

# **The International Law of the Democratic Peace: A Legal Turn and its Analytical Consequences**

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## *Abstract:*

While legal scholars distinguish certain modes of the incorporation of international legal norms into national legal systems, the Democratic Peace literature does not make a comparable attempt concerning the role of norms in foreign policy decision-making. Rather, the normative model only assumes the externalisation of democratic norms of peaceful conflict resolution, constitutive for the internal political affairs of democratic states. This one-way character rules out the possibility of an inter-relatedness of national and international norms. Accordingly, international norms play no role in the Democratic Peace research program nor has national or international law been taken into account. As the recent debate about the war in Iraq has shown, it appears as an increasingly important feature of democratic foreign policy to legitimate the use of force as lawful in national as well as international discursive arenas. The assumption is that, while varying in their involvement in military campaigns, democracies differ in their interpretation and handling of international law on the use of force as well. Therefore, hypothesising about the relation between democratic rule and behaviour towards international law, the paper aims to sketch a legally informed version of the Democratic Peace theory.

*work in progress – comments welcome*

## 1. Introduction<sup>1</sup>

Recent attempts to examine the attitudes of democratic states towards international law circumscribe an empirical strain of an interdisciplinary agenda.<sup>2</sup> Yet whilst interconnections between International Relations (IR)<sup>3</sup> and International Legal Studies have increasingly been deemed necessary since the beginning of the 1990's,<sup>4</sup> this scholarly debate has only reluctantly guided empirical work.<sup>5</sup> Alluding to the topic of the prohibition of the use of force on the one hand and democratic foreign policy on the other, scholars indeed contribute to the research on the well-known phenomenon that democracies do not attack each other but, however, wage war against non-democracies.<sup>6</sup> While the debate on the Democratic Peace (DP) has, yet, not paid noteworthy attention to international law, legal scholars have sporadically reflected the findings of their IR colleagues.<sup>7</sup> To start with the latter, especially Anne-Marie Slaughter's liberal theory of international law—as a *liberal* theory—obviously shares the DP premises. Challenging *statist* assumptions, Slaughter and DP might have contracted an interdisciplinary alliance against realist IR and/or dogmatic international law. As I will argue, such a *common enemy logic* should be taken with a pinch of salt. Though there are—no doubt—certain similarities, the two theories differ in important aspects.

The DP debate has prevalently referred to the German philosopher Immanuel Kant and especially to his *Perpetual Peace*. Although omnipresent in this essay, international law was not taken into account by DP scholars. This *lacunae* is notably astonishing as the *Perpetual Peace* is recognised as a legal pacifist draft in neighbouring disciplines. And even Bruce Russett's and John Oneal's attempts to operationalise Kant's three definitive articles as *democracy*, *membership in international organisations* and *interdependence* (trade) ignore international law.<sup>8</sup> Rather, in the debate the term *law* does only appear in its usage as a *scientific law*, stating that the DP “comes as close as anything we have to an *empirical law* in

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<sup>1</sup> For the financial support according to the participation at the ISA conference in Hawaii I am grateful to the Fritz Thyssen Stiftung. Many thanks to Katja Freistein for some helpful remarks.

<sup>2</sup> Bothe & Fischer-Lescano 2005; Ku & Jabobson 2003.

<sup>3</sup> Following the convention, International Relations (shifted initials) means the discipline that examines into the matters of international relations.

<sup>4</sup> Keohane 1997; Raustiala & Slaughter 2002; Slaughter et al. 1998.

<sup>5</sup> see the special issue of *International Organization* 54: 3 (2000).

<sup>6</sup> See now, the special issue of *International Politics* 41 (2004).

<sup>7</sup> Damrosch 2003; Slaughter 1995 (Please note that, in the following, the quoted page numbers refer to the pdf version available at the European Journal of International Law Website, <http://www.ejil.org/journal/Vol6/No4/art1.html>.)

<sup>8</sup> Russett & Oneal 2001

international relations”.<sup>9</sup> Nevertheless, on the side of the DP the absence of international law may not be due to pure disinterest. I will argue that international norms are widely neglected for methodological reasons. Analytically concentrating on either monadic or dyadic approaches, the DP debate lacks theory building on a systemic level of analysis and must be supplemented in this regard in order to integrate notions of international law.

Interdisciplinary in focus, the aim of the paper is to explore possible paths of a legal turn in DP. It starts from the assumption that international law plays its role in the foreign policy making of democratic states and that the combination of the two research topics—DP and international law—opens up interesting research desiderata. As a result, several questions must be posed. First, *can we jump on the bandwagon?* Since there is a debate about liberalism among scholars in International Legal Studies, the potential of this debate should be evaluated (section 2). Secondly, *what alternative strategies of an integration of international law into the DP are conceivable?* A brief critique focusing on the normative DP proposition leads to a threefold agenda of topical integration. In this paper I will only sketch one of these strategies—the proposition that foreign policy proceeds according to the national rule of law—(section 3) in order to pose the third question: *what theoretical and/or analytical consequences follow from such an integration?* Following the rule of law, democratic executives should be constrained in a way that parallels the argument made by the liberal DP theory. An observation of national legal systems, in contrast, indicates that this one-way logic is flawed. In contrast, a legally informed DP has to cope with an interconnection of national and international frameworks, i.e. a *normative two-way traffic*. The model has to break with liberal IR in one of its foundational claims: its *bottom-up* logic (section 4). Finally, *how can the mission of integration be accomplished in the face of these problems and how can the research agenda be designed in a way that an IR debate about DP can benefit from the Legal Study’s insights?* As Legal Studies consider such a normative interconnection in form of theories about the incorporation of international legal norms into national legal systems, I will suggest to understand the legal side of the DP as a *transnational legal process* (TLP), a concept well elaborated by Harold Hongju Koh (section 5). In the last section, I will conclude with some preliminary considerations concerning the benefits of a legal turn on the side of political science. In short, given the increasing attention to an international legal discourse paid by public audiences, it can be argued that international law also plays a role beyond the borders of national or international legal systems. Thus, addressing a discursive approach, the

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<sup>9</sup> Levy 1989: 88 (emph. PL)

TLP concept can be paralleled by assuming a *discursive incorporation* of international (legal) norms into national discourses.

## 2. *Can we jump on the bandwagon?*

### 2.1. *Democracies are more likely to do law with one another*

The most obvious attempt to combine DP<sup>10</sup> and International Legal Studies has been formulated by Anne-Marie Slaughter in her “thought experiment”<sup>11</sup> of an *international law in a world of liberal states*. Following Andrew Moravcsik, the main argument behind her liberal theory is that realism in IR 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 puts it in a quite provocative but, nevertheless, apt fashion, “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*”.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> Furthermore and in addition to the DP, *liberal democracy* is much more classified along legal lines.<sup>15</sup>

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<sup>10</sup> This is not the place to review the body of DP literature. For excellent overviews, see Chan 1997; Müller 2004.

<sup>11</sup> Slaughter 1995: 14

<sup>12</sup> Koh 1996: 201f (emph., PL)

<sup>13</sup> Slaughter 1995: 9

<sup>14</sup> But see, Wagner 2003.

<sup>15</sup> However, all this should be due to Slaughter’s disciplinary background and, therefore, is not really astonishing.

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]”.<sup>16</sup> Following liberalism in IR, she objects the concept of states as unitary actors in world politics and assumes that the legal relations of democratic states are characterised by 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”,<sup>17</sup> 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,<sup>18</sup> 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.<sup>19</sup> While some sceptical positions point to theoretical flaws, others address the policy prescriptions of the liberal theory in international law.<sup>20</sup> To start with the latter, some author’s concerns focus on normative implications. 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.<sup>21</sup>

While this normative issue is no doubt interesting, the ultimate core of this paper is concerned with another question: How does Slaughter’s liberal theory relate to the DP? However, as Christian Reus-Smit shows, these both concerns are interrelated.<sup>22</sup> Since Slaughter refers to the positive liberal IR theory put forward by Andrew Moravcsik as her central frame of reference,<sup>23</sup> 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

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<sup>16</sup> Slaughter 1995: 15

<sup>17</sup> Slaughter 1995: 36

<sup>18</sup> 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 2004.

<sup>19</sup> Alvarez 2001; Reus-Smit 2001; Simpson 2001. For a severe criticism, see especially Koskenniemi 2000.

<sup>20</sup> For this disaggregation of Slaughter’s critics, see Alvarez 2001.

<sup>21</sup> cf. Alvarez 2001: 240; Koh 1996: 202.

<sup>22</sup> Reus-Smit 2001

standard predominantly formulated by Kenneth Waltz.<sup>24</sup> Yet whilst Slaughter bases her theory on these core assumption of a positive liberal theory, it is just impossible 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 excluded from the purview of positive theory, these values lack any foundation other than assertion”.<sup>25</sup>

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.<sup>26</sup> 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”.<sup>27</sup> Vice versa, in the remainder of this paper the aim is to explore international law’s implications for the DP. I will, following this concern, turn to the theoretical explanations of the DP in order to revisit the issue of legal relations between disaggregated liberal states in a moment.

## 2.2. *Separate Peace by Separate Norms?*

Early in the debate, scholars pointed at a normative explanation of the DP phenomenon, 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’”.<sup>28</sup> Because democracies are obviously not peaceful in general, this model can be no sufficient explanation. Therefore, the proponents of the normative argument very 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.<sup>29</sup> This is exactly the point where, at least from a legal perspective, certain problems take their origin.

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<sup>23</sup> Moravcsik 1997, 2003

<sup>24</sup> Reus-Smit 2001: 568

<sup>25</sup> Reus-Smit 2001: 589

<sup>26</sup> cf. Alvarez 2001: 234-238

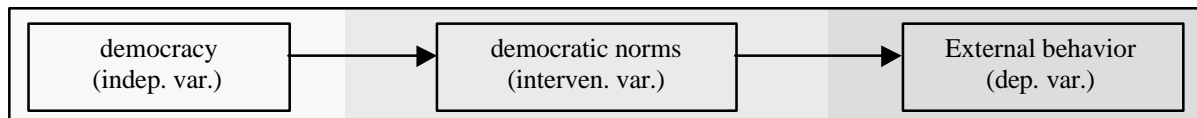
<sup>27</sup> Slaughter 1995: 39

<sup>28</sup> Maoz & Russett 1993: 625.

<sup>29</sup> Due to the prominence of the model, I will not go into the details. See, Dixon 1994; Dixon & Senese 2002; Maoz & Russett 1993; Owen 1994; Russett 1993.

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.<sup>30</sup> In short, these norms are norms of the domestic political process, i.e. *national* norms (Fig.1).

Fig. 1: the conventional normative argument



In the context of a more elaborated attempt to cope with the dyadic, authors added the assumption of mutual perception.<sup>31</sup> 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 ...”. Or as Alexander Wendt puts it:

“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.”<sup>32</sup>

Jürgen Habermas describes such a mode of human interaction as a “monadologic production of the lifeworld’s intersubjectivity”.<sup>33</sup> Indeed, the explanation is further on based on the monadic level.<sup>34</sup> In contrast, 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*.<sup>35</sup> “[N]orms serve as communication devices that enable interactions in the first place by providing a framework of shared and

<sup>30</sup> Dixon & Senese 2002: 549.

<sup>31</sup> see especially Risse-Kappen 1995

<sup>32</sup> Wendt 1999: 159f

<sup>33</sup> Habermas 1981 II: 197 (my transl.)

<sup>34</sup> For problems of this interrelatedness of monadic and dyadic arguments, see Müller & Wolff 2004: 14f; Oren 1995.

<sup>35</sup> Kratochwil 1989

collective understandings”.<sup>36</sup> The role Risse attaches to democratic norms differs from that of the monadic model. Norms do not *cause* action, they rather *ease* (communicative) action. Mutual understanding is based on a previously built intersubjectivity. In the course of Risse’s model, the attachment of norms to state territories tends to be abandoned. The national (democratic) norms are transformed into particularistic international norms only shared by democracies (inter-democratic *norm genesis*). In other words, intersubjective understanding becomes only possible between democratic actors. Following this argumentative line, the separate peace is a result of an “inter-democratic lifeworld”.<sup>37</sup>

The transgouvernemental networks put forward by Slaughter describe just those communicative arenas that are not well exemplified in, but however, seem to serve as foundations of the mode of inter-democratic ingroup-building (*Vergemeinschaftung*) achieved by Risse. Slaughter’s account can, after all, contribute to the DP regarding to a procedural explication of the anomaly of inter-democratic relations. This particularly applies to the 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 explanation as well as its empirical verification of the separate peace. *But note that this realm circumscribes a normative framework that is distinct from public international law.* Rather, this step is tantamount to a normative closure of the so-called “zone of peace” and perhaps even prevents 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*.<sup>38</sup>

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<sup>36</sup> Risse-Kappen 1995: 500

<sup>37</sup> Liste 2004

<sup>38</sup> cf. Koh 1996: 203

### 3. *Strategies: Integrating International Law*

In this section I will sketch three promising paths of integration in order to continue with the legal turn. Therefore, it is necessary to challenge the DP in its normative proposition, i.e. the assumption about the nature of the democratic process. Works that are searching for statistical correlations between regime type and the scale of domestic violence indicate that the assumption of inherent peacefulness is built on shaky grounds. The findings show no significant difference between the risk of civil wars in harsh autocracies and strong democracies. “While totalitarian states may achieve a domestic peace of sorts, which may be characterized as the peace of a zoo, a democratic civil peace is likely not only to be *more just* but also *more durable*“.<sup>39</sup> Thus, DP research has not sufficiently asked for the justice and/or durability of political processes although this might be its defining feature rather than a unquestioned form of peace. While a definition of peace in terms of a *negative peace* is appropriate according to an explanation of an inter-state peace, the same is not necessarily true for the domestic sphere. It has, respectively, not been problematised that political processes, *qua definitionem*, are never inherently peaceful. Norms are always backed by sanctions. In other words, the state subliminally threatens to enforce norms. However, 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.“<sup>40</sup>

It is only this perspective that qualifies the central assumption of the normative model—the assumption of inherent peacefulness. However, it does not inevitably override it. Focusing the legal turn, Kelsen’s “peace by law” semantic is a good starting point. Following an alternative version of the normative argument, democratic foreign policy should, first, comply with international norms. This, of course, promotes attempts to interrelate the two research topics DP and compliance.<sup>41</sup> Nevertheless, the attempts to correlate democracy and compliance

<sup>39</sup> Hegre et al. 2001: 44 (emph. PL)

<sup>40</sup> Kelsen 1973 [1944]: 3

<sup>41</sup> For the compliance literature, see Chambers & Chambers 1993; Franck 1990; Raustiala & Slaughter 2002; Wiener 2004; Underdal 1998.

empirically result in ambivalent findings.<sup>42</sup> Moreover, 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). Of course it could be objected that the general DP finding that democracies wage war as often as other regime types rules out respective compliance considerations. 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.<sup>43</sup> Probably, quantitative correlation studies in general will not tap new knowledge in this regard. However, the *managerial approach* by Antonia Handler and Abram Chayes<sup>44</sup> could be useful to trace the conditions under which such directly DP-relevant norms effect foreign policy decision-making.

Furthermore and according to the quoted passage by Kelsen, it can be assumed that democracies do not only externalise patterns of lawful behaviour but also the idea of the employment of force on behalf of the community.<sup>45</sup> A corresponding hypothesis could be that democracies show an affinity to associate the use of force to systems of collective security. This could be termed as the “Kelsenian externalisation”. Regular attempts by democratic states to bring issues before the Security Council could be read in this fashion.<sup>46</sup> A study by Andreas Andersson supports the hypothesis that democracies are more likely than other types of states to join United Nations interventions, i.e. employment of force on behalf of the (interstate) community.<sup>47</sup> While Andersson states that his findings are consistent with the normative DP proposition, addressing a legally informed version of Andersson’s argument, the assumption could be made that national legal systems (as normative systems on the state level) constrain foreign policy action. Like domestic politics, foreign politics are to be understood as an exercise of state authority and, in the democratic state, have to be executed in accordance with the rule of law. Unlike the domestic sphere, however, the addressee of state action (e.g. another state) is external to the legal community from which the action originates and, thus, an engagement can hardly be understood as a “reaction against a delict”

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<sup>42</sup> Dai 2003; Gaubatz 1996; Raustiala & Victor 1998

<sup>43</sup> cf. Damrosch 1997: 452, 460

<sup>44</sup> Chayes & Chayes 1993, 1995 (arguing that “the general level of compliance with international agreements cannot be empirically verified”, 176). The term *managerial* was, according to the approach of the Chayes’, first used by Downs et al. 1996.

<sup>45</sup> cf. Kelsen 1973 [1944]

<sup>46</sup> However, the possibility should be taken into account that the internationalisation of a norm of collective use of force and especially its institutionalisation run the risk of undermining the democratic control of military engagement and should therefore be taken with a pinch of salt. See, Dembinski et al. 2004.

<sup>47</sup> Andersson 2002

or as a “sanction”.<sup>48</sup> But following the “Kelsenian externalisation”, the distinction between arbitrary and rightful employment of force (*violencia* and *potestas*) is likewise possible in the international realm, viz, by an analogous assumption of a legal order beyond the borders of the nation state.<sup>49</sup> Facing the increasing level of legalisation in world politics, this might be no big deal.<sup>50</sup> On the other hand, it could also be argued that the collective use of military force under UN auspices, quite the contrary to unilateral engagement of troops, refers to compliance with international legal norms. In other words, we are recommitted to the just mentioned *democratic compliance proposition*. Thus, the “Kelsenian externalisation” ranges between compliance at the inter-state level and substantive foreign policy prescriptions at the state level and points to an interconnection of different levels of analysis. Regarding to the theory of the DP, such a “legalisation of the argument” is desirable but still absent in both the monadic and dyadic DP approaches. Three preliminary hypotheses can be deduced from the remarks above.

- (a) *Democracies can be expected to privilege legal mechanisms of conflict resolution on the international level (democratic compliance proposition)*
- (b) *Democracies should promote systems of collective security (collective security proposition)*
- (c) *The scope of democracy’s foreign policy decision-making should range in accordance with the rule of law (rule of law proposition)*

Admittedly, the distinction between (a), (b), and (c) is artificial. In the real world these functions should be multiply interrelated and only hardly distinguishable. But it is directly this inter-relatedness that necessitates to look closely for the analytical consequences of such a legal turn in DP research. In the remainder I will not continue with an elaboration of each of the integrative strategies but exemplify a legally informed model of foreign policy decision-making that particularly represents the *rule of law proposition* (c) in order to clarify the aforementioned analytical problematique in the subsequent section.

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<sup>48</sup> cf. Kelsen 1973 [1944]: 3

<sup>49</sup> Brock 2004

<sup>50</sup> Abbott et al. 2000; Goldstein et al. 2000. For critical positions, see List & Zangl 2003; Finnemore & Toope 2001.

### 3.1. The Rule of Law from Within?

Although constitutions are certainly an integral part of democracy's institutional landscape, this aspect has only recently been taken into account by (legal) scholars in a wider DP context.<sup>51</sup> To begin with, authors acknowledge the long history of constitutional checks on the use of force that is referred to as a concept that originates from the Enlightenment but likewise depends on international events of a global scale (e.g. major wars).<sup>52</sup> Further, Michael Bothe and Andreas Fischer-Lescano subdivide the topic along several lines. First, they point to the twofold quality of *substantive checks*. While constitutional provisions do not only formulate limits according to warfare or the deployment of military forces, they also determine how international legal norms are to be applied to national legal systems. Secondly, constitutions define *procedural checks* and, thereby, determine the balance of power between the executive, legislative, and judicial branches.<sup>53</sup> Yet, only the latter constitutional argument has been provided for by DP scholars. Thus, a legal turn can give rise to an important insight. As *procedural* as well as *substantive* checks are taken into consideration, institutional/structural and normative explanations, arguably, move closer together.<sup>54</sup> In contrast, Maoz and Russett carry the *procedural* quality of their institutional model to the extremes when arguing that “the time required for a democratic state to prepare for war is far longer than for nondemocracies”.<sup>55</sup>

Following this line of inquiry, the examination into constitutional checks raises three types of question.<sup>56</sup> First, it is asked if constitutional provisions do really have a share in the explanation of the DP. Secondly, legal scholars obviously do not yet foreclose the possibility to explain the separate peace phenomenon at the monadic level of analysis. This is interesting! As they have not been concerned with the DP as long as political scientists, they might still be full of hope. On the other hand, it should not be hastily ruled out that their more precise institutional raster can account for plausible monadic explanations. Much interdisciplinary work is to be done here. Finally, the constitutional turn accentuates a shift that has recently moved the DP research from a theory of democracy and peace to a theory of democratic wars.

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<sup>51</sup> Bothe & Fischer-Lescano 2005; Damrosch 1997. See especially the contributions to the edited volume Ku & Jacobson 2003.

<sup>52</sup> Damrosch 2003

<sup>53</sup> Bothe & Fischer-Lescano 2005

<sup>54</sup> As Maoz and Russett point out, “it is extremely difficult to distinguish between these models in terms of contradictory predictions. Normative and structural explanations are often not well differentiated conceptually, thus enhancing them the difficulties of testing them as alternative hypotheses”. Maoz & Russett 1993: 626.

<sup>55</sup> Maoz & Russett 1993: 626

Thus, the primary question is no longer how democracies maintain peace but how they go to war.<sup>57</sup> The supposable benefit is that we can presumably better account for the variances of democratic states in their war proneness.

But contrasting the political science's DP analysis, a legal analysis probably allows to trace causal mechanisms more effectively in domestic legal systems by observing these system's function in certain cases. Empirical benefits can be expected.<sup>58</sup> Nevertheless, the legal praxis does not make it as easy as it might sound like. It could be objected that the application of the rule of law in the field of foreign affairs has its problems. Especially due to the so-called "political question doctrine",<sup>59</sup> the practical effect of legal systems on foreign policy might be vastly limited. However, this does not automatically point to its irrelevance. As Bothe and Fischer-Lescano argue, especially the role of legal provisions in political discourses should be a matter of future consideration.<sup>60</sup> As an example, in the AWACS case the German Constitutional Court (*Bundesverfassungsgericht*) has decided that the participation of the *Bundeswehr* with NATO out-of-area missions is in accordance with German constitutional law. Thus, the court—understood as a democratic institution—has not impeded the commitment of troops or has ordered the *Bundeswehr* back into the barracks, nor has arguably any court ever done so.<sup>61</sup> From a DP perspective, this could be evaluated as a contra-inductive finding, most notably when having in mind a legal turn. But this is not inevitably a case against a legally informed (institutional) DP argument. Moreover, the court decision has opened the floor for a comprehensive political debate that continues to have effects to this day.<sup>62</sup> Although the court did not *directly* narrow the executive's scope of political action it did, nevertheless, decide that any decision on the use of military force should have to be made by the *Bundestag* (*Parlamentsvorbehalt*), and did, as a result, strengthen the democratic—legislative—control of military forces. From a broader perspective, therefore, a democratic institution proceeded as the institutional DP model would have expected. The difference is just that the focus is more on institutional design or *Rechtspolitik* than on the all-day political events like i.e. an actual decision to use military force. It might be true that courts do not constrain democratic foreign policy decision-maker's action in the short run but they

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<sup>56</sup> Bothe & Fischer-Lescano 2005

<sup>57</sup> For a referring development in the political science debate, see especially Müller 2004

<sup>58</sup> However, this might be a primary legal and not an interdisciplinary desiderata.

<sup>59</sup> Franck 1992

<sup>60</sup> Bothe & Fischer-Lescano 2005. I will turn to the discursive implications of domestic and especially international law at the end of this paper.

<sup>61</sup> Bothe & Fischer-Lescano 2005.

<sup>62</sup> For the recent debate about an *Entsendegesetz* (law on troop commitment), see Mayer 2004.

obviously do so in the long run. Thus, stating the irrelevance of legal institutions misses the point. Banish the law from an explanation of the DP is inappropriate since it refrains from a functional differentiation of the democratic institutional landscape.

#### 4. *The level of analysis problematique*

##### 4.1. *Normative Two-way Traffic*

Like already mentioned above, a legal turn in DP is complicated not only by practical hindrances such as political-question-doctrines but also by the research program's analytical character. As shown above, in monadic works norms are attached to the state level. This equally holds for the conventional normative DP proposition as well as for the *rule of law proposition*. How this effects a level of analysis problematique can be clarified while, for the time being, remaining on the issue of national constitutional frameworks. Bothe and Fischer-Lescano point to the twofold quality of substantive checks.<sup>63</sup> Arguably, it is a matter of constitutional rules that are, at least, constitutive for foreign policy decision-making, particularly the decision to use military force. But constitutions also prescribe the application of international law in the national legal context. While the function of the former norms, from an analytical point of view, fits the classical IR-liberal argument (see above), the latter norms challenge it. Legislative and judicial branches are equally involved in this challenge. Parliaments ratify international treaties and transform international legal norms into national law; courts apply international legal rules in the course of "national" cases since judges include sources as international treaties or international customary law in their decision process.<sup>64</sup> For this reason, the assumption of norm externalisation becomes more and more problematic. It is far from sufficient to describe foreign policy as a bottom-up process. In contrast to the *liberal one-way logic*, we have to deal with a *normative two way traffic*. Normative arenas intertwine. In the course of legal procedures as well as the process of legislation international legal norms are incorporated into the national legal systems. Provided that we cling to the monadic externalisation mechanism, DP should at least act on the

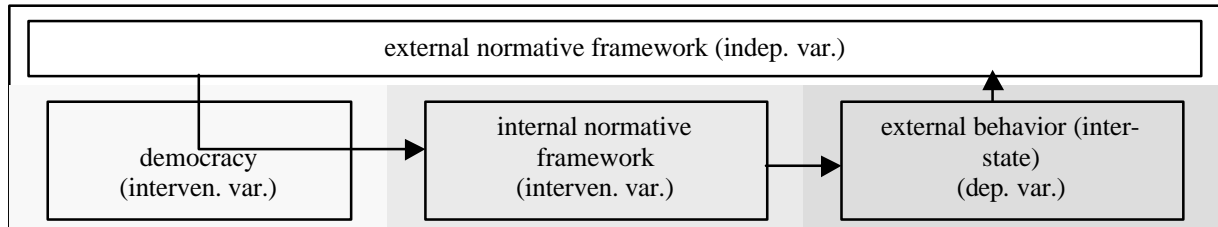
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<sup>63</sup> Bothe & Fischer-Lescano 2005

<sup>64</sup> This is not the place to engage in the questions of the relationship between state law and international law, mechanisms of legal norm incorporation, etc. See, Bothe & Fischer-Lescano 2005; Kunig 2004. However, this should be a key concern of a legally informed DP. Particularly, the differences of democracies in their constitutional and legal cultural structures of incorporation could account for the variances of the democratic state's variances in their attitudes towards international law.

assumption that norm externalisation and internalisation are interrelated or reciprocally interwoven. To give consideration to this interrelation it is appropriate to combine the monadic path of explanation with a *systemic level of analysis* (Fig.2).

Fig.2: normative two-way traffic



#### 4.2. Democratic Peace from Top-Down?

In fact, the DP by contending that “top-down or outside-in models [...] are in deep trouble”,<sup>65</sup> challenges IR realism in the latter’s refusal of the “second image”,<sup>66</sup> i.e. that assumptions about international politics cannot be made on the basis of state’s attributes. James Lee Ray even states that DP falsified realism.<sup>67</sup> However, some DP scholars have recently pointed to the importance of a systemic level of analysis.<sup>68</sup> As Nils Petter Gleditsch and Harvard Hegre show,

“given the conventional wisdom—that democracies hardly ever fight each other but overall participate in war as much as other countries—it follows logically that the probability of war in a politically mixed dyad must be higher than the probability of war between two nondemocracies”.<sup>69</sup>

Following this logical argument, the probability of war in the international system rises with the number of mixed dyads. Although democratisation might be a peace strategy in the long run, for the peace on earth a 50-50 percent distribution of democratic and non-democratic states can be expected to be the worst case. Ray criticises the systemic search for a “net effect”,<sup>70</sup> arguing that assumptions about the operations of a system should for

<sup>65</sup> Maoz & Russett 1993: 636

<sup>66</sup> Waltz 1979

<sup>67</sup> Ray 2003.

<sup>68</sup> As Ray put it, “the term *level of analysis* refers to the unit of analysis, or social entity (e.g. single states, pairs of states, or the entire international system) about which a given study offers descriptions, explanations, or predictions” (Ray 2000: 299, *emph. in original*). For systemic approaches in DP, see also Cederman 2001; Gleditsch & Hegre 1997; Harrison 2004; Huntley 1996.

<sup>69</sup> Gleditsch & Hegre 1997: 284

<sup>70</sup> Gleditsch & Hegre 1997: 298

methodological reasons not be deduced from a summation or extrapolation of its constituents (i.e. on the basis of the empirical findings on the nation and/or dyadic levels of analysis). Otherwise, as he states, systemic arguments add nothing to our knowledge.<sup>71</sup> I tend to share this assessment, yet, for an additional reason. Trying to exemplify the mentioned logical implications, Gleditsch and Hegre hypothetically point to an imagination of “a United Nations of all countries except one going to war to rid the world of the last vestige of authoritarianism”.<sup>72</sup> The reference to the United Nations points to the problem in order. In the course of assumptions about the quantity of mixed dyads in the international system, normative aspects—like the legal system of the United Nations—are, as a matter of fact, neglected. It is just not reflected that the basic parameters of warfare change with the normative structure of the international realm and that such changes *de facto* occurred during the period under study by Gleditsch and Hegre.<sup>73</sup> The League of Nations, the Briand-Kellog Pact, the Charter of the United Nation with its article 2(4), all these cornerstones in the development of international law determined major restraints of the scope of foreign policy decision-making. Reducing the systemic level to pure quantities is, thus, ahistorical and falls short of giving an adequate picture.

Leaving its ontological disposition intact, Alexander Wendt has challenged Kenneth Waltz’s systemic theory of international politics.<sup>74</sup> Wendt explicitly does not criticise the neorealism’s level of analysis. Moreover, he only argues that the systemic structure should not be addressed as a given. Or, as he prominently titles, “Anarchy Is What States Make of It”.<sup>75</sup> Informing the international system with *social* instead of just *brute facts*, he offers the primary gain of structuralist or American constructivism. Recently, Ewan Harrison proposes to inspire (systemic) DP with the Wendtian social theory (i.e. Wendt’s notions of state socialisation and culture on the international level, especially his *Kantian culture of anarchy*).<sup>76</sup> As Harrison argues, constructivism and DP, both, focus on cultural norms.<sup>77</sup> Thus, he assumes the existence of a “liberal peace norm”,<sup>78</sup> what opens up the capability to use a compliance framework to explain the DP findings.

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<sup>71</sup> Ray 2000: 312. Further, it could be questioned if, from a Waltzian perspective, Gleditsch & Hegre do really argue on a systemic level of analysis. I would not go so far. However, since Gleditsch & Hegre make a systemic claim, they do not accept the assumption of states as *like units*.

<sup>72</sup> Gleditsch & Hegre 1997: 298

<sup>73</sup> Gleditsch and Hegre cover the *Polity* time span from 1816 to 1994, see Gleditsch & Hegre 1997: 284.

<sup>74</sup> Wendt 1999

<sup>75</sup> Wendt 1992

<sup>76</sup> Harrison 2004; Wendt 1999.

<sup>77</sup> Harrison 2004: 521

<sup>78</sup> Harrison 2004: 532

Although the combination of degrees of internalisation/compliance and the assumption that democracies in the international realm, while promoting liberalism, serve as norm entrepreneurs delineates a promising research agenda, the mentioned *liberal peace norm* or compliance with a Kantian culture remain fairly abstract categories. For this reason, I will now suggest to concentrate on more specific international norms—that is, international legal norms—that are associated to the use of military force as the primary issue of DP research.

### 5. *Coping with the images*

Here, an important remark is in order. The explanation of the attitudes of democratic states towards certain provisions of public international law concerning the use of force cannot be undertaken by narrowing the perspective to a *third image*. Otherwise state attributes (e.g. democracy/non-democracy) could hardly be taken into consideration.<sup>79</sup> What is needed is not a *third* instead of a *second image* but a form of pragmatic interconnection of levels of analysis. However, the idea of reversing the *second image* is far from new.<sup>80</sup> Yet, in the field of Legal Studies the question of how international norms matter in the domestic realm is a key object of analysis. Focussing on mechanisms of norm incorporation, legal scholars have developed complex compliance models that proceed beyond the political scientist's bottom-up/top-down differentiation. Furthermore and in contrast to their colleagues in IR, they seem to have less problems with the aforementioned normative inter-relatedness. Therefore, in this section I will refer to the concept of *transnational legal process* (TLP) best elaborated by Koh.<sup>81</sup> Defining the issue, he 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 rules become integrated into national law and assume the status of internally binding domestic legal obligations”.<sup>82</sup>

While posing the question *why nations obey*, the concept can absolutely be understood as a contribution to the literature about compliance. Answering this question, Koh points to the repeated interaction of different actors—not just state actors!—in world politics driving them

<sup>79</sup> And where would be the value added in contrast to American constructivism?

<sup>80</sup> To be sure, I paraphrase Peter Gourvitch 1978. See also Cortell & Davis 1996.

<sup>81</sup> Koh 1996

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.<sup>83</sup> However, Koh effectively objects the 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",<sup>84</sup> 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 set*. Thus, obedience implies an *internal imperative*.

This consideration can also be applied to state actors. 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. Following this line of argument, when states obey international law it could be understood as the result of social, political, as well as legal internalisation. As the sequencing of these internalisation processes varies, repeated interactions between the actors of these systems increase the effect of the TLP—last but not least, on state decisions to wage war. 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<sup>85</sup> 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. Because TLP does not stop at the borders of the legal system, the concept stimulates a interdisciplinary research agenda. The sequencing of

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<sup>82</sup> Koh 1998: 625

<sup>83</sup> Koh 1996. For the rationalist explanation, see Abbott 1989; for the liberal theory, see above.

<sup>84</sup> Koh 1998: 626

<sup>85</sup> While Risse indeed acknowledges the role of (transnational) civil societies, Slaughter can be criticised for overemphasising governmental networks. See, Fischer-Lescano & Liste 2004.

internalisation processes highlights a possible link between Legal Studies and DP: a real legal turn.

### 6. *Mutual benefits?*

Four preliminary conclusions should be drawn from the suggested legal turn. First, it could help specifying the institutional argument and, thereby, contribute to the analysis of institutional causal mechanisms. A benefit of integrating the observation of legal systems into the institutional model is the specification of the now rather sketchy differentiation by democratic subtypes (i.e. parliamentary versus presidential systems).<sup>86</sup> Secondly and due to these specifications, contributions to the explanation of the democracy's variances in their use of force, as well as their referring legal attitudes, can be expected. Thirdly, while holding that legal systems play their role in the "daily advancement" of democratic institutions, an observation of the legal functions can help making the DP less static. Reacting on political events of different scale, democratic institutions are redesigned and, as a consequence thereof, the structural conditions of military engagement change. The same holds true for the international level, since *Rechtspolitik* is a phenomenon that is observable in both the national and the global realm.<sup>87</sup> And fourth, while legal institutions contain of single normative provisions, from a legal perspective normative and institutional explanations of the DP phenomenon move closer together. As Harald Müller and Jonas Wolff put it, "in explanations derived from preferences, democratic institutions are a necessary condition for peacefulness, but they play only a role as transmission belt for these preferences and have no causal force in their own right".<sup>88</sup> This assumption parallels Roberts Dahl's minimal requirements for a democracy that have to perform the task of guaranteeing the formulation, signification and equal weighting of the citizen's preferences.<sup>89</sup> This is not the same with legal institutions that indeed bear their own causal force insofar as preferences are figured out in (legal) norms.

But as I was concerned with the methodological disposition of the research program and the analytical consequences of a legal turn, the benefits can reach beyond these inspirations of conventional paths of the DP. I have argued that from a legally informed perspective the DP is best understood as a TLP. Koh's concept points to a necessity to *contextualise* the functions

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<sup>86</sup> see Auerswald 1999; Elman 2000

<sup>87</sup> Fischer-Lescano & Liste 2004

<sup>88</sup> Müller & Wolff 2004: 6

of national as well as inter- and/or transnational legal systems. While the legal system alone seems not to be able nor willing to make democracies more peaceful, assumed causal chains linking democratic rule to obedience with international law (in particular the prohibition of the use of force)—to, as a consequence thereof, peace—will hardly be verified. But putting *law in context* could, however, explore future research desiderata.

The war in Iraq has motivated commentators to argue that Iraq 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 undermined the foundations of the United Nations legal system.<sup>90</sup> Contrasting the position that international law is in decline, private actors in world politics articulate their position towards the use of military force in the language of international law. Additionally, scholars emphasise the way the US administration has legitimised its military undertakings, viz, not by an emerging norm of preventive action but by a creative interpretation and in somehow auto-interpretative linkage of different Security Council resolutions.<sup>91</sup> 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. 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 meaning other—private—actors of world society attach to it. Following this strain of argument, it is not only state-compliance and/or *opinio iuris* but also the *public discourse* that is relevant to assess the role of international law and how it might have changed in the course of a war discourse. Therefore, a legally informed DP should—like the TLP concept—elaborate its theorems beyond the state.

As a concluding remark, I will in brief try to sketch the outline of an inquiry of the DP that takes these impulses serious. An observation of political and/or societal discourses in connection with the decision (not) to intervene in another state (i.e. a non-democracy) to a certain extent parallels the incorporation of international legal norm into national legal systems. Here, interdependence serves as a *discursive incorporation mechanism*. The assumption is that these societal debates have affected the democratic leader’s scope of action by applying the binary code lawful/unlawful to military options. The crucial point is that these binary coding processes referred to international law as a validity claim. While some DP

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<sup>89</sup> Dahl 1971: 3f

<sup>90</sup> Glennon 2003

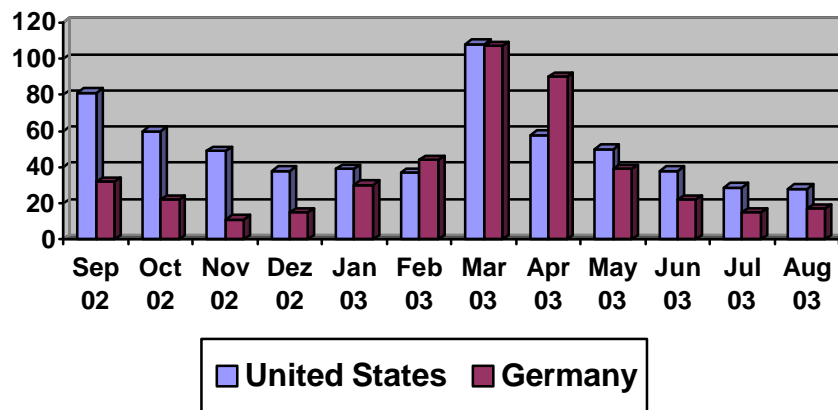
<sup>91</sup> Bothe 2003

scholars pointed to the role of interdependence, discourses were not taken into consideration.<sup>92</sup> In contrast, Immanuel Kant indeed recognised a *discursive incorporation* of international norms into national discourse by stating that,

“Since the narrower or wider community of the peoples of the earth has developed so far that a violation of rights in one place is felt throughout the world, the idea of a law of world citizenship is no high-flown or exaggerated notion. It is a supplement to the unwritten code of the civil and international law, indispensable for the maintenance of the public human rights and hence also of perpetual peace”.<sup>93</sup>

This too breaks with the methodological dispositions of DP research. Since the reference to a “narrower or wider community” in the quoted passage at a first sight parallels the social-constructivist approach by Risse (and Slaughter, see above), a closer look reveals a discrepancy. The legal consciousness of the people affects events beyond the “zone of peace” and, thus, does not implicitly circumscribe a “separate peace” argument. “Violation[s] of rights in one place” are also felt when these places are outside the inter-democratic community. The societal reactions are a good example. A preliminary *quantitative discourse analysis* underlines this assumption (Fig. 3).<sup>94</sup>

**Fig. 3**



Searching two US-American and two German newspapers<sup>95</sup> for catchwords referring to an application of international law to a present discussion about military options,<sup>96</sup> a significant

<sup>92</sup> Russett & Oneal 2001. In their work, the third definitive article of Kants Perpetual Peace is operationalised as international trade. This falls short of accounting for the societal interdependencies of a world society.

<sup>93</sup> Kant 1795

<sup>94</sup> *Quantitative content analysis: Iraq 2003*. Newspaper articles referring to international law (New York Times, Washington Post, Frankfurter Allgemeine Zeitung, Süddeutsche Zeitung).

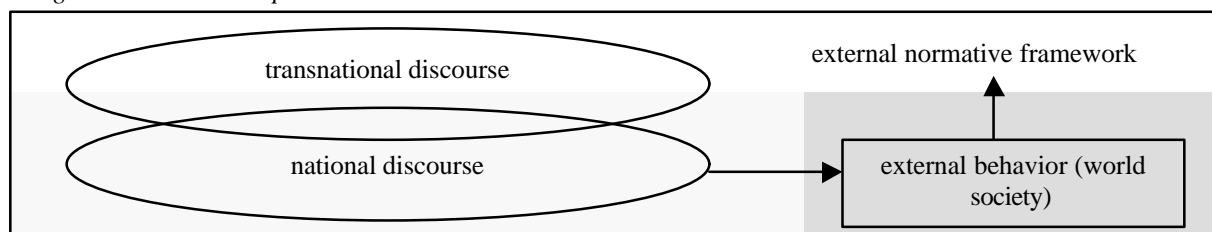
<sup>95</sup> For the US, New York Times and Washington Post; for Germany, Frankfurter Allgemeine Zeitung and Süddeutsche Zeitung.

<sup>96</sup> Yet in this phase of work, I have just searched for the term international law/Völkerrecht. Adding further search terms in the course of random samples explicitly did not change the results to a notable extent.

peak in the time of the beginning of hostilities is observable. Although it cannot be inferred from the data that in the democratic discourse of the two countries surveyed war is felt as a violation of rights and is *scandalised* in the language of international law respectively, the recognition of the use of force as an issue to be legally evaluated is existent. Moreover, the curve barely differs although the military option had much more consent in the United States than in Germany.<sup>97</sup> 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.

Although Risse pointed to the necessity of analyses of communicative processes and even to discourse analysis,<sup>98</sup> respective discursive or “reflectivist”<sup>99</sup> approaches are still not common in the DP literature. And although Kant emphasised a *legal consciousness* in a “community of the people of the earth”, transnational publics, etc. are neglected as well. But as a research design as sketched in this section explicitly refers to the interconnectedness of transnational and national discourses depends on such a analytical shift inter-state system to world society<sup>100</sup> (Fig.4).

Fig.4: discursive incorporation



Admittedly, it could be argued that a direct accountability of the usage of the term international law to the actual discussion about military options is not so important. Rather, an increase of public interest in questions related to international law alone is significant. The argument behind that assumption is that the interest in international law is catalysed through war.

<sup>97</sup> 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.

<sup>98</sup> Risse-Kappen 1995: 511

<sup>99</sup> Keohane 1988.

<sup>100</sup> see, Brock & Albert 1995, Buzan 2004

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