

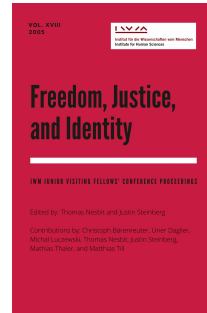
# Accounting for Humanitarian Intervention: Some Remarks about the Cost of Taking Sides [1]

---

Mathias Thaler

IWM Junior Visiting Fellows' Conference Proceedings, Vol. XVIII © 2005 by the author

Readers may redistribute this article to other individuals for noncommercial use, provided that the text and this note remain intact. This article may not be reprinted or redistributed for commercial use without prior written permission from the author. If you have any questions about permissions, please contact the IWM.



---

## I. Introduction

---

Periods of warfare are probably the best times in which to witness the strange overlapping of morals, politics and law. Today, we can perceive many different reactions to this confusion (apart from the ever prevailing disgust and dismay): appealing to rational arguments in order to establish a lawful consensus, withdrawing from politics in order to safeguard one's moral integrity, praising the role of power and interest in order to identify the true motivations behind any moral claim. What all these approaches have in common is the urge to purify our everyday language, to monopolize our discursive choices, to dissolve the clash of claims between morals, politics and law – typically by contending that we can reveal a single explanatory structure underlying the semantic chaos if we finally consider the supreme importance of ... what: morals, politics or law? At this point some key difficulties come to the fore. Any seemingly objective description of a real humanitarian intervention works with hypotheses that ultimately rest on normative decisions. Some of these assessments are made explicit, whereas others remain latent. A full proof of this fact is the debate between leading jurists about the status of humanitarian interventions, as I will show below. If these legal scholars determined a “humanitarian intervention” to be a straightforward war of aggression, this would have tremendous effects i.e. their judgment would virtually create a criminal matter of fact. To talk about “value-free science” (à la Max Weber) in this context would be mere self-deception.

We must therefore acknowledge from the beginning of this preliminary examination that any (not only judicial) argument for or against humanitarian intervention itself promotes a form of partisanship, be it dominant or be it antithetic. One may call this bias the essentially *political burden of theory* – it always can and often will be used to legitimize or de-legitimize certain actions. This does not mean that one necessarily has to formulate

a clear-cut opinion in the dispute about the justifiability of a specific conflict. This requirement would be a misleading – yet widespread and somehow understandable – conclusion drawn from the thesis of unavoidable political commitment.

The converse seems more promising: philosophy's foremost duty in this situation might be to challenge the *hegemonic truths* about concrete political projects. But even if I refuse to take sides in any direct way, I can never overcome the political sphere as such. That is, to put it bluntly, the paradox of critical thinking: We should eventually liberate ourselves from the pressure of taking sides without neglecting the necessity of political commitment in general. In which direction should philosophy lead us here? According to my view, political theory has to maneuver between the temptation of counseling politicians through policy-recommendations and the always-alluring option of intellectual escapism. This view is in opposition to another understanding, which holds that the proper direction would rather be to participate in these debates and to unfold philosophy's authority with regard to ethical dilemmas. That is what a lot of so-called public intellectuals do nowadays when they believe that they play an engaged role in the political arena. The problem with such a claim of presumed authority is, as we will see later, its closeness both to arrogance and apology: philosophers often tend to either look down on the many ways morality is understood in discourses of ordinary people or to support a specific kind of dominant rationale. Both forms of engagement seem very outdated and inappropriate to me, therefore I would like to suggest something else that has been a vital part of philosophical activities ever since the enlightenment period: *critique*. Critique of the interests, intuitions and commitments we share is eminently social critique and the expression of what Michael Walzer once called "immanent criticism."<sup>[2]</sup> According to this view, it is futile for the social critic to pretend to be located in absolute distance to the society and its struggles. She will stay on the margins of the societal framework rather than stand completely outside of it.

The goal of this paper is to provide an example for such a strategy of middle course and intrinsic critique. It aims at highlighting several perspectives on the relationship between morals and politics. I cannot, of course, treat this gigantic subject in any sufficient manner, but it needs to be raised nevertheless, precisely because the idea and state practice of humanitarian intervention is a special case of the conflict between, or reconciliation of, politics and morals. That is why it hopefully makes sense to go a fairly long way around before finally returning to the actual topic of this article. The central and perhaps banal purpose is to show that the stakes are high whenever we feel compelled to raise our voices: speaking in someone's name is a perilous endeavor.

I commence by giving a genealogical sketch of the lines along which the liaison between politics and morals evolved during the past 200 years. To that end I suggest not only that we reconsider the macro-history of ideas but also to take into account an idealized confrontation between two conceptual characters drafted by Niccolò Machiavelli and Immanuel Kant (II). I subsequently continue by hinting at the variety of moral foundations. What it means to deliver a moral grounding for politics is not easy to understand. Obviously, the main initial point is to grasp the diversity of morality itself (III). In the next chapter I modulate my rhetorical tone and review the most recent events

in Iraq. Everything – or rather nothing – has been said about the American invasion; I thus confine myself to pose a peculiar question (IV): How are we to explain the fact that moral arguments were just a minor part of the official justification of this war? My snapshot-reply would be: it is the all-embracing power of the US, stupid! After this, I analyze in more detail what may happen if moral issues are brought up at large scale in a humanitarian intervention (V). The paradigm instance for such an ethical overloading was the Kosovo-intervention in 1999. My concluding remarks are concerned with two radically divergent appraisals of the war against Serbia that reflect in an idiosyncratic way the voices of Machiavelli and Kant: Danilo Zolo vs. Jürgen Habermas.

## II. Taking a Step Back in History: Archaeological Miniatures

---

One specific task of archaeology (in the metaphorical sense Michel Foucault attached to that notion) is to turn to the history of ideas and uncover the origins of particular discourses in which we can detect various modes of moralized politics today – such as the debate about humanitarian interventions. When scrutinizing the history of ideas the perspective applied obviously makes a great difference: I will suggest a *bird's eye* and a *worm's eye* view that are, in my eyes, especially valuable if we want to demonstrate that there is a “problem overhang”[3] symptomatic of the relationship between morals and politics. Hans Blumenberg developed this concept of “problem overhang” to come along with the historical reality that some epochs fail to solve their fundamental problems and therefore leave these problems behind for the following epoch to resolve. My argument is that the precarious affiliation between morals and politics frames such a problem overhang at the threshold of the Enlightenment period. Naturally, this argument is far from being inventive, since one of the foremost theoreticians of historiography delineated it in his dissertation: Reinhart Koselleck, in the first chapters of “Kritik und Krise,”[4] perfectly exemplifies a macro-approach to my topic when he attempts to describe the passage from Hobbes to Kant as a shift from *indirect* to *direct power*. What is he aiming at with this distinction?

He examines how the moral judgment of the bourgeoisie, its ability to resist against the absolute monarch, transformed itself within the period from the confessional civil wars in the early 17<sup>th</sup> Century to the French Revolution of 1789. To put it straightforwardly: the epistemological and political break can best be comprehended as a dynamical expansion of man's moral internal space into the political sphere. Hobbes characterized this space as apolitical by strictly keeping apart the public subordination of the citizen under the law of the Leviathan from the private judgment of natural man as such. Koselleck claims that this fundamental separation was the point of departure for the Enlightenment project, because it gave birth to extremely dissimilar twins: *publicity* and *secrecy*. Whereas the public sphere was the official playground for the *république des lettres*, the Masonic lodges founded an arcane counter-republic against enlightened absolutism. Both twins were born out of the arising middle class; they were part of the economic and intellectual elite but had no influence on the political system of absolutism what so ever. In the beginning the bourgeoisie's critique had to be disguised as purely moral in order to avert the monarch's control. That is why Koselleck uses the phrase “indirect power” – the political system was criticized, but on the ground of moral, not political judgments. At the

end of this development we can determine how the confrontation finally turned political. In the introduction of his “Critique of Pure Reason” Immanuel Kant put this omnipotence of critique, this hypocrisy in very concrete terms: “Unser Zeitalter ist das eigentliche Zeitalter der *Kritik*. *Religion* durch ihre *Heiligkeit* und *Gesetzgebung* durch ihre *Majestät* wollen sich gemeiniglich derselben entziehen. Aber alsdann erregen sie gerechten Verdacht wider sich und können auf unverstellte Achtung nicht Anspruch machen, die die Vernunft nur demjenigen bewilligt, was ihre freie und öffentliche Prüfung hat aushalten können.”[5] It was necessary for this direct critique to address the sovereign head-on, and it is well known how the whole story ended up: with a French king’s head off.

Immanuel Kant is a decisive figure in this game, not only for the macro-perspective suggested by Koselleck, but also for another approach to the history of ideas. Kant’s vision of a “moral politician” represents the perfect antipode to Niccolò Machiavelli’s idea of the virtuous prince. I will not offer you an in-depth analysis of Kant’s reception of Machiavelli; instead I shall try to sum up the basic features of these two opponents. Let me start with the model of the new prince.[6] Machiavelli’s theory is supposed to offer guidance to any potentate that has recently come to power with his own weapons. To that end he initially refutes any humanist and ecclesiastic advice regarding princely behavior: the classical virtues of humanist ideology stemming from Cicero and Seneca would have catastrophic effects if the new prince ever adopted them. Generosity or the general verdict of violence will make it hard for the prince to govern because they both limit his options. For Machiavelli, there is only one criterion for effective princely behavior, and that is: *mantenere lo stato*, the maintenance of status. To meet this criterion the prince needs to be flexible in every respect; he constantly has to lie and break contracts, he must establish brutal measures to subjugate his people. Machiavelli formulated these prescriptions within the prevalent genre of “princely mirror”-literature but at the same time he systematically subverted all of its constitutive *topoi*. [7]

It is almost a commonplace on the long and winding road of the *Principe*-reception that this unorthodox guidebook for rulers is the source of a novel form of politics – politics emancipated from any moral requirements. Benedetto Croce made a strong argument for this view and many scholars followed him in claiming that Machiavelli was the creator of a truly scientific concept of politics.[8] It is hard to completely reject that thesis since it brings up fundamental aspects of the Machiavellian ideal; yet it needs to be revised especially to understand Kant’s worries with the new prince. Isaiah Berlin recommended such an alternative interpretation by arguing that the negative virtues – lying, stealing, murdering – of the new prince should be seen as a vital part of pagan morals even if they radically broke with any traditional form of ethics.[9] According to Berlin the moral focus comes into the discussion because there is one supreme value that directs the prince: *mantenere lo stato*. The morals developed for the new prince are therefore eminently political; the political realm somehow dictates the flexible agenda for the ruler and dominates over the moral requirements of the church. This domination through politics implies, however, no refutation but rather some kind of *revaluation* of morality. The princely ethics must be politicized, that is the Machiavellian message from Berlin’s perspective. Let me now turn to one of the best-developed arguments against the prince.

In the appendix to his “Perpetual Peace,” Kant intends to transform the “disagreement” between morals and politics into “agreement.”[10] To that end he scrutinizes two personifications of their possible connection: the *political moralist* vs. the *moral politician*. The political moralist possesses the exact attributes of the Machiavellian new prince since he exclusively takes advantage of moral reflections on political grounds. For the political moralist the political realm is independent, while the moral sphere depends upon the demands of political business.

According to Kant, this mapping of the moral landscape is radically inverted. First of all, he denies that the putative political morality deserves this title at all. In his system of human practice, morality reigns over any other form of practice like prudence or expediency. This superiority of morality stems from the general form of moral judgments: they are categorical, not hypothetical. If there were an authority above the moral sphere it would automatically turn all moral judgments into hypothetical claims because the characteristic trait of moral judgments is their unconditional standing. The moment we set up values beyond our moral obligation – just like the slogan of *mantenere lo stato* – we invalidate the categorical imperative. Hence, Kant’s primary refutation of the Machiavellian idol is that it neglects the *paramount position* of morality.

Is there, then, a correct connection between morals and politics? Yes, but it looks entirely different from the solution of the *Principe*. The moral politician – Kant’s conceptual hero in “Perpetual Peace” – subjects every political decision he makes to his moral sense. In a constituted republic the manifest expression of this moral politics will be the lawful proceeding of the sovereign. Public law is, in Kant’s vision, the benchmark for moral politics since it forces the absolutist ruler to act in accordance with the *volonté générale* of the people. The principle of publicity permits the citizens to control and influence the monarch even if they have no real democratic rights. As a result, law is the appropriate medium of moral politics, and this definition very well goes along with the overall argument in “Perpetual Peace”: the emergence of lawful relations between individuals, between states, and between individuals and states prepares a coming peace that shall not only be preliminary but perpetual. The Machiavellian political moralist represents a permanent threat to this project since he calls into question the unifying power of morals. If there are specific values beyond the categorical imperative, if there is, in other words, a *plurality* of moral languages, there will be no chance to overcome the violent *status naturalis*.

One can without difficulty show that Kant actually had Machiavelli’s new prince in mind, as a negative pattern, when writing in favor of the moral politician.[11] Apart from this philological examination there might be a more speculative approach to the virtual debate between Machiavelli and Kant: an *allegorical reading* of their confrontation. Such an interpretation presumes that their opposing theories continue to exert influence on political discourses, perhaps even in our time. It will be an important task of the last chapter to substantiate this speculation. Before letting the descendants of the new prince and the moral politician speak we have to illuminate some fundamental problems.

### III. Foundations and Performativity: Questioning Morality

---

The entire argument I have delineated so far concerns the question of whether there can be a moral foundation of politics, and, if so, how. This question was also crucial in the debate between Machiavelli and Kant. As we have seen, Kant accuses the very concept of political morality – embodied by Machiavelli’s virtuous prince – of being unable to fulfil the obligatory demands of any moral order. The dispute about the moral foundation of politics is therefore always a conflict about the foundation of morality itself. When discussing something like “foundation of morality” it is evident that a simple definition would miss the point here. Bernard Williams raises three questions with regard to an eventual foundation of morality: To whom is it addressed? From where? Against what? [12]

I shall start with the middle one. What is at stake with the “From where” question is the source of morality, the foundation on which morality should rest. I want to emphasize a major distinction – paraphrasing Ernst Tugendhat[13] – that has been forceful and notorious ever since the Greek origins of Western moral philosophy: either morality is based upon a certain form of *tradition* or it is rooted in human *nature*. The first option usually is associated with religious moral concepts insofar as the quest for foundations is terminated dogmatically; by introducing an axiomatic source that cannot be doubted anymore, no matter if this is the holy book or God’s word. Challenging the source of morality is the same as challenging the tradition in itself. Therefore, traditionalist moral concepts carry out the strong social function of identification: the addressee of the foundation must necessarily be member of the corresponding tradition. Hence the scope of possible addressees is inherently limited and particular.

In contrast to this, naturalist moral concepts focus on some kind of essence and immanence of mankind. I’m aware of the terminological problems that are linked to the term “naturalism”. My use of this concept is, to be sure, located on a very low theoretical level; one could even say it is borrowed from ordinary language. The vocabulary of natural features that distinguish human beings from animals has an intrinsic tendency to be all-embracing and universalistic because the addressee of the moral foundation is the human being as such, not the insider of a pre-defined community. Of course, every usage of the term “nature” is highly precarious, and many critics have demonstrated that the manipulative construction of human nature might ironically lead to mechanisms of massive exclusion. The history of racism and sexism is sad evidence of the enormous dangers of naturalist moral concepts. Nonetheless, naturalism has been the dominant mode of founding morality in modern times, and its most influential sub-category has been modern rationalism in the Kantian mold. In Kant’s moral philosophy the *fact of reason* builds the fundament of morality itself whereas other forms of human cognition such as empathy and compassion are pushed aside. The adversaries of rationalism stick to an analogous kind of naturalism, though. Just think of Arthur Schopenhauer’s response to Kantian morals by stressing the decisive role of emotions; Schopenhauer’s pleading for emotions as the source of moral motivation clearly emanates from naturalism, as well.

As we have remarked, the question from where a foundation is carried out has an impact on its addressee. The question of the addressee must, however, strictly be distinguished from the question: *against what* is a foundation is carried out? According to Williams it is

one of moral philosophy's typical mistakes to intermingle these two aspects. In his eyes, the moral skeptic is the wrong person to be addressed by a foundation since he will never be responsive to any argument. The skeptic position should rather be considered as something *against what* a foundation takes place. This means that the universalistic fantasy of convincing the moral skeptic necessarily is futile, or, as Williams puts it: "When the philosopher raised the question of what we shall have to say to the skeptic or amoralist, he should rather have asked what we shall have to say about him. The justification he is looking for is in fact designed for the people who are largely within the ethical world, and the aim of the discourse is not to deal with someone who probably will not listen to it, but to reassure, strengthen, and give insight to those who will." [14]

The rough distinctions I sketched so far should underline the great variety of perceptions concerning the possible foundation of morality. A choice on this level of foundation will have an impact on the political level, though. Religious fundamentalism as a form of traditionalist morality, for instance, may raise very strong political claims; hence it is constructive to assume hypothetically that moral arguments possess a specific force that John L. Austin has named "illocutionary". [15] Austin's famous argument about speech acts – either interpreted as locutionary (constative) or illocutionary (performative) – can be used to grasp the way that moral arguments operate within political debates. The philosopher from Oxford developed his ideas in several steps but in their final version they contained elements of a general theory of speech acts: any kind of linguistic utterance could be analyzed as the product of a speaker's intention. What she is *doing* in saying something then is the key to understand the so-called illocutionary force of certain claims. Vulgarizing Austin one might state that the respective *political context* helps to define what one is doing in introducing moral arguments. The performative side of moral arguments comes to the fore. What I'm contending here is rather trivial. Moral arguments should be seen as *tools* or *instruments* within political debates, not merely as normative conclusions descending from a sphere beyond politics. In the following we will observe how differently the role of these tools and instruments can be judged. In the case of Iraq (2003), moral arguments did not (on either side of the Atlantic) count very much, whereas the NATO-intervention for Kosovo in 1999 marked the historical milestone of a self-confident waging of war in the name of human rights. Why is it that morality's illocutionary force fluctuated so strikingly in these dissimilar situations? To approximately answer this question we must shed light on the political contexts within which the respective wars were taking place.

#### **IV. Iraq 2003: The Demise of Morality?**

---

It seems to be clear, that the Bush administration had a mission when invading Iraq in March 2003, but it is less apparent where its sources lie. Presumptions range from pure power politics to establishing a global empire and religious proselytizing. At least three different sorts of reasons were officially named to justify that war: (1) legal arguments concerned with Iraq's refusal to comply with the demands of the International Atomic Energy Agency and the restrictions of resolution 1441 [16] ; (2) preventive arguments concerned with the imminent dangers of weapons of mass destruction; (3) humanitarian arguments concerned with the constant oppression of the Iraqi people through the

dictatorial regime of Saddam Hussein.[17] The most powerful argument was the second, primarily because of the weakness of the others: the first argument never was brought to the fore honestly due to the administration's obvious lack of interest in multilateral solutions (just recall the somewhat embarrassing performance of Colin Powell addressing the Security Council to implement resolution 1441[18] ), whereas the third argument played the inferior role of backing the others. The liberation and democratization of the Iraqi people was considered a pleasant yet natural side effect of the higher-ranking goal to get rid of Saddam Hussein. Ironically, this idea of relating and prioritizing the different reasons to wage this war was completely turned upside down by the actual events: There were, as far as we know by now, no weapons of mass destruction in Iraq, and the autonomy and thus self-governance of the Iraqi people has become a crucial question of survival for the US army.

What can we learn from this? Definitely more than one single lesson. Nevertheless I'm particularly interested in the bare fact that the humanitarian issue was so weakly addressed by American authorities before the raid. Maybe there was not enough evidence to prove the need for an acute military intervention in the name of human rights; everyone talked about Hussein's slaughter of the Kurds in March 1988, though. There was public awareness of the humanitarian problems in Iraq within the US, but this consciousness was relatively neglected by the Bush administration, just like the legal issues. Actually, surprising though it may be, there was not much moral talk about how to rationalize that war; the entire case about international terrorism's interaction with Iraq and the proliferation of biological bombs was presented from an internal security point of view: prevention from Iraqi weapons would lie in the US' own interest and would therefore be commanded by pure reason of state. The moral aspects of this war showed up after Bush, impressively landing on the deck of USS Abraham Lincoln, had announced that the "mission was accomplished" on May 1, 2003. The media scandal – a pleonasm since without media there would have been no scandal – of the Abu Ghraib prison after all brought the moral perspective back into the play, and again the resonance in the American public has been rather poor. No comparison to the My Lai massacre in Vietnam in 1969, when people really began to ask what this killing of hundreds of civilians was all about, no questioning of the war against terror as such.

I shall not continue in that polemic direction; all I want to do now is to draw two conclusions from what I advanced so far. Just to be more precise: I'm claiming that there is surprisingly little moral talk in justifying the war in Iraq; I'm not referring to religious speech which is evidently spreading everywhere in political discourse. This distinction is, as we have seen, not univocal but can be used to clarify different political projects: the moral justification of a humanitarian intervention always includes universal standards that are or should be equally shared by all states, such as especially human rights. It somehow appeals to "naturalist" norms like the protection of individual dignity. Religious signifiers – take as an example the famous "axis of evil" – are, on the contrary, by definition exclusive and independent of mutual consent; their status never stays undisputed. They may be classified as moral assertions only in the "traditionalist" sense depicted above.



Hence my first thesis would be that the current avoidance of moral categories and the simultaneous supremacy of religious notions in American politics at home and abroad is a clear sign of the true dominance of the Republican majority today. If you permit yourself to totally eliminate from your political agenda any explanation of your actions to the international community you may actually be called a hyper-power – someone whose authority can neither be challenged by one concurrent nor by the totality of the concurrents. This observation of all-embracing American dominance has been causing some deep depression around the world. There is, to my mind, no immediate cure to this depression, despite the desperate desire to rearm the European Union. We can rely on another historical fact, though: my second thesis is that morality of a more universalistic type will inevitably return into American politics as it always does in serious conflicts. I claim that the return of morals, especially in Iraq, is going to have pragmatic and strategic reasons. The ideological fight for the “hearts and souls” of the people in this occupied country has become a military necessity in times of guerrilla tactics; otherwise terrorists and insurgents will always, due to their close affiliation with the population, profit from asymmetrical warfare. That is one of the central lessons the US army and political caste learned from Vietnam but evidently have forgotten on their way to Baghdad.[19]

Everything I said so far seems to point in a specific direction: that more arguing about the moral justification of this war may have lead to success; that the Iraq invasion should have been justified by parameters like human rights protection; that human rights protection actually is a good ground for unilateral interventions. Is that chain of conclusions convincing? In the following I want to scrutinize the justificatory claim of the idea of humanitarian intervention, considering as an example not Iraq 2003 but Belgrade 1999. During the Kosovo crisis the Western powers came close to a consensus that allowed them to neglect the provisions of international law, and particularly to push aside the UN-system of international peace and security. The harmony had been destroyed, though, after September 11, and there are serious doubts if it may ever again be reconstructed. One question we have to bring up is the causal relation between these incidents: in how far has the moral reasoning on the humanitarian intervention in Kosovo contributed to the further weakening of global institutions, which became apparent during the wars in Afghanistan and in Iraq? Some advocates of the illegal attack on Serbia almost arrogantly promoted the idea of one-sided interventions by alluding to a coming cosmopolitan order where every person on this planet would have enforceable rights. This Kantian dream unfortunately possesses a nightmarish twin that is at present thriving and prospering: in the state of exception all rights are suspended, and judicially the person ceases to exist.[20] The anti-terrorist camp on Guantanamo Bay might be the place where all the repressed facets of Kantian cosmopolitanism violently return.

## **V. Kosovo 1999: Clashing Claims**

---

Although the idea as well as the state practice of humanitarian interventions is far from being particularly contemporary there is something instructive about their precarious status: humanitarian interventions are carried out in a legal and moral “no man’s land”; a conceptual landscape that is in need of some mapping. But maybe the term “no man’s land” is not appropriate since it intimates that there are no moral or legal signposts at all

covering the field of humanitarian intervention. The opposite is true: humanitarian interventions are a perfect example of clashing claims that stem from legal moral and political realms. That is why they are so interesting and at the same time so difficult to take hold of. Their ambiguity vividly illustrates the current transformation of international politics. This transformation happens at least on three different stages: (1) on the level of international law, (2) on the level of international ethics, and (3) on the point of intersection between international law and international ethics. All these stages were addressed on a specific occasion that can be seen as a landmark event in this debate: the Kosovo intervention in 1999. This intervention marks a shift in the idea and state practice of humanitarian intervention because a highly questionable interpretation actually became hegemonic. This interpretation contends that the morals of human rights can justify a massive breach of international law. The argument was very prominently proposed by Jürgen Habermas to intellectually support the decision of the German government to participate in the war. Habermas's interpretation of the events has tremendous effects on the three levels of transformation that I now want to analyze one by one.

Regarding the level of international law it is indubitable that humanitarian interventions pose a big problem for their legal supporters. In the UN-Charter the general prohibition of the use of force (Art. 2/4) protects (as *ius cogens*) the territorial integrity and political sovereignty of states.[21] It must be conceived as huge historical progress that after World War II any war and – more general and thus more comprehensive – any force were finally banned as instruments of politics. All over the so-called “classical” period of international law – which broadly started with the Westphalian peace from 1648 and the subsequent European order – the resort to war had been part and parcel of the sovereign powers of the monarch. This free right to wage war (*ius liberum ad bellum*) famously propagated by Clausewitz for instance was taken away from the states already in the Kellogg-Briand pact from 1927. Art. 2/7 of the UN-Charter, drafted in 1945, overtly prohibits any intervention into the internal affairs of a state. There are two exceptions from this general ban of interstate force: Art. 51 declares self-defense as legal. If a state is attacked by an aggressor it can lawfully strike back without infringing upon Art. 2/4. Furthermore, the entire chapter VII of the Charter regulates law enforcement measures provided by the organs of the United Nations. The Security Council plays a pivotal role in this process since it is the only organ to legitimately enact resolutions against states. It is an undecided question if actions taken under the auspices of the UN can be named “humanitarian interventions” at all. Some legal scholars typically claim that humanitarian interventions can have no rationale in the framework of the UN Charter;[22] others maintain that technically the term “humanitarian intervention” applies to the actions decided and promoted by the Security Council as well.[23] The true dispute is not about labels and names, though, it is more about the legal status of a rivaling set of rights that seems to challenge the political sovereignty of states: human rights provisions address the human beings as such, not as citizens of particular states. How should these universalistic claims be positioned with regard to the particularistic claims of the sovereign state? The Kosovo case revealed some possible responses to this question.

From the standpoint of international law it seems to be uncontroversial that the intervention for Kosovo was illegal. The Security Council was blocked by Russia's and China's vetoes and therefore no resolution could be enacted. Nevertheless NATO launched an air attack on March 24, 1999, opening the 78 day long operation "Determinate Force". The question of how this development ought to be assessed has been an object of much controversy between jurists. The question remained if it could be permissible, if not justified from the point of view of human rights. German legal scholar Bruno Simma, now himself judge at the International Court of Justice in The Hague, stressed that the NATO states had committed a clear violation of the UN Charter when resorting to war; this violation may be excused, though, due to the *erga-omnes*-duty to protect human rights all over the world. In Simma's view this violation of the Charter must be seen as an *ultima ratio* yet constitutes no emerging paradigm of international law. Whereas Simma still attributed a constitutive role to the United Nations, other leading jurists appealed to the transformative power of NATO's self-authorization. Antonio Cassese, at that time presiding judge at the International Criminal Tribunal for the former Yugoslavia, argued in a commentary on Simma's position that the systematic breach of the deficient mechanisms of international security might hopefully lead to a new form of customary law by which a spearhead of powerful and responsible states would be in charge of the global protection of human rights.[24] One can thus observe a significant dispute about the prospect of international law during the Kosovo-intervention. Moving forward from Belgrade to Baghdad we can clearly register in which direction the state practice of international law has been moving.

Disagreement is even more salient in international ethics. Let me give a graphic example – an opposition between two radically different appraisals – that illustrates the current transformation on this level. For the positive view I'll turn to the most influential figure in the German intellectual scene today: Jürgen Habermas. In an article for the German weekly newspaper "Die Zeit", Habermas formulated an authoritative account of the first participation of German soldiers in a war since 1945.[25] In this contribution to an extensive debate, he's absolutely aware of the illegal status of the intervention; nevertheless he takes it for granted that "legal pacifism" provides us with the conceptual framework to justify the air strikes. The term "legal pacifism" designates a specifically German and Austrian tradition of international ethics starting from Kant and finally culminating in Hans Kelsen's work; a tradition that presumes that peace can only be achieved through law. This point of departure is very startling and troubling, since there is no doubt about the illegal character of the intervention. Hence, one has to consider *which kind* of law Habermas has in mind: He focuses on the subjective cosmopolitan law of individual persons, not the law between sovereign states. In the name of human rights it is therefore permissible to infringe upon the inter-state law of sovereignty and territorial integrity. Habermas is sure about the imminent dangers of this argument: force, at first prohibited from international relations in the UN-Charter, is again introduced in the political realm with the very concept of humanitarian intervention. How can this development be called peaceful? How can Kant, as someone who was very uncertain about the possible configuration of any cosmopolitan law, be the godfather of this transformation? Is this the return of the genuinely pre-modern doctrine of just war?[26]

Habermas quotes a famous passage from “The Concept of the Political” by Carl Schmitt: “Whoever invokes humanity is cheating.”[27] Applied to the Kosovo-intervention this would mean that behind the moral claim of human rights there are hidden interests that become manifest whenever we thoroughly look for the concrete motivations and power aspirations of the intervening states. One could even say that this provocative quotation in particular, and Carl Schmitt in general, are somehow haunting Habermas’s mind like spectres ever since “Faktizität und Geltung”[28] because the accusation of using universalism to realize particular ends targets the heart of any liberal theory. Habermas attempts to refute this suspicion of imperialism through human rights politics by offering three counter-arguments.

His first argument is *political*: “It is not the case that within the post-national constellation powerful nation-states would be dominated by the rules of international community. It is the erosion of state authority, it is civil wars and ethnic conflicts within collapsing states that call for intervention – not only in Somalia and Rwanda, but also in Bosnia and now in Kosovo.”[29] What Habermas says here is that the entire global arrangement has changed since the Charter was drafted in 1945. He’s not taking any normative stance here, but accepts Ulrich Beck’s description of the “post-national constellation” as appropriate. If the nation-state ceases to be the dominant model of political sovereignty in our times, any international law centering on nation-states is ultimately outdated and useless. Some theorists call this development rather dramatically the “end of Westphalian order”, and this diagnosis is correct in my eyes. It is problematic, though, to justify the violation of international law simply by saying that the political situation has changed. The very sense of law is that reality has to adapt to it, and not the other way around; otherwise virtually any violation could be excused by referring to an interest-driven description of a seemingly “objective” reality.

Habermas’s second argument is *historical*: “The founding of the UNO, the human rights declaration, the threat of punishment for aggressive wars and for crimes against humanity (...) were necessary and correct answers to the morally significant experiences of the century as well as to the totalitarian release of politics and to the Holocaust.”[30] What Habermas observes here is that the primary subjects of international law – the nation-states – had proved to be extremely murderous and inhumane during World War II and afterwards. This bad track record of inner-state violence and oppression may explain the interventionist paradigm in terms of a historical progress. But Habermas fails to mention a fact that he had already acknowledged before: that the Kosovo-intervention *de facto* and *de jure* was an aggressive war, an illegal attack of a sovereign state. So, Habermas wants to have it all, at one time: the prohibition of inter-state force and human rights protection all around the world. Systematically and logically this is unfeasible.

The last and most important argument is *philosophically inspired* and Habermas concentrates all of his oratorical power to validate it: “As long as human rights remain weakly institutionalized on the global level, the borderline between law and morals can be blurred, just like in the case at hand. Since the Security Council is blocked, NATO could not help referring to the moral validity of international law – such as norms which are not actually applied and upheld within the international community. The sub-

institutionalization of the right to universal citizenship finds expression in a gap between the legitimacy of peace-keeping interventions and their effectiveness.”[31] The paradox of this passage is highly indicative of Habermas’s approach. As a remedy for the feared moralization of politics Habermas proposes international legalization; and again he thinks of the cosmopolitan law, not of inter-state law. This legalization is confronted with institutional resistance, for instance with the dominant principle of equal sovereignty of states. The solution, then, must be to transfer a particular privilege to some states, a license to intervene: these morally superior states are entitled to *anticipate* the rule of cosmopolitan law by enforcing it upon less developed states. Habermas is completely aware of the fact that this asymmetrical assignment of responsibility entails a breach of existing international law; nonetheless he justifies this violation by claiming that the NATO states acted within a hypothetical and tentative structure: the Western powers attacked Serbia *as if* cosmopolitan law were already fully institutionalized.[32]

One must remark that this defense of humanitarian intervention is situated within a wider framework of theoretical reflection.[33] Human rights are therein not seen as primarily moral rights forming the basis of international law; in Habermas’s view human rights always need to be integrated into national law regimes. They are subjective rights of personal law bearers, which means that they own a powerful tendency to become positive law. Morals are important, but just for backing up the process of legal integration. To paraphrase Clausewitz in a way that characterizes Habermas’s position quite well: moral obligations are the continuation of legal obligations by other means. The only severe problem is that these “other means” sometimes consist of illegal measures such as attacking a sovereign state like Serbia. This predicament has even more twists and turns if we consider the political traps of “vanguardism” in international relations. I would maintain that all these problems could, to some extent, be traced back to the Kantian heritage Habermas is so eager to accept. Since Kant himself is not at all sure which authority – morals or law – shall preside over politics, it is no surprise that his successors struggle with the same inconsistency. Habermas’s alleged solution is to introduce an evolutionary dimension, which opens up the space for unequal treatment under one binding law. The conflict between morals and law persists, though.

I’m skeptical of this rationale, not only because Habermas’s defense of the war rests on a weak argumentative basis, but also because the German philosopher shows astonishingly little sensitivity to the imminent dangers of his statement. Other theorists, not to mention many people from civil society, were comparatively more enraged with Habermas.[34] One of them is Danilo Zolo whose opinion on the Kosovo-intervention I would like to sum up and finally criticize.[35]

In contrast to Habermas’s legal pacifism Zolo calls his own standpoint “political realism”. This perspective, which actually is a multi-coloured cluster of political theories, assumes that power and interest are the driving forces in international relations. It furthermore concentrates on the pivotal role of the state and its “realpolitik” in the global order, while refuting the very idea of any cosmopolitan structure. Roughly speaking, the converse Habermasian position may be called idealist, although this distinction has become more and more blurred.

What does this realist attitude demand with regard to the ethical dimension of humanitarian interventions? “From the realist perspective, the sincerity of the ideological convictions of individual political or military decision-makers is irrelevant. It is important, instead, to grasp to what extent ethical motivations can play a role of persuasion in war. From this point of view, to qualify a war as ‘humanitarian intervention’ is a typical ploy for self-legitimization by those who wage that war. As such, it is part and parcel of war itself, an instrument of military strategy in the strict sense, used to obtain victory over the enemy.”[36] For the Machiavellian Zolo, there is no discussion at all about the hierarchy between politics and morals: moral arguments are solely of instrumental use for political strategies to be more persuasive. Starting precisely from this point he tries to show in how far the Kosovo-intervention was a paradigm case of such a “ploy for self-legitimization”. Concerning the above-mentioned engagement of internationally renowned jurists he accuses them of acting within an area where they are laymen. Their pleading for an illegal attack in the name of a morally incorruptible cause – the protection of human rights – renders a lack of professionalism visible. Instead of clearly emphasizing the illegality of the “humanitarian intervention” these legal scholars (like Simma and Cassese) turn to morality to conceal the original scandal of the attack. This desperate attempt of justification cannot, in Zolo’s eyes, but collapse.

The sphere of international ethics as primarily addressed by Jürgen Habermas is more complicated. The lion’s share of Zolo’s disapproval of the Kosovo-intervention actually deals with Habermas, and I think that this quarrel reveals some interesting differences in their respective approaches. Against the argument of a coming cosmopolitan law Zolo maintains:

However, the upholders of Kantian cosmopolitan law do not seem to grasp that this ‘universalist claim’ is not enforceable within the framework of current international institutions. (...) The theorists of ‘legal pacifism’ seem to forget that international institutions and legal system are all founded on the consent of states and – with some traumatic exceptions, probably bound to become more frequent in the years to come – on their sovereignty.[37]

That argument is a classical realist move: alluding to the actual state of affairs. Notice that Zolo’s analysis involves no moral or political evaluation. He simply hints at the fact that raising a universalist claim undermines the existing system of global institutions; a compromise between national sovereignty and the obligation to intervene is not viable. As a consequence Zolo is highly critical of the notion of universal human rights which he believes to be a strongly Eurocentric model. What about Habermas’s fear of a moralization of politics?

Habermas’s doubt deserves to become certainty – and not merely a moral certainty, but a juridical and political conviction. On this point ‘legal pacifism’ is certainly ‘in the wrong’, since its exponents, beginning from its founding father, Hans Kelsen, espouse the theory of ‘just war’ in a context allegedly inspired by pacifism. (...) The thesis that I believe should be upheld against Kelsen’s and Habermas’s legal pacifism is that modern war can in no way and in no case be viewed as a ‘legal sanction’.[38]

That argument is quite sophisticated because it focuses on the point of intersection between law and morals. Zolo claims that the entire tradition of “legal pacifism” exhibits a severe congenital abnormality: while prohibiting the use of force in inter-state relations it maintains that under certain conditions of “justice” force must be exercised by the global community. Some of these circumstances are listed in the UN-charter (self-defense, law enforcement by the Security Council), whereas others remain outside of this provisional framework. In certain cases war even has to be waged to punish a member of the global community by means of a legal sanction.

Zolo rejects this view and replaces it with a radical pacifism that relates no more to the theory of “just war”:

Modern war, fought with nuclear weapons (...) is incommensurable with the categories of ethics and law. By nature its function is to destroy – without bounds, discrimination or restraint – the lives, possessions and rights of thousands, or hundreds of thousands, of human beings, without any evaluation of their individual responsibility. (...) Thus, in its destructive consequences modern war is hardly distinguishable from international terrorism, if by terrorism we mean the use of force against innocent victims to cause panic.[39]

War is located beyond the realms of law and morality. There can be no justification of inter-state force, whatsoever. What makes it inherently impossible to distinguish between different forms of war (and their respective legitimization) is the destructive force of modern weapons. Zolo gives the Schmittian analysis of “*bellum iustum*”[40] a surprisingly anti-militarist twist: the decisive point pertains to the connection of *ius ad bellum* (the right to wage war) and *ius in bello* (the rights of warfare). Since today rights of warfare such as the protection of innocent civilians cannot be guaranteed, there must not strictly be any right to wage a war, either.

Although there is, of course, nothing wrong with pacifism as such, Zolo’s proposal leaves many problems aside. He systematically avoids a big part of what is so troubling and unsettling in the world since 1989, simply by claiming that war is wrong, always and everywhere. Is this verdict in accordance with our moral sentiments (to use an extremely risky expression)? We may ask, for instance, if the accusation of imperialism through human rights politics could also be applied to cases like Rwanda in 1994 or Darfur today. Is the international community performing its duties in a more responsible way now, than it was during the Kosovo-crisis? From Zolo’s viewpoint the answer would, without any doubt, be: yes, the international community has behaved correctly in these situations because no war was fought, no weapons fired. One is immediately inclined to reply: admittedly, no legal sanction was imposed on an autonomous state, but at what terrible cost? If a state permanently fails in securing its citizens from genocide and mass displacement it should not anymore be taken as a fully sovereign member of the international community. The categorical prohibition of any humanitarian intervention seems to contradict our moral intuitions, and Zolo’s realist pleading for a radical pacifism can never, in my eyes, substitute moral reasoning in general.

The double critique I have offered – not only of Habermas’s argument in support of humanitarian intervention but also of Zolo’s rejection of humanitarian intervention – may leave us puzzled. If both accounts are, in one respect or the other, deficient, we may even feel helpless due to the lack of positive outlooks. I refrain from taking sides not because I am convinced that sublime pessimism is an intellectually superior perspective; neither would I implicitly maintain that we are confronted with an eternal *aporia*, originating from the virtual debate between Machiavelli and Kant, which can never be resolved. All I wanted to illustrate in this paper is that the idea of humanitarian intervention represents one of the most disputed and complex topics in political theory today. Habermas as well as Zolo try hard to deliver a definite, comprehensive solution to the problem; they both draw a demarcation line between morals and politics, without being conscious of the price they finally have to pay. Is there any way to keep this price down or to minimize the risk? Since the escapist transcending of the political sphere is, at least in my vision, no option at all, there is apparently no method to cut the argumentative costs completely. Balancing the price might be the best thing we are able to do. When measuring the advantages and disadvantages of a concrete humanitarian intervention we should at the same time dedicate ourselves to a thorough examination of the political context in which we are actively participating. Otherwise we become victims of the same self-deception as Habermas and Zolo: the pursuit of a higher end – be it morals, politics or law – may veil the failure of the means.

---

### Notes:

1. Work on this paper was supported by the Austrian Academy of Sciences. Furthermore I would like to express my gratitude to all the participants of IWM’s Junior Visiting Fellows’ Conference, which took place in Vienna on December 9, 2004, for their generous comments.
2. Cf. Walzer, Michael, *Interpretation and Social Criticism*, Harvard 1993
3. Blumenberg, Hans, *Die Legitimität der Neuzeit*, Frankfurt am Main 1996, pp. 76-77
4. Koselleck, Reinhart, *Kritik und Krise*, Frankfurt am Main 1973
5. Kant, Immanuel, *Kritik der reinen Vernunft*. Werkausgabe Bd. I (hg. von Wilhelm Weischedel), Frankfurt am Main 1974, p. 13 (A XII)
6. Machiavelli, Niccolò, *Il Principe/Der Fürst*. Übersetzt und herausgegeben von Philipp Rippel, Stuttgart 1986
7. Cf. Skinner, Quentin, *Machiavelli zur Einführung*, Hamburg 2001
8. Cf. Croce, Benedetto, *Etica e Politica*, Bari 1945
9. Berlin, Isaiah, *Die Originalität Machiavellis*, in: idem, *Wider das Geläufige. Aufsätze zur Ideengeschichte*, Frankfurt am Main 1994, pp. 93-157
10. Kant, Immanuel, *Zum Ewigen Frieden*, in: idem, *Schriften zur Anthropologie, Geschichtsphilosophie, Politik und Pädagogik 1*. Werkausgabe Bd. XI (ed. by Wilhelm Weischedel), Frankfurt am Main 1977, pp. 193-251
11. Cf. Williams, Howard, *Kant’s Political Philosophy*, Oxford 1983
12. Williams, Bernard, *Ethics and the Limits of Philosophy*, London 1985
13. Tugendhat, Ernst, *Vorlesungen über Ethik*, Frankfurt am Main 1993



14. Williams (1985), p. 26
15. Austin, J. L., *How to Do Things With Words*, Harvard 1975
16. Cf. <http://www.un.int/usa/sres-iraq.htm> (December 1, 2004)
17. Cf. Luban, David, Preventive War, in: *Philosophy & Public Affairs* 32/3 (Summer 2004), pp. 207-248
18. Cf. <http://www.whitehouse.gov/news/releases/2003/02/20030205-1.html> (November 23, 2004)
19. Cf. Hersh, Seymour, *Chain of Command. The Road from 9/11 to Abu Ghraib*, New York 2004
20. Cf. Agamben, Giorgio, *Ausnahmezustand, Homo Sacer II.I*, Frankfurt am Main 2003
21. Cf. Dinstein, Yoram, *War, Aggression and Self-Defence*, Cambridge 2001
22. Cf. Clark Arend, Anthony/Beck, Robert J., *International law and the use of force. Beyond the UN Charter paradigm*, New York 1993
23. Cf. Pape, Matthias, *Humanitäre Intervention. Zur Bedeutung der Menschenrechte in den Vereinten Nationen*, Baden-Baden 1997
24. Cassese, Antonio, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?:* <http://www.ejil.org/journal/Vol10/No1/com.html> (November 24, 2004)
25. Cf. Habermas, Jürgen, Bestialität und Humanität. Ein Krieg an der Grenze zwischen Recht und Moral, in: Merkel, Reinhard (ed.), *Der Kosovokrieg und das Völkerrecht*, Frankfurt am Main 2000, pp. 51-65
26. For another reading of Kant as a defender of humanitarian intervention cf. Anderson-Gold, Sharon, Crimes against Humanity. A Kantian Perspective on International Law, in: Kneller, Jane/Axinn, Sidney (eds.), *Autonomy and Community. Readings in Contemporary Kantian Social Philosophy*, Albany 1998, pp. 103-117
27. Cf. Schmitt, Carl, *Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drei Corollarien*, Berlin 1996, p. 55
28. Habermas, Jürgen, Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates, Frankfurt am Main 1998
29. Habermas (2000), p. 59 (my translation)
30. Habermas (2000), p. 59 (my translation)
31. Habermas (2000), pp. 60-61 (my translation)
32. This structure reveals a strange (and funny) kinship with the scientific “fictionalism” of early 20<sup>th</sup> century Neo-Kantian Hans Vaihinger whose major work deals with the productive effects of fictions: cf. Vaihinger, Hans, *Die Philosophie des Als-ob. System der theoretischen, praktischen und religiösen Fiktionen der Menschheit auf Grund eines idealistischen Positivismus*, Aalen 1986
33. It is quite informative that this more elaborate analysis is connected to Habermas’s Kant interpretation: cf. Habermas, Jürgen, Kants Idee des ewigen Friedens – aus dem historischen Abstand von 200 Jahren, in: idem, *Die Einbeziehung des Anderen. Studien zur politischen Theorie*, Frankfurt am Main 1996, pp. 192-236
34. Cf. Hondrich, Karl-Otto, Was ist dies für ein Krieg? Die Nato kämpft im Namen der Moral, doch sie scheut wirkliche Risiken, in: *Die Zeit* 22/99
35. Cf. Zolo, Danilo, *Invoking Humanity. War, Law and Global Order*, London/New York 2002
36. Zolo (2002), p. 38

37. Zolo (2002), pp. 82-83

38. Zolo (2002), p. 88

39. Zolo (2002), p. 89

40. Cf. Schmitt, Carl, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, Berlin 1988

*Preferred citation:* Thaler, Mathias. 2005. Accounting for Humanitarian Intervention: Some Remarks about the Cost of Taking Sides. In *Freedom, Justice, and Identity*, ed. T. Nesbit and J. Steinberg, Vienna: IWM Junior Visiting Fellows' Conference Proceedings, Vol. 18.