

## **On the possibility of a philosophical justification for universally binding principles in an age of one-state supremacy and shrinking inter-state institutions<sup>1</sup>**

The general theme of “global justice and inter-cultural dialogues” embraces not only questions of *distribution* and *recognition*, but also questions of *peace and survival*. In this paper, focusing on the latter, I shall discuss the question of the possibility of a *philosophical justification* for universally binding principles for international law and thus for inter-state and intercultural behavior.

### ***Preliminary Remarks***

Following the treaty of Westphalia there was a focus on the question of state sovereignty, implying non-intervention, to secure peace. Since the Second World War, with the Nuremberg trials and the UN declaration of human rights, and more recently with the International Criminal Court, there has been a focus on international trials of crimes against humanity committed within any state or national legal system. By the time of the war on Serbia, started without UN Security Council legitimization, there were arguments being put forward in favor of an ”anticipatory” normative justification, with this intervention being seen as a step towards an emerging international legal system (as a *Weltbürgergesellschaft*).<sup>i</sup>

Positive law, embedded in institutions with legal sanctions, has a normative force in its own right;<sup>ii</sup> but in times of crisis and legal rearrangements a normative justification for the basis of existing legal principles is asked for. However, in modern societies it is a commonplace that *purely scientific* arguments alone will not do when it comes to a basic normative justification, nor will *metaphysical or theological* arguments, and the same goes for *contextual* arguments relying on contingent traditions or settings.

This being so, some people want to turn to the ”post-sceptical rationalism” of *discourse ethics* for an answer, as in Jürgen Habermas and Karl-Otto Apel,<sup>iii</sup> and in this paper I shall argue in favor of this discourse-theoretical approach, while at the same time emphasizing the need for improvements of the versions of discourse ethics found in Apel and Habermas – briefly stated: less emphasis on their notion of ”idealization” and more emphasis on a ”pluralist” and ”meliorist” approach, operating more analytically, for instance by cautious analyses of a variety of situated thought-experiments, preferably in terms of ”arguments from absurdity” in a pragmatic sense. Such a ”praxeological” version of discourse ethics thus implies a blend of continental (self-referential) and analytic (conceptual) methods.<sup>iv</sup>

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Along these lines I shall also point to the need for "inter-rational judgment"<sup>v</sup> in assessing the different scientific and scholarly disciplines needed to analyze the actual situations properly – an intricate epistemic need that has been greatly increased by the change in US/NATO towards a military strategy based on active intervention and preemptive strike.<sup>vi</sup>

Also, along the same lines I shall point to the philosophical need to operate with a gradual notion of a "person", ranging from present persons to future generations and also to other sentient beings – thus widening the scope of fair distribution across generations, and gradually across species, the latter point entailing ecologically relevant considerations beyond current anthropocentric arguments.<sup>vii</sup>

Basically I shall defend a positive thesis concerning the possibility of a universal justification for basic normative principles, while at the same time emphasizing the need for inter-rational and inter-national learning-processes, both between scientists and scholars, and between all those concerned, across civilizations and generations.<sup>viii</sup>

However, when we take part in such dialogues we should all be aware of our own historical and cultural embeddedness: history and culture are matters that matter, also for intellectuals who apparently talk in universal terms.<sup>ix</sup>

### ***(I) Background conditions for a universal justification for international law***

A fundamental question in international law is related to the justification of the use of military force across national and legal borders, the standard justification being self-defense and/or UN support. With the development of new military technology, and with a new threat of terrorism and international instability, the question of an extended notion of self-defense, and also, in some quarters, an idea of a new power-based international order, have emerged. These trends were decisively strengthened by the terrorist strike against the World Trade Center in New York, an event that gave support to the US doctrine of preemptive strike, for the sake of national safety and global stability. At the same time a growing concern for crimes committed by tyrannical regimes against their own population has led to a reconsideration of the traditional principle of non-intervention, opening for the possibility of military intervention for the sake of human rights, when supported by the world community through the United Nation Security Council.

What is often called "the modern project" was initially conceived of in optimistic terms as a process towards steadily improving control over life-threatening natural and social conditions, and hence towards increased security and human well-being. But in our times, confronted with the various risks and uncertainties built into this "project" itself, there are good reasons for less euphoric attitudes towards the modern predicaments: although many forms of risk and uncertainty can be influenced and reduced in various ways, there are some basic forms of risk and uncertainty that will prevail. (i) There are risks and uncertainties inherently connected to the *irreducible fallibility* of human knowledge, including scientific and scholarly knowledge.<sup>x</sup> (ii) The inherently *perspectival* nature of the different scientific and scholarly disciplines adds to this basic cognitive uncertainty. (iii) When these kinds of knowledge, which in principle are fallible and perspectival, are put into use by the various *institutions* in modern societies, unintended consequences tend to emerge, tied to the restrained functioning and fragmentation of these institutions.<sup>xi</sup> (iv) To these factors we should add a reminder of the role of the *human factor*, which in principle transcend any total prediction or control.<sup>xii</sup>

For such reasons, total control and security is not obtainable. There will always be vulnerability, and irreducible fear of intended or unintended harm.<sup>xiii</sup> More specifically, and briefly stated, any attempt at total control in terms of strategic and instrumental rationality will sooner or later reach its limits: in human societies there will always be a need for communicative action and understanding, basically related to the necessity of childhood socialization and for understanding within one's own peer group. Furthermore, open and enlightened discussions among free and equal citizens represent one of the forms of communication that transcends strategic and instrumental rationality and the kind of asymmetric use of force that is related to strategic actions.<sup>xiv</sup>

These remarks are reminders of the existence of *inherent limits* to the idea of complete control in terms of instrumental and strategic actions based on modern science and technology, military technology included. In our times, political and military actions will have to operate within the framework of inevitable risk and uncertainty and of an irreducible basic need for communicative rationality; these cognitive and institutional constraints will always prevail in modern societies.

In all of this, and intertwined with these problems, we are faced with the question of a universal justification for basic normative principles, a question which cannot be solved instrumentally or strategically, e.g. not by science and technology alone. Nor can the question of a universally binding justification be solved by any particular religion or theology, since there are different religious and theological doctrines and since any religious or theological doctrine will be critically questioned in a culturally modern society. Slogans like *Allah is great* or *God bless America* are not compelling arguments for those who believe in another god or have a different belief in the same god or for those who do not find the idea of a god convincing at all, or even meaningful. Nor are contextual or ethnocentric arguments plausible, since such arguments are never convincing in other contexts or for other ethnicities – hence, *patriotism*, even for a superpower, is no convincing argument as a universally binding justification for basic principles of international law, nor is *religious fundamentalism*.

## ***(II) A modern, post-metaphysical response: discourse ethics in terms of universal pragmatics***

An established and well-entrenched legal system has its inherent legitimacy, as it were.<sup>xv</sup> But in times of deep crises and legal and political upheaval, it can be argued that a context-transcending, universally valid justification is required, and therefore, that there is a need for a justification that in its nature is philosophical - but not metaphysical in a traditional sense, which is intellectually untenable in a modern society. For this reason we shall now turn to discourse ethics, primarily as it is found in the universal pragmatics of Karl-Otto Apel and Jürgen Habermas.<sup>xvi</sup>

Not all philosophers or intellectuals would agree on the view that such a philosophical justification for basic legal principles is required and possible. Richard Rorty, for one, would question both the need and the possibility of such an attempt at a philosophical justification for basic norms.<sup>xvii</sup> However, in this paper we shall not start by defending discourse ethics and the view that there is a need for a philosophical justification for basic principles of international law. Instead we enter the debate among the main proponents, namely Apel and Habermas, hoping that the arguments in favor of discourse ethics and the idea of a normative justification will become clearer as we proceed.

We begin with a few general observations: discourse ethics is a philosophical pragmatics, conceived in terms of the pragmatic-linguistic turn, emphasizing the importance of "forceless force of the better argument" (Habermas) for possible discursive solutions of basic validity claims - not only of propositions (related to truth claims) but also of norms regulating human behavior (related to rightness claims). Value questions are at the outset seen as contextual, whereas norms for rightness are in principle considered to be apt for discursive and universal justification. Any denial of the "forceless force of the better argument" is conceived of as being self-referentially inconsistent, in terms of performative self-contradiction; in so doing, one denies that which is a precondition of this very denial – in that case there is a performative contradiction.

Discourse ethics works on two levels, as it were: reflectively recognized preconditions for discussion and discursively obtained answers within a discussion.<sup>xviii</sup>

The proponents of discourse ethics try to show, by arguments from performative self-contradiction, that there are preconditions for discussion that cannot be seriously denied, since they are necessarily presupposed in any serious denial. These unavoidable conditions for any serious discussion include requirements for symmetric relationships between participants and for the search for better arguments. These normative preconditions are *constitutive* for argumentation, in the sense that any serious argumentation would be impossible without these norms, at the same time they are *regulative* for argumentative behavior, in the sense that these norms regulate the behavior of the participants in argumentation: a violation of these norms is conceived of as being normatively wrong.

Within a practical discussion (that is, an argumentation on normative questions, such as questions of rightness) the better arguments are to be followed, hopefully leading to a justification of the question under debate, in terms of an ideally rational consensus among everybody concerned. In this sense the valid answer is conceived of in terms of a counterfactual "idealization" which is seen as presupposed in any serious discussion: the *consensus* obtained among all parties concerned, in a free and enlightened discussion under ideal discursive conditions, indicates what is meant by normative rightness (moral validity).

It is well known that among the proponents and opponents of discourse ethics conceived in terms of universal pragmatics, there have been extended discussions about the epistemic status, and the possibility of the notion of an ideal *consensus*, and also about the notion of an *ideal speech-situation* (Habermas) or an *ideal community of interpreters and researchers* (Apel). In this paper, however, we shall delimit ourselves to some of the recent arguments on these issues between Apel and Habermas, and add our own remarks to these debates.

As a first step we shall briefly delineate (as a reminder) the following four points concerning discourse ethics in terms of universal pragmatics:<sup>xix</sup>

(i) There are claims concerning necessary *normative preconditions* for (practical and theoretical) argumentation.<sup>xx</sup>

(ii) There are claims concerning some *implications arising* from these preconditions, as to the possible content of practical argumentations, such as the impossibility of irrational and ethnocentric positions within a universalistic oriented discussion.

(iii) There are claims concerning the possibility, *within* a practical discussion, of reaching valid conclusions regarding some basic normative questions, in terms of a

rational consent, that is, a consensus under ideal (or sufficiently improved) conditions among everybody concerned.

(iv) There are claims concerning the moral obligation to strive for the best possible *realization* (i.e., improvement) of discursive conditions in real life.

At the outset we have raised the question of the possibility of a philosophical justification for universally binding principles. To the extent that discourse ethics, conceived in terms of universal pragmatics, can be convincingly defended, we apparently do have an interesting candidate for a positive answer to that question: a discourse-based reflective justification for normative principles, with implications also for international law and thereby for the relationship between states, peoples and civilizations.

Which normative principles? According to discourse ethics, normative legitimacy is brought about by:

(α) discursive rationality that ideally implies a search for the *better argument* and thus an openness to all relevant arguments, and

(β) inclusiveness that ideally implies participation and mutual recognition of *everybody concerned*.

Briefly, in positive terms: all arguments should be heard and everybody concerned should be listened to. Briefly stated in negative terms: undue exclusiveness undermines normative legitimacy.

To be sure, in some scientific and scholarly discussions we are faced with competence requirements that are asymmetrically distributed in a population,<sup>xxi</sup> and there are intricate questions concerning the requirement of a real participation when we consider future generations, the “hard cases” (of biomedical ethics), and non-human sentient beings, all of them unable to participate.

However, generally speaking the discourse-ethical principle of legitimacy requires argumentative openness and participatory inclusiveness. When applied to international law, a lack of such openness and inclusiveness, for instance in terms of unilateralism and one-state hegemony or of one-religion rule, runs counter to this principle of legitimacy. In this sense, the principle of discursive inclusiveness is a post-metaphysical and post-conventional notion of rationality and legitimacy – a modern notion, alien both to tribalism and fundamentalist essentialism.

To examine this position we shall now turn to some points in the recent discussions between Apel and Habermas.

### ***(III) The Habermasian approach***

Having been under attack from Karl-Otto Apel,<sup>xxii</sup> blaming Habermas for a detrimental weakening of the reflective and philosophical core of universal pragmatics, in favor of functionalist and empirical arguments, Habermas has responded by pointing at “architectonic” differences between the two of them: while Apel wants to establish a post-metaphysical normative justification, in terms of a universal morality (as a renewed and revised version of “natural rights”), from which legal systems and practices can be legitimized (or criticized), Habermas emphasizes the relative autonomy of legal normativity versus moral normativity, and consequently he considers Apel’s hierarchical model (to the extent that it subsumes legal normativity under moral normativity) to be inappropriate. Instead Habermas attempts to develop a dual system, of a “moral principle” and a “democracy principle”, on the same level, as it were; both rooted in the *discourse principle* (D), a basic principle which is normative, but still “neutral” as to the differentiation between the “moral principle”

and the “democracy principle”. The discourse principle is cast in these terms:<sup>xxiii</sup> “Valid are just those norms of action that all possibly concerned parties could have agreed upon, as participants in a rational discourse”.<sup>xxiv</sup>

For one thing, in Habermas (as in Apel) there is an emphasis on the positive role the legal system has in supporting the motivation for moral behavior (making it more reasonable to expect law-abiding behavior from fellow citizens). On the other hand there is in Habermas (in contrast to Apel) a certain doubt as to the strength and extent of reflective universal-pragmatic arguments. While holding on to the importance of discursive processes, both as a learning-process (including mutual role-taking and discursive formation of opinion), and as a way of solving normative controversies concerning basic rightness and justice (contextual value questions excluded), Habermas expresses his doubt as to the strength and extent of self-reflective arguments, due to problems of the pragmatically idealized notion of an ideal speech-situation and of the criteriological notion of consensus, and due to problems of the extension of self-referential arguments outside the realm of argumentation.<sup>xxv</sup>

In support of normative universality, and in compensation for his doubts as to the importance and strength of purely philosophical arguments, Habermas has elaborated theories of socialization (as in Lawrence Kohlberg) and of modernization (as in Max Weber), within a normative-pragmatic horizon emphasizing the irreducibility of communication and of symmetric interpersonal relations.

For Habermas, the difference between Apel and himself is ultimately due to a difference in the *conception of philosophy*: “I assume that our discussions concerning the correct architectonic structure of the theory are in the last instance related to a dissent as to the role of philosophy itself.”<sup>xxvi</sup>

#### ***(IV) The Apelian approach***

In response Apel argues that a lack of an adequate conception of *reflection* (in Habermas and his followers) is the decisive reason for the difference between Habermas and himself.<sup>xxvii</sup> Self-referential arguments, conceived in terms of universal pragmatics, is at the core of Apel’s thinking: we have to avoid performative self-contradictions! Such pragmatically self-referential contradictions represent an absurdity (a *Sinnlosigkeit*) which undermines what the speaker is saying! Utterances of this kind are self-detrimental.

These performative self-contradictions are often implicit in what is said or presupposed, in such a way that a careful and competent analysis is needed in order to spell them out. This is the task of a *critical*, or negative, use of self-referential arguments: other people are criticized for their self-referential inconsistency.<sup>xxviii</sup>

The critical use of arguments from self-referential inconsistency is often seen as quite convincing, and such critical arguments against self-referential inconsistency are extensively used both by Apel and Habermas.<sup>xxix</sup> However, the decisive point for Apel is the *constructive*, or positive, use of these arguments: by reflecting on the absurdity created by a performative contradiction we become aware of pragmatically unavoidable preconditions.

In this connection Apel talks about *Sinnkritik*, “meaning criticism”. These are reflective arguments, working through a *via negativa*: by the creation of an absurdity (a *Sinnlosigkeit*) we become aware of some principle that is needed in order to avoid this very absurdity.<sup>xxx</sup>

This positive use of self-referential arguments represents a kind of transcendental reasoning (though different from Kantian transcendentalism which is conceived in terms of the subject-object model of epistemology, prior to the

pragmatic-linguistic turn), and this is certainly the core of Apelian transcendental-pragmatics: according to Apel this constructive (or positive) use of “meaning-critical” pragmatic arguments makes us aware of preconditions for argumentation, in terms of necessary regulative principles for an ideal community of interpreters and researchers, as well as in terms of the notion of a consensus among all rational persons, under these ideal conditions.

These idealizations are conceived of as preconditions embedded in our argumentative speech-acts, since the basic validity claims which are inherently connected to these speech-acts (such as the truth claims and claims of rightness) are in principle argumentatively “redeemable” (answerable). However, due to the fallibilism connected to any real discussion and any real consensus, the notion of validity (of truth and of normative rightness) requires a counterfactual idealization.<sup>xxxii</sup>

The idea of such idealizations, as well as the basic point of speech-act inherent validity-claims, are found not only in Apel, but also in Habermas and Wellmer and other philosophers associated with universal pragmatics. This idea of idealization represents the basis for their belief in a mediation between the notion of *justification* and the notion of *truth* (or more broadly, the notion of validity, including normative rightness), while at the same time avoiding the problems of a naive epistemic realism (connected to the subject-object distinction of classical epistemology). Apel, Habermas, Wellmer and other speech-act oriented universal-pragmatists want to maintain a conceptual *distinction* between justification and truth, while at the same time *relating* justification and truth. Justifications are connected to the best argument for the time being and can thus “be lost” (Putnam), whereas truth in terms of this universal-pragmatic precondition (or idealization) is “final” and not relative.

The difference among these philosophers, from Apel and Habermas to Wellmer, lies in their different ways of conceiving these idealizations: Apel defends a strong notion of universal-pragmatic idealizations, based on his strong notion of performative and self-referential reflection. Wellmer has all along argued that the Apelian conception of these preconditions – such as final consensus through ideal communication – is infelicitous, not only since these conditions are beyond actual realization (which is also emphasized by Apel), but because these conditions, according to Wellmer, are metaphysically loaded and in the end conceptually meaningless: human existence is finite and human communication will always be characterized by different perspectives and a lack of transparency. Therefore, the idea of a perfect communication, pointing at a final consensus (in terms of a perfect synthesis of all perspectives), is not only empirically impossible, it is conceptually meaningless. Nor can it be an ideal, since such an aim implies the abolition of human communication as it is known to us.

These critical arguments, expressed by Wellmer, are extensively accepted by Habermas (to some extent as a self-criticism of his former views), but not by Apel.<sup>xxxiii</sup>

Against this criticism Apel’s response consists firstly of a counterattack in terms of a *critical* use of self-referential arguments (of performative self-contradiction): where does Wellmer find himself, philosophically, when he makes these claims? Does he not make claims of universal validity (about human finitude and the impossibility of ideal communication and final consensus), and if so, how do these universalistic claims match with his own sceptically oriented philosophy?<sup>xxxiiii</sup>

Apel’s response also consists of a *constructive* argument. Whereas Wellmer strongly emphasizes the speech-act’s inherent relationship to the “good argument” in the first person indicative tense - thus distinguishing between this epistemically

normative relationship to better arguments and the epistemically neutral relationship which exists while either referring to one's own former opinions or observing the opinions of others (as different from one's own present opinion) – Apel argues that a reflective awareness of one's own fallibilism is present already in this first person indicative tense, which is the reason why we are open for further arguments and thus are willing to continue the discussion.<sup>xxxiv</sup>

Along these lines Apel attempts to show that the criticism raised against his version of universal pragmatics is less serious for his position than his critics seem to believe.

## ***(V) Attempt at an assessment of the pragmatic approaches***

### ***(1) Apel***

To strengthen his transcendental-pragmatic argumentation, Apel emphasizes the self-referential inconsistency of any general fallibilist position, while at the same time suggesting (supporting Popperian views in this respect) that our knowledge is in fact fallibilistic; for the sake of self-referential consistency we therefore have to realize that there is some kind of non-fallibilistic reflective insight, and that is exactly what transcendental pragmatics explains.<sup>xxxv</sup>

However, this argument, which formally is quite strong, does depend on a sharp distinction between a nearly all-embracing fallibility on the one hand and the absolute certainty of transcendental pragmatics on the other. What about the adequacy of this dichotomy? Are these ideal-type concepts appropriate for the understanding of the role of fallibilism in human life? And what about the application of such high-level concepts on concrete cases?

We may ask: *what* is a concept, and *where* do the concepts do their work? These are important but intricate questions. Are concepts to be conceived in terms of general and often clear-cut *positions*, or should they rather be analyzed and understood by focusing on the way they work in various *practices*?

As a starter one could say that positions and practices are both important for the status and role of concepts, as well as for our analysis of their role.

At this point it might be appropriate to recall that the pragmatic-linguistic turn has been conceived somewhat differently by different philosophers. There are those who conceive this turn as a change from the classical epistemology, with its subject-object model, towards a speech-act related philosophy. There are those who see this change as a rupture, like a *change of paradigm*, whereas others conceive this change in terms of a *dialectic learning-process* (transferring former insights into new and better conceptions). And there are those who see this change not only as a change of positions, in some way or another, but as a change in the *way of doing philosophy*: a self-critical awareness of the frailty and vagueness of our language leads to a cautious way of working, avoiding “big words” and relying on careful analyses of chosen cases or thought-experiments, in order to get a more realistic and nuanced conception of our concepts and the work they do in our various practices.

When such case-oriented analyses of *concepts in use* are undertaken it becomes dubious to assume that *all* insight is “fallible” (with the exception of insight tied to the unavoidability of strictly self-referential arguments).<sup>xxxvi</sup> Consider for instance the insight an agent has of his or her own behavior, starting with simple acts like holding a cup of tea, crossing a street, tightening a screw, and the like. We certainly often make mistakes, even in such simple cases. But still it can be argued that as a rule the agent knows what the agent has to know in order to do what the agent does. This is an act-inherent insight that is *not* appropriately described as *fallible*, at least not in the *same*



sense as explicit hypotheses in the empirical sciences are called fallible. And the latter, i.e. hypotheses in the empirical sciences, seem to be the cases that fallibilists (such as the Popperians) have in mind when talking about our knowledge as fallible: empirical hypotheses are certainly fallible; that is why they are “hypotheses”, to be tried out in some empirical research. But the act-inherent insights of the researchers, for instance while doing this kind of empirical research, is at least not fallible in the same sense. On the contrary, one could argue that such insights are presupposed, as valid and trustworthy, by the researchers: in doing their empirical research they *necessarily presuppose* that the floor is stable, that the screws can be tightened, that the measuring instruments function in the same way today as they did yesterday, etc.<sup>xxxvii</sup>

The importance of such *act-inherent insights* is emphasized by the later Wittgenstein and by the early Heidegger.<sup>xxxviii</sup> Such insights are often implicit, not thematized, and hence they are often called tacit knowledge. But to a large extent they can be articulated and talked about, in various ways.<sup>xxxix</sup> Certainly, any verbal articulation of such insights represents a danger of misconception; hence there is an aspect of fallibilism tied to such verbalizations. But even so, the permanent possibility of misfit in any concrete case of verbal expression does not imply that all cases of verbalization are uncertain.<sup>xl</sup>

These points are just mentioned to indicate that the crude dichotomy (in Apel), between a very vast notion of fallibility and the absoluteness of strictly self-referential insight of transcendental pragmatics, appears to be *inadequate* when we start looking into the various epistemically relevant practices and how the concept of fallibility could most reasonably be analyzed in these cases.

To the extent that this case-oriented way of reasoning makes sense, it strikes in both directions, as it were. It questions the Apelian dichotomy, with its emphasis on the uniqueness of strictly transcendental-pragmatic reflection, but it also questions the general fallibilism of the sceptically inclined philosophers, be they members of the Popper tradition<sup>xli</sup> or post-modernist intellectuals defending a conception of language as being far too vague and socially embedded to allow for any universal validity-claims.

In these debates I would argue in favor of a more case-oriented way of working in philosophy, more sensitive for the varieties and nuances of our different conceptual practices. This way of working has implications for the realm outside the core of transcendental pragmatics (as indicated in the paragraphs above, pointing at cases of certainty different from those of transcendental pragmatics in Apel). But this case-oriented and cautious way of philosophizing has implications also for the very core of transcendental-pragmatics: Apel assumes that his “meaning-critical” method of strictly self-referential argumentation reveals *one unique* kind of absurdity (*Sinnlosigkeit*) that reflectively shows a unique kind of necessity in terms of strict unavoidability.

However, how do we know that there is but one kind of absurdity, in the different cases? Is it, for instance, equally “absurd” to deny the validity of the utterance “I hereby claim that I exist” as it is for the utterance “I hereby claim that you exist”, or for the utterance “I hereby claim that consensus is the ideal aim of any serious argumentation”? These and other cases are found in Apel, but without a satisfactory discussion as to the possible epistemic differences between these cases, for which a denial is supposed to give an absurdity.<sup>xlii</sup> Referring to the quoted utterances, there is quite another degree of theoretical clarification needed in order to understand (and possibly accept) the latter utterance (about consensus) than it is in the first one

(about the speaker's own existence). Nor is it evident that the first utterance and second utterance are epistemically identical.<sup>xliii</sup>

Therefore my claim: already within the core of transcendental pragmatics, and even more so in its philosophical "surroundings", there seems to be a plurality of different cases and different notions of absurdity.

This claim does not represent a detrimental criticism of transcendental pragmatics; it represents a pluralistic transformation of transcendental-pragmatics. In so doing it takes more notice of some crucial counterarguments, not only from literary oriented post-modernists but also from more case-oriented analytically trained philosophers.

If so, my pluralist approach represents a strengthening, not a weakening, of the main points of transcendental pragmatics as in Apel's version, that is, its claim of being a counterargument against scepticism and to be an argument in favor of the possibility of universal validity, not only in terms of truth but also in terms of some basic norms of rightness and justice.

Along these lines I would argue in favor of a transcendental pragmatics that is sensitive to linguistic differences and nuances and that cautiously analyzes a variety of cases. To sum up: our act-inherent validity-claims, and more specifically, our speech-act inherent validity-claims and their possible transformations into discursive interaction in order to try to solve some of these claims by following the forceless force of the better arguments, and the reflective insight into some unavoidable constitutive and normative preconditions for a serious argumentation – are all maintained, but with an emphasis on the binding force of what is seen as the better argument, and the inherent obligation to seek the still better argument, or rather, the obligation to avoid what is epistemically less good.

This "pluralism" and "meliorism", directed against what is worse rather than towards what is perfect (according to the thesis of "the primacy of the negative"), does not embrace a strong and substantial notion of a converging consensus and of ideal communication. But it does defend universally valid norms that are pragmatically rooted, and it does defend the possibility of discursive processes, both as mutual learning-processes and as processes for argumentative clarification and possible solutions. Its notion of a self-referential transcendental-pragmatic reasoning is case-oriented and open for varieties, and this kind of "meaning-critical" reasoning is also extended, beyond the realm of pragmatic self-referential arguments, to include a variety of cases based on arguments from absurdity, each of them revealing some constitutive precondition, either for special activities or for actions in general.<sup>xliv</sup>

## (2) *Habermas*

Asking for a justification of international law, we should at the outset give a positive assessment of Habermas for his extensive elaboration of the theory of law, combining philosophical reflections on normative validity-claims and institutional considerations of the functioning of a legal system in modern societies. In so doing he relates himself to major positions in ongoing discussions of the theory of law.<sup>xlv</sup>

Whereas Habermas at an earlier stage (in *Theorie des kommunikativen Handelns*) described the dangers of a legal intervention into the lifeworld, he now underlines the positive support for moral motivation caused by a constitutional state and its legal system. But his earlier writings on the theory of modernization and of socialization retain their importance as a background also for his later work on the possibility of normative obligations in modern societies, that is, for universal (meta)norms of *justice* and *rightness* (but not for *value questions*, that are seen as

contextual).<sup>xlvi</sup> Roughly speaking, Habermas and Apel hold similar views on the latter, whereas there are differences between the two as to the role of normative justification, for morality as well as for legality, international legality included.

However, in Habermas's theory of law there is a philosophical uneasiness concerning (i) the architecture of his main argument, that is, concerning the interrelationship of the discourse principle (D) and the universalization principle (U), concerning (ii) the interrelationship of these principles to the "morality principle" and "democracy principle", and (iii) concerning the further "specification" of the various legal and social rights.<sup>xlvii</sup> In addition there is, in relation to the discourse principle and the universalization principle, an uneasiness as to the strength of the philosophical justification for normative validity. This philosophical uneasiness is addressed and criticized by Apel, who instead offers an answer in terms of his transcendental pragmatics. But that answer is unconvincing for Habermas, due to its strong transcendental-pragmatic idealizations and its strong claims of self-referentially obtained conclusions concerning universally valid (meta)norms.

However, Habermas does not seem to consider the possibility of a more case-oriented and language-sensitive use of "meaning-critical" arguments from absurdity, including performative self-contradictions. Instead he relies on a combination of support from theories of modernization, of socialization and of modern law and from conceptual dichotomies such as the ones between rightness and goodness, between norm and value, between justification and application – in each case, the former supposedly universal, the latter contextual. These dichotomies are supposed to represent a safeguard against the slippery-slope towards relativism, especially towards relativism concerning the basic norms of rightness and justice.

These dichotomies are cast in terms of fairly general concepts, explicated by a discussion of high-level positions, rather than by cautious analyses of cases and of the way our concepts are used in various theoretical practices. It is therefore my contention that a transformed transcendental-pragmatics, in more pluralist and meliorist terms, could have contributed better to the solution of the question of a safeguard of normative universality than what is obtained by these dichotomies – and, at the same time, avoiding the critical arguments raised against the strong claims of the Apelian position.

This is my main point in this assessment of Apel and Habermas: another way of working philosophically, more sensitive to the variety of conceptual practices, in discussions as well as in the lifeworld, would have been an advantage both for the Apelian and the Habermasian approach. This does not mean that reflections on general positions should be abolished. They should not. But it does mean that a more analytic way of philosophizing should be promoted also in this field of reflection on pragmatic preconditions. My proposal could thus (as indicated earlier) be described as a combination of analytic and continental philosophy: self-critical and practice-oriented analyses of pragmatic preconditions.

### *(3) Moral subject and moral discussant*

I shall conclude by adding a few remarks to the discourse principle (D): "Valid are just those norms of action that all possibly concerned parties could have agreed upon, as participants in a rational discourse".<sup>xlviii</sup>

Evidently, there are "concerned parties" who cannot be participants in any rational discourse. Firstly there are various empirical reasons why this and that person cannot take part in this or that special discussion with consequences for his or her interests. To take care of this difficulty, the discourse principle is cast in hypothetical

terms: “zustimmen könnten” (“could have agreed upon...”). But the term “könnten” is vague and ambiguous, since there are “parties concerned” that not only for contingent empirical reasons cannot participate, but that in principle could never participate in any rational discussion. The hard cases from bio-medical ethics are well known: among these cases we do not only have minors who have not yet reached the level of personal maturity required for a discursive participation, but also individuals who have permanently lost their former capabilities as a person and who will therefore never again be able to participate in any rational discussion, and we have members of *homo sapiens* who by birth are handicapped to such a degree that they will never be able to participate in such discussions. In these cases there are “parties concerned” that for various reasons *could never* take part in any rational discourse. In such cases it is therefore required to have somebody else, an appointed and responsible representative, to defend their interests.

Conceptually this means that we need to distinguish between (i) “those concerned” – that is, bio-bodily subjects that can be harmed; we could call them *moral subjects*, or subjects with a moral standing – and (ii) possible “participants” in practical discussions; we could call them *moral discussants*. Not all moral subjects are moral discussants - though all moral discussants have to be moral subjects, in order to be able to understand what a practical discussion is all about.<sup>xlix</sup> This point has important implications, both epistemically and as to the question of an extension of the notion of moral subject (“party concerned”).

Epistemically the point is important since discourse theory is conceived of in terms of possible participation. Even when the tricky terms of “consensus” and “ideal speak situation” are disregarded, the problem remains as to the possibility of participation of all parties concerned. Discourse theory is modeled on a conception of discursive participation, of discussion as a mutual exchange of arguments and as a mutual learning-process with real role-taking for the sake of an improved identity and preference formation - that is, it is modeled on *participation*, participation here-and-now among other moral discussants (who are also moral subjects). But for future generations, and for the hard cases of bio-medical ethics, such discursive participation is in principle impossible.

Therefore, the intentions of discourse ethics have to be taken care of by advocacy representatives (*advokatorische Vertretung*). This means that qualified persons have to take responsible decisions concerning the well-being of all these actual and possible moral subjects, decisions as to what could be said to be good and right for them.

To the extent that we have knowledge about some basic needs, it tends to be easier to get a discursive consent concerning harm than happiness (i.e., the asymmetry between the negative and the positive, and the primacy of the former). Furthermore, to the extent that values are tied to conceptual systems and that there can be an enlightened discussion and decision about the relative adequacy and inadequacy of different conceptual systems in a given case, we could to the same extent defend some value decisions taken by advocacy representatives. In this sense some degree of “paternalism” is both unavoidable and desirable. In such cases we should talk about legitimate paternalism; and in such cases the principle of participation is transformed into an enlightened discussion of need interpretations and of avoidance of harm for moral subjects who cannot take part in these discussions.

As to the extension of the notion of “parties concerned” to the various moral subjects who cannot take part in discussions, we could briefly refer to the following points: taking future generations into consideration is normatively required, since

future persons are “concerned” as a consequence of our activities and decisions. Future generations have then to be defended by responsible representatives (*advokatorische Vertretung*). This point has practical implications, for national law as well as for international law, for instance as to conflicting interests concerning scarce ecological resources (when related to future generations as well as to non-human moral subjects). In this perspective, one theme of importance for international law is the scarcity and vulnerability of ecological resources, another is the possibility of future biotechnological interventions in the human biology, with implications also for questions of identity.<sup>1</sup>

In addition to these implications for international law and global justice, extended to future generations, we also have the tricky question as to how to draw a normatively justifiable line between humans and non-humans, when they all are moral subjects, that is, sentient beings that can be harmed by our activities and decisions. Briefly stated, in carrying out case-oriented analyses we are forced to acknowledge that whatever capability or characteristic we find persuasive for a normative ascription of a moral standing (implying representative defense in practical discussions), there will always either be some humans who fail to meet these criteria, or some non-humans who comply better with these criteria than some humans.<sup>ii</sup> In any case, there seems to be no good reason for a clear-cut distinction between humans and non-humans when it comes to the question of moral standing and hence to the demand for discursive representation.<sup>iii</sup>

The latter point has its normative and even legal implications: if there is no clear-cut demarcation between humans and non-humans, then a reasonable conclusion would be an inclusive rather than an exclusive attitude, thus including non-humans in the realm of moral subjects. This means that parts of what used to be conceived of as “nature” (such as sentient animals) should be defended discursively by representatives. Ethical anthropocentrism is thus overcome in favor of an eco-ethics of a gradual kind, reaching from humans into the realm of other sentient beings. This ethical gradualism has certainly far-reaching implications for the normative foundation and extension of international law.

All in all this means that discourse theory has to rely on reasonable but fallible arguments on behalf of other persons and sentient beings, and this means that the participatory aspect of discourse theory has to be supplemented by a gradualist meliorism, sensitive to the various cases.

This proposal represents, in my view, a necessary transformation of the Habermasian and Apelian approaches to normative validity, including justice in legal terms. And this inclusion of moral subjects, that are not and cannot be moral discussants, has vital implications for international law: the principle of self-rule through discursive and political participation has to be transformed such that it includes a discursive and legal defense for all existing parties, all moral subjects, and also a defense, by representatives, of moral subjects who cannot take part in practical discussions and democratic processes. To the extent that these subjects are actively or structurally excluded, we have a violation of the legitimacy of international law.

#### ***(VI) Concluding remarks***

On the background of this brief presentation of the Habermasian and the Apelian approach to the question of the possibility of a philosophical justification for universally binding principles, including international law for basic justice between nations and generations, I would particularly emphasize the desirability of a more

analytically oriented way of working, which in my view would strengthen this attempt at a justification for basic universal principles at the moral and legal level.

These principles demand the primacy of justice, not power, as a basic obligation for a civilized international community. This means that the use of force has to be legitimated in accordance with these principles, cautiously applied to concrete situations. This conception asks for discursive collaboration and a search for some kind of reasonable consent, favoring international agreements and institutions, trying to avoid unilateralism, especially when based on unreasonable asymmetries and excessive interpretive one-sidedness. Furthermore, living in a modern society we realize that modern technology while making global markets possible, also make global terrorism possible. In a risk society unintended detrimental consequences have to be taken into consideration, and the same holds true for intended harm in terms of sabotage or terrorist attack, carried out by ideologically perverted or mindless persons.

Against the background of these basic legal principles and with a realistic conception of the risks in modern societies based on modern technology, we should do our best to establish more adequate international institutions for the reduction of detrimental acts, including military conflicts, and for improved conditions for global and intergenerational justice. In so doing, we need to take various scientific and scholarly views into account. But then it is important to avoid an undue bias in the composition of the various bodies of experts, since an undue dominance of some special kind of expertise will be detrimental both to the rationality of the picture presented and to the possibility for unprivileged groups to have an equal chance of an adequate representation and an appropriate say.

As we know, economic interests or military perspectives quite often define the situation and thus determine the agenda and the means of solving the problem as it is seen in terms of these interests and in these perspectives.<sup>liii</sup> In an effort to avoid such unreasonable and undesirable biases as to the composition of scientific and scholarly perspectives or disciplines it might therefore be useful to improve the public's competence in terms of "science literacy" and thus to improve their ability to reflect on a given composition of disciplinary perspectives. In this sense a basic ability of inter-disciplinary reflection (of "inter-rational rationality") is required.

To promote not only *global justice* but also *dialogues between cultures*, there is a similar need for an inter-national rationality. For this purpose, too, there is a lesson to be learnt from discourse theory, emphasizing the need for communication and mutual recognition in discussion: this mutual recognition does *not* imply that criticism between cultures is excluded; but it excludes an ethnocentric normative asymmetry between persons and peoples, and it includes the basic recognition of all persons as persons. At the same time, it opens for, and even asks for, a fair and decent criticism of acts and ideas that are biased or infelicitous or downright wrong - legally, morally or cognitively. Without the possibility of a mutual, discursively based criticism of this kind there can be no real recognition, nor any real learning-process based on discursive exchange and role-taking between persons and peoples.

In this connection the interplay between discourse theory as a communicative practice and the normative theory of modernization and socialization is important. However, in many cases there might be an inherent tension between modern technology and related social practices on the one hand and pre-modern social structures and attitudes on the other. This seems to be a basic problem in many Islamic countries. But similar tensions are also found in Western countries, such as the United States, where for instance a religious rhetoric is politically accepted, due to a lack of cultural modernization in terms of a self-reflective scepticism in such matters.

When it comes to the need for inter-national and inter-cultural dialogues, we also have to take into consideration purely cultural and value-based varieties. On the communicative level there is a need for *dialogues* promoting mutual understanding as well as for *discussions* for the sake of better arguments on various levels. In short, there is a need for improved understanding, not only for improved justification.

Furthermore, we should realize that there are “big dialogues” as well as “small dialogues”: there is a need to spell out the overall perspective of a tradition and discuss its achievements and values; but there is also a need to listen to concrete contextual interpretations and comments, based on lifeworld situations and personal experiences. It is important to talk *with* people, and not only to talk *about* them and *at* them. It is important to learn to listen, especially to that which is unfamiliar and strange. Therefore, so-called small talk might be a great thing:<sup>liv</sup> “big wheels” and “small wheels” are both required to promote mutual understanding in an international community with different codes of meaning, identities and values.

*I conclude:* philosophically there is a possibility of a justification of basic normative principles, also for international law and for global and intergenerational justice. Such justification should be supplemented with theories of modernization, including reflections on scientific and scholarly expertise, and it should be supplemented with inter-cultural dialogues.

At the very end we could, in this perspective, indicate a few especially urgent challenges: (i) We need to get a realistic view of the *common* technological roots of economic globalization and of modern risk societies, including the possibility of terrorism. (ii) We need to renew and reinforce the kind of *critique of religion* that started with Spinoza and the Enlightenment, and which could neutralize religious fundamentalism.<sup>lv</sup> (iii) We need to support a just and realistic *redistribution* of scarce resources, globally between generations and also with due consideration of the needs of the various sentient beings beyond *homo sapiens*.

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<sup>i</sup> Cf Jürgen Habermas on the war in Kosovo, in Habermas 2001b, p. 27-39, “Von der Machtpolitik zur Weltbürgergesellschaft”. Apel’s view: “Das Spannungsverhältnis zwischen Ethik, Völkerrecht und politisch-militärischer Strategie in der Gegenwart. (Philosophische Retrospektive auf den Kosovo-Konflikt)”, in Marcel Niquet *et al.* (eds.), 2001, p. 205-218. Comments on Apel’s view: Tilman Lücke, “Zwischen Völkerrecht und Verantwortungsethik: Militärintervention in der Perspektive der Moralphilosophie Karl-Otto Apels”, in Böhler *et al.* (eds.), 2003, p. 350-363.

<sup>ii</sup> Cf for instance functionalist and institutional arguments in favor of legal normativity, in Habermas 1992.

<sup>iii</sup> E.g. Apel 1988 and 1998, and Habermas 1983 and 1991.

<sup>iv</sup> Cf Skirbekk 2002.

<sup>v</sup> Or “inter-rational rationality” (borrowed from Martin Seel).

<sup>vi</sup> As to the current debate on the idea of a world order based on international law, in a double attack from North-American *Rechtsradikalismus* and islamic fundamentalism, see e.g. Frachon and Vernet 2003, Habermas 2003 and 2005, Atlas 2003, Heer 2003, and Tibi 2002.

<sup>vii</sup> Skirbekk 2002, ch. 7.

<sup>viii</sup> Cf the main conclusion in Skirbekk 2002.

<sup>ix</sup> Cf Skirbekk 2001.

<sup>x</sup> Cf the various arguments brought forward by the studies of the sciences and the humanities.

<sup>xi</sup> Cf Ulrich Beck on “risk society”.

<sup>xii</sup> Cf e.g. Karl Popper’s argument against predictions in history, in *The Open Society and its Enemies*.

<sup>xiii</sup> The development of new technology constitutes the basis both for a globalized economy and for a “risk society”, including the possibility of terrorism.

<sup>xiv</sup> This is a main point in Habermas’s theory of communicative action in modern societies.

<sup>xv</sup> This point is emphasized by Habermas (e.g. in Habermas 1992), and also by numerous other theoreticians of law, not least by a *Systemtheoretiker* like Niklas Luhmann.

<sup>xvi</sup> Cf recent references to this *Auseinandersetzung* in Dietrich Böhler, Matthias Kettner and Gunnar Skirbekk (eds.) 2003.

<sup>xvii</sup> Cf the debate between Rorty and Habermas (and Wellmer), e.g. in: Robert Brandom (ed.) 2000, and also Wellmer’s criticism in Wellmer 2004.

<sup>xviii</sup> Skirbekk 2002, ch. 8.

<sup>xix</sup> Cf Apel 1988, 1998.

<sup>xx</sup> Skirbekk 2002, p. 222-226.

<sup>xxi</sup> *In casu*, in clearly professional discussions, as in the scientific and scholarly discourses.

<sup>xxii</sup> Cf three papers against Habermas, printed in Apel 1998.

<sup>xxiii</sup> Translation (word by word) G.S.: “Gültig sind genau die Handlungsnormen, denen alle möglicherweise Betroffenen als Teilnehmer rationaler Diskurse zustimmen könnten” (in: Böhler *et al.* [eds.] 2003, p. 47).

<sup>xxiv</sup> There are ongoing discussions concerning the interrelationship between this *discourse principle* (D) and the so-called *universalization principle* (U), and concerning their relationship to the normative principles of argumentation. And there are ongoing discussions as to how the democracy principle can be “specified” in terms of legal principles and rights, such as constitutional state, international law, and human rights. These discussions are already integrated in the Habermasian elaboration of a theory of law, with the intention of maintaining a normative foundation, doing the work of similar aspirations as in the tradition of “natural rights”, while at the same time paying attention to the specific way a modern legal system functions: avoiding both a neutralization of the basic normative principles and the danger of a philosophical overloadedness (which is found in the transcendental-pragmatic approach of Apel, according to Habermas).

<sup>xxv</sup> For Apel, the latter point is approached through his “part B” of discourse ethics, focusing on the problem of application to the various situations. Along these lines Apel also argues in favor of an ethics of responsibility (cf Max Weber): in strategic situations it might be morally wrong to act morally (i.e. *gesinnungsethisch*).

<sup>xxvi</sup> Translation (word by word) G.S.: “Ich vermute, dass unsere Auseinandersetzungen über den richtigen architektonischen Aufbau der Theorie letztlich auf einen Dissens über die Rolle der Philosophie selber zurückgeht” (*op.cit.*, p. 64).

<sup>xxvii</sup> “Die Antwort auf meine Frage, die Habermas im Kapitel 5 von *Wahrheit und Rechtfertigung* skizziert hat, ist m.E. durchweg von der – auch bei Wellmer – anzutreffenden unzulänglichen *Reflexionstheorie* bestimmt.” (*op.cit.*, p. 129). And also: “Dieser kaum noch bemerkte Selbstwiderspruch der Gegenwartsphilosophie [Apel is referring to Wittgenstein, Heidegger, Gadamer and Derrida] beruht aber – und dies ist für die hier zu führende Diskussion noch wichtiger – auf dem nahezu vollständigen Fehlen einer angemessenen *Reflexionstheorie*, ...” (*op.cit.*, p. 191-2). See also Apel, in Burckhart and Gronke (eds.) 2002 (p. 71-88): “Transzendente Intersubjektivität und das Defizit einer Reflexionstheorie in der Philosophie der Gegenwart”.

<sup>xxviii</sup> The target under attack by this criticism is not only radical scepticism, explicitly denying the possibility of knowledge, but a wide variety of statements and theories expressing or presupposing a general fallibility (uncertainty) for all forms of knowledge. Such cases are abundant in post-modernist writings - claiming, suggesting or assuming that language is too vague to allow for argumentation of the kind favored by discourse theory, or claiming, suggesting or assuming that the “forceless force of the better argument” is nothing but

power in disguise, or claiming, suggesting or assuming that all knowledge is in principle fallible. This critical (or negative) use of arguments from self-referential inconsistency is almost a commonplace in philosophy. The controversial point in this critical use of self-referential arguments is not so much the necessity of avoiding such inconsistencies; what is mostly discussed is rather the question of whether, in each concrete case, an *assumed* self-referential inconsistency is *really* to be seen as such an inconsistency, or whether it should rather be seen as a paradoxical way of expressing some kind of insight. But when such paradoxical insight is at stake, it is appropriate to emphasize that the meaning of such paradoxical communication should at least be explainable for other people – hence, there are limits to the (postmodernist) arguments from paradoxical insight.

<sup>xxix</sup> Cf Habermas and his criticism of French post-modernists in Habermas 1985.

<sup>xxx</sup> These are not *deductive arguments* (that is the misconceived counterargument among proponents of “critical theory”, from Hans Albert to Herbert Keuth), nor are they *theoretical arguments* on the *semantic* level. They are *pragmatically self-reflective arguments*, to be conceived of in the first person indicative tense. Nor should they, according to Apel, be misconceived in terms of *psychological* statements about personal experiences. – Furthermore, each person can reflectively be aware of one’s own fallibility in the reflective act when this person is rationally persuaded that an actual argument is the best argument. This is exactly the reason why we as discussants have to presuppose that there might be still better arguments ahead and that the notion of truth is embedded in our discursive speech-acts in terms of a presupposition of an ideal consensus (under ideal conditions). Fallibilism is thus connected to arguments within a rational discussion; but referring to the reflectively recognized preconditions for rational discussion, the notion of fallibilism does not really make sense – except as an awareness of possible improvements in the way one articulates these reflective insights.

<sup>xxxi</sup> This is not the kind of idealization connected to “ideal models” (such as *homo economicus*), posited for intellectual purposes. The kind of idealization (found in universal pragmatics) refers to (assumedly) pragmatically unavoidable preconditions for speech-acts, or more specifically for argumentative speech-acts. These idealizations are thus assumed as being inherently *given* in these acts. They are *not posited* by us, for specific intellectual purposes.

<sup>xxxii</sup> Cf Wellmer in Böhler *et al.* (eds.), 2003, but also in Sandbothe 2000.

<sup>xxxiii</sup> Cf Horst Gronke, in Dietrich Böhler *et al.* (eds.), 2003, pp. 260-282: “Die Relevanz von regulativen Ideen zur Orientierung der Mit-Verantwortung. Eine Verteidigung von Apels transzendentaler Transformation des Pragmatismus”.

<sup>xxxiv</sup> The latter point can also be cast in terms of a philosophy of the internal relationships between the various epistemic attitudes connected to the different *personal pronouns* (cf Øfsti 1994): the “I”, the “you” and the “he” and “she” – as well as the “we” and “they” – are not only (necessarily) learnt simultaneously, but we also learn to move reflectively between the different personal-interpersonal relationships. I learn that “I” is a “you” for the other, and the other way round, and that both “I” and “you” can also be “he” or “she” – possibly even an “it”, in extreme cases (as when a person’s body is conceived of in descriptive natural-scientific terms). The other person, and his or her counterarguments, are therefore inherently present in “my” own present position, holding a specific argument to be the (epistemically) good argument.

<sup>xxxv</sup> Cf Apel’s article “Fallibilismus, Konsenstheorie der Wahrheit und Letztbegründung”, in Apel 1998, p. 81-193.

<sup>xxxvi</sup> Cf Skirbekk 2002.

<sup>xxxvii</sup> Cf Wellmer in Lutz Wingert 2001, p. 13-52, “Gibt es eine Wahrheit jenseits der Aussagenwahrheit”. Also Wellmer 2004 and Skirbekk (ed.) 2002, p. 236-270, “On the Variety of Truth Questions, from practice-inherent certainties to propositional fallibility”.

<sup>xxxviii</sup> As in Wittgenstein’s *Über Gewissheit* and (differently) in Heidegger’s *Sein und Zeit*.

<sup>xxxix</sup> Cf Kjell S. Johannessen on “intransitive understanding” in Wittgenstein, in Fjelland 1997, p. 225 ff. Also Øfsti 1994.

<sup>xl</sup> Similar points can be made referring to some kinds of *explicit statements* that could be part of a scientific discourse, such as the statements that *all humans are mortal*, that *the universe has existed long before our birth*, that *the Earth is round*, etc. In these cases it would not make sense to ask for empirical support to find out whether these statements are true. It is even unclear what possible counterarguments could look like in these cases. In some other cases, such as the *descriptive macro-anatomy of the human body*, we could argue that a final answer has been *reached*, beyond reasonable doubt – that is: on the general level, such as in the case of the number of joints of *clavicula* or the number of bones in the hand or foot; but this would certainly not apply on the specific level of comparative studies, such as the changes in weight and obesity over time, or comparative studies relative to certain characteristics in different populations. In the latter cases empirical research can go on and on, in great scale. But on a general level, concerning descriptive macro-anatomy of the human body, it can be argued that we know what there is to be known. In this field and on this level there is no room for fallibilism. We have obtained complete and secure knowledge. Research has come to an end. This discipline is now a subject for student education, not for renewing research. (Cf Skirbekk ed. 2002.)

<sup>xli</sup> Such as Hans Albert and Herbert Keuth.

<sup>xlii</sup> Cf Matthias Kettner, in Dorschel *et al.* (eds.) 1993, p. 187-211.

<sup>xliii</sup> The question as to the possibility of a variety of notions of “meaninglessness” (or “absurdity”) may be clarified by case-oriented analyses of the kind found in the discussions in analytic philosophy concerning category mistakes and contextual inconsistencies. (Cf Skirbekk 2002 and 1993, see also the first essay in this collection.) As a brief reminder of this kind of analyses we would here just make the following remark: the absurdity of the category mistake of “my dog is the first of May” is apparently different from that of the utterance “my dog has a PhD in philosophy”. The latter is empirically absurd in the world known to us, but still we can make movies with that kind of dog – in Disney’s cartoons it is done all the time. The same is not possible in the former case. And then we could consider, first, cases of increasingly severe empirical falsehood, and then, cases of increasing absurdity, as it were - for instance: “my dog counts to 30”, “my dog counts to 2000”, “my dog reads newspapers”, “my dog has a PhD in philosophy”, “my dog is the first of May”. Hence, between plain empirical mistakes (such as the utterance “my dog is a bulldog”, when it is a poodle) and logical contradictions (such as the utterance “my dog is not my dog”, taken literally), there seems to be a variety of epistemic mistakes (a variety of “falsehoods” and or “absurdities”) of varying severity, as it were. Our point is now that the notion of absurdity (or meaninglessness) is far from clear and homogenous.

<sup>xliv</sup> This is the main conclusion in Skirbekk 2002.

<sup>xlv</sup> Main reference, Habermas 1992.

<sup>xlvi</sup> For the idea of a legal order for a pluralistic global society, cf Habermas 2005, p. 324-365.

<sup>xlvii</sup> Such as social rights, in addition to participatory rights and civil rights.

<sup>xlviii</sup> Habermas 1992, p. 138.

<sup>xlix</sup> Cf Skirbekk 2002, p. 173 ff. In addition there is a distinction between those who can act morally (*moral agents*) and those who also can discuss rationally (*moral discussants*). All moral discussants are moral agents but not all moral agents are moral discussants. This is a tricky point, since it is tied up to the delicate question of capabilities required for the participation in discussions; thereby, indirectly, the question is raised as to a possible exclusion from participation. This is a morally delicate question, but it is also an epistemically delicate one, especially for discourse theory relying, epistemologically, on a notion of an agreement in a possible (real) discussion among all parties concerned.

<sup>1</sup> Cf Habermas 2001a, defending a restrictive law of biotechnology, based on an argument emphasizing the danger of asymmetric interpersonal relationships, due to changes (decided by the parents) of the genetic constitution of other people (i.e. their children).

<sup>ii</sup> Skirbekk 2002, ch. 7.

<sup>iii</sup> We here disregard political and theological decisions in favor of a clear distinction between those who should and those who should not count as human persons. Cf Skirbekk 2002, p. 173 ff. Cf also fourth paper in this collection.

<sup>iiii</sup> There is in modern societies based on scientific and scholarly knowledge, a constant danger of conceptual bias and therefore of a specific kind of “perspectival blindness” - for instance: the world could primarily be conceived in terms of military and strategic concepts, or in terms of moralistic values, simplistically conceived in terms of good and bad. In such cases there is a need to promote mutual discussions and role-taking and to avoid unilateral asymmetries, including asymmetry in legal terms.

<sup>liv</sup> Cf Anne Granberg 2004.

<sup>lv</sup> In addition, the international community should implement a fair solution for Palestinians and Israelis, against illegal occupation and colonization.