

## Special Issue: The Kantian Project of International Law

### Introduction – The Kantian Project of International Law: Engagements with Jürgen Habermas' *The Divided West*

By Achilles Skordas & Peer Zumbansen \*

After Habermas' *Der gespaltene Westen* was published in Germany in 2004 to wide acclaim, Polity Press published an English language edition of the book in 2006. *The Divided West* contains Habermas' recent writings on international law and, particularly, his landmark essay on "The Kantian Project and the Divided West – Does the Constitutionalization of International Law Still Have a Chance?" The essay constitutes the most elaborate contribution by Habermas on the challenges facing the international legal order today. While carefully unfolding his inquiry into the dynamics of international law within the current state of transatlantic relations and the role played by the United States in this and the global context, his essay has an objective beyond this. Habermas revisits Kant's concept of cosmopolitan citizenship and a world legal order, as elaborated in the essays "To Eternal Peace" and "Idea for a Universal History with Cosmopolitan Intent." Habermas explores the chances of a revival Kant's thesis in a (post)-Kosovo and (post)-Iraq Era of International Relations. Habermas' essay makes a number of poignant and provocative observations that have already been taken up in an increasingly global discussion.

This Special Issue of the *German Law Journal* celebrates the publication of *The Divided West* with a series of essays of highest timeliness. Habermas' essay encompasses both an analysis of the current trajectories in international law and an inquiry into the relevance of a commitment to international law in a world with one remaining super-power. Habermas' observations focus on the general challenges that face public international law within the "post-national constellation." In this constellation, he writes, "nation states [are enmeshed] in the dependencies of an increasingly interconnected world society whose functional differentiation effortlessly bypasses territorial boundaries."<sup>1</sup> While these observations would, for example, provide the basis for a more in-depth engagement with contemporary explorations of a "law without the state" phenomenon (Teubner), along

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<sup>1</sup> Jürgen Habermas, *Does the Constitutionalization of International Law Still Have a Chance?*, in *THE DIVIDED WEST* 115, 175 (Ciaran Cronnin trans., 2006)

with a myriad of “privately” made law on the transnational level (norms, standards, agreements between regulatory networks, *lex mercatoria*), Habermas is as skeptical in his embrace of these norms as “law” as he remains careful not to fully close the door on this ambiguous normative order. At the time of writing his essay the verdict is more a “not yet” than a “not at all.” Another strand of further engagement could have led him to take more seriously the aspect of “functional differentiation,” which he believes is unfolding with little regard to jurisdictional (“territorial”) boundaries. While this would constitute an explicit engagement with Niklas Luhmann’s foundational concept of “world society,” Habermas leaves this field largely untouched, and cannot – or does not want to – go beyond the “primacy of the political.”<sup>2</sup> Instead, he redefines the relevant terms and situates the transnational level between the domestic-democratic one and a supranational one, which in itself is comprised of states having to learn the art of “governance without government.”<sup>3</sup>

The other grand concern of his essay is the particular role played by the United States in this post-national scenario, and here importantly with regard to the consequences of American unilateralism for U.S.-European relations. It is this side of his essay that makes an even stronger case for a special issue of the *German Law Journal* dedicated to Habermas’ recent work. The *German Law Journal* dedicated its 2002 Annual Conference and Special Issue to Robert Kagan’s barbed characterization of Europe as Venus and the U.S. as Mars. On this model Kagan described Europeans as trusting the “power of law” and the U.S. as embracing the “law of power” with the U.S. serving as the protective precondition for Europe’s blissful paradise.<sup>4</sup> And the *German Law Journal* had the privilege of publishing Max Pensky’s English translation of Habermas’ essay “*Interpreting the Fall of a Monument*.”<sup>5</sup> We see this special issue as a unique opportunity to continue our coverage of Habermas’ contribution to the current state of transatlantic and global relations. As evidenced by numerous of Habermas’ interventions, not least his collaboration with Jacques Derrida on the idea of a “core Europe,”<sup>6</sup> Habermas’ exploration of the current emerging legal and political global order remains embedded in a commitment to the liberal promise, evidenced in the (American) overcoming of German Nazism and pursued throughout his life-work in varied arenas of public contestation. As the essays in this special issue testify, the project is far from complete. As the exploration of “the limits of

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<sup>2</sup> *Id.* at 118 (a “politically constituted world society”).

<sup>3</sup> *Id.* at 136-137, 140, 176.

<sup>4</sup> ROBERT KAGAN, OF PARADISE AND POWER (2003)

<sup>5</sup> Jürgen Habermas, *The Fall of a Monument*, 4 GERMAN LAW JOURNAL 701 (2003); *republished in* 10 CONSTELLATIONS 364-370 (2003); *reprinted as* ch. 2 in THE DIVIDED WEST.

<sup>6</sup> Jacques Derrida and Jürgen Habermas, *February 15, or: What Binds Europeans Together. A Plea for a Common Foreign Policy, Beginning in Core Europe*, in OLD EUROPE, NEW EUROPE, CORE EUROPE. TRANSATLANTIC RELATIONS AFTER THE IRAQ WAR 3 (Daniel Levy, Max Pensky & John Torpey eds., 2005); *republished as* ch. 3 in THE DIVIDED WEST.

international law” continues,<sup>7</sup> there is much promise in an interdisciplinary dialogue between international lawyers and political philosophers on the future prospects of the international legal order. Published against the explosive drumbeat of war in the Middle East, this special issue also might be another academic iteration on how the world could – or should – be. One may wonder whether, in the era of functional differentiation and world society, if “the West” is still a notion, and, if it is, whether it is divided along increasingly (in)visible lines.

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<sup>7</sup> JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

