The Doctrines of US Security Policy

An Evaluation under International Law

HEIKO MEIERTÖNS

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The practice of outlining principles for the conduct of US security policy in so-called doctrines is a characteristic feature of US foreign policy. From an international lawyer's point of view two aspects of these doctrines are of particular interest. First, to what degree are the criteria for the use of force, as laid down in these doctrines, consistent with the limitations for the use of force in international law? Second, which law-creating effects do these doctrines have? Furthermore, the legal nature of these doctrines remains uncertain. These matters are examined, beginning with the Monroe Doctrine of 1823, taking into account the Stimson Doctrine of 1932, the doctrines of the Cold War period and the Bush Doctrine of 2002. The Bush Doctrine in particular has generated controversies concerning its compatibility with Article 51 of the UN Charter, due to its principle of pre-emptive self-defence.

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PREFACE AND ACKNOWLEDGEMENTS

The year 2009 will be remembered as the end of eight years of the Bush Administration, with Barack Obama being sworn in as President that January. A legacy of the previous administration, in terms of international law, is the Bush Doctrine of 2002, formulated in reaction to the events of 11 September 2001. It is one of the most striking examples of the generally low opinion in which international law was held by some within the US administration at that time.[1] As one legal adviser from the Pentagon stated in a conversation in 2008, recalling the years 2002 to 2003: 'I wasn't asked a legal question in two years.'

Announced at the height of this generally hostile approach, it seems natural to discuss this doctrine with regard to its impact on the *ius ad bellum*. It also has to be analysed in a broader legal and historical context. The practice of outlining principles for the conduct of US foreign and security policy in so-called doctrines is a characteristic feature of US foreign policy. From an international lawyer's perspective, two questions arise from these doctrines. First, to what degree are the criteria for the use of force laid down in these doctrines consistent with the limitations of the use of force in international law? Second, which law-creating effects do these doctrines have? Furthermore, to date the legal nature of these doctrines remains largely unexplored.

This book examines these matters, beginning with the Monroe Doctrine of 1823. The Stimson Doctrine of 1932 and the doctrines of the Cold War period, like the Truman Doctrine of 1945 are discussed, as is the Bush Doctrine of 2002. The Bush Doctrine in particular generated controversies concerning its compatibility with Article 51 of the UN Charter due to its principle of pre-emptive self-defence.

The question of what effects these doctrines had, and continue to have, on the development of international law is closely connected with matters

1 J. Goldsmith, *The Terror Presidency – Law and Judgment Inside the Bush Administration* (New York: W. W. Norton, 2008), pp. 58–70.

concerning the influence of a sole superpower on the structure of international law. Hence, this book also addresses the questions regarding what influence a hegemonic power can exercise on the development of international law, and whether a 'hegemonic international law' or 'imperial international law' is currently emerging.

A number of issues concerning US foreign policy and their impact on international law have received considerable attention from international lawyers over the last decade. Yet they are rarely placed in the broader context of the history of international law. This book aims to close that gap by providing answers to the two questions outlined above. It places isolated discussions of singular aspects concerning the legality of the use of force in the broader context of the history of international law and also of US security policy.

I have previously thanked those who supported the initial writing of this work in the foreword to the German edition.[2] Now, writing some time later, I would like to thank both those who provided technical support for the writing of the updated English version, and those who provided me with intellectual and spiritual support.

In that broader context I have had the advantage of being able to build on the works of two distinguished scholars of international law and diplomatic history, one German and one American: Herbert Kraus (1884–1965) and Cecil V. Crabb (1924–2003). They devoted a considerable part of their lives to the exploration of doctrines, decades before I set my mind on this subject. I feel a certain closeness to their thoughts and considerations, though – for obvious reasons – I never met them in person. I will, therefore, elaborate briefly on my appreciation of their works. Hence, while working on this topic, I often considered myself fortunate enough to say, as clichéd as this observation may sound: 'If I have seen further it is only by standing on the shoulders of Giants.'[3] I can only hope that this work will satisfy their high standards for the scholarly discussion of doctrines.

The first, Herbert Kraus, founder of the Institute of International Law at the University of Göttingen,[4] laid down a still convincing standard

2 H. Meiertöns, *Die Doktrinen U.S.-amerikanischer Sicherheitspolitik – Völkerrechtliche Bewertung und ihr Einfluss auf das Völkerrecht* (Baden-Baden: Nomos, 2006).

3 Sir Isaac Newton, Letter to Robert Hooke (15 February 1676), quoted in A. Rupert Hall, *Isaac Newton: Adventurer in Thought* (Cambridge University Press, 1996), p. 139.

4 A CV of Herbert Kraus can be found in RdC, 50 (1934-IV), 315; on Herbert Kraus, see further D. Rauschning, 'Herbert Kraus (1884–1965)', in D. Rauschning and D. V. Nerée (eds.), *Die Albertus-Universität zu Königsberg und ihre Professoren* (Berlin: Duncker &

for the positivist legal discussion of an essentially political, even highly politicised, ideological subject such as doctrines. As far back as 1914 Kraus conducted research for his higher doctorate (*habilitation*) on the Monroe Doctrine at Columbia University, New York;[5] a highly unusual place for a German scholar of international law at that point in history. It should not be surprising that I found the work of a German international lawyer (founder of the same institute where I wrote most of this book), who focused on the subject of an American doctrine ninety years before work on this book begun, a great inspiration.[6]

Kraus is a fascinating personality due to a certain fact that sets him apart from most of his contemporaries. After the Nazi seizure of power in 1933, Kraus found himself at a crossroads. Unlike a number of other German scholars of international law, who had at that stage either voiced support for, or opposition to, the National Socialist ideology, or were simply alienated for religious or other reasons,[7] Kraus had remained silent on the issue. His silence itself may be reprehensible, but as a result he was able to choose whether he wanted to endorse or reject this ideology. At exactly the point when others joined the NSDAP in large numbers, decided to remain silent, withdrew to matters of purely academic interest,[8] or continued their work regardless of political changes,[9] he did exactly the opposite. In 1934 he published a text on the crisis of inter-state thought calling the newly elected Chancellor indirectly 'a fool'.[10] A dispute with Carl Schmitt, today regrettably forgotten, on international law and international ethics followed.[11] After a period of forced retirement between 1937 and 1945 he

Humblot, 1994), pp. 371–81; J. Martinez and F. Prill: 'Geschichte der Völkerrechtsforschung und – lehre and der Georg-August-Universität Göttingen', in C. Calliess, G. Nolte and P. Stoll (eds.), *Von der Diplomatie zum kodifizierten Recht – 75 Jahre Institut für Völkerrecht der Universität Göttingen (1930–2005)* (Cologne: Heymanns, 2006).

5 H. Kraus, *Die Monroedoktrin in ihren Beziehungen zur amerikanischen Diplomatie und zum Völkerrecht* (Berlin: Guttentag, 1913).

6 Kraus also happens to be one of the predecessors of the supervisor of this Ph.D. thesis, Georg Nolte as holder of the chair for Public International Law at the University of Göttingen, currently held by Andreas Paulus.

7 On this see D. F. Vagts, 'International Law in the Third Reich', A.J.I.L., 84 (1990), 661–704.

8 M. Stolleis, *History of Public Law in Germany* (Oxford University Press, 2004), pp. 408–31.

9 G. Stuby, *Vom 'Kronjuristen' zum 'Kronzeugen'. Friedrich Wilhelm Gaus: ein Leben im Auswärtigen Amt der Wilhelmstraße* (VSA-Verlag: Hamburg, 2008).

10 H. Kraus, *Die Krise des zwischenstaatlichen Denkens: eine Bilanz* (Göttingen: Vandenhoek & Ruprecht, 1933), p. 26.

11 C. Schmitt, 'Nationalsozialismus und Völkerrecht', *Schriften der Deutschen Hochschule für Politik*, Issue 9, Berlin (1934); H. Kraus, 'Carl Schmitt, Nationalsozialismus und Völkerrecht', N.Z.I.R., 50 (1935), 151–61.

returned to his chair in Göttingen. The fact that after 1945 Kraus – an East Prussian from Kaliningrad/Königsberg – focused on rather unpopular, arcane questions of the legal status of the former eastern territories of the German Reich,[12] may have contributed to the little attention his work received. Yet this cannot diminish his achievements in his early work on the Monroe Doctrine.

The second scholar, Cecil V. Crabb (1924–2003), was Professor of Political Science and Chairman of the Department of Political Science at Louisiana State University from 1968 to 1979. Crabb authored some of the most widely used textbooks on US foreign policy. His textbook on international politics, *Nations in a Multipolar World*, was one of the first to focus on the concept of 'multipolarity' and its implications for the international system.[13] His book, *The Doctrines of American Foreign Policy – Their Meaning role and Future*,[14] was groundbreaking work on the subject of doctrines and provided me with a most valuable and comprehensive analysis and description of doctrines in their historical context.

To a certain degree the English used in the writing of this book remains 'German', and the perspective certainly is. Wherever it was possible, original English texts or translations of texts into English are quoted. However, frequent reference is made to some German scholarly opinions as this work is essentially a product of the German strand of an international discourse. When initially writing this work, this sometimes resulted in a feeling – probably unchanged for 2,000 years, and already known to scholars in the Germanic-Roman province when writing about the Roman Empire – of being unheard. What could have been a better motivation for going ahead with an English version of this text?

The translation of this work began in Göttingen, but it was not before a stay in Paris in late 2007 that I really found the time to work on the translation, still uncertain whether it would ever see the light of day. It was on a cold day in January 2008, having strolled into the Cambridge University Press bookshop on King's Parade, that I made the decision to finalise my work on an English language version. I had never been to Cambridge before; however, the day before I had attended an excellent

12 H. Kraus, *Der völkerrechtliche Status der deutschen Ostgebiete innerhalb der Reichsgrenzen nach dem Stande vom 31. Dezember 1937* (Göttingen: Schwartz, 1964); S. Sharp. 'Review: Herbert Kraus, Osteuropa und der deutsche Osten, vol. I: Die Oder-Neisse-Linie. Eine völkerrechtliche Studie', A.J.I.L., 49 (1955), 284.

13 C. V. Crabb, *Nations in a Multipolar World* (New York: Harper & Row, 1968).

14 C. V. Crabb, *The Doctrines of American Foreign Policy – Their Meaning, Role and Future* (Baton Rouge, LA: Louisiana University Press, 1982).

lecture by Ralph Zacklin, former United Nations Assistant Secretary-General for Legal Affairs at the Lauterpacht Centre.[15] I found it of great comfort that I, holding a Ph.D. from the University of Munich (93 in the *Times Higher Education Supplement*'s ranking of the world's top 100 universities in 2008),[16] felt I could easily relate to scholarly works on international law presented at the University of Cambridge (Rank 3), grasping the references he made. Later that day, standing in the Squire Law Library looking at familiar books, it dawned on me that the German debate on international law was not quite as isolated as I had previously thought.

The English text was finally completed and updated at the Law School of Humboldt University, Berlin, an institution to which I quickly developed strong ties, where work at the chair of Professor Dr Georg Nolte at the Institute for Public International Law and European Law provided me with an ideal working environment to finish this book.

I wish to thank Oscar Rennalls and Mike Giardina for their help with the translation. Research students Felix Ehrhardt, Anika Seemann and Tobias Ross assisted with the format of the footnotes. I thank the anonymous reviewers for their comments on language and style. Errors and omissions, however, are – of course – all mine. I also thank Finola O'Sullivan and Richard Woodham at Cambridge University Press for their guidance throughout the publication process. The participants of the 27th Manfred Wörner Seminar in May 2009 were the ideal conversationalists for discussing the added, updated chapter on the possible emergence of an 'Obama Doctrine'.

Finally, I particularly thank Miriam J. Anderson, Memorial University, St John's for her encouragement, without which I would certainly have never dared to undertake the task of writing an English version of this work. At the time we became acquainted in 2007 she was a Ph.D. candidate at the Centre of International Studies, University of Cambridge and a Visiting Scholar at Columbia University, New York – just like Herbert Kraus more than ninety years before.

Berlin, September 2009
Dr. Heiko Meiertöns, M.Litt.

15 R. Zacklin, 'The UN Secretariat and the Use of Force in a Unipolar World', Hersch Lauterpacht Memorial Lectures, 2007–8, available at: www.lcil.cam.ac.uk/Media/lectures/pdf/2008_Hersch_Lectures/2008_Lecture_3.pdf.

16 www.timeshighereducation.co.uk.

The present book constitutes an updated and revised version of the author's doctoral thesis, which was accepted by the Faculty of Law of the Ludwig-Maximilians-University of Munich, Germany on 2 November 2005 (*summa cum laude*). The thesis was awarded the Helmuth-James-von-Moltke-Preis 2007 by the German Section of the International Society for Military Law and the Law of War for outstanding judicial work in the field of security policy.

ABBREVIATIONS

A.D.	Annual Digest and Reports of Public International Law Cases
AdG	Archiv der Gegenwart
A.F.D.I.	Annuaire Français de Droit International
A.F. & S.	Armed Forces and Society
A.J.I.L.	American Journal of International Law
Am.H.Rev.	American Historical Review
AöR	Archiv des öffentlichen Recht
A.S.I.L.	American Society of International Law
A.U.I.L.Rev.	American University International Law Review
AVR	Archiv des Völkerrechts
B.C.I.C.L.R.	Boston College International & Comparative Law Review
Berk.J.I.L.	Berkeley Journal of International Law
BVerfGE	Entscheidungssammlung des Bundesverfassungsgerichts
B.Y.I.L.	British Yearbook of International Law
Cal.W.I.L.J.	California Western International Law Journal
Cas.W.Res.J.I.L.	Case Western Reserve Journal of International Law
CENTO	Central Treaty Organization
CFR	Council on Foreign Relations
Chin.J.I.L.	Chinese Journal of International Law
C.J.I.L.	Connecticut Journal of International Law
Col.J.T.L.	Columbia Journal of Transnational Law
Cong. Rec.	Congressional Record
Corn.I.L.J.	Cornell International Law Journal
CTS	Consolidated Treaty Series
DGVR	Deutsche Gesellschaft für Völkerrecht
Dipl.Hist.	Diplomatic History
Documents	Documents on International Affairs
D.US.P.I.L.	Digest of US Practice in International Law
EA	Europa Archiv
E.J.I.L.	European Journal of International Law
E.P.I.L.	Encyclopaedia of Public International Law
Eu.GRZ	Europäische Grundrechte–Zeitschrift

Eu.J.I.R.	European Journal of International Relations
For.Aff.	Foreign Affairs
For.Pol.	Foreign Policy
FRUS	Foreign Relations of the United States
FS	Festschrift
GA	General Assembly
G.J.I.C.L.	Georgia Journal of International and Comparative Law
G.L.J.	German Law Journal
G.Y.I.L.	German Yearbook of International Law
Harv.I.L.J.	Harvard International Law Journal
H.J.I.L.	Heidelberg Journal of International Law
H.J.L.P.P.	Harvard Journal of Law & Public Policy
H.L.R.	Harvard Law Review
Hous.J.I.L.	Houston Journal of International Law
Hu.V-I	Humanitäres Völkerrecht–Informationsschrift
ICJ	International Court of Justice
I.C.L.Q.	International and Comparative Law Quarterly
I.Con.	International Conciliation
IISS	International Institute for Strategic Studies
I.J.I.L.	Indian Journal of International Law
I.L.A.Rep.	International Law Association Report Conference held at . . .
ILC	International Law Commission
IMT	International Military Tribunal
Int.Aff.	International Affairs
Int.J.	International Journal
Int.L.	International Lawyer
Int.Org.	International Organisation
Int.Sec.	International Security
I.R.R.C.	International Review of the Red Cross
I.S.P.	International Studies Perspectives
Isr.L.R.	Israel Law Review
I.Y.H.R.	Israel Yearbook on Human Rights
J.C.S.L.	Journal of Conflict and Security Law
J.I.A.	Journal of International Affairs
J.I.L.P.A.C.	Journal of International Law of Peace and Armed Conflict
J.I.P.O.	Journal of International Peace and Organisation (Friedens-Warte)
JöR	Jahrbuch des öffentlichen Rechts
J.Pol.	The Journal of Politics
JZ	Juristenzeitung
K.A.E.V.R.	Kleine Arbeitsreihe zur Europäischen und Vergleichende Rechtsgeschichte

LdR/VR	Lexikon des Rechts/Völkerrecht
L.G.Rev.	Lawyers Guild Review
LNC	League of Nations Covenant
L.N.O.J.	League of Nations Official Journal
LNTS	League of Nations Treaty Series
Louis.L.Rev.	Louisiana Law Review
Mich.J.I.L.	Michigan Journal of International Law
Mich.L.Rev.	Michigan Law Review
Miss.V.H.Rev.	Mississippi Valley Historical Review
Mil.L.Rev.	Military Law Review
M.P.Y.U.N.L.	Max Planck Yearbook of United Nations Law
NATO	North Atlantic Treaty Organization
Natl.Int.	The National Interest
N.D.L.R.	Notre Dame Law Review
N.J.W.	Neue Juristische Wochenschrift
NSS	National Security Strategy
N.Z.I.R.	Niemeyers Zeitschrift für Internationales Recht
OAS	Organization of American States
ÖZöRV	Österreichische Zeitschrift für öffentliches Recht und Völkerrecht
Pac.Aff.	Pacific Affairs
Pace.I.L.R.	Pace International Law Review
P.P.Sci.	Perspectives on Political Science
P.S.Q.	Political Science Quarterly
RBDI	Revue belge de droit international
RdC	Recueil des Courses
Rev.Hell.d.Int.	Revue Hellenique de droit International
RGBl.	Reichsgesetzblatt
R.G.D.I.P.	Revue générale de droit international public
R.I.A.A.	Reports of International Arbitral Awards
R.I.S.	Review of International Studies
R.O.W.	Recht in Ost und West
RuP	Recht und Politik
Rus.P.L.	Russian Politics and Law
SCOR	Security Council Official Record
SEATO	South East Asian Treaty Organization
StanfordJ.I.L.	Stanford Journal of International Law
StanfordL.Rev.	Stanford Law Review
S.S.J.	Schriften der Süddeutschen Juristenzeitung
TempleLQ	Temple Law Quarterly
T.Inq.L.	Theoretical Inquiries in Law
TLCP	Transnational Law & Contemporary Problems
Trans. Grotius Soc.	Transactions of the Grotius Society

UN	United Nations
UNCIO	United Nations Conference on International Organization
UN Doc.	United Nations Document
UN GA	United Nations General Assembly
UN RSC	United Nations Report of the Security Council
UNTS	United Nations Treaty Series
UNO	United Nations Organisation
Va.J.I.L.	Virginia Journal of International Law
Vand.J.T.L.	Vanderbilt Journal of Transnational Law
VBS	Völkerbundssatzung
VCLT	Vienna Convention on the Law of Treaties
VN	Vereinte Nationen
VRÜ	Verfassung und Recht in Übersee
W. & M.L.R.	William & Mary Law Review
Wash.Q.	The Washington Quarterly
WorldP.J.	World Policy Journal
Y.B.WorldAff.	The Year Book of World Affairs
Y.J.I.L.	Yale Journal of International Law
Y.L.J.	Yale Law Journal
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZdAkDR	Zeitschrift der Akademie für Deutsches Recht
ZfV	Zeitschrift für Völkerrecht
ZRP	Zeitschrift für Rechtspolitik

1

Introduction

'Right' and 'might' are two antagonistic forces representing alternative principles for organising international relations. Considering the interaction between these two forces, one can identify certain features: with regard to questions considered by states as being relevant or having vital importance to their own security international law serves as means of foreign policy, rather than foreign policy serving as a means of fostering international law.[1]

Given the nature of international law as a law of coordination and also the way in which norms are created under it, pre-legal, political questions of power are of far greater importance under international law than they are under domestic law.[2] Despite an increasing codification of international law or even a constitutionalisation,[3] international law lacks a principle which contradicts the assumption that states, based on their own power may act as they wish.[4] In spite of the principle of sovereign equality, the legal relations under international law can be shaped to mirror the distribution of power much more than in domestic law.[5]

1 H. Morgenthau, *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen* (Leipzig: Universitätsverlag Robert Noske, 1929), also: Ph.D. thesis, Leipzig (1929), pp. 98–104; L. Henkin, *How Nations Behave – Law and Foreign Policy* (New York: Praeger, 1968), pp. 84–94.

2 F. Kratochwil, 'Thrasymmachos Revisited: On the Relevance of Norms and the Study of Law for International Relations', J.I.A. 37 (1984), 343–56.

3 J. A. Frowein, 'Konstitutionalisierung des Völkerrechts', *DGVR-Berichte*, 39 (1999), 427–45.

4 N. Krisch, 'Weak as Constraint, Strong as Tool: The Place of International Law in US Foreign Policy', in D. M. Malone and Y. F. Khong (eds.), *Unilateralism and US Foreign Policy* (Boulder, CO: Rienner, 2003), pp. 41–2.

5 In 1910, Max Huber wrote that public international law 'of all laws has the closest connection to its social foundations, and it has to have, because the objective order of law in it is based directly upon the will of the subjects of law, and organs are lacking which would be able to enforce independently a binding effect of the legal order upon the subjects of law.' (Author's translation of: 'von allen Rechten . . . sich am engsten an seinen sozialen Unterbau anschließt und anschließen muß, weil hier die objektive Rechtsordnung unmittelbar auf dem Willen der Rechtssubjekte beruht und weil es hier an Organen fehlt, welche in

The international dominance of the United States since 1991 is a political fact which has implications for the development of international law. This has received considerable attention over recent years, although as an area of study it is still in its infancy.[6] The transformation of political hegemony[7] into international legal structures, on the other hand, is a question which drew attention long before the rise of the United States to superpower status.[8] Wilhelm Grewe has categorised the history of international law into various phases of Spanish, French and English dominance and American–Soviet rivalry.[9] Continuing this categorisation one might consider the current phase of international law as a US-American age.[10]

The political dominance of a single state is not a situation that could be described as unprecedented, but a condition with historically comparable situations – times in which a state with superior power at the same time exercised a predominant role in the development of international law.[11] In spite of that, the legitimacy of singling out the position of a single state and differentiating between the consideration of the legal relations of the most powerful state with the other states, and the legal relations of the states with each other has been questioned. The status of a sole superpower would not create unique relations between the most powerful state and the others, which change the foundations of international law.[12]

der Lage wären, unabhängig vom Willen einzelner Rechtssubjekte die Rechtsordnung zu verwirklichen.') M. Huber, *Die soziologischen Grundlagen des Völkerrechts* (Berlin: Verlag Dr Walther Rothschild, 1928), p. 9.

6 M. Byers and G. Nolte (eds.), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003); J. Murphy, *The United States and the Rule of Law in International Affairs* (Cambridge University Press, 2004); D. Vagts, 'Hegemonic International Law', A.J.I.L., 95 (2001), 843–8; Symposium: 'The New American Hegemony', C.J.I.L., 19 (2004), 231–406.

7 On this term see further: L. Brilmayer, *American Hegemony* (New Haven, CT: Yale University Press, 1997), pp. 14–18. On different concepts of hegemony: P. Minnerop, *Pariа-Staaten im Völkerrecht?* (Springer: Berlin, 2004), also Ph.D. thesis, Göttingen, 2003–4, pp. 425 *et seq.*

8 For example, H. Triepel, *Die Hegemonie*: *ein Buch von führenden Staaten* (Stuttgart: Kohlhammer, 1938), in particular pp. 203–18.

9 W. Grewe, *Epochs of International Law*, trans. Michael Byers (New York: Walter de Gruyter, 2000). On Grewe's work see: B. Fassbender, 'Stories of War and Peace – On Writing the History of International Law in the "Third Reich" and After', E.J.I.L., 13 (2002), 479–512.

10 Similarly see: S. Scott, 'The Impact on International Law of US Noncompliance', in Byers and Nolte (eds.), *United States Hegemony and the Foundations of International Law*, pp. 450–1; S. Scott, 'Is there Room for International Law in Realpolitik?: Accounting for the US "Attitude" Towards International Law', R.I.S., 30 (2004), 87–8.

11 Grewe, *Epochs of International Law*, pp. 19–29; H. Mosler, 'Die Großmachtstellung im Völkerrecht', S.S.J., 8 (1949), 38–45.

12 S. Ratner, 'Comments on Chapter 1 and 2', in Byers and Nolte (eds.), *United States Hegemony and the Foundations of International Law*, pp. 106–8.

With regard to that critique, various commentators have pointed out – correctly – that there seems to be a difference in quality between the meaning of actions and statements of the United States and other states, which tend to acquire a paradigmatic character for the relationship of power and law under the current international legal system.[13]

Since the early days of its existence, the United States has been one of the voices advocating self-restraint and recognition of international law when using force.[14] At a time when the United States was the only nuclear power in the world, it consistently promoted an institutionalised restraint of its predominant position by supporting the foundation of the United Nations.[15] As Alexis de Tocqueville wrote in 1831: 'L'influence de l'esprit légiste s'entend plus loin encore que les limites precises . . . Il n'est presque pas de question politique, aux Etats-Unis, qui ne se resolve tôt ou tard en question judiciaire.'[16] On the other hand, the United States' willingness to accept restrictions on its own course of action through international law has always had its limits with regard to its own security interest. These limits have recently become obvious.[17]

1.1 Doctrines and public international law

Long before it achieved its position of pre-eminence, one characteristic feature of US foreign policy has been the declaration of so-called 'doctrines'. These doctrines have, *inter alia*, the function of setting binding standards for cases when the use of force can serve as a means of US foreign policy. Unlike US-American domestic policy, the leading concepts of which are usually labelled as undogmatic, or even as

13 G. Nolte, 'Conclusion' in: Byers and Nolte (eds.), *United States Hegemony and the Foundations of International Law*, p. 492; M. Byers, 'The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq', E.J.I.L., 13 (2002), 21–41; Vagts, 'Hegemonic International Law', 843–8; N. Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order', E.J.I.L., 16 (2005), 369–408.

14 L. Henkin, 'The Use of Force: Law and US Policy', in L. Henkin *et al.* (eds.), *Right v. Might – International Law and the Use of Force*, 2nd edn. (New York: Council on Foreign Relations Press, 1991), pp. 37–69; R. Kagan, *Paradise & Power – America and Europe in the New World Order* (London: Atlantic Books, 2003), pp. 9–11.

15 J. Ikenberry, 'Institutions, Strategic Restraint, and the Persistence of American Postwar Order', Int.Sec., 23/3 (1998/9), 43–78.

16 A. de Tocqueville, *De la Démocratie en Amérique, Oeuvres, papiers et correspondances*, 8th edn. (Paris, Gallimard, 1951), vol. I.I, p. 282.

17 M. Byers, 'Terrorism, the Use of Force and International Law after 11 September', I.C.L.Q., 51 (2002), 401–14.

ideological eclecticism,[18] US foreign policy is full of such declarations of principles.

The declaration of doctrines was a characteristic feature of US foreign policy during the Cold War. Yet the US declared doctrines long before the formation of this so-called bipolar international system of the Cold War,[19] and before the formation of the so-called unipolar system which followed its end.[20] Even though single doctrines have been discussed in depth in political science,[21] little attention has been paid to them in the science of international law. The National Security Strategy (NSS) published in November 2002,[22] the main statements of which are commonly known as the Bush Doctrine,[23] has generated interest not just among the general public and political scientists, but, in contrast to its predecessors, among international lawyers also. Considerable interest has been devoted in particular to the discussion of the legality of the stated criteria for the use of force between states.[24]

Public international law serves as a central instrument of foreign policy, in particular of US foreign policy, especially when it comes to the

18 C. V. Crabb, *The Doctrines of American Foreign Policy* (Baton Rouge, LA: Louisiana State University Press, 1982), pp. 1–2.

19 In general on polarity of the international system see: K. Mingst, *Essentials of International Relations* (New York: W. W. Norton, 1999), pp. 86–91; G. Evans and J. Newnham, *The Penguin Dictionary of International Relations* (London: Penguin, 1998), pp. 52, 340–1, 550–1.

20 C. Krauthammer, 'The Unipolar Moment', For. Aff., 70 (1990/1), 23–33; C. Krauthammer, 'The Unipolar Moment Revisited', Natl.Int., 70 (2002/3), 5–17.

21 For example, E. Rossides (ed.), *The Truman Doctrine of Aid to Greece* (Washington, DC: American Hellenic Institute Foundation, 2001); A. The, *Die Vietnampolitik der USA von der Johnson – zur Nixon-Kissinger-Doktrin* (Frankfurt: Lang, 1979); W. Tucker (ed.), *Intervention & the Reagan Doctrine* (New York: Council on Religion and International Affairs, 1985).

22 The White House, The National Security Strategy of the United States of America, September 2002, available at: www.whitehouse.gov/nsc/nss.html; printed in L. Korb, *A New National Security Strategy* (New York: Council on Foreign Relations, 2003), pp. 99–139.

23 W. Lafeber, 'The Bush Doctrine', Dipl.Hist., 26 (2002), 543–58; F. Heisbourg, 'A Work in Progress: The Bush Doctrine and Its Consequences', Wash.Q., 26/2 (2003), 75–88; G. Nolte, 'Weg in eine andere Rechtsordnung', *Frankfurter Allgemeine Zeitung*, 10 January 2003, p. 8, also printed in D. Lutz and Hans J. Gießmann (eds.), *Die Stärke des Rechts gegen das Recht des Stärkeren* (Baden-Baden: Nomos, 2003), pp. 187–96.

24 T. M. Franck, 'Editorial Comments: Terrorism and the Right of Self-Defense', A.J.I.L., 95 (2001), 839–43; M. E. O'Connell, *The Myth of Preemptive Self-Defense*, ASIL Task Force Papers, Washington, August 2002; F. Mégret, '"War"? Legal Semantics and the Move to Violence', E.J.I.L., 13 (2002), 361–400; S. D. Murphy, 'Contemporary Practice of the United States Relating to International Law, Terrorist Attacks on World Trade Center and Pentagon', A.J.I.L., 96 (2002), 237–55.

implementation of matters of principle.[25] The advancement of a basic political interest may coincide with an interest in furthering the creation of a new legal rule, or a certain interpretation of a legal rule, or it may have that effect.[26] Certain behaviour, of which the conformity with international law may originally have been in doubt, may cause an adjustment of international law to this behaviour and thus may propel a political concept into the realm of legality under international law.[27]

Hence, an examination of the connection between these doctrines and international law seems to be almost an obvious choice for an evaluation under international law.[28] This makes it even more surprising that Cecil V. Crabb's monograph, *The Doctrines of American Foreign Policy – Their Meaning, Role and Future*, is so far the only work which also discusses the subject of doctrines itself.[29] Other works usually offer only an historical description of single US doctrines. However, Cecil V. Crabb wrote from the perspective of diplomatic history and not that of international law,[30] which underlines the fact that the significance of these doctrines is mainly seen as political and not legal.

Along the clearly defined border in international law between 'law' and 'non-law',[31] political doctrines are generally considered as belonging to the realm of non-law.[32] Marcelo Kohen goes as far as to evaluate the relevance

25 Krisch, 'Weak as Constraint, Strong as Tool', pp. 43–53.

26 K. Ipsen *et al.* (eds.), *Völkerrecht*, 5th edn. (Munich: C. H. Beck, 2004), pp. 45 *et seq.*, ch. 1, § 3.I.

27 Within the limits of the principle *ex inuria ius non oritur*, of which the present interpretation has been framed by a US-American doctrine itself, the Stimson Doctrine (see below Chapter 2, section 2.2.2); H. Kelsen, *Principles of International Law*, 2nd edn. (New York: Holt, Rinehart & Winston, 1967), pp. 415–16.

28 W. Nagan and C. Hammer, 'The New Bush National Security Doctrine and the Rule of Law', Berk.J.I.L., 22 (2004), 382, 390: 'To better investigate the National Security issue it would be useful to review an important, often underappreciated aspect of international law: national security doctrines . . . American international lawyers might best deal with the accompanying clashes between international law and international power by examining past American national security doctrines.'

29 See also: C. von Wrede, 'Der Rechtsanspruch der Deutschen Bundesregierung auf völkerrechtliche Alleinvertretung Gesamtdeutschlands und die Hallstein-Doktrin', Ph.D. thesis, Freiburg, Switzerland, 1966, in particular pp. 16–34; R. Watson, C. Gleek and M. Grillo (eds.), *Presidential Doctrines: National Security From Woodrow Wilson to George W. Bush* (New York: Nova Science Publishers, 2003), in particular Watson, 'On the History and Use of Presidential Doctrines', pp. 7–25. However, Watson and his co-workers do not enter into a discussion of the legal and dogmatic aspects of doctrines.

30 Crabb, *The Doctrines of American Foreign Policy*, pp. 1–9

31 P. Kunig, '2. Abschnitt', in Graf Vitzthum (ed.), *Völkerrecht*, p. 148, nos. 165–6.

32 K. Krakau, 'Lateinamerikanische Doktrinen zur Realisierung staatlicher Unabhängigkeit und Integrität', VRÜ, 8 (1975), 117–44.

of doctrines of US security policy as follows: 'little if any insight can be derived from these doctrines which would shed light on the formulation or interpretation of the rules of international law relative to the use of force . . . They primarily demonstrate that law comes after the fact . . . '[33] Yet a classification of doctrines like this does not rule out a discussion and evaluation of doctrines from the perspective of international law.

In addition, the use of the term 'doctrine' is not uniform. In many cases it refers only to a legally irrelevant, journalistic simplification of an explicitly declared or implied principle of American foreign policy.[34] Sometimes organs of state adopt the denomination 'doctrine' for certain principles, although originally used by non-state actors. In part, US presidents have been fully aware of promulgating a doctrine and have used the term themselves.[35] Furthermore, the use of the term 'doctrine' in the English-speaking world with regard to security policy differs widely and refers to different levels of strategic planning.[36] Certain concepts, considered by American strategic planners as 'doctrinal', are considered by British planners as 'operational'. A difference must also be drawn between political doctrines and regulations which are considered 'military doctrine'.[37]

Well-established definitions from the field of strategic studies may contribute to a better basic understanding of doctrines; they do not,

33 M. Kohen, 'The Use of Force by the United States after the End of the Cold War, and its Impacts on International Law', in Byers and Nolte (eds.), *United States Hegemony and the Foundations of International Law*, pp. 197–231. On the other hand, Kohen concedes that doctrines may have a certain legal meaning: 'These policy statements are nevertheless essential starting points to understanding the instances in which the Unites States uses force and how the US government tries to explain its actions from a legal point of view', p. 201.

34 Ernst Reibstein defines a doctrine as a 'formulation of a maxim under international law in the realm of security, respectively, balance' (author's translation of: 'völkerrechtliche Formulierung einer Maxime auf dem Gebiet der Sicherheit bzw. des Gleichgewichts'); E. Reibstein, *Völkerrecht* (Freiburg: Alber, 1963), vol. II, p. 418.

35 While James Monroe was not aware of formulating a doctrine in 1823, Richard Nixon himself called the principles of his speech on 3 November 1969 the Nixon Doctrine. *Cf.* Crabb, *The Doctrines of American Foreign Policy*, p. 304.

36 On the basic division of levels of planning into international politics, grand strategy, theatre strategy, operational, tactical and technical, see: E. N. Luttwak, *Strategy – The Logic of War and Peace*, 2nd edn. (Cambridge, MA: Belknap Press of Harvard University Press, 2001), pp. 87 *et seq.*

37 The definition of 'military doctrine' in *The Oxford Companion to Military History* reads as follows: 'An approved set of principles and methods, intended to provide large military organizations with a common outlook, and a uniform basis for action . . . ' R. Holmes (ed.), *The Oxford Companion to Military History* (Oxford University Press, 2001), pp. 262–3.

however, allow for a sufficiently legally precise classification. Colin S. Gray defines the term doctrine as follows:

> Doctrine teaches what to think and what to do, rather than how to think and how to be prepared to do it. Academic scholars of strategy and war are apt to forget about the vital intermediary function that doctrine plays between ideas and behaviour. Scholars write theory, they do not write doctrine . . . Doctrine *per se* is a box empty of content until organizations decide how much of it they want, and how constraining they wish it to be.[38]

1.2 Objective of this work

The doctrines of US security policy formulate authoritative principles for the use of force which claim validity beyond the area of jurisdiction of the United States. In order to approach these doctrines from a legal perspective, it is necessary to distinguish between doctrines as political guidelines and the legally relevant content of doctrines. Even though doctrines present political guidelines, they are not entirely free of assertions of law.

In this work an evaluation of the United States' so far declared doctrines under international law will be undertaken. The central question in this process is that of the reconcilability of the statements of law and principles for the use of force in US international relations as declared in doctrines with public international law in force at the time. This first requires describing US-American policy and legal opinion with regard to the legality of the use of force, as it can be derived from doctrines. The question of the extent to which US-American statements within doctrines or corollaries contain statements of law is the starting point for the discussion.

Initially, the declaration of a doctrine is merely a unilateral act of state. There are different levels at which unilateral acts of state can be relevant under public international law: they can mark legally non-binding, merely political declarations of principles, or can be a legally recognised type of action (for example, reservations or recognition), of which the legally constitutive effect is not contested in public international law.[39] Unilateral declarations can have a self-binding effect for a state.[40] Furthermore, the

38 C. Gray, *Modern Strategy* (Oxford University Press, 1999), pp. 35–6.

39 See on the meaning of unilateral declarations under international law: A. Rubin, 'The International Legal Effects of Unilateral Declarations', A.J.I.L., 70 (1977), 1–30.

40 *Nuclear Tests* (*New Zealand* v. *France*), judgment, I.C.J. Rep., 1974, pp. 472–3, Nos. 46–8.

quality of unilateral acts as a source of law is in doubt.[41] Within the discussion of the question of legality in cases where force is used as foreseen in doctrines, the question of the legal nature and the quality as a rule of law of certain doctrines will be considered.[42]

Public international law emerges by a transformation of political relations into legal relations. These emerge as pre-legal, political processes transfer their quality from a merely political pattern of behaviour to a legal rule.[43] Thus, the interaction between law and politics is already noticeable during the process of creation of public international law. This interaction also continues once the original process of the creation of public international law with regard to a certain legal rule has been completed. A legal rule of public international law remains connected with politics as far as its interpretation and change are concerned.[44] The United States could have taken actions creating law by declaring certain doctrines. If, for example, the response of other states is limited to *acquiescence*, US behaviour may constitute a change of customary law,[45] a tacit change of a treaty, a changed interpretation of a single legal provision or self-binding behaviour of the United States.

The extent to which doctrines constitute law-creating behaviour, or may have caused such behaviour, is also a subject of this study. The second central question of this work is the question of the extent to which the principles of doctrines continue to have an effect on particular legal rules of public international law. That is, the degree to which a legalisation of these political principles has taken place.[46]

1.3 Course of the inquiry

The answer to these two questions is structured as follows: as a first step, I describe which rules of behaviour each doctrine lays down for the use of force and any statement of law that the United States has made with regard

41 W. Fiedler, 'Unilateral Acts', E.P.I.L., IV (2000), pp. 1018–23.

42 See below, in particular Chapter 2, sections 2.1.3.1 and 2.2.

43 M. Kaplan and N. Katzenbach, *The Political Foundations of International Law* (New York: John Wiley, 1961), pp. 19–29.

44 Ipsen *et al.* (eds.), *Völkerrecht*, ch. 1, § 3.I, nos. 2–4, pp. 45 *et seq.*; I. Brownlie, 'The Reality and Efficacy of International Law', B.Y.I.L., 52 (1981), 1–8.

45 See generally on acquiescence: J. Müller and T. Cottier, 'Acquiescence', E.P.I.L., I (1992), pp. 14–16.

46 For a definition of 'legalization' see: K. Abbott *et al.*, 'The Concept of Legalization', Int.Org., 52 (2000), 401–19.

to the legality of the use of force within the framework of the doctrine presented. I also explore the connections between doctrines and the opinion of public international law held by the respective US administration, as well as the question as to whether the statement constituted an adequate account of the law then in force. Thanks to the distinct accountability of the US executive to Congress with regard to the use of force in international relations, a high number of explanatory statements concerning doctrines exist which deal closely with their meaning and explain the circumstances in which they foresee the use of force.[47]

I shall include possible different legal interpretations under public international law. As a starting point for an evaluation of doctrines under public international law, single questions of law can be used (for example, doctrines and the law of self-defence, doctrines and humanitarian intervention, etc.). Possibly this would require the presentation of the whole law concerning the legality of the use of force and its relation to doctrines. As the regulations on the legality of the use of force have undergone considerable change,[48] a chronologically organised discussion of the doctrines allows one to follow their relationship with the development of international law. It also helps to finally reach an overall conclusion concerning their legal nature.

Additionally, possible questions concerning the legality of the courses of action foreseen in doctrines result from the statements within the doctrines themselves. If the outcome of the description of a doctrine should be that a doctrine does not, for example, proclaim a right of pro-democratic intervention,[49] it would not be necessary to discuss the legality of that type of intervention to evaluate the legality of this particular doctrine under international law.

Furthermore, the influence that these statements of law had on the development of international law with regard to the legality of the use of force will be described. The response to doctrines among the science of

47 M. Glennon, 'The United States: Democracy, Hegemony and Accountability', in C. Ku and H. Jacobson (eds.), *Democratic Accountability and the Use of Force in International Law* (Cambridge University Press, 2003), pp. 323–47; L. Henkin, *Foreign Affairs and the US Constitution*, 2nd edn. (Oxford: Clarendon Press, 1996), pp. 115–28.

48 In general on the development of international law see: I. Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), pp. 19 *et seq.*; H. Neuhold, *Internationale Konflikte – verbotene und erlaubte Mittel ihrer Austragung* (Vienna: Springer, 1970), pp. 55 *et seq.*; A. Arend and R. Beck, *International Law and the Use of Force – Beyond the UN Charter Paradigm* (London: Longman, 1993), pp. 15–25.

49 Asserted, for example, with regard to the Reagan Doctrine by M. Reisman, 'Coercion and Self-determination: Construing Charter Art 2(4)', A.J.I.L., 78 (1984), 642–5.

international law is also included in this presentation. Finally, a conclusion with regard to the current status of the respective doctrine – which validity it claims for the current shaping of American security policy, if the doctrine is still valid, to what extent it is in accordance with the current law in force – will be reached. In conclusion, similarities of doctrines is presented, with an examination of whether a uniform classification under international law of the discussed doctrines is possible.

1.4 Historical dynamics of the theme

While texts on international law often deal with doctrines and pronounce a judgement about their legality,[50] they do not often precisely delimit and define the doctrine. This is necessary in order to properly legally evaluate doctrines.

Doctrines on security policy are dynamic matters subject to constant adjustment. An author who is writing, for example, about the Monroe Doctrine, can refer to either the core statements of Monroe's speech of 1823 as an historical term, or to the contents which have been attached to the Monroe Doctrine after certain modifications, changes or interpretations at a later point in time. Likewise, the term can refer to a subsequent practice or to single declarations of principle only.[51]

Ultimately, a direct or indirect link to such a doctrine could be construed for almost the whole of US-American foreign policy over the last 180 years. Furthermore, it is not apparent when a statement is being considered as a doctrine and when a statement is merely considered as a corollary to an already existing doctrine. Doctrines are by their nature in no way static, but are dynamic guidelines for policy because they serve the purpose of determining a course of action for contingencies in the future. As no doctrine can be so comprehensive that it offers a set course of action for all contingencies, a change of the political starting position may result in an adjustment of the doctrine itself.[52]

Hence, due to the dynamics of the subject, a comprehensive and continuous evaluation of doctrines under international law is not possible. It

50 For example, A. Randelzhofer, 'Art. 2(4)', in B. Simma (ed.), *The Charter of the United Nations*, vol. I, p. 129; M. Dixon, *Textbook on International Law*, 6th edn. (Oxford University Press, 2007), p. 328.

51 On different uses of the term 'doctrine' in the literature on international relations see: Evans and Newnham, *The Penguin Dictionary of International Relations,* pp. 57, 61–2, 207–9, 464.

52 Crabb, *The Doctrines of American Foreign Policy*, pp. 394–7.

is only possible to examine essential intermediate states that are representative of phases of a doctrine with regard to their conformity with the law in force at a particular time. This apportionment of a doctrine into phases is not necessarily a legal action, but one that results from the changes of doctrines as political principles. However, changes of the reconcilability of single doctrines with international law also result from fundamental changes of the applicable law on the use of force. Just like doctrines, it is also subject to continuous changes.[53]

Which legally relevant statements in the sense of *opinio iuris* or 'state practice' these doctrines contain, depends again on the rules for the creation of law; the development of these is just as dynamic as that of the rules with regard to the use of force.[54] Thus, in the consideration of doctrines there will be a brief discussion of these rules.

1.5 Dogmatic question und methodology

The outline of a work which surpasses the usual and central question for a jurist of what the law in force is, requires some decisions as to the methodological premises of the work. This choice of methods determines the aspects of the consideration of law and the focus of the work.[55] Beyond any doubt the decisive task with which a jurist is charged in terms of a positivist approach is to answer the question of what the law in force is; thus, the legal obligations of the subjects of international law.[56] An inclusion of the level of 'being', instead of a limitation to the level of 'should', which means leaving a purely normative approach, is considered by representatives of a pure legal doctrine as leaving the discipline of law.[57]

Since the beginning of the confrontation between positivists and adherents of natural law in the seventeenth century, the question has been disputed as to what degree the science of international law may include cognitions which do not result from the study of norms themselves

53 J. Fawcett, 'Intervention in International Law', RdC, 103 (1961-II), 343–423.

54 M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press, 1999), pp. 133–6, 207–10.

55 K. Larenz, *Methodenlehre*, 3rd edn. (Berlin: Springer, 1975), pp. 165–71.

56 M. Koskenniemi, 'Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations', in M. Byers (ed.), *The Role of Law in International Politics* (Oxford University Press, 2000), p. 31.

57 H. Kelsen, *General Theory of Law and State*, trans. A. Wedberg (Cambridge, MA: Harvard University Press, 1945), pp. 4–5; H. Kelsen, *Reine Rechtslehre* (Leipzig: Hans Deuticke, 1934), pp. 2, 9–11.

without losing its character as *legal* science.[58] Yet in 1929, Dionisio Anzilotti, a prominent representative of 'voluntaristic' positivism, wrote in his *Textbook of International Law* that the science of international law, on the one hand, has 'to determine and explain the legal rules in force and position them in the logical forms of a system. Secondly . . . it has to strive in connection with other disciplines for a critical evaluation of the law in force and a preparation of future norms.'[59]

This already goes beyond the dogmatic question which would comply with a positivist approach of 'pure legal doctrine'. Alternative methods can be envisaged as to how aspects beyond this approach can be included in a work on public international law.[60]

It would be conceivable to examine the effects of public international law as an instrument within the political process of reaching a decision on the interpretation of norms of public international law. This would have a final aim of deciding how public international law should be designed in order to promote effectively certain values such as a 'free world society' and respect for human beings.[61]

This is basically the starting point of the New Haven School.[62] Even though an indisputable fascination is attached to this basic thought, such a 'policy-oriented approach' has been accused of being merely a means for implementing an ideology. An endangering of public international law may result from an extreme ideologisation, through which a dissolution of law into sequences of decisions is reached resulting in the loss of a quality of a norm.[63] Such a policy-oriented approach is not pursued within this work.

Furthermore, it would be conceivable to examine which political interests fixed in doctrines have been brought to bear in the process of

58 Described in N. Paech and G. Stuby, *Machtpolitik und Völkerrecht in den internationalen Beziehungen* (Baden-Baden: Nomos, 1994), pp. 43–8; 68–70.

59 D. Anzilotti, *Lehrbuch des Völkerrechts* (Berlin: Walter de Gruyter, 1929), pp. 14–15.

60 N. Krisch, *Selbstverteidigung und kollektive Sicherheit* (Berlin: Springer, 2001), also Ph.D. thesis, Heidelberg, 2001, pp. 19–20.

61 M. McDougal, 'International Law, Power and Policy', RdC, 82/1 (1953), 140–1, 180–8.

62 S. Voos, *Die Schule von New Haven: Darstellung und Kritik einer amerikanischen Völkerrechtslehre* (Berlin: Duncker & Humblot, 2000), pp. 98 *et seq.*

63 K. Krakau, *Missionsbewußtsein und Völkerrechtsdoktrin in den Vereinigten Staaten von Amerika* (Metzner, Frankfurt a.M., 1967), pp. 514–18. More drastic is the critique of the 'policy-oriented approach' by Simma, who labels the New Haven School as 'court jurisprudence' (*Hofjuristerei*): B. Simma, 'Völkerrechtswissenschaft und Lehre von den internationalen Beziehungen: Erste Überlegungen zur Interdependenz zweier Disziplinen', ÖZföRV, 23 (1972), 308, n. 53a.

creation and interpretation of particular rules of public international law, and which political questions have thus not become the subject of international law discourse.[64] On this basis, it would be possible to disclose to what degree certain states and jurists assume only a fictional universality and acceptance of norms where their strands of argumentation and use of language are adopted by others as if this was generally accepted public international law. The aim of this approach could be to show differences between real and fictitious expressions of universality and consensus in public international law, and, thus, to 'deconstruct' norms linguistically.[65] This is basically the approach of the Critical Legal Studies School. According to this school, public international law is merely a certain type of discourse about international relations, a certain type of dispute which states have chosen. It is considered as a task of the science of international law to 'deconstruct' this discourse.[66] In doing so, critical legal scholars want to point out that public international law is not politically neutral. They want to achieve this by choosing a method of analysis which focuses on ideologies, interests and structures and create a connection between the theory of public international law and the practice of international law, instead of being limited to the legal discourse itself.[67]

Prima facie this work could, therefore, be attributed to Critical Legal Studies School, because the doctrines of US security policy are by their nature a political subject which constitutes the starting point of the work. Yet in terms of a more traditional, positivist approach, public international law is not treated as a type of discourse about international relations, merely as a type of 'superstructure',[68] but as a binding set of norms. In addition, its historical development only is included in the considerations. Accordingly, no attempt is made in this study to 'deconstruct' norms of public international law. Instead, the possible determination of objective law is assumed. However, different possible interpretations of legal norms will be included. In doing so it is assumed that, despite

64 M. Koskenniemi, *From Apology to Utopia, the Structure of International Legal Argument* (Helsinki: Lakimiesliiton, 1989), pp. 458–501.

65 A. Carty, 'Critical International Law: Recent Trends in the Theory of International Law', E.J.I.L., 2 (1991), 66–96.

66 N. Purvis, 'Critical Legal Studies in Public International Law', Harv.I.L.J., 32 (1991), 81–127, in particular pp. 114–16.

67 D. Kennedy, 'Theses about International Law Discourse', G.Y.I.L., 23 (1980), 353–5.

68 A. Arend, R. Beck and R. Vanderlugt (eds.), *International Rules – Approaches from International Law and International Relations* (Oxford University Press, 1996), pp. 227–9.

judicially conflicting opinions of law, the existence of an objective legal system is possible.[69]

Furthermore, it would be conceivable to examine which design of doctrines of security policy and public international law may be the most sensible in order to achieve certain political aims by connecting methods of law and political science. The interaction between the science of law and political science is a subject which has lately generated considerable attention in the science of public international law.[70]

A comparison often made is that between the importance of international political science (or international relations) for public international law and domestic political science for constitutional law: 'Just as constitutional lawyers study political theory, and political theorists enquire into the nature and substance of constitutions, so too should two disciplines that study the laws of state behaviour seek to learn from one another.'[71] Especially during the 1990s, interdisciplinary works guided by the desire for a better understanding of the connections between public international law and international politics attracted particular attention.[72]

The discussion of doctrines under international law – facts of life capable of legal evaluation, which require a precise determination before they can be evaluated – necessitates a focus on the description of the underlying facts. This constitutes the interdisciplinary element of the work, but it is not the foremost attempt to relate political theory with legal theory.[73] A criterion of analysis, attributed to the theory of political realism, is inserted only marginally into the discussion in the context of doctrines under different polarities of the international system.[74] The

69 On the critics of the critical legal studies approach see: I. Scobbie, 'Towards the Elimination of International Law: Some Radical Scepticism about Sceptical Radicalism', B.Y.I.L., 61 (1990), 339–62, in particular p. 344; M. Byers, 'Response: Taking the Law out of International Law: A Critique of the "Iterative Perspective"', Harv.I.L.J., 38 (1997), 201–5.

70 R. Beck, 'International Law and International Relations: The Prospects for Interdisciplinary Collaboration', in Arend, Beck and Vanderlugt, *International Rules – Approaches from International law and International Relations*, pp. 3–30; K. Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers', Y.J.I.L., 14 (1989), 335–411.

71 A-M. Slaughter-Burley, 'International Law and International Relations: A Dual Agenda', A.J.I.L., 87 (1993), 205.

72 A-M. Slaughter, A. Tumello and S. Wood, 'International Law and International Relations Theory: a New Generation of Interdisciplinary Scholarship', A.J.I.L., 92 (1998), 367–97; Byers (ed.), *The Role of Law in International Politics – Essays in International Relations and Law*.

73 On this issue see further below, section 1.5.

74 Mingst, *Essentials of International Relations*, pp. 86–91.

work does not constitute an attempt to comply with the requirements of a 'joint discipline', as that term has been explained by Kenneth Abbott, Anne-Marie Slaughter and their co-workers.[75] An attempt will be made rather, as generally proposed by Slaughter, to extend an isolated legal consideration of norms by adding historical–political aspects.

The majority of international lawyers base their activity on a stricter understanding of public international law and the science of international law. They deal with the determination of existence, meaning, range and legal consequences of a legal rule, and only to a lesser extent with understanding the process through which legal norms are created.[76]

As essential and central this question may be for the science of international law, it decouples jurisprudence from its use-oriented actual task: the normative, legal evaluation of facts of life.[77] As Bruno Simma wrote in 1974: 'A scientific method of international law, which limits itself to the mere description of the positive contents of norms, misses in many . . . totally decisive points the international *reality of law*.'[78]

Furthermore, the claim was raised during the debates of the 1970s on methods that the science of public international law should – without losing its characteristics as science of *law* – strive for a further completion of dogmatic–normative work by thoroughly examining public international law in reality. This should be achieved mainly by taking into account the dynamic dimensions of norms, their creation, development and application with regard to 'meta-judicial factors' (*metajuristische Faktoren*).[79] Actions with a double nature are considered as meta-judicial factors. They constitute a social action at the level of 'being' (*Sein*), and at the same time these processes have effects at the level of ideals (*Sollen*), namely that

75 K. Abbott, 'International Law and International Relations Theory: Building Bridges – Elements of a Joint Discipline', ASIL Proceedings, 86th Annual Meeting, 1992, pp. 167–72; Slaughter, Tumello and Wood, *International Law and International Relations Theory*, p. 384.

76 Byers, *Custom, Power and the Power of Rules – International Relations and Customary International Law*, p. 25.

77 P. Mastronardi, *Juristisches Denken. Eine Einführung* (Bern: Haupt, 2001), pp. 1–3; H.-J. Musielak, *Grundkurs BGB*, 7th edn. (Munich: C. H. Beck, 2002), p. 1, no. 1.

78 Author's translation of: 'Eine völkerrechtswissenschaftliche Methode, die ihre Aufgabe im bloßen Beschreiben positivrechtlicher Norminhalte erschöpft sieht, geht in vielen . . . ganz entscheidenden Punkten an der internationalen *Rechtswirklichkeit* vorbei'; B. Simma, 'Völkerrecht und Friedensforschung', Friedens-Warte/J.I.P.O., 57 (1974), 78; already similar in 1929: Morgenthau, *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen*, p. 62.

79 O. Kimminich, 'Der Stand der Friedensforschung', Universitas, 26 (1971), 294–5. Similarly see: H. Mosler, 'Die Großmachtstellung im Völkerrecht', pp. 9–11.

of norms.[80] The target in this process shall be 'to question public international law with more purpose, [and] to advance also into the pre-legal realm, which methodological purists consider as . . . *ultra vires*',[81] without blending syncretically legal norms and facts.

The claim brought forward at the time that the science of international law should 'get rid of the remainders of legal positivism',[82] was quite rightly rejected in order to prevent it from losing its nature as a science of law. If a study wants to satisfy the principles outlined by Simma above without giving in to such a claim, this will need to be done by adding an historical–political dimension to the discussion of norm-related statements in the doctrines of US security policy.[83] The starting point of the work is accordingly a judicial one, which basically matches a positivist method: namely, the question to as to what degree the doctrines of US-American security policy were, and are, in accordance with respective public international law in force.

If, according to the historical–political method of public international law as outlined above, one includes the 'predetermined dimensions of the subject matter of the study',[84] it becomes apparent that a limitation to a presentation of the norm-related content of doctrines of US security policy would not correspond with the subject matter discussed. Such a method would not offer an opportunity for an adequate survey of the subject of cognizance. Thus, the discussion of norms is complemented

80 B. Simma, 'Völkerrechtswissenschaft und Lehre von den internationalen Beziehungen: Erste Überlegungen zur Interdependenz zweier Disziplinen', p. 301. Herbert Kraus argued with regard to this matter that: 'A political principle can very well be at the same time a legal rule of international law or be based on one' (author's translation of: 'Ein politischer Grundsatz kann sehr wohl zugleich inhaltlich ein Völkerrechtssatz sein oder einen solchen zu seiner Grundlage haben'). H. Kraus, *Die Monroedoktrin und ihre Beziehungen zur Amerikanischen Diplomatie und zum Völkerrrecht* (Berlin: Guttentag, 1913), p. 353.

81 Own translation of Simma, 'Völkerrecht und Friedensforschung', p. 80: 'das Völkerrecht zielführender zu hinterfragen, [und] auch in jenen vorrechtlichen Bereich vorzudringen, der für den methodologischen Puristen *ultra vires* . . . liegt'.

82 K. Kaiser, 'Völkerrecht und Internationale Beziehungen, Zum Verhältnis zweier Wissenschaften', Friedens-Warte/J.I.P.O., 58 (1976), 199. (Author's translation of 'sich von den Restbeständen des Rechtspositivismus zu trennen'.)

83 Similarly, with regard to the choice of methods, in spite of the obvious differences between the subject and theme of this work see: T. Schweisfurth, *Sozialistisches Völkerrecht? Darstellung – Analyse – Wertung der sowjetmarxistischen Theorie von Völkerrecht 'neuen Typs'* (Berlin: Springer, 1979), p. 42.

84 Author's translation of: 'vorgegebenen Dimensionen [des] Untersuchungsobjekts'; B. Simma, 'Bemerkungen zur Methode der Völkerrechtswissenschaft', in H. von Bonin (ed.), *Festschrift für Ernst Kolb zum 60. Geburtstag* (Innsbruck: Österreichische Kommissionsbuchhandlung, 1971), p. 339.