



Discourse Theory and International Law:

An Interview with Jürgen Habermas*

*Dear Professor Habermas, we have had four days of intense discussions on international order based on your landmark book *Between Facts and Norms*. On that basis, I want to ask you some questions that might be of interest to the members of the European Society of International Law.*

Your writings on international order usually contain two main parts. One part consists of reconstructions of such important concepts as sovereignty, human rights or constitutionalism. The other part consists of policy proposals, for example a certain reform of the Security Council or the General Assembly. Some readers might be puzzled to find them in the same text. Could you explain the relationship between these two parts?

This question touches on a peculiar difficulty of a more or less personal nature. Since the early eighties, I have been publishing, alongside my professional books and articles, *Kleine Politische Schriften* [Small Political Writings]. These assemble essays, speeches and occasional writings on current issues, and they are meant to contribute to a – somewhat nationally colored – diagnosis of the time. In following this publication policy I wanted to make my readers aware of the role which I take in each case - either that of an academic who tries to meet the usual scholarly standards or the role of a public intellectual who, as a citizen, makes use of his academic competences for the

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purpose of a specific political intervention. Your question points to the embarrassing fact that this division of labor does not quite work with regards to international law.

This is not an academic discipline which I first studied and then made use of in specific policy contexts. I did not regularly study law at all and never got a degree in law. Only in the course of my developing academic interests, by the end of the fifties, did I begin to read first public law (especially German *Staats- und Verfassungsrecht* [state and constitutional law]) and later on legal theory. This has lead me finally to write, in the context of a discussion with expert associates, *Between Facts and Norms*. But I never achieved a similar familiarity with international law. Here it was the other way round. Political challenges such as the humanitarian interventions after 1989-1990, the European Monetary Union since the Maastricht Treaty, Bush's invasion into Iraq, the European crisis in the wake of the global banking crisis 2008, etc., came first. In order to come to terms with these problems, and to gain a basis for forming reasonable political judgments, I had to learn a lot more, and more specifically, about international and European law. I need not to tell you: you were the first of the colleagues in both fields who helped me with professional advice, literature and criticism.

In your legal theory, you make an important claim that traditional positivist legal reasoning is deficient and that it needs to open up to broader normative considerations as elaborated by political theory. One important linkage between the two realms of thinking are principles. Could you explain how you see the relationship? Why is it important for a legal scholar to have an interest in normative political theory?

I am not in the position to criticize deficiencies in legal scholarship. But I see, indeed, a natural connection between constitutional law and normative political theory. Basic rights are legal

principles, and in deciding hard cases, any constitutional court has to find out which one of the competing rights may claim priority over the other in view of the best possible description of the relevant circumstances. In the light of Ronald Dworkin's path-breaking book on "Taking Rights Seriously", Robert Alexy and Klaus Günther have discussed the status of "principles" (including basic rights) as distinct from "norms". This discussion explains why it is necessary to take recourse to a normative background and to provide a frame that makes it possible in each case to preserve the coherence of all legally valid principles. A similar reason might have motivated John Rawls to distinguish the Supreme Court as the primary institution to implement and protect the very conception of justice that he proposed in terms of a *constructive* and purely normative political theory. I myself prefer a *reconstructive* approach instead. Looking back at legal history, the legal theorist can try to extract from the sample of exemplary democratic constitutions those principles which enable the rational reconstruction of their essential features. Unsurprisingly the rule of law (or human rights) and popular sovereignty (or democracy) are the two most basic elements from which constitutional principles derive.

From my point of view, a principled understanding of the constitution is relevant for both legal scholars and judges, because political authority depends in constitutional states on an immanent kind of legitimation – one internal to the legal system itself. There is no metasocial legitimation left in modern times (no legitimation of the kind that once was provided by a shared religious framework). The doctrinal work is interpretive and normative at the same time because of a double reference: It is bound by the law of the land, that is by legal facts, while the application and specification of valid law requires – especially in hard cases – normative reasoning, that is, a type of reasoning which is guided by those principles that confer legitimacy to the legal system as a whole. Of course, democratic procedures are the final source of legitimacy, but democracy (in the modern sense) is not exterior to the law. It is in turn constituted by and carried out in the medium of law.

This medium determines, by the very form of subjective rights, how citizens can perform their political and private autonomy, and how they can secure the precarious balance between both.

Although you are a critic of traditional legal thinking, you give high consideration to doctrinal writing and reasoning. You refute approaches which dissolve legal reasoning either in a social sciences approach or in normative considerations. Could you please explain why you think that the doctrinal level is so important?

At the level of norms and practices, I admire law as the most visible and the most rational form of what characterizes human culture in general – I mean the feature of *constructing and intentionally shaping* social reality. Every part of human culture, including speech and language, is a construction. Though most of it has not been brought about intentionally, it is not grown by nature either – it is not *physei*, but *thesei*. And of all social constructions legal arrangements are the most artificial ones. The doctrinal work of legal scholars is at the heart of systematizing and rationalizing a corpus of legal norms – of making its construction transparent. This might be the reason why all the great social theorists since Durkheim were fascinated by law and wrote on the sociology of law. But again, one can hardly give an appropriate account of those achievements from either a sociological or a philosophical point of view alone. Sociologists and philosophers have to pay due respect to the doctrinal work of lawyers, which first lays bare the bones of a legal corpus.

*Some legal theorists base law on facts, on the power to constrain, others on legitimacy. The very point of your landmark book **Between Facts and Norms** is that a strong theory needs to combine both elements. However, **Between Facts and Norms** deals with the law of a sovereign nation state. Does this thought also apply to international law, and must the thought be adapted to the*

specificities of international law as there is neither an international policeman nor a world parliamentary assembly?

I would rather say that the principles for building a community of free and equal citizens on national territories can and should also guide the transformation of international law. The rapidly increasing number of international organizations indicates that we have to respond to the immense challenge of a multicultural world society emerging from growing transnational interdependencies in the wake of economic and digital globalization. In early modern times, the political framework of the European state system was a response to a similar expansion of markets and new modes of production and communication. But at the end of the 18th century the constitutional state did not come about as the result of sheer adaptation to capitalist development – it was *founded*. The ideas of democracy and the rule of law were not implemented until emancipatory struggles had been fought in their name. You are right though in pointing out that we cannot just project the familiar national design of liberal institutions onto the supranational level. The same *principles*, if they ever can be implemented on a global scale, will assume a different *institutional* format. In view of this task, the range of speculation may be a bit larger for the philosopher than for the legal scholar. But both move between facticity and validity.

I expect that the proper design for a democratic constitutionalization of international law will one day take shape as a consequence of further historical steps *in the rationalization of both the medium of modern law and the substance of state power*. The constitutional state is designed for legal norms that are both enforced and legitimate, such that that citizens can follow them either for reasons of self-interest or out of respect for the credentials of democratically legislated law. In view of this fact you refer to the plausible objection: “There is neither an international policeman nor a world parliamentary assembly” for the enforcement and legitimate generation of international law. Allow

me to explain my intuition of a further “rationalization” of law and politics with regard to the missing “policeman”.

Modern law is sanctioned by a state which monopolizes the means of legitimate coercion. Starting from the premise that a similar state at the global scale is neither possible nor desirable, we are tempted to conclude that there cannot be an “international policeman” either. And most of the humanitarian interventions so far provide empirical evidence for this scepticism. If we look, however, in the direction of the development of European law, we discover an inconspicuous change in the composition of the very medium of law. The member-states of the European Union still dispose over the means of legitimate violence and yet obey and implement the legal commands of EU-institutions. With this shifting constellation of the two components of state law – enforcement and legitimation – European law forms a legal order that does not quite fit any more within the traditional concept of law. The relative weights of the “factual” and the “normative” components changed in favor of the recognition of the legitimacy of a supranational authority which does not dispose over any sanctioning power. In this respect the distance between international and state law has slightly narrowed. Once we change our traditional conception of the coercive nature of valid law accordingly, it appears less improbable, too, that impartial decisions of a reformed UN-council will some day engender the voluntary support of member-states for the effective interventions of an “international policeman” as a matter of routine.

Most international lawyers see the legitimacy of international law as based on state consent. By contrast, you reconstruct the legitimacy of international law on the basis of two sources: states and cosmopolitan citizenship. For many, this role of the cosmopolitan citizen and the concept in itself have a utopian ring. Could you explain how the concept can have a role in a reconstructive theory of international law?

Your question refers to the second, the legitimation component of law. Can the chain of democratic legitimation be extended beyond the nation state into an international arena which has so far been conceived as the space for power-based interactions between sovereign states? We already observe signs for a rationalization of the substance of political power that corresponds to the change in the composition of the medium of law. The traditional conception of state-sovereignty presupposes a corresponding “realist” conception of state power. This power was to become manifest in the self-assertion of a supposedly autonomous state which pursues his national interests. And the legal expression of this decisionist core of state power was the right to go to war (without any obligation to justify such a decision). The abolishment of this right marked a caesura in the history of international law. However, this derogation, and the fact that in our post-heroic age war is no longer a preferred mechanism for solving international conflicts, are only the most visible symptoms of what I call the rationalization of the substance of state power.

More important is the impact that the growing number and density of international organizations have on the eroding legitimation base of classical international law. Today, even great powers have lost their functional autonomy in various policy fields. States are forced to cooperate with other states in the face of problems which can only be solved by joint action. Step-by-step, foreign policies undergo an assimilation to the mode of domestic policies. The decisionist substance of political power is more and more liquefied in the melting pot of the communication flows of organized transnational negotiations and discourses. States even begin to understand themselves, and to act from time to time, not only as sovereign powers, but *also* as members of the international community. With this trend in mind, the question of how international law is - or should be - legitimated shifts the burden of proof to those who defend the traditional conception of state

consent. Their opponents who struggle with various experimental designs for a transnationalization of democracy have a strong argument.

They can insist on the fact that the growing network of functionally specialized international organizations generates a lack of legitimation which can no longer be covered by the consent of contracting parties. Even on the assumption that all members of an international organization are proper democracies, the legitimation they, each by each, confer to the organization as a whole no longer matches the actual needs for legitimation, as the organization gains more and more competences on the base of an ever closer cooperation of the contracting members states. For the affected national citizens any intervention from an international or supranational authority appears as an intrusion of foreign powers because of the asymmetry that exists between the *separate* and thus nationally limited authorization of one's own government and the indiscriminate overall impact of the *joint* decision-making process of the representatives of all participating governments. Moreover, in contrast to national cabinets which cover all relevant policy-fields, the focus of functionally specified international organizations does not allow the consideration and balancing of the external effects of interventions that spill over the target area into other fields. A latent paternalism is thus built into the new forms of organized international cooperation and the corresponding developments of international law. Under the innocent title of "governance", technocratic regimes will keep spreading hand-in-hand with the growth of international organizations unless we disclose democratic sources for the legitimation of their operations. Even the paternalistic imposition of liberal human rights which is now advocated by a growing number of renowned political philosophers would not serve as an equivalent for the transnationalization of democracy. Therefore, I propose to conceive of the "international community" as composed of, and constituted by, both states and citizens. This makes the idea of a world-parliament indispensable. But such an institution, located at the end of a rather long legitimation chain, would differ from

national parliaments in two important aspects at least: It would have relevant but rather limited competences and share these competences with the member states of the world-organization.

In this context, one must not misunderstand the concept of “shared popular sovereignty”. Whereas in the frame of federal states, subnational units appear only as *constituted components*, in the scenario for a supranational democracy, member states of the world organization would retain the sovereign role of *constitutive powers* and yet share this role with the sum total of world citizens as the other “sovereign”. States – or peoples who are already constituted in the form of a political community – would enter the process of global constitution-making alongside the sum total of individual citizens of the world as *another* constituent power. At the level of the constituted world community, this role would reserve for nation-states a comparatively strong position.

Many contemporary authors favor one or another form of pluralism when it comes to the relationship between international and domestic law. By contrast, you have opted for a monist approach à la Kelsen for a global legal order. Could you please explain what you see as deficiencies in the pluralist theories and why you opt for monism?

I am not sufficiently familiar with the larger family of legal pluralisms. As far as these approaches rely on the contextualist assumption that there are legal languages which form closed, i.e. mutually untranslatable, universes of meaning, they start from a false philosophical premise. Donald Davidson and Hans-Georg Gadamer have, each in his way, convincingly criticized this radical version of holism. Contextualism cannot explain how international courts with justices from different legal traditions ever come to agree on decisions for the same or similar reasons. The jurisdiction of heterogeneously composed international courts provides evidence for the role of principled reasoning; mutual understanding across the gaps between different backgrounds is made

easier by recourse to shared principles. Another reason for rejecting the radical versions of legal pluralism is the systematic neglect of needs for legitimation. In a nutshell, a picture of a world society which is ruled only by mechanisms of self-regulation and mutual adaptation is blind to problems of legitimation. The state as sanctioning power and implementing agency recedes into the background, even though these are precisely the functions that require legitimation in the first place.