states could be allocated to a sphere beyond law, i.e. a sphere of politics.³⁰ This becomes clearer by asking, *how does Slaughter's liberal theory build upon the DP?* Since she refers to the positivist liberal IR theory put forward by Andrew Moravcsik as her central frame of reference,³¹ this frame lacks the potential to serve as a normative guidance. More precisely, it left its guiding quality behind when reinventing liberalism under the positivist scientific IR standard predominantly formulated by Kenneth Waltz.³² Yet whilst Slaughter bases her theory on these core assumption of a positivist liberal theory, it is logically problematic to deduce the mentioned policy prescriptions from the same liberal framework.

When positive international relations theory is used uncritically to spawn normative prescriptions for the global order, the institutional structures and processes it emphasizes shift from being empirical facts to political values. But in the absence of the type of political reasoning explicitly

²⁷ Slaughter, *International Law* (Fn. 23), p. 36

²⁸ While horizontal networks mean the cross-border interaction of executive, legislative, or judicial institutions of two or more states, vertical networks circumscribe the interaction between national to supranational interactions, best exemplified within the EU framework. For this more elaborated version of intergovernmental networks, see Slaughter, Anne-Marie 2004: *A New World Order* (Princeton University Press: Princeton).

²⁹ Alvarez, José E. 2001: *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, *European Journal of International Law* 12: 2, pp. 183-246; Reus-Smit, Christian 2001: *The Strange Death of Liberal International Theory*, *European Journal of International Law* 12: 3, pp. 573-593; Simpson, Gerry 2001: *Two Liberalisms*, *European Journal of International Law* 12: 3, pp. 537-571. For a severe criticism, see especially Koskenniemi, Martti 2000: *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations*, in: Byers, Michael (eds.): *The Role of Law in International Politics*, Oxford, pp. 17-35.

³⁰ cf. Alvarez, *Do Liberal States Behave Better?* (Fn. 29), p. 240; Koh, *Transnational* (Fn. 11), p. 202.

³¹ Moravcsik, Andrew 1997: *Taking Preferences Seriously: A Liberal Theory of International Politics*, in: *International Organization* 51:4, pp. 513-553.

³² Reus-Smit, *The Strange Death* (Fn. 29), p. 568.

excluded from the purview of positive theory, these values lack any foundation other than assertion.³³

This illustrates the role of DP in the liberal theory of international law quite well. Slaughter resorts to the DP as an unquestioned premise but does explicitly not try to contribute to a theoretical explanation of the relation between democracy and peace.³⁴ Rather, she even states that her “aim has been to consider this research [liberal IR, PL] and its underlying assumptions and to explore its implications for international law”.³⁵ Vice versa, in the remainder of this paper the aim is to explore international law’s implications for the DP.

The transgouvernemental networks put forward by Slaughter describe just those communicative arenas that are not well exemplified in, but seem to serve as foundations of the mode of inter-democratic ingroup-building (*Vergemeinschaftung*) achieved by Risse. Slaughter’s account could, after all, contribute to a further explication of the process-oriented explanation of the anomaly of inter-democratic relations. This particularly applies to her network idea. In this regard, the critique mentioned above—and perhaps even Slaughter’s self-assessment—is not justified at all. It might be conceivable to trace processes of inter-state conflict management along the lines of Slaughter’s *disaggregated new world order* in the course of empirical analyses. Although one might still challenge the normative imperatives—the *Ought*—of the liberal theory in international law, an examination of the *Is* of trans-democratic networks could contribute to a truly dyadic and better explanation of the separate peace. *But note that this realm circumscribes a normative framework that is explicitly distinct from public international law!* Rather, this step is tantamount to a normative closure of the so-called “zone of peace” and perhaps even inhibits the integration of international law into the DP instead of stimulating it. Other than international law “democratic norms” do not constitute a sphere of *universal discourse*.³⁶

3. Several Steps from an Incorporation of International Law to One of Transnational Discourse

But how can, then, international law be “incorporated” into the DP? To start with, a promising approach would be to replenish the normative DP model with legal norms of the democratic *Rechtsstaat*. In this regard, the normative explanation is indeed instructive through its emphasis on democratic

³³ Reus-Smit, *The Strange Death* (Fn. 29), p. 589.

³⁴ cf. Alvarez, *Do Liberal States Behave Better?* (Fn. 29), pp. 234-238.

³⁵ Slaughter, *International Law* (Fn. 23), p. 39.

norms of peaceful conflict resolution at the nation-state level. It has, respectively, not been problematised that political processes, *qua definitionem*, are never inherently peaceful since norms, in generell, are always backed by sanctions. In other words, the state subliminally threatens to enforce norms. However, in a *Rechtsstaat* executive action must proceed in a scope of lawfulness. Following from this, it is more precise to talk of a norm of *right- or lawful* conflict resolution than of one of *peaceful* conflict resolution that is inherent to the democratic process.

Within an organized society, however, absolute absence of force – the idea of anarchism – is not possible. The employment of force in the relationship between individuals is prevented by being reserved for the community. To guarantee peace the social order does not exclude all kinds of coercive acts; it authorizes certain conditions. The employment of force, in general forbidden as a delict, is exceptionally permitted as a reaction against the delict, that is, as a sanction.³⁷

In so doing, the central assumption of inherent peacefulness is contested, however, it is not inevitably overridden. Focusing the legal turn, Kelsen's "peace by law" semantic is a good starting point. Following such an "alternative version" of the normative DP argument, democratic foreign policy should be expected to comply with international norms. This, of course, promotes attempts to interrelate the two research topics DP and compliance research.³⁸ Nevertheless, attempts to correlate democracy and compliance empirically result in ambivalent findings.³⁹ Additionally, while some statistical relations were found in environmental or trade issues, research has not sufficiently focused on the issues of special interest for DP (e.g. compliance with the prohibition of the use of force).⁴⁰

³⁶ cf. Koh, *Transnational* (Fn. 11), p. 203.

³⁷ Kelsen, Hans 1973 (1944): *Peace through Law* (Garland Publishing Inc.: New York/London), p. 3.

³⁸ For the compliance literature, see Chayes, Abram/Chayes, Antonia Handler 1993: *On Compliance*, *International Organization* 47: 2, pp. 175-205; Chayes, Abram/Chayes, Antonia Handler 1995: *The New Sovereignty: Compliance with International Regulatory Agreements*, Cambridge; Franck, Thomas M. 1990: *The Power of Legitimacy Among Nations*, New York; Raustiala, Kal/Slaughter, Anne-Marie 2002: *International Law, International Relations and Compliance*, in: Walter Carlsnaes/Thomas Risse/Beth Simmons (eds.): *Handbook of International Relations*, London, pp. 538-558; Wiener, *Contested Compliance* (Fn. 3); Underdal, Arild 1998: *Explaining Compliance and Defection: Three Models*, *European Journal of International Relations* 4:1, pp. 5-30.

³⁹ Dai, Xinyuan 2003: *Democracy and Compliance with International Agreements*, Paper presented at the ECPR General Conference, Marburg, 18.-20. September 2003; Gaubatz, Kurt T. 1996: *Democratic states and commitments in International Relations*, *International Organisation* 50: 1, pp. 109-139; Victor, David G./Raustiala, Kal/Skolnikoff, Eugene B. 1998: *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice*, Cambridge.

⁴⁰ Of course it could be objected that only one of the general DP findings—democracies wage war as often as non-democracies—rules out respective compliance considerations. And since DP scholars refer to Correlates of War (COW) data, problems to capture not only war initiation but the lawfulness of the use of force will remain. For the latter point, see Damrosch, Lori Fisler 1997: *Use of Force and Constitutionalism*, *Columbia Journal of Transnational Law* 36, pp. 452, 460; see also Damrosch, Lori Fisler 2003: *The Interface of National Constitutional Systems with International Law and Institutions on Using Military Forces: Changing Trends in Executive and Legislative Powers*, in: Charlotte Ku/Harold K. Jacobson (eds.): *Democratic Accountability and the Use of Force in International Law* (Cambridge University Press: Cambridge).

By informing the externalisation argument with Kelsen's legal theory, a distinction between arbitrary and rightful employment of force (*violencia* and *potestas*)⁴¹ is likewise possible in the international realm, viz, by an analogous assumption of a legal order beyond the borders of the nation state. Facing the increasing level of legalisation in world politics, this seems to be self-evident. Furthermore and according to the quoted passage, it can be assumed that democracies do not only externalise patterns of lawful behaviour but, additionally, the idea of the employment of force on behalf of the community. A corresponding hypothesis could be that democracies show an affinity to associate the use of force to systems of collective security. Regular attempts by democratic states to bring issues before the Security Council could be read in this fashion. A study by Andreas Andersson tends to support this hypothesis, arguing that democracies are more likely than other types of states to join United Nations interventions or—to put it in Kelsenian terms—the employment of force on behalf of the (interstate) community.⁴² By arguing, as Andersson does, that his findings are consistent with the normative DP proposition, he makes an interesting point. The floor is now open to the assumption that the *legal form* of the use of force influences the democratic state's decision on a military involvement. Thus, it is not only the regime type of a potential opponent, like in the dyadic variant of the DP, but also the legal status of "war". For this reason, norms of international law—as the prohibition of the use of force in article 2(4) UN-Charter—are to be taken into consideration.

Obviously, international law as part of the normative structure of international relations influences state action. This systemic argument unfolds a clear top-down logic.⁴³ By the same token, it is the regime type attribute that enables the logic to come to the fore. *Top-down* and *bottom-up* go hand-in-hand. Accordingly, legal scholarship enables interesting insights. Domestic legal systems gradually differ in their "openness" to international law (*Völkerrechtsfreundlichkeit*). The intersection of national and international legal systems varies. Traditionally, two legal theories concur in considering the interpretation of the inter-relatedness of domestic and international law: *dualism* and *monism*.⁴⁴ The former theory assumes that international law and the domestic legal systems exist as separated or autonomous legal systems. It follows that an international legal norm needs to be incorporated into domestic law by a legal act. Only then an international legal norm becomes valid in the domestic legal sphere. In cases of norm collisions

⁴¹ see Brock, Lothar 2004: World Society From the Bottom Up, in: Mathias Albert/Lena Hilkermeier (eds.): Observing International relations: Niklas Luhmann and World Politics (London/New York: Routledge), pp. 86-102.

⁴² Andersson states that his findings are consistent with the normative DP proposition. See, Andersson, Andreas 2002: United Nations Intervention by United Democracies? State Commitment to UN Interventions 1991-99, Cooperation and Conflict 37: 4, pp. 363-386.

⁴³ cf. Wendt, Social Theory (Fn. 18).

domestic law, as a logical consequence, is considered as prior to international law.⁴⁵ In contrast, monism frames domestic and international law as subsystems of a single overall legal system (*Gesamtrechtsordnung*). Thus, international norms can be implied in the domestic legal process without an incorporation in form of a special act on the domestic level. Other than dualism, monism has no clear solution to cases of norm collisions. Therefore, two monistic variants (*primacy of domestic law/primacy of international law*) evolved.⁴⁶

Although legal scholars mention that these two theories are of limited importance for the legal *praxis*,⁴⁷ it gives me the chance to point to a critical aspect in DP research. I argue that, basing theory building on the monism-dualism divide, as legal systems can be at least gradually differentiated as either monistic or dualistic, so can political discourses.⁴⁸ Kant's reference to a global "intercourse" (see above) implies the assumption of national and transnational discourses—like monism—as subsystems of one global discursive system while, in contrast, the emphasis of "democratic norms" that is so omnipresent in the normative DP explanation appears more dualistic. As it obviously makes no sense to act on the "dualistic" assumption of an "official act of discursive incorporation", it is the theory of monism with its two variants which is of special interest from a political science perspective. In this regard, it could be stated that while Kant's argument—at least in his 3rd definitive article⁴⁹—points to a *primacy of the transnational discourse*, the majority of DP scholars seem to imply a *primacy of the national discourse*.

Yet, in the field of Legal Studies the question of *how* international norms matter in the domestic realm is a key object of analysis. Especially Harold Koh, while focussing on the process of norm internalisation, has developed a compliance model that proceeds beyond the political scientist's aforementioned bottom-up/top-down differentiation. I will, thus, refer to his concept of *Transnational Legal Process* (TLP).⁵⁰ Defining the issue, Koh states that TLP means

the process whereby an international law rule is interpreted through the interaction of transnational actors in a variety of law-declaring fora, then internalized into a nation's domestic legal system. Through this three-part process of interaction, interpretation, and internalization, international legal

⁴⁴ see, Kunig, Philip 2004: *Das Verhältnis des Völkerrechts zur staatlichen Rechtsordnung: Grundbegriffe und Grundpositionen*, in: Wolfgang Graf Vitzthum (ed.): *Völkerrecht* (de Gruyter: Berlin/New York), pp. 94-100.

⁴⁵ Kunig, *Das Verhältnis* (Fn. 44), p. 95.

⁴⁶ Kunig, *Das Verhältnis* (Fn. 44), p. 95.

⁴⁷ Kunig, *Das Verhältnis* (Fn. 44), p. 96.

⁴⁸ Note that the terms "monadic" (from the DP context) and "monism" (from the field of legal scholarship) are not used interchangeably!

⁴⁹ Kant, *Perpetual Peace* (Fn. 6), pp. 137-142.

⁵⁰ Koh, *Transnational* (Fn. 11).

rules become integrated into national law and assume the status of internally binding domestic legal obligations.⁵¹

While posing the question *why nations obey*, the concept can be understood as a contribution to the literature about compliance. Addressing this question, Koh points to the repeated interaction of different actors in world politics—not just state actors!—driving them to obey. Thus, it is not the assumption of the actor’s self-interest (as in rationalist theories) or the ascription of certain patterns of legal behaviour to state attributes (notably liberal/illiberal, as in Slaughter’s liberal theory) that accounts for compliance with international law.⁵² Moreover, Koh effectively rejects the general term *compliance* by presenting a continuum ranging from *coincidence* over *conformity* and *compliance* to *obedience*. All these terms describe “relationships between stated norms and observed conduct”,⁵³ but obviously these relations are of a varying depth. Associated with the varying degrees of norm internalisation are three shifts that occur when moving along the continuum of which, in this context, the most important one is the shift from the *external* to the *internal*. While acting the way a norm provides because of *coincidence* does not imply any internalisation of the norm, even norm compliance, following Koh, does still occur because *external* factors affect the actor’s decision to follow or disregard the norm. In contrast, in the course of obedience as the deepest internalisation of norms, we can assume a change in the actor’s *value sets*. Thus, obedience implies an *internal imperative*. The crucial point is that while in the course of TLP different actors—political actors, bureaucracies, non-governmental organisations, individuals, etc.—, interacting in multiple territorially as well as functionally differentiated arenas, are involved, state actors are constrained. Thus, when states obey international law it could be understood as the result of social, political, as well as legal internalisation. While this internalisation proceeds, repeated interactions between the actors of these systems increase the effect of the TLP and—so could be expected—, hence, on state decisions to wage war.⁵⁴ Thus, from a legally informed perspective, *the DP is best understood as a product of one strain of the TLP*.

⁵¹ Koh, *Transnational* (Fn. 11), p. 625

⁵² Koh, *Transnational* (Fn. 11). For the rationalist explanation, see Abbott, Kenneth 1989: *Modern International Relations Theory: A Prospectus for International Lawyers*, *Yale Journal of International Law*, 14: pp. 335-411; for the liberal theory, see above.

⁵³ Koh, Harold Hongju 1998: *Bringing International Law Home*, *Houston Law Review* 35, p. 626.

⁵⁴ This emphasis on communicative interaction and the constitution of value sets or identities—involving national and transnational norm entrepreneurs, governmental norm sponsors, etc.—parallels Risse and Slaughter but lacks the exclusiveness of inter-democratic clubs of communication. Here, universal instead of democratic norms serve as communication devices. The intersubjectivity might not be of the same depth as in the so-called “zone of peace” but, as Koh convincingly shows, still enables interaction, i.e. TLP.

4. Scandalisation on the Legal Surface

The war in Iraq has motivated commentators to argue that this event marks a turning point in the development of international law and that the intervention by a coalition of the willing without a chapter VII mandate by the Security Council undermines the foundations of the United Nations legal system, let alone international law.⁵⁵ However, while international law is seen to be in decline, private actors increasingly articulate their position towards the use of military force in the “language of international law”. Additionally, scholars underline the way the US administration has legitimised its military undertakings, viz, not by an emerging norm of preventive action—like proclaimed in the *National Security Strategy* from September 2002—but by a creative interpretation, i.e. an auto-interpretative linkage of different Security Council resolutions (see below).⁵⁶ The latter appraisal makes clear that while the US-administration gave “old Europeans” the cold shoulder, they did not terminate their participation in the TLP. Yet, the assumption can be made that this process can also result in a *contestation* of an international norm. Thus, the role of international legal rules—like the prohibition of the use of force of *article 2(4) UN-Charter*—is not just circumscribed by state-compliance but also by the non-state actor’s opposition to the state’s politics of international law (*Völkerrechtspolitik*),⁵⁷ i.e. an alleged alternative meaning non-state actors attach to it. Following this strain of argument, it is not only state-compliance and/or state *opinio iuris* but also the *public discourse* as part of the TLP that is relevant to assess the role of international law and its development. Therefore, a legally informed DP should, while following Kant, elaborate its theorems beyond the state. The concept of TLP can guide research. However, while opposing Slaughter, Koh plays down the importance of the liberal democracy for the incorporation of international norm into the domestic legal systems in the course of the TLP.⁵⁸ But holding that democracy matters, does by no means necessitates to accept Slaughter’s argument in its normativity. Moreover, empirical “evidence” that non-democracies like Libya participate in the TLP does not falsify the hypothesis that liberal democracy promotes a TLP participation. The same holds true when US courts—like in the *United States v. Alvarez-Machain* case before the Supreme Court that Thomas Franck cites—reject incorporating international legal norms.⁵⁹ This, too, is far from a “methodologically well-done falsification”. Thus, liberal democracy is neither a necessary nor a sufficient condition. But Koh does not present any

⁵⁵ Glennon, Michael 2003: Why the Security Council Failed, *Foreign Affairs*, May/June 2003.

⁵⁶ Bothe, Michael 2003: Der Irak-Krieg und das völkerrechtliche Gewaltverbot, *Archiv des Völkerrechts* 41: 3 (September 2003), pp. 255-271.

⁵⁷ Fischer-Lescano/Liste, *Völkerrechtspolitik* (Fn. 8).

⁵⁸ Koh, *Transnational* (Fn. 11).

⁵⁹ cf. Franck, Thomas M. 1998: Dr. Pangloss Meets the Grinch: A Pessimistic Comment on Harold Koh’s Optimism, *Houston Law Review* 35.

“evidence” that democracy is not even a major determinant. Because of this reason, it is of special—last not least methodological—interest to analyse not only cases of successful but of failed norm internalisation.⁶⁰ Much work—in legal scholarship as well as in political science—remains to be done here.⁶¹

Referring to Koh, I argue that the theory building in DP can benefit from considerations on the inter-relatedness of national and transnational arenas. This necessitates a discursive perspective. The observation of political and/or societal discourses regarding the decision (not) to intervene in another state (i.e. a non-democracy) parallels the analysis of the TLP, i.e. of the incorporation of international legal norms into national legal systems. Other than legal scholars, social scientists, accordingly, have to deal with a “discursive incorporation mechanism”. Bringing democracy back in, the assumption can be made that these societal debates, first, benefit from the transparency and discursive openness of democratic societies and, second, that discourses unfold a kind of communicative power that affects the democratic leader’s scope of action by an application of the binary code—lawful/unlawful—to the question of a military engagement.⁶² Referring to international law as a validity claim, actors obviously tend to use international law as an opportune argumentative surface.

4.1. The Quantity of Discourse

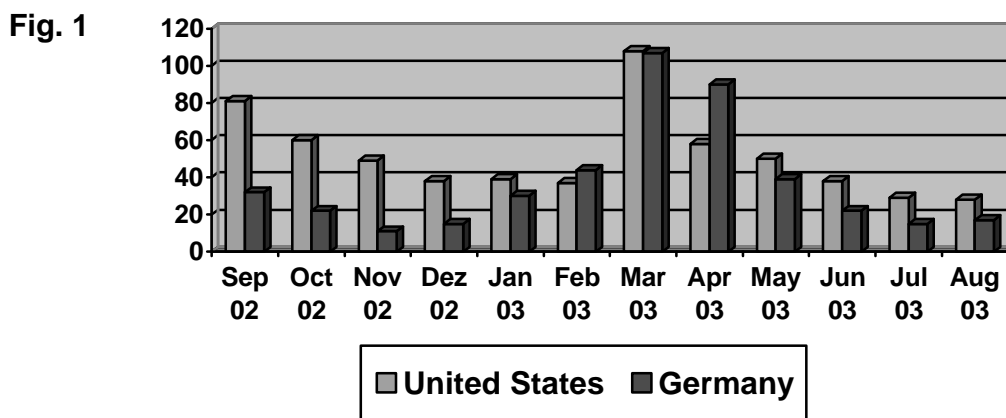
The impression that we nowadays experience an increase in international law-based argumentation, that is, actors are using law-related frames in order to qualify events in world politics, can be validated by a quantitative discourse analysis. Global discourse on the “global war on terror” is a good example. In this context, not only have critics scandalised the treatment of prisoners in Guantanamo and Abu Ghraib along legal lines. Moreover, national courts in different countries have acted as components of a global legal system. This became especially manifest in an indictment of Donald Rumsfeld before a German court put forward by a representative of an American NGO. Admittedly the case has been rejected by the main federal

⁶⁰ cf. Keohane, Robert O. 1998: *When Does International Law Come Home?*, *Houston Law Review* 35.

⁶¹ For an observation of the operation of the legal systems of the United Kingdom, the USA, and Spain in the course of the Iraq war, see now Eberl, Oliver/Fischer-Lescano, Andreas 2005, *Trotz demokratischen Rechts in den Krieg? Die militärischen Entscheideungen zum Irakkrieg in Großbritannien, Spanien und den USA*, HSFK-Report, Frankfurt/M (forthcoming).

⁶² For “communicative power”, see Habermas, Jürgen 1992: *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt am Main: Suhrkamp), p. 187.

prosecutor (*Bundesstaatsanwalt*).⁶³ Nevertheless, such a global legal discourse becomes particularly apparent where resistance is articulated. While searching German newspapers⁶⁴ for the keyword “Völkerrecht” (“international law”) during a one year period before and after the beginning of the operation “Iraqi Freedom”,⁶⁵ a significant peak in the time of the beginning of hostilities is observable (see Fig. 1).



Obviously, there is a relationship between events in world politics and references to international law in the public discourse. A “violation of right”, as Kant puts it, seems indeed to be “felt all over”.⁶⁶ The war discourse unfolds its transnational moment. However, by doing the same thing with US-American newspapers,⁶⁷ the result is puzzling because exactly the same trend is observable. At least from a quantitative perspective, the variance in the use/non-use of military force does not seem to affect the discursive framing nor can we give evidence concerning the varying results in public-opinion polls. The military option had much more consent in the United States than in Germany.⁶⁸ Of course, it cannot be inferred from that data that in the democratic

⁶³ Fischer-Lescano, Andreas 2005: Torture in Abu Ghraib: The Complaint against Donald Rumsfeld under the German Code of Crimes against International Law, *German Law Journal*, pp. 689-724.

⁶⁴ *Frankfurter Allgemeine Zeitung, Süddeutsche Zeitung*.

⁶⁵ Adding further search terms in the course of random samples explicitly did not change the results to a notable extent. Admittedly, it could be argued that it is not so important if the usage of the term “international law” directly refers to the actual discussion about military options. Rather, an increase of public interest in questions related to international law alone is significant. The argument behind that assumption is that the general interest in international law is catalysed through war.

⁶⁶ see above, Kant, *Perpetual Peace* (Fn. 6), p. 142.

⁶⁷ *New York Times, Washington Post*.

⁶⁸ Following a *Newsweek* poll, during March 2003—the peak—the public support of US military action against Iraq in the United States highly depended on the circumstances of a military engagement. 85% of the interviewees supported to attack Iraq together with the major allies with the full support of the United Nations Security Council. Only 54% supported an engagement without such a United Nations mandate but with the support of the allies and only 43 supported the military campaign of the United States alone and without a mandate. Obviously the issue of legitimacy by the United Nations affected the public support more than the participation of the allies. See <http://www.xxx>. In contrast, 84% of the interviewees (*Politbarometer* survey) in Germany in March were against the war. It is interesting that 62% believed that the intervention in Iraq breaks international law while only 6% believed it

discourse of the two countries surveyed war is felt as a violation of rights and is *scandalised* in the language of international law respectively. It is just possible to state that the recognition of the use of force as an issue to be “legally” evaluated is existent in both national discourses. By the same token, the result does not compellingly point to an ignorance towards international norms on the American side. The hypothesis could be made that while the public discussion about international law points to an operation of the non-state actor strain of the TNP in the United States, this process did not result in an incorporation of international norms into the national hegemonic discourse, but in a hegemony of contestation.

4.2. The Quality of Discourse

As the quantitative analysis does not enable a qualification of the positions represented in the newspaper articles, no assertions about the impact of these societal discourse on political (scope of) action can be undertaken. For this reason, additional qualitative approaches are necessary. Of course, this is not the place to introduce the study of discourse in IR. Nevertheless, a few remarks are in order as, by now, discourse analysis has not been adopted by DP scholars.⁶⁹ This might be due to a two-fold quality of discourse analysis as method as well as a (post-modern) theory. In particular, the latter does not seem to fit well into a “positivist research program”.⁷⁰ Shared by nearly all discursive approaches is a grasp of discourses as *systems of signification*.⁷¹ In this regard, the focus lies on the question *how* things are constructed in order to *mean* something. The emphasis is on the process of the construction of meaning or as Iver Neumann puts it, “discourse analysts read texts, and they read societal processes as text”.⁷² The analyst asks *how* a standpoint can be articulated, rather than *why* it has been articulated. Moreover, it is more or less irrelevant to the discourse analyst if an actor really means what he or she says. In contrast, the aim is to infer on the discourse as a structural condition of practice. For this reason, a standpoint as such is not the major concern as, first, articulations also matter when the standpoint represents the opinion of a

to be legal and 32% thought that they lack the competence to answer the question. See “Ein starker Rückhalt für den Anti-Kriegskurs”, *Süddeutsche Zeitung*, March 29, 2003, p. 10.

⁶⁹ Although Risse has pointed to the necessity of analyses of communicative processes and even to discourse analysis, respective discursive approaches are still not common in the DP literature. See, Risse-Kappen, *Democratic Peace* (Fn. 17), p. 511.

⁷⁰ Furthermore, the dichotomy between good (positivist) and bad (post-modern) research has recently been reproduced by scholars on both sides (itself an potential object of discursive analysis). See, Milliken, Jennifer 1999: *The Study of Discourse in International Relations: A Critique of Research and Methods*, *European Journal of International Relations* 5: 2, pp. 225-254, see esp. pp. 227-321.

⁷¹ Milliken, *The Study of Discourse* (Fn. 70).

⁷² Neumann, Iver B. (no year): *From Meta to Method: The Materiality of Discourse*, unpubl. Ms.

minority.⁷³ Second, it is assumed that speech acts are undertaken in order to “fix the ‘regime of truth’”.⁷⁴ Thus, while the discourse is (always) in flux, articulations can be assumed to contribute to its ongoing reproduction. Hence, Jennifer Milliken aptly refers to the discourse as “structure of meaning in use”.⁷⁵

Back to international law, the argument of this discursive approach is that the discourse circumscribes the state authority’s scope of politics of international law.⁷⁶ Furthermore, this system of signification determines the possibility of a discursive incorporation of international norms. In the following, I will look for the signification of the term *international law* in order to evaluate the integrative potential of a national discourse: its *normative permeability*. In this regard, it is not the standpoint of commentators that matters. Rather, it can be expected that affirmative, as well as critical remarks on the Iraq policy of the Bush administration by referring to international law reproduce a certain structure of meaning. Nevertheless, the analysed text should (and does) explicitly contain articulations that represent majority and minority opinions to rule out a possible selection bias.⁷⁷

4.2.1. *United States*

How has “international law” been signified? Although it has from time to time been stated that the military engagement in Iraq is unlawful, commentators in the United States held a relatively pragmatic view on international law. International law is widely seen as only one means to regulate international affairs beside others. Commentators are well aware of the instrumentality in American politics of international law. It is often assumed that, on the one hand, international law is often evaded by the United States but that, on the other hand, evasion has its limits. The discourse appears to be dominated by a degree of self-reflection much more differentiated than often asserted. However, “Americans” indeed accentuate limits of international law (e.g. an inadequate enforcement of law in the international realm or the sovereignty of states without perceiving the regime type). Thus, while an idealist conception is vastly regarded as naive, the

⁷³ In this regard, discourse studies differ from mainstream constructivist approaches in IR where norms are stressed as “collective understanding”. See, Milliken, *The Study of Discourse* (Fn. 70), p. 230.

⁷⁴ Milliken, *The Study of Discourse* (Fn. 70), p. 230.

⁷⁵ Milliken, *The Study of Discourse* (Fn. 70), p. 231.

⁷⁶ Note that this “circumscription” is not tantamount to a causal chain. Due to the epistemological disposition of the approach, the discourse cannot be understood as an independent variable.

⁷⁷ Milliken, *The Study of Discourse* (Fn. 70), p. 233. For an additionally argument for such an opinion-controlled selection, see below.

hegemonic discourse in the United States is unfoundedly described as ignorant towards international law. Rather, a certain dynamic power is acknowledged.

“And even though there are no police to enforce it, international law can also create a fairly powerful incentive to obey the rules it lays down. [...] What we cannot do is sneer at international law one day and invoke it the next. Nor can we pick and choose among the agreements we’ve signed and expect other countries not to do the same. [...] But even among nations, each decision to obey or ignore a particular rule strengthens or weakens all the other rules”.⁷⁸

Or, as the same author holds it,

“Just like specific instances such as the rule against using human shields, the general regime of international law depends on a willingness to sacrifice short-term goals that may even be admirable for the long-term goal of establishing some civilized norms of global behavior. It sounds naive, and maybe it is. But you’re either in the game or you’re not. You can’t pick and choose which rules to take seriously”.⁷⁹

Accordingly, the action taken by the United States, the United Kingdom and Spain towards a so-called “second resolution” by the UN Security Council including the subsequent decision to reject the draft and legitimate the use of force as an undertaking to enforce former resolutions is quite meaningful.⁸⁰ The approach to international law as a type of cost-benefit calculation is apparent. As former president Jimmy Carter puts it in a New York Times editorial,

“American stature will surely decline further if we launch a war in clear defiance of the United Nations. But to use the presence and threat of our military power to force Iraq’s compliance with all United Nations resolutions -- with war as a final option -- will enhance our status as a champion of peace and justice”.⁸¹

All this reflects a notion of international law as a “political thing” and this impression can be *a fortiori* established since affirmative, as well as critical narratives reproduce this image. States

⁷⁸ Kinsley, Michael, Our Kind of Law, The Washington Post, March 28, 2003, p. A23.

⁷⁹ Kinsley, Michael, Problems of International Law, The Washington Post, March 3, 2003, p. A19.

⁸⁰ “Congress has confirmed in two separate resolutions in 1991 and again last fall that the President has the authority to use our armed forces in the specific case of Iraq. Under international law, the basis for the use of force is equally strong. There is clear authorization from the Security Council to use force and to disarm Iraq. The President referred to this authority in his speech to the American people on Monday night. The source of this authority is UN Security Council Resolution 678, which was the authorization to use force for the Gulf War in January, 1991. [...] Historical practice is also clear that a material breach by Iraq of the conditions of the ceasefire provides a basis for the use of force. This was established as early as 1992. The United States, the United Kingdom and France have all used force against Iraq on a number of occasions over the past 12 years. Just last November in Resolution 1441, the Council unanimously decided that Iraq has been and remains in material breach of its obligation. [...] Iraq has clearly committed such violations and accordingly, the authority to use force to address Iraq’s material breaches is clear. [...] This basis in international law for the use of force in Iraq today is clear. [...] The President may also, of course, always use force under an international law in self-defense”. See, State Department (Richard Boucher), Press Briefing (Excerpt), March 20, 2003, <http://www.state.gov/p/nea/ci/18912.htm>.

⁸¹ Jimmy Carter, Just War—or a Just War?, The New York Times, March 9, 2003, p. 13.

create international law, i.e. a “law of states” as “law by states”. This subordination of law under politics becomes intelligible when Secretary Colin Powell makes it clear

“that even in the absence of a second resolution, if the United States feels strongly that Iraq still has weapons of mass destruction and trying to develop new ones, the United States reserves the right and believes there is sufficient authority within international law, based on many acts of noncompliance, many material breaches in the past and continuing material breaches into the present, that would give us a basis for undertaking whatever might be required to disarm Iraq.”⁸²

Nevertheless, as a political means international law has to be “deployed” with great care. An unduly evasion of or even ignorance towards international law could fall back negatively on the United States. International law, consequentially, is—and should further on be—restrained by American interests. In other words, evaluating the United State’s ambitions in Iraq on a legal surface, “pros” and “cons” to a noteworthy extant share one notion of international law. Their mutual opposition appears in terms of antithetic results of a cost-benefit calculation. It is this notion that can well be assumed to prevent the discursive incorporation and invites a contestation of international legal norms like the prohibition of the use of force. What has been unfolded is a *logic of contestedness* instead of a *logic of appropriateness*.⁸³

4.2.2. Germany

Recently, a senior US diplomat assumed in Berlin that while insisting on international law continuously chancellor Gerhard Schröder tends to “hide behind the law”. Further on, somebody who stresses international law in this fashion, “means something different”. Regarding the SPD/Green coalition’s election campaign in 2003,⁸⁴ this interpretation unfolds a certain plausibility. But, particularly, this interpretation can now be understood as signifying international law exactly in the fashion of the American discourse. From this perspective chancellor Schröder is, consequentially, seen as an actor who uses international law as a political means. As I tried to make clear, it is not the concern of a discourse analysis to make claims concerning an actor’s intentions. Rather, from the discursive perspective the statement must be seen as a narrative that, in a further step, could be compared to narratives put forward in the (German) discourse. For this reason I will, again, pose the question *how “international law” has been signified?* Compared to the

⁸² Colin Powell, Interview With Journalists From New Security Council Member Nations, Washington, DC, January 16, 2003, <http://www.state.gov/secretary/former/powell/remarks/2003/16750.htm>.

⁸³ Wiener, *Contested Compliance* (Fn. 3).

American discourse pragmatic attitudes towards international law are virtually not observable. Rather, international law is signified as a value in itself. This becomes clear by the following statements by the German administration.

“The SPD/Green coalition, in the past, has decided for military involvement also against massive resistance under the conditions of moral necessity, legitimacy under international law, and the inequitableness regarding the consideration of all alternatives and consequences. And the coalition has done so only then. In the case of Iraq this is contemporarily not the case”.⁸⁵

“Due to the German history and the politico-cultural imprint of the post-WWII decades, for German politicians, independent of their partisanship, the honour of principles of international law is not only a legal but also a political and moral imperative”.⁸⁶

“It is essential that processes of globalisation go hand-in-hand with international legalisation because a peaceful and well-ordered coexistence builds upon the basis of international law and the rule of law”.⁸⁷

In contrast to the above mentioned “American” appreciation, the political and societal discourse in Germany tells another story. International law is explicitly not referred to as a political means. The term is, rather, signified as a (moral) scale of political action. Actors do not undertake an evaluation in form of a cost-benefit calculation which is so present in the United State’s TLP. In Germany an evaluation as “unlawful” according to international legal obligations, obviously, rules out political options. Hence, international law appears as a fixed category in the political discourse. It is referred to as a “mechanism of subsumption” (*Subsumptionsmechanismus*).

In sum, in the American discourse international law is “politicised” whereas this “politicisation” is transparent and seems to be very well acknowledged. In contrast, the discourse in Germany

⁸⁴ Until today it is often proposed that the coalition has won the election only because of Schröders strong opposition to Bush’s Iraq policy, as well as an excellent conflict management in connection with a Hochwasser in Eastern Germany right before the election.

⁸⁵ “Die rot-grüne Koalition hat sich in der Vergangenheit gegen starken Widerstand dann zur Beteiligung an Militäreinsätzen entschieden, wenn sie moralisch von ihrer Notwendigkeit überzeugt war, sie Völkerrechtlich für legitim und unter Abwägung aller Alternativen und Konsequenzen für unvermeidbar hielt. Aber eben nur dann. Und dies ist im Fall Iraks gegenwärtig nicht der Fall”. Karsten D. Voigt, “Transatlantische Beziehungen in der Bewährungsprobe – Deutschland und die USA nach dem 11. September”, speech at the Centre for International Relations, Warsaw, March 3, 2003, http://www.auswaertiges-amt.de/www/de/ausgabe_archiv?archiv_id=4143.

⁸⁶ “Aufgrund der deutschen Geschichte und der jahrzehntelangen Prägungen der Nachkriegszeit ist für deutsche Politiker heute unabhängig von ihrer Parteizugehörigkeit die Achtung Völkerrechtlicher Prinzipien nicht nur ein rechtliches sondern auch ein politisches und moralisches Gebot”. Karsten D. Voigt, Macht, Souveränität und Herrschaft des Rechts - neue Herausforderungen an die transatlantischen Beziehungen, Aus Politik und Zeitgeschichte 11/2003, http://www.auswaertiges-amt.de/www/de/ausgabe_archiv?archiv_id=5156.

⁸⁷ “Es ist unerlässlich, dass die Prozesse der Globalisierung von zunehmender internationaler Regelsetzung begleitet werden, denn Völkerrecht und Rechtsstaatlichkeit bilden die unabdingbaren Grundlagen eines friedlichen und geordneten Zusammenlebens”. Joschka Fischer, “Für ein System globaler kooperativer Sicherheit”, speech at the 57th UN General Assembly, September 14, 2002, New York http://www.auswaertiges-amt.de/www/de/ausgabe_archiv?archiv_id=3534.

tends to “de-politicise” international law whereby certain political options—those that are stigmatised as “unlawful”—are foreclosed. Referring to post-structuralists like Jacques Derrida, this notion of international law can be denoted as likewise “political”.⁸⁸

This result might not be very surprising. However, a further examination of law-related signification processes can help elaborating theories about democracy’s decisions to use or not to use military force. It can preliminarily be concluded that the degree of discursive incorporation of international norms is relatively high in Germany. Yet, this *logic of appropriateness* is not penetrated by a *logic of contestedness* as politicians and commentators widely seem to consent on the former logic. Thus, abrupt breaks in Germany’s politics of international law—e.g. in the course of the now presumably forthcoming change of government—cannot be expected.

5. Conclusion

Kant assumed that the “perpetual peace” depends on a global intercourse that becomes manifest in a globally shared legal conscience. Moreover, the peace proneness of democracies necessitates the subjugation of the state apparatus (*Staatsapparat*) under democratic law. Hence, the relationship between democracy and law is of central importance in Kant’s legal pacifist draft.

“By drawing attention from war as an inter-executive quarrel to the relation between executives and their societies, Kant observes these inter-state conflicts as legal conflicts and similarly appraises the internal organisation of states in legal categories”.⁸⁹

What is so important is that peace results from a “legally informed” coexistence of both, world society and state system. In the course of the construction of new public spaces the exclusive territoriality of law is challenged.⁹⁰ However, neither this legal aspect of *Perpetual Peace* nor its appraisal of an “idea of cosmopolitan right” has been taken into account by the DP scholarship. Taking this into consideration, new research desiderata come to the fore in this context.

The considerations of the DP as a type of a TLP can be understood as subscribed to these Kantian notions. To be sure, especially Kant’s “high-flown notion” is an ideal type that can

⁸⁸ See, Derrida, Jacques 1991: *Gesetzeskraft. Der mystische Grund der Autorität* (Frankfurt/Main: Suhrkamp). For an excellent application in IR, see Zehfuß, Maja 2002: *Constructivism in International Relations: The Politics of Reality* (Cambridge: Cambridge University Press), ch. 5.

⁸⁹ Eberl/Fischer-Lescano, *Trotz demokratischen Rechts in den Krieg?* (Fn. 61) (my transl.).

⁹⁰ Brock/Albert, *Entgrenzung* (Fn. 1), p. 270.

scarcely be observed in political realities. It can, however, be empirically approached. As I have argued, the internalisation of international norms depends on a normative inter-penetration of discursive arenas. Political and/or discursive systems vary according to their normative permeability. Finally, the assumption of this paper has been that this permeability is influenced by the similarly varying significations of notions of the global realm (here: international law, but other signifiers—e.g. United Nations—are equally worth to be taken under examination). Thus, the “law of the democratic peace” is a fairly political affair.

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