

# Humanitarian Intervention, Dirty Hands, and Deliberation

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## Introduction

The theory and practice of humanitarian intervention in an increasingly globalised world present many problems for an international community committed to norms of freedom, justice, human rights, and democracy. In particular, those advocating humanitarian intervention, especially of a unilateral nature, face the problem of dirty hands, which involves hard choices for which there seems to be no morally correct solution. For example, whatever we may think regarding the motivation and public reason-giving of President George W. Bush and Prime Minister Tony Blair, amongst others, one must admit that difficult moral choices were faced, that a certain amount of moral and political legitimacy was lost, and that this would have been the case whichever decision was finally arrived at. The moral dilemma faced by those proposing and supporting intervention in Iraq, part of the justification for which was intervention on specifically humanitarian grounds, shows up the need for tough moral dilemmas to be discussed – whether resolved definitively and to the satisfaction of all, or not – in international institutions that encourage deliberation among interested and affected parties. This would, I propose, require the strengthening of international and European law, thus making up for the loss of moral and political legitimacy that is the inevitable result of such ‘dirty hands’ scenarios, so called because agents cannot avoid getting their hands dirty, so to speak.

I will begin by giving a short account of theories of humanitarian intervention, set in the context of a discussion about just war theory. We are here more concerned with criteria that must be met in order for an *intervention* to be properly justified, and less concerned with the criteria that must be fulfilled in order for a war to be fought justly, and those pertaining to the aftermath of any conflict (1). Next, I turn to the problem of ‘dirty hands,’ and argue that

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the decision to intervene on humanitarian grounds almost always involves the key actors in moral dilemmas for which there appear to be no morally correct answers – or, at least, no decision that will not leave the political actor with dirty hands and feelings of guilt, regret, remorse, etc. (2). These opening parts lay the theoretical ground and establish that humanitarian intervention is an area of decision-making fraught with moral and practical dilemmas. In the next section, I turn my attention towards the idea of an overlapping consensus of moral values, such as human rights and democracy that would serve as the foundation of an international deliberative decision-making process (3). Of course, dirty hands scenarios, by definition, do not admit of solutions morally acceptable to all interested and affected parties, and there is a sense in which spreading responsibility, by making the decision dependent upon the result of a period of deliberation amongst a number of interlocutors, appears to place the “blame” on so many different shoulders that responsibility cannot be traced to any source. Nevertheless, decisions reached through deliberation can be said to be epistemically superior to those reached unilaterally, and so decisions on humanitarian intervention reached through deliberation can claim a provisional legitimacy beyond that to be expected from unilateral or bilateral decision-making that does not involve interested and affected parties in a process of deliberation.

## Just War Theory and Humanitarian Intervention

Let’s begin with a short exegesis of humanitarian intervention couched in terms of just war theory (JWT), in order to establish some practical and moral guidelines for the former. Of course, these criteria of action are meant as relatively specific and tight practical and moral constraints for the purposes of establishing the legitimacy of wars before, during, and after conflict and/or humanitarian intervention. As such, no war could claim to be completely just in the sense to be explained below. Even the Second World War, which many consider to be the paradigmatic example of a just war, does not conform to the constraints of JWT criteria, in that it violates some basic requirements of the theory.

Nevertheless, this does not mean that wars and humanitarian interventions cannot enjoy *degrees* of legitimacy. If we were to insist upon the satisfaction of all criteria, no war in the history or future of mankind could be considered “just” or legitimate. So, the reader is warned that JWT acts something like a regulative ideal or an operative fiction, and wars and interventions can be considered more or less just and legitimate, but never completely so. Nonetheless, humanitarian intervention should not be rejected on the grounds that it will fail to meet the criteria of JWT. The theory itself offers consequentialist and deontological conditions that help those formulating and carrying out humanitarian intervention to bear in mind the morality of that intervention.

As noted above, wars are conducted in three stages: before (*jus ad bellum*), during (*jus in bello*), and after (*jus post bellum*) conflict. We can briefly give an account of some of the principles and norms contained by the first of these three aspects<sup>2</sup>. *Jus ad bellum* requires that a number of normative considerations be borne in mind, including that the intervening state have a just cause, such as acting in self-defence, protecting citizens of another state from human rights violations perpetrated by their own state, and/or punishment for a wrongdoing that has not been corrected.

We should devote more time to this “just cause” requirement, as it requires an account of state legitimacy that is of philosophical interest to us. Firstly, in order to be considered legitimate, a state must be recognised both by itself and the international community. The consent of the people, or a majority of the people, is evidently vital to its legitimacy, for no state could reasonably make a claim to legitimacy in the face of widespread discontent within its borders and the suppression of signs of discontent. Legitimacy obviously cannot depend on the continuing and overt consent of all citizens. It is enough to say that the majority are not opposed to it, that a minority is not suppressed, and that the procedures, mechanisms, and institutions through which governments are chosen generate outcomes that are seen as legitimate, even though some will disagree with the substantive outcome. Secondly, since the state exists primarily as a set of institutions, procedures, and practices to protect the basic rights of citizens – which can, of course, be interpreted in a variety of ways, at least within certain limits – it is only legitimate to the extent that it carries out this function. Thirdly and finally, a state cannot violate the rights of other states or the people of other states. Evidently, these three criteria of legitimacy allow us to speak of intervention in the event of any rights violation, even when the state in question violates the rights of its own people, as we could not be morally consistent if we washed our hands of civil war, as well as terrorism.

Is it correct to say that for a state to be legitimate that it must also be democratic? According to the brief definition given above, the answer to this question might be No. Legitimacy, according to this understanding anyway, requires only the maintenance of basic rights, general consent, and the understanding of the people that the system is fair. In this case, one’s understanding of the fairness of the procedures for deciding leaders and governments is the determining factor, and not the democratic nature of those institutions per se. However, there is clearly a sense in which a democratically-run state is more legitimate than undemocratic states, to the extent that deliberation is a function of legitimacy, along with other features of the democratic state. Obviously, there is a question mark over the legitimacy of illiberal and undemocratic states, and whether this supposed illegitimacy, which comes about as much by

<sup>2</sup> My analysis of the conditions required for a war to be just closely follows that of Brian Orend. See Orend, “War,” Stanford Encyclopedia of Philosophy, 2005. <http://www.seop.leeds.ac.uk/entries/war/>

definitional fiat as anything else, always provides uncontested grounds for intervention. For if a state is not democratic, even if it fulfills the other conditions of legitimacy discussed above (that it has general consent, and does not violate the basic rights of its own citizens), it is illegitimate overall simply and only by virtue of its not being democratic, and other states always have cause (we cannot say just yet whether it is a *just* cause) to intervene.

We will refer occasionally in this paper to empirical examples of humanitarian intervention, and here we mention the recent and ongoing war in Iraq. Was the intervention of American- and British-led troops in Iraq a just intervention, conducted on humanitarian grounds? So far we can say that Saddam Hussein violated the rights of Iraqi citizens, and that the perception of legitimacy was not shared by many Iraqi citizens and the international community, the war appeared just. Also – and this is something of a moot point – Saddam was suspected of hiding and developing weapons with the capacity to cause mass destruction. As it turned out, no such weapons existed, although it could be argued that since other criteria of legitimacy had already been violated, the question of the existence or non-existence of WMDs is neither here nor there. In this case, the knowledge that Saddam did not possess WMDs means that the argument itself was a cover and a pretext for an intervention that had already been agreed upon, and this means that the condition of right intention was violated.

Continuing with the example of Iraq, any consideration of rights violations and illegitimacy may be beside the point if the intervening state or states do not themselves act for the right reason or reasons, or if their motivation is different from the publicly stated reasons given. In the case of the Iraq war, there has been much consternation over the motives of the American President, George W. Bush, and his British equivalent, Prime Minister Tony Blair, which were suspected of not being pure. Does it really matter if motives are not pure, or differ from the professed reasons? In other words, does the end justify the means, and are we fooling ourselves by thinking that our politicians will always act out of motives connected directly to the common good or requirements of justice? The problem is that JWT threatens to impose restrictions, of both a practical and moral nature, that would render every conflict and act of intervention illegitimate and unjust, and this could not do. However, perhaps we should not demand that for a war or act of humanitarian intervention to be just it must fulfill every single criteria laid down. In any case, humanitarian intervention always risks violating deeply-held moral principles even when the case in favour of intervention seems fairly straightforward and the *jus ad bellum* conditions are met, and we will turn to the subject of “dirty hands” shortly.

Before that, we must complete our account of *jus ad bellum* by noting some further conditions, with our attention turned mainly to the final one. Firstly, intervention must be a last resort, and no other channels, legal or otherwise, that

would obviate the need for intervention should be available. Secondly, the intervening state must be assured that the probability of success is high, and that a potentially dangerous and costly intervention not be liable to fail. Thirdly, the condition of proportionality stipulates that states must weigh the costs of fighting, or continuing to fight, against the expected benefits. As Orend points out, the pros and cons of intervention must be considered universal goods, in order to avoid the unfortunate situation of an intervening state only taking into account its own potential gains and losses, and not those of its enemy and third parties.<sup>3</sup> Finally, and most importantly from our point of view, is the condition of “proper authority and public declaration,” which stipulates that intervening states make their decision to go to war or to intervene through the proper channels and procedures, and that the decision be publicly announced, both to the state’s citizens and those of the “enemy.” States lacking in this requirement, Orend states, lack the legitimacy to go to war in the first place.<sup>4</sup>

That will do for a short introduction to just war theory and the morality of humanitarian intervention. We have passed over a discussion of the conditions and criteria demanded during and after war or intervention, as they are not directly relevant to the case at hand. Rather, we are here concerned with showing that such instances of humanitarian intervention always require morally troubling decisions, and that under normal circumstances, just wars and just humanitarian interventions can be realised and fully justified even if certain just war requirements are violated. We will see now that such dilemmas are a part of our moral reality and cannot be wished away by invoking a too strict conception of JWT. For these reasons, we can say that certain cases of humanitarian intervention lead to political actors getting dirty hands in a way that is regrettable but inevitable.

## Dirty Hands: Humanitarian Intervention and Moral Dilemmas

The term ‘dirty hands’ was first coined by the French Marxist-existentialist Jean-Paul Sartre in his play of the same name (*Les Mains Sales*). In the play, Hoederer, a realistic communist party official, castigates the young Hugo, an idealistic party member, for his apparent inability to realise that politics is a business in which one must plunge one’s hands and arms into ‘filth and blood’ in order to achieve the overall aim of attaining a higher good, in this instance the abolition of class distinctions. Thus, Hoederer argues, politicians cannot avoid getting dirty hands.<sup>5</sup> Michael Walzer also highlights the problem of dirty hands, especially so in his characterisation of a situation in which

<sup>3</sup> See: Michael Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations* (New York: Basic Books, 2000), p. 119, and Orend, “War.”

<sup>4</sup> Orend, “War.”

<sup>5</sup> Steven de Wijze, “Dirty Hands: Doing Wrong to do Right,” *South African Journal of Philosophy*, 13:1 (1994), pp. 3-19. Here, pp. 4-5.

a politician must choose whether or not to order the torture of a suspected terrorist, who may or may not have access to information regarding the location of a bomb, expected to explode soon, which would kill many innocent civilians.<sup>6</sup> The Canadian politician and political theorist Michael Ignatieff also discusses the so-called “ticking bomb” example as paradigmatic of dirty hands theory.<sup>7</sup> Whichever way one would choose to act, an immoral act has been committed that leaves the agent in question with certain feelings of guilt, even though the alternative course of action would also result in the same or similar feelings, specifically, what de Wijze refers to as ‘tragic-remorse,’<sup>8</sup> or what might otherwise be referred to as “agent-regret.”

Humanitarian intervention, more or less due to its very nature, involves protagonists, i.e. decision-makers, in moral dilemmas that cannot be resolved. All acts of war involve irresolvable moral dilemmas, because war will inevitably lead to loss of life. Only the most carefully fought war could avoid the death of civilians and one’s own soldiers (the loss of life of enemy combatants would presumably not present an especially significant moral dilemma for decision-makers). Humanitarian intervention, of course, need not be accompanied by war. For example, when a state allows humanitarian forces to provide personnel and services to help displaced or severely disadvantaged groups, there is no real moral dilemma to be faced, except, perhaps, the dilemma of whether one should deploy resources to provide support for foreigners at all (although I do not think that such cases represent a dilemma anyway, as the morally right course of action is obvious). The most interesting cases, and the ones with which we are here concerned, are those involving force or war in the effort to intervene on humanitarian grounds. In these cases, decision-makers do face an irresolvable moral dilemma, in the sense that civilian casualties will almost certainly result from intervention. Decision-makers here face getting “dirty hands,” for (to simplify matters somewhat) intervening risks civilian casualties, as well as casualties to one’s own forces, whereas a policy of non-intervention will allow, say, the violation of human rights to continue unchecked. In short, however one acts, one is left with dirty hands, and feelings of regret. Each possible response seems to violate some moral principle or principles, and so one must inevitably do wrong in order to do right.

Dirty hands are a regrettable part of our moral reality, and such situations cannot be wished away by claiming that those, such as Walzer, who maintain the reality of such moral dilemmas, suffer from a conceptual confusion. For instance, it might be argued that dirty hands is a conceptual confusion for the reason that, logically at least, one cannot do right and wrong at the same time. But saying that a moral conflict can lead to dirty hands is not the same as an

<sup>6</sup> de Wijze, “Dirty Hands,” p. 4.

<sup>7</sup> Michael Ignatieff, “If Torture Works...,” *Prospect*, April 2006, pp. 34-37.

<sup>8</sup> Steven de Wijze, “Tragic-Remorse – The Anguish of Dirty Hands,” *Ethical Theory and Moral Practice*, 7 (2004), pp. 453-471.

empirical claim that rests on facts. Whilst it is either true or false, and never both or neither, that there is a cup of coffee on the table in front of me, such considerations do not translate over to the moral realm in such a clear-cut way. De Wijze invokes the example of impossible desires to demonstrate the possibility of dirty hands. I may have a desire to eat a doughnut and a desire to lose weight, but this does not mean that I cannot have both these desires at the same time. If I do eat a doughnut, satisfying one desire but frustrating the other, I may feel guilt at having let myself down or allowing my behaviour to be swayed by a short-term desire. But nonetheless, moral claims are, de Wijze argues, more like desires in this relevant sense, and this clears the conceptual confusion over the possibility of the phenomenon of dirty hands.<sup>9</sup>

It should be pointed out that moral conflicts or dilemmas do not always involve getting dirty hands. To spell out and then justify this claim is beyond the scope of this paper, but suffice it to say that we can distinguish between ordinary cases of moral conflict and dirty hands scenarios.<sup>10</sup> What, then, is the difference? What constitutes the “dirty” feature of dirty hands scenarios? As de Wijze argues, following Stocker, ‘in all cases of dirty hands what is common is that actions involve the *justified* betrayal of persons, values or principles due to the immoral circumstances created by other persons...within which an agent finds herself.’<sup>11</sup> As such, even good people, moved by moral considerations, can commit moral violations. Thus, the real difference between moral dilemmas or conflicts and dirty hands scenarios is that the evil circumstances, within which one must commit another moral violation, are created by other human beings as part of an “evil” project.

We are beginning to see now that cases of humanitarian intervention are not always cases of dirty hands. It should be clear that a decision whether or not to intervene in the case of a natural disaster is not a dirty hands scenario, and not even a moral dilemma. What is important is that the situation in which one must intervene or not is one created by other human beings, and that one’s actions lead to a moral violation of some sort in the effort to realise the lesser of two evils. Whilst cases of humanitarian intervention are not necessarily characterised by man-made evil circumstances and the necessary violation of a moral principle or principles, it is still the case that instances of humanitarian intervention that do not have these “dirty” features are relatively uncontroversial, and do not involve an irresolvable moral dilemma. Therefore, such cases do not require the same amount of philosophical attention that dirty hands cases warrant.

How, then, does one go about deciding in such cases how one ought to act? These cases of humanitarian dirty hands involve all the characteristics of private dirty hands scenarios, but, in addition, the situation is very much com-

<sup>9</sup> de Wijze, “Dirty Hands,” p. 8.

<sup>10</sup> de Wijze, “Dirty Hands,” pp. 9-10.

<sup>11</sup> de Wijze, “Dirty Hands,” p. 11.

plicated by the existence of many international actors, including nation-states and international organisations such as the EU and the UN, that potentially will each have different values, or different lexical orderings of values. Therefore, an already-complicated situation, in which a moral violation must necessarily take place, is further complicated by the fact that different international actors will disagree on the preferred course of action. Moral conflict, then, is irresolvable on one level (the dirty hands scenario), and potentially irresolvable at yet another (international actors with different values). It is therefore important that institutions exist that can attempt to bring together interested or affected parties so as to resolve the moral conflict at the level of international actors, even though through such action the dirty hands moral dilemma cannot be satisfactorily resolved.

We noted towards the beginning of this paper that state legitimacy, to a large extent, is a function of the consent of the people. Now, it is also the case that the legitimacy of political decisions, taken within the nation-state, is a function of a deliberative process amongst roughly free and equal citizens. This is the most basic and most vital feature of models of deliberative democracy. The extent to which models of deliberative democracy can be carried over to the international realm is a matter of controversy, for it is normally held, by realists, that the international scene is one characterised by a Hobbesian “state of nature,” in which states act in their own self-interest, and are only occasionally constrained by international law or international disapprobation. Whilst moral disagreement persists at the individual level, so that decision-making cannot terminate in consensus, the problem is surely magnified at the international level, especially if international relations is an amoral realm of pure national self-interest. But if deliberation can accommodate persistent and fundamental moral disagreement within the nation-state, then it should be able to do so at the international level, in the face of the different moral codes of specific nation-states. In any case, the idea that international relations is a Hobbesian state of nature has descriptive force only, and no prescriptive force. To describe international relations as Hobbesian is not to say that this state of affairs is morally acceptable or tolerable – an “is” does not imply an “ought.” In any case, prescriptive realism, as we can call it, ignores the reality of international relations. For even when international actors act purely in their own self-interest, they rarely justify themselves by reference to this self-interest. As such, the embedded norms of international law and international justice constrain international actors, even when the latter are attempting to manipulate the system by shrouding their self-interest in terms of morality or justice. It is a mark of the power of international norms of morality and justice that even the worst dictator must justify themselves in terms of those norms.

Such observations point to the deeply embeddedness of morality in international law and international relations. Thus, it can be maintained, institutions that foster dialogue and deliberation amongst international actors can



help to make good the promise of norms relating to international justice. In any case, as we have already noted, deliberation is the condition that secures the legitimacy of decisions, whether at the national or international level, even where consensus cannot be secured on certain issues. Nonetheless, whilst consensus on substantive moral principles might not be possible even after a process of deliberation, decisions relating to humanitarian intervention, as difficult as they sometimes are, can be reached. Essentially, the decision not to intervene is itself a decision and an action, so either way, whichever course of action is chosen, a period of deliberation amongst interested and affected international actors will at least increase and improve the legitimacy of the final outcome, and at most result in a decision that commands provisional legitimacy, in the sense that it is supported by a majority of the participants. To this end, we turn now to a brief account of the decision-making ability of the EU, and ask whether even agreement over procedures would be possible amongst the various international actors that comprise it. I will support the idea that European politics can be characterised, at least amongst certain countries, by an overlapping consensus of norms and values, for instance, over the values of democracy, self-determination, and basic human rights. This should form the foundation of a deliberative decision-making process that attempts to flesh out more substantive questions, such as the actual form that humanitarian intervention will take. This is possible against a background consensus already established between reasonable persons.

It is unfortunate that dirty hands cases involve moral violations, because this will result in the violation of certain JWT criteria. But, as we have already said, wars and interventions cannot satisfy all of the above criteria. As such, decisions are accompanied by feelings of agent-regret or tragic-remorse, as they should, and this can only be viewed as the unhappy and unfortunate consequence of holding political office, as decision-makers are always aware that the responsibility of making difficult decisions is part and parcel of the role they have willingly taken on, and that it involves moral obligations that extend well beyond those to be reasonably expected in the private realm.

## International Politics and Overlapping Consensus

The American political theorist John Rawls initially employed the idea of an overlapping consensus to support a liberal political conception of justice that is freestanding in relation to the various reasonable worldviews of citizens of a liberal democracy. Even though reasonable disagreement persists in democratic states that allow for the use of reason under democratic conditions, reasonable persons can be expected, Rawls tells us, to agree on certain matters of political importance, and such reasonable persons do so out of a commitment to their own comprehensive moral or religious doctrine.<sup>12</sup> Thus, for

<sup>12</sup> See: John Rawls, *Political Liberalism*, second edition (New York: Columbia University Press, 1996).

example, reasonable persons will happen to agree that all citizens are roughly free and equal, at least in a political sense. Such convictions are supported as part of a comprehensive doctrine and for different reasons, which is why the consensus is said to overlap.

Similarly, Habermas's conception of constitutional patriotism shares some features with Rawls's conception of an overlapping consensus. Citizens of a democratic culture will not agree on the substantive content of ethical norms and values, but yet may still agree on the procedures for the legitimate enactment of laws and the legitimate use of political power.<sup>13</sup> Thus a procedural consensus can be said to exist at a more abstract level than reasonable disagreements over ethical values and ways of life. It might also be added that citizens not holding to all or most aspects of such an overlapping consensus would be acting unreasonably, in the sense that a commitment to certain basic norms and values, such as the right to freedom of speech and political participation, is a requirement of living in a liberal democratic state that is considered an association of individuals and groups cooperating non-violently and characterised by reasonable disagreement.

Is it possible that such an overlapping consensus, or commitment to a constitution (i.e. constitutional patriotism) might be possible at the European or international level? Certainly, many EU member states are equally committed to basic human rights and freedoms, and would welcome their introduction, or more effective realisation, in other states that currently suffer from the lack of democratic institutions or substantively realised (rather than merely formally guaranteed) human rights. The question of whether Europe could have a constitution I leave to one side,<sup>14</sup> although a written constitution signed by all member states would certainly lend humanitarian interventions more legitimacy, were they to be included and justified by a constitution enjoying provisional legitimacy amongst member states. In any case, the rapid expansion of the EU undermines the possibility of a constitution enjoying the consensual support of its members, although it could be argued that one of the basic conditions of membership of the EU should be genuine support for the values of democracy, freedom, and human rights, and so therefore there seems to be no reason that a written constitution could not be implemented. Thus, the withdrawal or denial of support for a constitution requiring just those basic commitments would be a strong sign that the state in question takes an unreasonable or sceptical view of the human rights of its own and other citizens, and this seems to me to be reason enough to reject or seriously question their potential or ongoing membership of the EU.

<sup>13</sup> Jürgen Habermas, "Struggles for Recognition in the Democratic Constitutional State," in his *The Inclusion of the Other: Studies in Political Theory*, edited by Ciaran Cronin and Pablo de Greiff (Cambridge: Polity Press, 2002), pp. 203-236. Here, p. 225.

<sup>14</sup> See: Jürgen Habermas, "Does Europe Need a Constitution?," in his *Inclusion of the Other*, pp. 155-161.

One of the main problems regarding the EU and its status as a decision-making set of institutions that bind the member states through European law is its supposed democratic deficit.<sup>15</sup> As Habermas correctly points out, EU institutions lack direct democratic legitimacy because their legitimacy is derived from that of the member states, rather than from the democratic will of the united citizens of Europe.<sup>16</sup> As such, decisions to intervene similarly lack legitimacy, at least as they sometimes appear to individual member states and citizens. Thus we leave open the idea of a substantive European constitution covering substantive and wide-reaching matters of policy. But a more limited constitution, covering only the basic norms and values that unite the disparate nations and citizens of Europe could be possible, on the basis of an overlapping consensus on these basic norms and values. The areas of agreement thus form the overlapping consensus, and could serve as the basis of a limited constitution that would also provide the guidelines for humanitarian intervention, say, by specifying the conditions under which humanitarian intervention is morally justified, as when basic rights are systematically and violently violated. It almost goes without saying that just war theory would here offer certain guidelines; but the point is that such issues are open to reasonable interpretation, and, as such, should be the subject of a deliberative process that aims to produce epistemically superior outcomes to ones reached unilaterally or bilaterally. As we shall see later, human rights and minority interest groups located in civil society are vital in providing competing – but always *reasonable* – interpretations of the same moral and political phenomena. It is then the task of decision-making bodies to take account of these interpretations (both of the situation itself and its possible happy resolution) and provide a decision and a framework for action, should action be taken.

This is obviously an empirical question, as to whether such an overlapping consensus exists, and what the exact content of it would be. But the burden of proof, it seems, rests with opponents of a European constitution, and not the other way around. Opponents would do well to ask themselves whether any member states would reject this minimal content (a commitment to democracy and basic human rights) of a potential European constitution. If the answer to that question is affirmative, then opponents would do equally well to ask whether member states that do reject these basic norms and values could ever satisfactorily function as members of the EU. The EU seems to so fundamentally rest on these commitments that any state choosing to reject them would, almost by definition, be unreasonable towards both its own citizens and those of other states, whether members or not. Thus these basic commitments could form the unproblematic core of a limited written European constitution.

This would offset the problem identified by Grimm, namely, that the people of Europe are not homogenous enough to accept or give continuing sup-

<sup>15</sup> Habermas, “Does Europe Need a Constitution?,” p. 155.

<sup>16</sup> Habermas, “Does Europe Need a Constitution?,” p. 156.

port to a European constitution. For even though deep and substantive differences in ethical outlook persist and should be expected to persist, reasonable persons can – or should – all agree that human beings are entitled to basic mutual respect, which itself entails the granting of basic rights and freedoms, guaranteed by a democratic state. To this end, a political culture characterised by free-flowing communicative action must be the basic requirement of EU (and, for that matter, UN) decision-making, so that European institutions are receptive to the democratic opinion- and will-formation of citizens united by their commitment to democracy and basic rights. As Habermas acknowledges, the functional requirements of this deliberative conception can hardly be realised even within the boundaries of an individual nation state, and therefore the chances of enacting a European-wide deliberative process are even less realistic.<sup>17</sup> But I am here less interested in the empirical possibility of European-wide deliberation than with the normative justification for instituting such a process by way of a limited written constitution. In any case, as Habermas rightly argues, ‘Given the political will, there is no a priori reason why it [Europe] cannot create the politically necessary communicative context once the constitutional basis for such a context has been laid down.’<sup>18</sup>

Even so, if Europe is united not by substantive ethical agreement but by a more abstract, and partially procedural, consensus on democracy and human rights, then this could serve as the basis for a deliberative process geared towards the justification (or not, as the case may be) of humanitarian intervention. Nor should Europe or European institutions be overly fearful of using its commitment to democracy and human rights to justify intervention on humanitarian grounds. Although a full justification of the freedom and equality of human beings is beyond the scope of this paper, it should suffice to say that these values are so deeply embedded in the democratic political culture of England, for example, that they do not stand in need of a philosophical justification that refers to first principles or axiomatic foundations. It is enough, as Walzer and, to some extent, Rawls, point out, that the shared meanings of many European citizens actually support the principle of intervention on humanitarian grounds.<sup>19</sup> Reasonable citizens, I would maintain, share a certain thin or minimalist morality that contains a commitment to norms pertaining to freedom and equality, and, it follows, to democracy too, for the democratic state is the only one that can guarantee formal rights to freedom and equality at the same time, even if the empirical reality of established democratic states has been a disappointing experience up to now.

<sup>17</sup> Habermas, “Does Europe Need a Constitution?,” p. 160.

<sup>18</sup> Habermas, “Does Europe Need a Constitution?,” p. 161.

<sup>19</sup> See, for example, Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Democracy* (New York: Basic Books, 1983), and Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame: University of Notre Dame Press, 1994).

If reasonable persons share this minimal morality, then they also fill out this thin conception themselves into a thick morality, so that each culture or nation (although it is increasingly rare for pluralistic nations to share a thick morality) understands and interprets the issues or norms at hand differently. It is largely for this reason, and in the interests of generating legitimacy, that decisions over the shape and content of humanitarian interventions should have a deliberative aspect. First of all, we may agree that intervention should occur under certain circumstances, but it is by no means clear what these circumstances should be. Is the state in question forfeiting its legitimacy and sovereignty by violating human rights in a systematic way? Will intervention solve the problem or make it worse? Etc. Secondly, even if we were to agree that certain criteria have been met and that humanitarian intervention is thus justified, it is again not obvious what exact form the intervention should take. Should ground troops be involved, or are air strikes more likely to result in certain objectives being achieved? What form should these objectives take? Does the intervening force intend to stay in the country to oversee its recovery and development? If yes, what substantive content should these plans have? These are questions that so not admit of objectively correct answers, and a period of deliberation, conducted within a reasonable time frame and terminating in a majority decision, would increase the legitimacy of the final outcome.

Such a process should not involve citizen participation at the level of national or international decision-making bodies – even deliberative democrats realise that this is an unrealistic expectation. Instead, decision-making bodies should be responsive to a liberal political culture that allows for free flowing communication at the level of civil society, amongst, for example, minority rights groups, human rights groups, women's groups, and so on. Decision-making bodies should thus be responsive, accountable, and responsible to a civil society engaged in processes of opinion-formation. Evidently, the media here play a vital role in the transformation of communicative power, generated by citizens in civil society, into messages that are fed up through sluices to arenas of official will-formation and administrative power.<sup>20</sup>

It might, of course, be objected that issues of humanitarian intervention are both complex and subject to strict time constraints, as when the need to act quickly and decisively overrides the need for deliberation. As for the first objection, the complex issues surrounding humanitarian intervention are not all of a specialised manner, requiring the expertise of officials and bureaucrats. Even the technicalities of complex issues overlap with moral questions that communicatively competent citizens are capable of discussing and deciding. As for

<sup>20</sup> See: Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge: Polity Press, 1996), and Kenneth Baynes, "Democracy and the *Rechtsstaat*: Habermas's *Faktizat und Geltung*," in *The Cambridge Companion to Habermas*, edited by Stephen K. White (Cambridge: CUP, 1995), pp. 201-232. Here, p. 213.

the second objection, time constraints will surely apply, but this is not a reason to limit deliberation per se – it is only a reason to limit deliberation to the point at which a decision needs to be made. Furthermore, because many instances of humanitarian intervention are also cases of dirty hands, the issue of whether to intervene or remain neutral is one that requires careful consideration, and there is no a priori reason why interested and affected citizens cannot be included in such discussions, at least to the extent that their interpretations and considered reflections are allowed to feed up into decision-making institutions.

Now, this deliberative process confuses the subject of dirty hands in at least one way. For, on the one hand, if decisions are ultimately taken by one politician (or a small group of politicians), then it is easy to place the blame when moral violations take place, even when they are unavoidable and must be taken to realise the lesser of two evils. But when decisions are made in a more deliberative way, the blame, and attendant feelings of tragic-remorse, are spread so far and wide that responsibility cannot be said to lie with one individual or small group. However, on the other hand, the expectation of feelings of tragic-remorse may move individual political actors to shy away from tough decisions (even though obviously, as we said earlier, inaction is a form of action). Therefore, if the guilt attached to the expected or realised costs of humanitarian intervention is spread over the citizenry of various nation-states, or at least amongst those with the moral fortitude to take a stand against tyrannical regimes, then states and international decision-making bodies may be more inclined to take a moral position, rather than a self-interested position cloaked in talk of justice, and act decisively to prevent the gross and systematic violation of human rights. For example, why do the leaders of countries such as Great Britain justify a morally dubious war (or intervention) in Iraq, yet shy away from acting to prevent humanitarian disasters in Rwanda, Zimbabwe, and Darfur? Despite pressure from grass-roots human rights and aid organisations, instances of human rights violations go unpunished in some countries but not in others. What is the rationalisation for such a selective policy? Perhaps, and one merely speculates here, many deaths could have been avoided and human rights (re)asserted in certain countries if national and international institutions had been more responsive and accountable to groups in civil society that warned of impending disaster. A more deliberative approach to humanitarian intervention would not solve such problems immediately and decisively, but it would be a step in the right direction towards a European or international order no longer ashamed to *genuinely* pursue a policy of protecting and extending the human rights of citizens worldwide.

## Conclusion

In this paper we have argued that the most important instances of humanitarian intervention involve actors in dirty hands scenarios. As such, they very often involve the violation of certain just war criteria. But this need not detract

from the legitimacy or justness of humanitarian intervention. Dirty hands scenarios are characterised by moral violations necessitated by terrible situations created by human beings, rather than natural disasters, for example, and are a part of our moral reality. Such decisions can be decided on moral grounds, even though they will involve a moral violation. As such, international decision-making bodies take the lead in guaranteeing the human rights of citizens in foreign countries, based on the shared and overlapping commitment to freedom, equality, and democracy. It has been argued here that since we can expect disagreement on substantive matters of policy, that humanitarian intervention should be preceded by dialogue amongst interested and affected parties. In this way, decision-making institutions become more accountable and responsive, even though time pressures sometimes override the dialogical aspect set in European civil society.