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HUMANITARIAN INTERVENTION: THE NEW MISSING LINK IN THE FIGHT TO PREVENT CRIMES AGAINST HUMANITY AND GENOCIDE?

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INTRODUCTION

Over the course of the 1990s, the international community saw significant development and utilization of legal frameworks for mechanisms designed to prevent crimes against humanity and genocide. These mechanisms were used in over a dozen conflicts and allowed the international community to intervene to halt atrocities, punish those responsible for atrocities, provide redress for victims, and work together to prevent such crimes in the future. Utilized together, these mechanisms have the potential to be powerful tools against the perpetration of crimes against humanity and genocide.

Humanitarian intervention is a particularly crucial piece in this emerging mosaic of measures designed to prevent crimes against humanity and genocide. Since the early 1990s, there has been a significant need for humanitarian intervention, a need that will likely continue well into the future. For a time, there was also a significant reliance on humanitarian intervention to address many of the worst intrastate and interstate conflicts.

Unfortunately, despite the importance of humanitarian intervention, the international community is less likely to undertake meaningful and effective humanitarian interventions in the coming years. Future use of humanitarian intervention is limited by both the failure to develop an adequate legal basis for the doctrine of humanitarian intervention, and by a number of geo-political factors that mitigate against any significant humanitarian interventions in the near future. As such, the international community has lost one of its key tools to prevent crimes against humanity and genocide, thereby weakening its overall ability to address such atrocities.

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DEVELOPMENT OF HUMANITARIAN INTERVENTION SINCE 1990

Humanitarian intervention can take many forms, including using military forces to help deliver humanitarian aid, protect humanitarian aid operations, protect and defend the victims of violence, and, in some instances, defeat the perpetrators of violence.¹

Furthermore, effective humanitarian intervention consists of something more than simply deploying peacekeepers. Too often peacekeeping missions are not provided ample personnel or material resources or are restricted by a narrow mandate. The missions in Rwanda and Darfur are examples of the challenges such limitations create for interventions. Similarly, the deployment of peacekeepers after atrocities have occurred does not constitute genuine humanitarian intervention. The purpose of humanitarian intervention is to interpose international military forces into the conflict in order to either end the conflict or to provide for human security. To be effective, missions must be provided with the resources and mandate to meet that purpose.

Since 1990, there have been a large number of interventions, as well as a significant and increasing need for humanitarian intervention. During that period, there have been at least seventeen humanitarian interventions, including: northern and southern Iraq, East Timor, Bosnia, Somalia, and Kosovo.² Many of those interventions were effective in either halting or preventing further crimes against humanity and genocide, but many others were not.

In addition to those conflicts where the international community deployed forces in an effort to stop the conflict or lessen its consequences, there were many others that desperately required the intervention of the international community but did not receive it, including: the Democratic Republic of Congo, Georgia, Moldova, Chechnya, and Uganda.

In the cases where the international community conducted humanitarian interventions, whether effective or ineffective, international approval for the interventions was not always easily won. In fact, the international community is rarely united on such matters. Even where the international community had clear evidence of atrocities, such as in Bosnia and Kosovo, members of the international community have grappled with how to respond, often stalling for months or years before conducting effective interventions.

¹ Taylor B. Seybolt, HUMANITARIAN MILITARY INTERVENTION: THE CONDITIONS FOR SUCCESS AND FAILURE 39 (2007).

² *Id.* at 28.

THE NEED FOR HUMANITARIAN INTERVENTION WILL CONTINUE IN THE
NEAR FUTURE.

Despite the large number of humanitarian interventions since 1990, the need for future humanitarian intervention has not waned, and will not wane in the foreseeable future. A number of current conflicts around the globe warrant international intervention based on their brutality and violations of international law.

In the Sudanese region of Darfur, for instance, government and government-backed forces have carried out a targeted, organized, and well-documented campaign of genocide against Darfurian civilians. The campaign has lasted for over four years, and conservative estimates number civilian deaths at over 200,000, with an additional two million refugees and internally displaced persons.³ Throughout the campaign the international community has watched from afar, chastising the Sudanese government, but failing to take decisive action to stop the attacks on civilians. Even the United States government, which took a stand early on by labeling the campaign genocide, has failed to match its rhetoric with action. The limited deployment of African Union peacekeepers, which are unable to even secure their own bases against attacks, and the slow deployment of a limited number of United Nations (U.N.) peacekeepers does not constitute the basis for a genuine humanitarian intervention. As currently configured, these limited forces have been unable to stop the ongoing genocide, and are unlikely to be able to do so in the future.

Similarly, in recent months there have been widespread calls for intervention in Sri Lanka,⁴ as the longstanding civil war there has resumed following a short-lived ceasefire. For over twenty years, the LTTE and the Government of Sri Lanka have fought a brutal civil war in which an estimated 67,000 people have been killed and over half a million displaced. Despite calls for humanitarian intervention based on the Responsibility to Protect, it is unlikely that the international community will do more than simply provide good offices for ongoing negotiations.

In Burma, military leaders have repeatedly used brutal force to defy calls for democratic reform while their harsh rule has pushed hundreds of thousands of refugees across the state's border (the exact number is unknown).⁵ In 1988, the military killed over 3,000 pro-democracy demonstra-

³ See *Quick Guide: Darfur*, BBC NEWS, Sept. 6, 2006, <http://news.bbc.co.uk/2/hi/africa/5316306.stm>.

⁴ See, e.g., Gareth Evans, President, Int'l Crisis Group, Eight Neelam Tiruchelvam Memorial Lecture at the Int'l Centre for Ethnic Studies (July 29, 2007), <http://www.crisisgroup.org/home/index.cfm?id=4967>.

⁵ Chad Bouchard, *Thailand Border Bracing for New Burmese Refugees*, VOICE OF AMERICA, Oct. 3, 2007, <http://www.voanews.com/english/2007-10-03-voa10.cfm>.

tors. In the fall of 2007, the military launched a brutal crackdown against Buddhist monks and civilians seeking democratic reform. To quash the protests, the military raided monasteries, beating, torturing, and arresting the monks en masse.⁶ The military government has also carried out a long-term military campaign against numerous ethnic minorities in Burma. Recent studies utilizing satellite technology have scientifically confirmed ethnic cleansing of the Karen minority.⁷

Finally, many analysts predict, and a number recommend, that as the civil war in Iraq intensifies, the U.S. military may withdraw to four or five major bases and wait out the conflict. If this were to occur, there will be a need and call for humanitarian intervention to stop the civil war. It is unclear whether the United States would then redeploy its forces to stop the civil war.

In each of these cases, the violence, level of brutality, and number of violations of international law is roughly equal to or greater than those in prior instances that have received humanitarian intervention; but the prospect of intervention is limited. This is because the international community has, to date, failed to find an adequate legal framework to justify intervention, and a range of geopolitical factors together limit the ability of the international community to agree to conduct future interventions.

HUMANITARIAN INTERVENTION'S PLACE IN THE MOSAIC DEVELOPED TO PREVENT CRIMES AGAINST HUMANITY AND GENOCIDE

Since 1990, the international community has come to rely more heavily on the combined strength of the various mechanisms designed to prevent crimes against humanity and genocide. In addition to humanitarian intervention, other mechanisms include: the creation of international criminal tribunals, the progressive development of international humanitarian law, the expanded jurisdiction of domestic courts to cover violations of international humanitarian law, the development of the political will not to tolerate such crimes, and the evolution of U.N. institutions and mechanisms specifically designed to target the prevention of these crimes. In Bosnia and Kosovo, and many other conflicts around the globe, the international community combined these mechanisms to bring a lasting end to the conflict.

Humanitarian intervention is a particularly important piece in this mosaic of mechanisms. Where most other mechanisms seek to prevent and punish, humanitarian intervention is the only means the international community has to utilize military forces during the commission of crimes

⁶ Seth Mydans, *More Deaths in Myanmar, and Defiance*, N.Y. TIMES, Sept. 28, 2007, at A1.

⁷ Donald G. McNeil, *Myanmar's Descent, Seen From 150 Miles Up*, N.Y. TIMES, Sept. 29, 2007, at A6.

against humanity and genocide to deliver aid, protect civilians, or, in rare instances, defeat the perpetrators of these crimes. Thus, used effectively, humanitarian intervention can produce results. For example, analysis of the effectiveness of international threats in Kosovo shows that use of force, through humanitarian intervention, was the only way to force Serbia to halt its military campaign in Kosovo.⁸

Examples of effective uses of force in Bosnia and Kosovo include: NATO air strikes in 1995 to prevent further Serbian aggression against Bosnia; the deployment of an international force (IFOR) on the territory of Bosnia following the Dayton negotiations; the spring 1999 air campaign conducted against Serbian forces in Kosovo and Serbia proper in order to deter Serbian aggression in Kosovo; and the deployment of the Kosovo Force (KFOR) to provide security during the implementation of U.N. Security Council Resolution 1244, providing for the interim international management of Kosovo.⁹

In contrast, examples of ineffective humanitarian intervention in Bosnia and Kosovo include the 1993–1995 limitation on NATO to strike only military assets that had fired on civilian targets, rather than any asset in the unit engaged in the attack, and United Nations Protection Force (UNPROFOR) commanders' failure to provide air support when it was requested by UNPROFOR forces defending the safe areas around Srebrenica and Zepa, resulting in a civilian massacre.¹⁰

When humanitarian intervention is effectively coordinated with other mechanisms, the combined pressure of the mechanisms has the potential to operate as a powerful preventative force to stop and avert crimes against humanity and genocide. Used ineffectively, however, whether through lack of coordination, lack of understanding, competing political goals, or similar problems, such efforts can actually exacerbate a conflict, increasing the very problems these mechanisms are meant to address.¹¹

A key example of the dangers of uncoordinated peacekeeping is the humanitarian intervention in Bosnia. During the first four years of the war in Bosnia, the international community failed to adequately support the peacekeepers mandated with protecting civilians. The peacekeepers were essentially prohibited from using force except in self-defense.¹² Many commentators argue that the ineffective use of peacekeepers led to the massacre at Srebrenica in August 1995.¹³

⁸ PAUL R. WILLIAMS & MICHAEL P. SCHARF, *PEACE WITH JUSTICE*, 28 (2002).

⁹ *Id.* at 27.

¹⁰ *Id.* at 27–28.

¹¹ *Id.* at 33–35.

¹² *Id.* at 153.

¹³ *Id.*

In a key turn of events, on August 30, 1995, NATO launched limited air strikes against Serbian forces in Bosnia, shedding former limitations on military intervention. The action immediately produced results—Serbia agreed to key conditions, which they had formerly resisted. In fact, Slobodan Milosevic credited the air strikes with ending the war. In a conversation with General Wesley Clark shortly after the initialing of the Dayton Peace Accords in November 1995, Milosevic confided that “NATO won the war. . . . [I]t was your NATO, your bombs and missiles, your high technology that defeated us . . . we Serbs never had a chance against you.”¹⁴

Similarly, efforts at peacemaking failed in Kosovo until the international community acted on its threat to use force. Although the United States and its NATO allies threatened use of force throughout the Rambouillet/Paris negotiations, it was not until NATO planes began air strikes against key Serbian targets that the Serb offensive was halted.¹⁵ After seventy days of air strikes, the U.N. Security Council adopted Resolution 1244, which established interim international governing structures and terms for peace in Kosovo.¹⁶

As the likelihood of any future humanitarian interventions is bleak, the international community may see its overall ability to prevent crimes against humanity and genocide decrease.

THE STRUGGLE TO DEFINE THE LEGAL BASIS FOR HUMANITARIAN INTERVENTION

Despite the fact that the international community has engaged in over seventeen humanitarian interventions within the past twenty years, the legal basis for humanitarian intervention is not well settled. Numerous scholars, including Sean Murphy, who tried to establish an overall framework for the legality of humanitarian intervention, and Michael Scharf, who sought to establish the legal basis for the case-specific instance of humanitarian intervention in Bosnia and Kosovo, have developed potential legal frameworks. Regardless, the international community has been so uncomfortable with the notion of humanitarian intervention that it has not been able to adopt either a coherent framework or a case-specific basis for interventions.¹⁷

¹⁴ *Id.* at 1572.

¹⁵ *Id.* at 204–208.

¹⁶ *Id.* at 208.

¹⁷ See SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN THE EVOLVING WORLD ORDER (1996); Paul Williams & Michael Scharf, *NATO Intervention on Trial: The Legal Case that was Never Made*, 1 HUM. RTS. REV. 103 (2000) [hereinafter NATO Intervention].

In Bosnia, the legal discussions regarding humanitarian intervention focused on interpreting the scope of intervention authorized by the U.N. Security Council. In Kosovo, the discussions shifted away from legal arguments and focused on the moral authority to intervene. In the aftermath of the two genocidal campaigns in the Balkans, the international community reflected on the international legal framework for humanitarian intervention and developed the concept of the Responsibility to Protect. Nevertheless, these legal arguments have not provided states with a comfortable framework within which to act.

Bosnia

During the genocide in Bosnia, despite the clear and repeated authorization by U.N. Security Council Resolutions to use force to stop the genocide and crimes against humanity, the humanitarian intervention faltered. U.N. member states and the U.N. Secretary-General actively sought to interpret the mandate as narrowly as possible, and in some cases sought to erode the moral imperative to undertake humanitarian intervention.¹⁸

For instance, in a supplement to his 1995 Annual Report, *An Agenda for Peace*, then U.N. Secretary-General Boutros Boutros-Ghali lauded the “new kind of United Nations operation” developed in Bosnia and Somalia, in which, “even though the use of force is authorized under Chapter VII of the Charter, the United Nations remains neutral and impartial between the warring parties, without a mandate to stop the aggressor (if one can be identified) or impose a cessation of hostilities.” The report explains that the Security Council resolutions provide the “United Nations a humanitarian mandate under which the use of force is authorized, but for limited and local purposes and not to bring the war to an end.”¹⁹

Similarly, the United States and Europe, bogged down by a fundamental misunderstanding of the conflict, openly debated the strategic importance of Bosnia. Within the United States, officials sought to downplay the violence in Bosnia, disregarding classified intelligence detailing rape camps and massacres, to avoid the moral imperative to undertake a humanitarian intervention. The Bush Administration followed a policy that the United States had no strategic interest in Bosnia, and that European states should take the lead with regard to the conflict.²⁰ Within France, Great Britain, and

¹⁸ Paul Williams & Michael Scharf, *The Letter of the Law, in WITH NO PEACE TO KEEP: UNITED NATIONS PEACEKEEPING AND THE WAR IN THE FORMER YUGOSLAVIA* 34, 35–39 (Ben Cohen & George Stamkoski eds., 1995); WILLIAMS & SCHARF, *supra* note 10, at 82–83.

¹⁹ The Secretary-General, *Report of the Secretary-General on the Work of the Organization: Supplement to an Agenda for Peace: Position Paper of the Secretary General on the Occasion of the Fiftieth Anniversary of the United Nations*, para. 19, delivered to the General Assembly, U.N. Doc. S/1995/1, A/50/60 (Jan. 3, 1995).

²⁰ WILLIAMS & SCHARF, *supra* note 10, at 64.

other European states, leaders focused on alternative means to end the conflict, such as partition and appeasement, rather than the use of force.²¹ Britain, in particular, was committed to achieving a negotiated settlement that would not involve the use of force by the international community, and therefore was willing to agree to partition as a means of appeasing Serbia.²² Similarly, the French, who saw the Serbs as their traditional allies, tried to limit the role of international peacekeepers to one of minimizing human suffering while seeking a negotiated settlement.²³ As a result, when the international community finally decided to intervene after the massacre in Srebrenica, there was no clearly articulated legal basis for doing so.

After the end of the Bosnian conflict, Professor Sean Murphy attempted to make the case for a customary international law of humanitarian intervention. Surveying state practices since the early 1800s, with a particular focus on interventions in the post Cold War era, Murphy argued for the establishment of customary international law that allows for humanitarian intervention in cases of widespread deprivations of human rights.²⁴ Although influential, this legal framework has not been widely adopted by states.

Kosovo

As the Serbian regime turned from Bosnia to Kosovo and began to commit crimes against humanity, a handful of legal scholars put forth a series of legal arguments to justify humanitarian intervention. These arguments relied upon U.N. Security Council Resolutions relating to the former Yugoslavia and emerging customary international law.²⁵ Despite this legal basis, the international community refused to articulate a legal argument for the humanitarian intervention in Kosovo. Reportedly, the Office of the Legal Advisor at the State Department refused to even provide a legal justification to the Secretary's Office. France and Germany hesitated at the use of force without Security Council authorization, and Russia assured Milosevic that no such authority would be granted.²⁶ In the end, the European Union, and other states, opted for the rather quixotic argument of "illegal but legitimate."²⁷

²¹ *Id.* at 63–87.

²² *Id.* at 72.

²³ *Id.* at 74–77.

²⁴ Murphy, *supra* note 19, at 34.

²⁵ NATO Intervention, *supra* note 19, at 104–05.

²⁶ WILLIAMS & SCHARF, *supra* note 10, at 184.

²⁷ INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 4 (2000), available at <http://www.reliefweb.int/library/documents/thekosovoreport.htm>.

In addition to failing to establish a legal basis for intervention in Kosovo, the NATO-led intervention in Kosovo also served to further confuse the international debate regarding a legal framework for humanitarian intervention. Not only had NATO carried out air strikes without specific authority from the Security Council, but it did not even argue that it had such authority. In the wake of the intervention, legal scholars articulated a range of new possible legal frameworks for intervention.

In 2002, Jane Stromseth analyzed the four frameworks that emerged post-Kosovo. The first framework argued that intervention was only legal when authorized by the Security Council.²⁸ The second argued for “excusable breach,” in which “deviation from the strict letter of the U.N. Charter will be tolerated in exceptional circumstances.”²⁹ This does not argue a specific framework, but rather an exception that may be judged on a case-by-case basis. The third framework argued for the evolution of customary international law to allow for humanitarian intervention in specific circumstances.³⁰ This approach maintains the central role of the U.N. Security Council in determining acceptable uses of force while also recognizing the necessity of force in particular situations. The fourth framework argued for a right of intervention similar to a right to self-defense under international law.³¹ In the end, the third framework became the most prominent in the form of the Responsibility to Protect.

The Responsibility to Protect

In the face of the tension between the emerging norm of human security and sovereignty, the debate on a legal basis for intervention has now shifted from humanitarian intervention to the Responsibility to Protect. This shift transformed the debate from the question of the right to intervene to one about the responsibility of states to protect innocent lives and the duties inherent in sovereignty.

In 2001, the Canadian sponsored International Commission on Intervention and State Sovereignty published a report entitled *The Responsibility to Protect*, which emphasized a duty inherent in state sovereignty to safeguard the lives of civilians. The Commission argued that if this duty was not upheld, other governments, with the authorization of the United Nations, had the right to act, even to the extent of using military force as a

²⁸ Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS 232, 241–42 (J.L. Holzgrefe & Robert O’Keohane eds., 2003).

²⁹ *Id.* at 243.

³⁰ *Id.* at 244.

³¹ *Id.* at 245.

last resort.³² This report drew upon concepts articulated by others such as Frances Deng, a Commission member.³³

The Commission's report was soon followed in the report of the U.N. Secretary-General's High Level Panel on Threats, Challenges and Change, which endorsed

the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.³⁴

The concept was further endorsed by the United Nations by its incorporation in Koffi Annan's Report to the U.N. General Assembly *In Larger Freedom*, and in the September 2005 World Summit by the U.N. General Assembly, thus gaining broad international acceptance.³⁵

Despite broad acceptance of the Responsibility to Protect, the international community has failed to find a legal basis in which to seat the concept. The Responsibility to Protect argument essentially adopted the moral approach of just war theory, but not the legal framework. Interestingly, as the historical advocates of the just war approach placed "right authority" with the Pope, those who advocate for a "responsibility to protect" place that authority with the United Nations.

³² INT'L COMM'N ON INTERVENTION AND ST. SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 13 (2001), available at <http://www.iciss.ca/report2-en.asp>.

³³ See, e.g., FRANCES DENG ET AL., SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA (1996).

³⁴ Chair of the High-Level Panel on Threats, Challenges & Change, *Transmittal Letter 2004 from the Chair of the High-Level Panel on Threats, Challenges and Change*, para. 203, addressed to the Secretary-General, UN Doc. A/59/565 (Dec. 1, 2004).

³⁵ The Secretary General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, para. 4, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005). "In our efforts to strengthen the contributions of States, civil society, the private sector and international institutions to advancing a vision of larger freedom, we must ensure that all involved assume their responsibilities to turn good words into good deeds. We therefore need new mechanisms to ensure accountability—the accountability of States to their citizens, of States to each other, of international institutions to their members and of the present generation to future generations. Where there is accountability we will progress; where there is none we will underperform. The business of the summit to be held in September 2005 must be to ensure that, from now on, promises made are promises kept." *Id.* at para. 22.

NUMEROUS GEO-POLITICAL FACTORS MITIGATE AGAINST ANY
SIGNIFICANT HUMANITARIAN INTERVENTION IN THE FORESEEABLE
FUTURE

In addition to the international community's failure to adopt a legal framework for intervention, a range of other factors mitigate against the chance there will be any significant humanitarian intervention in the foreseeable future. These factors, such as the increasing tension between military forces and humanitarian agencies in conflict zones,³⁶ the fact that an effective humanitarian intervention requires military resources that few states possess,³⁷ and the reality that states undertaking genuine humanitarian intervention can only do so if they have the political will to protect strangers

³⁶ There is an inherent tension between the means and objectives of humanitarian agencies and the means and objectives of the military, which makes many "humanitarians" uneasy with supporting military intervention to provide for human security. Catriona Gourlay, *Partners Apart: Managing Civil-Military Co-operation in Humanitarian Interventions*, 3 DISARMAMENT FORUM 35, <http://www.unidir.org/pdf/articles/pdf-art131.pdf>. Humanitarian aid agencies and their staff continue to define their role as non-political and impartial, seeking to minimize violence and treat all sides equally. *Id.* Military forces, in contrast, take sides and seek to kill the enemy. *Id.* This tension is readily evident in the operation of the mix civilian/military Provisional Reconstruction Teams in both Afghanistan and Iraq, and has hampered their ability to accomplish their objectives. Greg Grant, *Tension Builds in Iraq*, GOVERNMENT EXECUTIVE, Dec. 1, 2006, <http://www.govexec.com/features/1206-01/1206-01na1.htm>.

³⁷ The interventions in both Bosnia and Kosovo consisted primarily of U.S. forces—by one count over 90% of the sorties made over Kosovo were by American warplanes. STEVE BOWMAN, KOSOVO AND MACEDONIA: U.S. AND ALLIED MILITARY OPERATIONS, CONGRESSIONAL RESEARCH SERVICE 4 (2003). With American and British forces pre-occupied in Iraq and Afghanistan for the foreseeable future, the military resources for an effective humanitarian intervention are simply not available. It may still be possible for small-scale humanitarian interventions, such as the case of East Timor where the Australians formed the bulk of the forces. Central Intelligence Agency, *The World Factbook, Timor-Leste*, <https://www.cia.gov/library/publications/the-world-factbook/geos/tt.html> (last visited Jan. 28, 2008).

Coupled with the lack of capacity is the fact that many conflicts that require humanitarian intervention are simply too remote from states that possess the military capacity to intervene. Richard Caplan, *Humanitarian Intervention: Which Way Forward?* 14 ETHICS & INT'L AFFAIRS 24 (2000). The case of the Sudanese genocide in Darfur is often cited as a conflict-too-far. Despite the fact the United States has declared the conflict in Darfur to be genocide and the international community has condemned the conflict, no state or alliance seems to possess the resources to effectively operate in that remote region. See *US Convinced of Darfur 'genocide'*, BBC NEWS, Feb. 1, 2005, <http://news.bbc.co.uk/2/hi/africa/4227835.stm>. As noted above, the A.U. troops that have been deployed seem barely able to defend their own bases, let alone protect the civilian population or defeat the forces committing genocide. *Darfur Rebels Attacks Base, Kill 10 Peacekeepers*, CNN.COM, Sept. 30, 2007, <http://www.cnn.com/2007/WORLD/africa/09/30/darfur.peacekeepers/index.html>.

at the cost of their soldiers' lives.³⁸ Such factors limit the capacity of actors to carry out interventions and introduce questions regarding the necessity or effectiveness of interventions.

Many humanitarian interventions have been ineffective in saving lives

First, and probably most importantly, it is not clear that humanitarian intervention has been particularly effective in protecting human security. Recently, Taylor Seybolt analyzed seventeen humanitarian interventions and found that just over half of those interventions were actually effective in saving lives. Dr. Seybolt defines effectiveness as saving more lives than would have been the case if there were not a humanitarian intervention. Dr. Seybolt further finds that humanitarian interventions led by the United Nations have generally failed or have achieved only mixed results, while those led by coalitions or undertaken unilaterally have had much greater success rates. This leads Dr. Seybolt to the conclusion that the United Nations should not lead humanitarian interventions.³⁹ The significance of this argument cannot be underestimated, as the United Nations is considered by the advocates of the Responsibility to Protect as the primary decision-maker with regard to when the international community can intervene.

The return of big-power politics

The humanitarian interventions of the 1990s were possible in large part because China was preoccupied with its internal economic transformation and the USSR had dissolved, leaving Russia in a state of economic and political disarray. China and Russia's re-emergence as global powers are likely to chill humanitarian interventions because both have demonstrated a willingness to wield their Security Council veto to prevent humanitarian interventions. During the recent crisis in Burma, for instance, China and, to a lesser extent, Russia have blocked calls for U.N. Security Council action, arguing that the Security Council is not the appropriate venue to consider the crisis.⁴⁰ Similarly, during the height of the genocide in Darfur, China

³⁸ The most striking example of how humanitarian intervention fails when states are unwilling to pay this price is the Srebrenica massacre, where the Dutch peacekeeping forces stepped aside and allowed Serb forces to massacre over 7,000 civilians. *Dutch Government Quits Over Srebrenica*, BBC NEWS, Apr. 16, 2002, <http://news.bbc.co.uk/2/hi/europe/1933144.stm>. Restrictions by many European governments on their forces operating in Afghanistan, in particular German forces, indicates that many of these states remain unwilling to commit to the real cost of humanitarian intervention even when they do deploy troops. SEBASTIAN MERZ, STILL ON THE WAY TO AFGHANISTAN? GERMANY AND ITS FORCES IN THE HINDU KUSH, SIPRI PROJECT PAPER 8 (Nov. 2007).

³⁹ SEYBOLT, *supra* note 3, at 270–73.

⁴⁰ *Malaysia Pushes for Burma Talks*, BBC NEWS, Oct. 7, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/7032291.stm>.

blocked Security Council action, protecting its close relationship with the Sudanese government and its oil interests in the country.⁴¹ Europe's dependence on Russian oil and gas, and Russia's willingness to use those resources as a political lever will further limit the ability of European states to call for, or participate in, humanitarian intervention.

Preemption on national security concerns.

Although preemption is not the same as humanitarian intervention—nor does it seek the same outcome—its resuscitation by the United States and other states will likely further inhibit reliance on the doctrine of humanitarian intervention in coming years. The re-emergence of preemption as a basis for intervention provides states with a more familiar doctrine on which to justify military intervention. Notably, the first humanitarian interventions, such as Tanzania's intervention in Uganda to remove Idi Amin, relied on preemption based on national security when they could have relied on humanitarian intervention. Similarly, the recent Ethiopian incursion into Somalia was also justified on national security grounds.⁴²

Legal institutions that were created to press for justice have been used in a way to chill humanitarian intervention.

The legal institutions developed to prevent crimes against humanity and genocide have been utilized in ways that chill the possibility of future humanitarian interventions. For example, from mid-1999 until June 2000, the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia undertook an extensive review to determine whether to initiate a formal war crimes investigation of NATO for acts committed during the humanitarian intervention in Kosovo. The review was initiated in response to complaints from the Federal Republic of Yugoslavia, Russia, and some Canadian law professors. By most accounts, the review was carried out in large part to demonstrate that the Yugoslav Tribunal was impartial. Over one year later, the Prosecutor concluded that no investigation was warranted.⁴³ With the creation of the International Criminal Court, few states are likely to be willing to undertake a humanitarian intervention, knowing

⁴¹ See Roberta Cohen, *Calling on China: The China-Darfur Connection*, BROOKINGS INSTITUTION, Aug. 5, 2004, <http://www.brookings.edu/views/op-ed/cohenr/20040805.htm>.

⁴² Alex Perry, *Interview: Ethiopian Prime Minister Meles Zenawi*, TIME, Sept. 6, 2007, <http://www.time.com/time/magazine/article/0,9171,1659420-2,00.html> (arguing the Islamic Courts Union had declared war on Ethiopia).

⁴³ Press Release, Int'l Criminal Tribunal for the former Yugo. (ICTY), Final Report to the Prosecutor by the Comm. Established to Review the NATO Bombing Campaign Against the Fed. Republic of Yugo., para. 90, PR/P.I.S./510-E (June 13, 2000).

that the prosecutor may then launch an investigation simply to demonstrate impartiality.

The tendency of tribunals, in particular the Yugoslav Tribunal, to indict individuals from all sides of a conflict out of a need to seem politically balanced has heightened this fear. These indictments tend to confuse the facts of and rationales for conflicts, however, blurring the line between criminal and non-criminal acts, and thus eroding the basis for humanitarian intervention.

The recent International Court of Justice case concerning the genocide committed against Bosnia will likely prove to further chill future humanitarian interventions.⁴⁴ The decision's confusing interpretation of the legal standard for genocide, particularly with regard to establishing an unjustifiably high legal standard needed to prove genocide, will likely influence whether states will intervene to prevent other genocides, including the current genocide in Darfur.

Question of moral authority

In the current political climate, humanitarian intervention requires a level of moral authority that few, if any, states or organizations possess. With the U.S.-led military engagement in Iraq, combined with the tendency of the E.U. member states to support an approach of appeasement over intervention and the continued controversies surrounding the conduct of U.N. peacekeepers—ranging from drug trafficking to permitting the Srebrenica massacre, and standing on the sidelines during the Rwanda genocide—the few states or organizations that formerly possessed the moral authority to undertake a large scale humanitarian intervention have eroded that authority, and no new states or organizations have stepped in to fill the void.

CONCLUSION

Humanitarian intervention will soon be the missing piece in the mosaic of mechanisms developed to prevent crimes against humanity and genocide. By failing to establish a clear legal basis for humanitarian intervention, and by failing to shift the manner in which it perceives human security, the international community has let a valuable tool slip from its repertoire that could have been used to prevent atrocities.

⁴⁴ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment (Feb. 26, 2007), available at <http://www.icj-cij.org/docket/files/91/13685.pdf#view=FitH&pagemode=none&search=%22Bosnia%22>.