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The United States and the Case for Humanitarian Intervention

Since the end of World War II, the established international community has had problems in dealing with humanitarian crises. Although there have been notable successes, diplomacy has too often proven incapable of preventing or stopping the displacement, exploitation, and slaughter of innocent civilians that are trapped in conflict areas. Even in the instances where diplomacy is eventually successful, countless lives are inevitably lost because of the delay between the beginning of diplomatic actions and the deployment of peacekeeping and/or humanitarian aid forces. These lives are important. In the best interests of a fair and just world steps need to be taken to ensure that these lives are looked after in the event that international diplomacy prove to be ineffective or too slow of a response.

It is the purpose of this paper to argue that these lives can only be saved by a country which is free from enough of the barriers erected by the international community and their competing state interests to quickly and effectively respond to emerging humanitarian crises. This country has to be able to act independently and without the logistical, financial, or military support of the various international bodies and alliances. The United States is one such country. The United States should make a firm, binding, commitment to responding to

humanitarian crises by adopting a responsibility to protect and also avoid placing itself in the position where international actors opposed to intervention can disrupt that response.

First, the international community can and has prevented atrocities but has been far from perfect in this pursuit. In general, they should not be counted on to take all the steps necessary to effectively prevent atrocities. There have been failures and at this time many of those failures have not resulted in effective change in the response to new humanitarian crises.

Second, The United States was roundly criticized during the Bush Administration for failing to ratify the Rome Statute that would have made the United States a member of and subject to the International Criminal Court. This paper will argue the alternative and address reasons why the United States is better able to perform in humanitarian efforts by not ratifying the statute.

The paper will also look to the issue of “lawfare”, which is the use of the legal system as a method of accomplishing a political or strategic objective, and how the United States can be subjected to its use by an opposing force as a tactic to block or delay humanitarian intervention. By ratifying the Rome Statute and engaging in humanitarian efforts that have not been fully sanctioned by the international community the United States would only expose itself to more barriers to immediate and effective action.

Finally, the paper will discuss how unsanctioned humanitarian efforts should be used, as a last resort, to intervene in situations where humanitarian intervention is critical to the preservation of human life. The United States should adopt the “responsibility to protect” doctrine in order to give both notice to the international community how the United States stands in relation to humanitarian crises and to provide a serious deterrent to those in the world that

think they can commit atrocities with impunity because they have erected barriers to international action.

The United States is the One of the Few Entities Capable of Providing Humanitarian Intervention in Most Conflict Areas

The role of intervening in humanitarian crises is one shouldered by the United States of America and few other countries who in one form or another have adopted the doctrine of humanitarian intervention. This is not due to any one single factor but a multitude of interlocking factors. The first among these is the internal barriers within United Nations Security Council.

I. The United Nations Ability to Act is Highly Limited

Security Council Issues

One of the greatest impediments to international intervention in humanitarian crisis is also the international body which is primarily tasked with providing for this humanitarian aid. The United Nations, through its charter, established the Security Council as its main force behind providing for the peace and stability throughout the world.¹

The United Nations intervenes in conflict areas only with the approval of the United Nations Security Council.² The Security Council is primarily tasked with maintaining international peace and security³ and through the 2005 World Summit, preventing and

¹ U.N. Charter art. 23, para. 1.

² *Id.* ch. VII, art. 39-51.

³ *Id.* art. 24, para. 1.

intervening in genocide, war crimes, crimes against humanity and ethnic cleansing.⁴ The Council is made up of five permanent members and ten elected members that hold two year terms on the Council.⁵ Each of the permanent members of the Council has full veto power over any of the proposed Security Council resolutions.⁶ In order for a resolution to pass the resolution must receive at least nine affirmative votes and no negative votes from the permanent five.⁷

The council's makeup was proposed under the shadow of the failure of the League of Nations to prevent the Second World War and was aimed at preventing future world-wide conflicts and other serious conventional wars.⁸ To this end it was a resounding success and has likely averted many large scale conflicts, world wars, and helped to prevent further offensive uses of nuclear arms.⁹

Unfortunately, this setup generally prevents any intervention by the United Nations unless there is no conflict with any of the permanent member's (United States, Great Britain, China, Russia, and France) state interests.¹⁰ This is particularly vexing considering the state interests and actions of some of the permanent members. These interests and actions cast a dark cloud of doubt over whether the U.N. Security Council could ever be fully depended on to make a call for action under Chapter VII of the United Nations Charter.¹¹ Listed below are a just a few of the permanent five members whose interests would likely cause them to interfere with the passing of a resolution necessary for the intervention in a humanitarian crisis.

⁴ 2005 World Summit Outcome, G.A. Res. 60/1, para. 139.

⁵ U.N. Charter art. 23 , paras. 1-2.

⁶ *Id.* art. 27.

⁷ *Id.*

⁸ High-Level Panel on Threats, Challenges and Change, *Report of the High-level Panel on Threats, Challenges and Change*, United Nations 2004, 10.

⁹ *Id.* at 10-14.

¹⁰ U.N. Charter chapter V.

¹¹ U.N. Charter chapter VII.

The Russian Federation: the Russian Federation has been a permanent Security Council member since shortly after the collapse of the U.S.S.R.¹² which was an original permanent member.¹³ During that time they have been involved in a number of controversial actions which likely would have resulted in U.N. sanctions had they not possessed a veto power. Examples of these actions are: Russian aerial bombing during the War in Abkhazia in 1992-1993¹⁴, the First Chechen War from December 1994 until August of 1996¹⁵, the Second Chechen War, that lasted from August 1999 until arguably April 2009 when Russian counter-insurgency efforts were officially halted¹⁶, the 2008 South Ossetia War¹⁷, and a number of other low intensity conflicts.

All of these incidents contain instances, sometimes entire campaigns, which involved the use of tactics, techniques, and procedures which ran afoul of basic human rights and the laws of war. Examples include using attacking civilian directly¹⁸, unnecessary and excessive damage to the non-military infrastructure¹⁹, and use of non-discriminating munitions in population centers.²⁰

¹² President of the Russian Federation, Letter to the Secretary-General from the President of the Russian Federation Dec. 24, 1991, U.N. Doc. 1991/RUSSIA, 1 (Dec. 24, 1991).

¹³ U.N. Charter art. 23, para. 1.

¹⁴ U.N. Secretary-General, Report of the Secretary-General's fact-finding mission to investigate human rights violations in Abkhazia, Republic of Georgia, Nov. 17, 1993, U.N. Doc. S/26795 (Nov. 17, 1993).

¹⁵ U.N. Secretary-General, The situation of human rights in the Republic of Chechnya of the Russian Federation, Mar. 26, 1996, U.N. Doc. E/CN.4/1996/13 (Mar. 26, 1996).

¹⁶ Human Rights Watch, *"Who Will Tell Me What Happened to My Son?"*, Human Rights Watch Sep. 27, 2009, at 3.

¹⁷ Human Rights Watch, *Up in Flames: Humanitarian Law Violations and Civilian Victims in Conflict over South Ossetia*, Human Rights Watch, January 2009, at 7, 89-122.

¹⁸ *Id.* at 115-122

¹⁹ *Id.* at 91-102

²⁰ *Id.* at 103-113.

In addition to these conflicts that the Russian Federation has been a part of, there are also a large number of instances where the Russian Federation has committed or has been suspected of committing human rights abuses within its own territory.²¹ Most of these instances revolve around the suppression of non-state media outlets²², pro-democracy non-governmental organizations²³, and internal opposition parties.²⁴

Further, the Russian Federation also has an unflattering record of arms sales to dictatorships and human rights violators.²⁵ (Note: none of the Security Council members have a completely clean slate when it comes to arms trafficking) This is especially true with the Syrian crisis that is currently unfolding.²⁶

While the United Nations is sending two separate envoys to try and stem the tide of violence in Syria and establish a cease fire that would protect innocent civilians²⁷ Russia is still sending in shipments into the country which the government of Syria is using to escalate the

²¹ Human Rights Watch, *An Uncivil Approach to Civil Society: Continuing State Curbs on Independent NGOs and Activists in Russia*, Human Rights Watch, June 2009.

²² Birgit Beumers, Stephen C. Hutchings & Natalia Rulyova, *The Post-Soviet Russian Media: Conflicting Signals*, Routledge 2009.

²³ Human Rights Watch, *An Uncivil Approach to Civil Society*, *supra*.

²⁴ *Id.*

²⁵ Amnesty International, *Arm Transfers to the Middle East and North Africa: Lessons for an Effective Arms Trade Treaty*, Amnesty International 2009.

²⁶ *Id.*

²⁷ U.N. Secretary-General, Statement Attributable to the Spokesperson for the Secretary-General on Appointment of Joint Special Representative to Syria (Aug. 17 2012), <http://www.un.org/sg/statements/index.asp?nid=6253>.

violence.²⁸ Shipments of arms have been seized on civilian passenger airplanes as they were heading over neutral countries and still Russia continues to send arms to Syria.²⁹

That act sends two messages to the international community and to the Security Council. The first: Russia has no issue with a country engaging in violence against civilians. The second: Russia will operate counter to the wishes of any international effort to stem violence if they can profit off of that violence.

Considering Russia's human rights violations and arms profiteering, it is highly unlikely that they can be counted on to allow the United Nations Security Council to pass resolutions that intervene in humanitarian crises that involve conflicts. It is even more unlikely that, if such a resolution would pass, Russia would commit any meaningful aid to support such an effort. The Security Council is greatly limited with Russia's permanent presence and cannot be counted on to intervene.

The People's Republic of China: The People's Republic of China has, in the past decade, grown to become the world's second largest economy by GDP.³⁰ A not insignificant portion of this growth can be attributed to China's willingness to commit to investment and development of infrastructure in countries whose human rights violations and rampant corruption have made them off limits to investment by much of the western powers.³¹ Some of these countries that

²⁸ *Russia to honour arms sales contracts to Syria*, The Telegraph (Jul. 11, 2012 2:33 PM), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9392200/Russia-to-honour-arms-sales-contracts-to-Syria.html>

²⁹ *Turkey intercepts Syrian plane as tensions mount*, USA Today (Oct. 10, 2012 7:23PM), <http://www.usatoday.com/story/news/world/2012/10/10/turkey-syria-plane/1625763/>

³⁰ *China Overview*, World Bank, <http://www.worldbank.org/en/country/china/overview> (last visited Dec. 4, 2012).

³¹ *human rights first, Investing in Tragedy: China's Money, Arms, and Politics in Sudan*, human rights first, Mar. 2008

have received vast inflows of Chinese capital are Africa's primary human rights violators (Sudan, Zambia).³²

This involvement in Africa has influenced China in a way that it often opposes any substantive Security Council Resolution that has been attempted to intervene in these troubled areas of Africa and the rest of the world.³³ An example of China using its veto power for its own purposes involve the vetoing of the extension of the mandate for U.N. Preventive Deployment force in Macedonia after that country had recognized diplomatic relations with the Taiwanese government.³⁴

The only exception to this is the recent abstention from voting during the Libyan Civil War³⁵, which allowed for no-fly zones to be enforced throughout the country.³⁶

China's stance of non-interference and its protection of its financial interests greatly limit the ability of the United Nations Security Council from responding to humanitarian crises in these countries.

The United States: The United States is itself not innocent of using the permanent member veto power to advance its own interests. Loyalties to Israel³⁷ have caused the United States to threaten Council Resolutions with its veto power many times among other reasons.³⁸

³² *Id.*

³³ *Id.*

³⁴ Press Release, Security Council, Security Council Fails to Extend Mandate of United Nations Preventative Deployment Force in Former Yugoslav Republic of Macedonia, U.N. Press Release SC/6648 (Feb 25, 1999).

³⁵ Security Council, Security Council Approves "No-Fly Zone" over Libya, Authorizing "All Necessary Measures" to Protect Civilians, by a Vote of 10 in Favour with 5 Abstentions, U.N. Doc. SC/10200 (Feb. 26, 2011).

³⁶ *Id.*

Elected Members: Another issue with relying on the United Nations Security Council for intervention in humanitarian crises is the unfortunate fact that many countries with abhorrent human rights records are given two year Security Council positions.³⁹ These countries, whose duty on the Security Council the maintenance of international peace and security, can only be counted on to work in their self-interests and are unlikely to condemn the behavior of another country that is similar to its own.

Failure to Enforce Resolutions

The United Nations Security Council also has a record of failing to enforce resolutions and to escalate measures against countries that willfully violate valid Security Council Resolutions. These failures can only be seen as emboldening countries to continue to ignore or violate Security Council resolutions in the future. In order for there to be any deterrent effect, countries and groups that wish to commit atrocities have to believe there is at least a reasonable chance that their actions will provoke an international response. When the international response never comes it shows the resolutions as failures.

Perhaps the greatest example of this failure is Iraq. After the Gulf War and prior to the United States led invasion in 2003, the United Nations Security Council issued many resolutions relating to the Iraqi government.⁴⁰ Many of these resolutions were ignored or willfully

³⁷ Sahar Okhovat, *The United Nations Security Council: Its Veto Power and Its Reform*, CPACS Working Paper No. 15/1 December 2011, at 13, 14.

³⁸ *Id.*

³⁹ Rep. of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, Dec. 15, 1999, U.N. Doc. S/1999/1257 (Dec. 15 1999). Page 50.

⁴⁰ Campaign Against Sanctions in Iraq, *U.N. Security Council resolutions relating to Iraq*, <http://www.casi.org.uk/info/scriraq.html>, 2004.

disobeyed.⁴¹ In addition to this, there was endemic corruption with the United Nations supervised “Oil for Food” program⁴² and constant obstructionist behavior in disallowing the International Atomic Energy Agency to conduct its mandated observation of Iraqi facilities.⁴³

The steadfast refusal of France, Germany, and Russia to escalate the issue with Iraq likely removed any incentive for the Iraqi government to take seriously the U.N.’s diplomatic and legal efforts to ensure compliance with the resolutions. This refusal prevented any type of non-regime change scenario from being attempted and likely erased any chances of the situation being resolved with minimal use of force.

To allow a nation to flaunt the resolutions of the United Nations Security Council and to do so repeatedly can only reduce the chances of other nations respecting the Council and their resolutions. The permanent members of the Security Council allowed this and international respect for the law suffered. Without this respect for the law, how can we expect nations who wish to violate the law to be deterred by its eventual enforcement?

Without some type of systematic reform of how international interventions are authorized and international resolutions are enforced there are likely to be many future humanitarian crises that will slip past the international community without receiving its required attention.

The most unfortunate part of this is that the Security Council resolutions are only the first step that needs to be taken to intervene in a humanitarian crisis.

⁴¹ Independent Inquiry Committee into the United Nations Oil-For-Food Programme, *Report on Programme Manipulation*, Independent Inquiry Committee into the United Nations Oil-For-Food Programme Oct 27, 2005.

⁴² *Id.*

⁴³ International Atomic Energy Agency, *Implementation of the United Nations Security Council Resolutions Relating to Iraq*, GC(46)/RES/15 (Sep. 2002).

U.N. Peacekeepers

Even if a resolution to intervene in humanitarian crisis somehow makes its way past the significant hurdles of dealing with the United Nations Security Council another problem remains. The peacekeeping forces sent by the United Nations typically lack the will, power, and freedom to accomplish tasks that go beyond mere observing, though there are certainly exceptions (Liberia⁴⁴ and Sierra Leone).⁴⁵

Glaring failures to protect at risk groups in Rwanda⁴⁶ and Bosnia⁴⁷ have shown that U.N. peacekeeping forces, the legally preferred group of much of the international community, cannot be relied upon to provide the necessary intervention needed by at risk groups.

In Rwanda, the U.N. peacekeeping force first stood by as the Hutu forces started their campaign of genocide.⁴⁸ They then withdrew from the country as United Nations Security Council unanimously voted to order all but 270 of the UNAMIR troops to leave.⁴⁹ In the ensuing diplomatic negotiations among the international community the Hutu forces slaughtered close to 800,000 ethnic Tutsi during the roughly one hundred days of the conflict.⁵⁰ It was not

⁴⁴ U.N. Secretary-General, Final Rep. of the Secretary-General on the United Nations observer mission in Liberia, Sep. 12, 1997, U.N. Doc. S/1997/712 (Sep. 12, 1997).

⁴⁵ U.N. Secretary-General, Eight Rep. of the Secretary-General on the United Nations observer mission in Sierra Leone, Sep. 28, 1999, U.N. Doc. S/1999/1003 (Sep. 28, 1999).

⁴⁶ Rep. of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, Dec. 15, 1999, U.N. Doc. S/1999/1257 (Dec. 15 1999).

⁴⁷ U.N. Secretary-General, Rep. of the Secretary-General pursuant to General Assembly resolution 53/35, Nov. 15, 1999, U.N. Doc. A/54/549 (Nov. 15, 1999).

⁴⁸ Rep. of the Independent Inquiry Rwanda, *supra*, at 15-19.

⁴⁹ *Id.* at 19-22.

⁵⁰ *Id.* at 3.

until the Tutsi forces from the RFP attacked and defeated the Hutu forces in Kigali that the slaughter stopped.⁵¹

In the conflict involving the former Yugoslavia states of Bosnia and Serbia, the United Nations Security Council passed a resolution in April of 1993 designating the area of Srebrenica as a U.N. enforced safe zone for the area's ethnic Muslims.⁵² Muslim refugees flooded into the area to seek protection from the United Nations Protective Forces which in Srebrenica consisted of 400 Dutch troops.⁵³ These troops stood by and watched as thousands of the male Muslims were systematically led away and slaughtered.⁵⁴ They did not intervene to prevent the raping of women and the displacement of the entire population from that area.⁵⁵ This failure led to the killing of thousands in Srebrenica.⁵⁶

Much of these failures can be attributed to limited mandates for the peacekeeping roles that were assigned and the failure of the U.N. to ensure an adequate deployment of forces to respond to the threat posed in the crisis.⁵⁷ These limited mandates are a byproduct of the diplomatic pressures and compromises that are needed to ensure a resolution can get past the veto threat of all five of the permanent members of the Security Council.⁵⁸

In any future "hot" conflict, which is one that is quickly deteriorating, there has to be serious doubts about whether the United Nations will be able to perform its role in a way that

⁵¹ *Id.* at 29.

⁵² U.N. Secretary-General, Rep. of the Secretary-General pursuant to General Assembly resolution 53/35, Nov. 15, 1999, U.N. Doc. A/54/549, 14-18 (Nov. 15, 1999).

⁵³ *Id.* at 44, 53.

⁵⁴ *Id.* at 57-70.

⁵⁵ *Id.* at 76-85.

⁵⁶ *Id.* at 102.

⁵⁷ Rep. of the Independent Inquiry Rwanda, *supra*, at 30-39.

⁵⁸ *Id.* at 43-48, 50-52.

best protects the lives of innocent civilians using humanitarian intervention. The United Nations is currently lacks a comprehensive plan to carry out such an operation without a clear mandate from the Security Council, which is both difficult to get and typically takes a great deal of time to procure; time which the victims in a humanitarian crisis may not have.

The North Atlantic Treaty Organization and the European Union

Aside from the United Nations, there are other entities that have made it their mission to intervene in humanitarian crises. Both N.A.T.O.⁵⁹ and the E.U.⁶⁰ have attempted to establish the ability to have an effective presence in these scenarios especially after the failure of the U.N. to intervene and stop the mass killings in the former Yugoslavia.

The European Union however was effectively stonewalled by the same forces that prevented the United Nations from quickly and effectively responding to the crisis in Darfur.⁶¹ The E.U. decided not to go as far as labeling the genocide there as atrocities which would have triggered the responsibility to act and therefore was able to sidestep any necessary actions on its part.⁶² Without that mandate to intervene the effort to stop the killings faltered. It was not until many of the mass killings had been accomplished that a token force of African Union troops were able to respond to the scenario.⁶³ That U.N. backed force lacked the necessary freedoms and mandate to effectively step in and stop the violence and much of the violence continued.⁶⁴

⁵⁹ Gareth Evans, *N.A.T.O. and the Responsibility to Protect*, International Crisis Group (Mar. 31 2009).

⁶⁰ Oxfam International, *The Responsibility to Protect and the European Union*, Oxfam International (Mar. 2008).

⁶¹ Paul Kubicek and Dana Parke, *European Union and Humanitarian Intervention: Bosnia, Darfur, and Beyond*, EU External Affairs Review July 2011, at 64.

⁶² Responsibility to Protect, *supra*, at 32-37.

⁶³ Paul Kubicek and Dana Parke, *European Union and Humanitarian Intervention*, *supra*, at 64.

⁶⁴ *Id.*

The message from this failure was clear. The E.U. would respond to token missions that didn't involve any real threat to their troops but would not engage themselves in a conflict that could result in E.U. casualties, even if vast amounts of civilians were in danger.⁶⁵ The E.U. and its actors would also not face the threat of prosecution by entering into a sovereign nation without the blessing of the Security Council.

N.A.T.O. however has proven more willing to enter into conflicts. The N.A.T.O. mission that provided air support and enforced no-fly zones in Libya was widely seen as a success for the alliance.⁶⁶ This success is likely to be one of N.A.T.O.'s last, however.

Due to severe budgetary constraints that have been imposed during the recent global recession and the increased spending necessary to stabilize the social safety nets of their countries, many of the N.A.T.O. countries are not meeting their goals for force size and military spending.⁶⁷ This has led some to call out N.A.T.O. as a dying organization, or in the words of the United States Secretary of Defense at the time, Robert Gates, a "paper tiger".⁶⁸

This drawdown of military forces is troubling as it is in addition to the force reduction measures that swept over N.A.T.O. after the fall of the U.S.S.R. and the dissolving of the Warsaw Pact.⁶⁹ Unfortunately, some of the forces that remain can be either ill-equipped to deal

⁶⁵ *Id.* at 66-67.

⁶⁶ International Coalition for the Responsibility to Protect, *The Crisis in Libya*, International Coalition for the Responsibility to Protect 2012, available at <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya>.

⁶⁷ Clara Marina O'Donnell, *The Implications of Military Spending Cuts for NATO's Largest Members*, Center on the United States and Europe at Brookings (July 2011), at 6-9.

⁶⁸ Associated Press, 'Dim if not dismal future': Gates blasts NATO, Associated Press, June 10, 2011, available at http://www.msnbc.msn.com/id/43351604/ns/world_news-europe/t/dim-if-not-dismal-future-gates-blasts-nato/#.UMVZO4NZV2A.

⁶⁹ Celeste A. Wallander, *Institutional Assets and Adaptability: NATO After the Cold War*, *International Organization* 54, 4, (Autumn 2000) 705-735, 718.

with humanitarian crises or are lacking in the professionalism necessary to accomplish the task.

An unconfirmed example of this failure can be found in Afghanistan. There, Italian troops had allegedly bribed the local Taliban fighters not to attack them and to leave the area in relative peace.⁷⁰ The French forces that relieved the Italians were unaware of this arrangement and took many casualties as a result of being unprepared for the violence.⁷¹

N.A.T.O., barring any future changes that reinvigorate its military forces, is likely to continue its decline to a point where it may no longer have the ability to function as a serious international actor.

The bottom line, neither alliance can be counted on to effectively intervene in a humanitarian crisis. This is not to disparage their good faith attempts to stop slaughter, but to recognize that they will not be able to respond in all instances. This is critical because it is the position of this paper that every humanitarian crisis must be dealt with in order to prevent or stop atrocities.

The United States' Role

The United States will have to carry the burden of humanitarian intervention as it and only a limited amount of countries are prepared to do so unilaterally if the United Nations and the international alliances fail to step in to prevent or stop humanitarian crises. That is not to say that, time permitting, all diplomatic avenues are taken that do not allow significant loss of life or any other atrocities to be committed while they are being pursued. However, the United States

⁷⁰ Associated Foreign Press, *French army denies reports of Italy paying bribes to Taliban*, Associated Foreign Press (Oct. 16, 2009), available at <http://www.france24.com/en/20091016-french-army-denies-reports-italy-paying-bribes-taliban>.

⁷¹ *Id.*

must stand by this position for there to be any deterrent to the offending behavior in the international setting.

Perhaps most important is the swift action if the international community is unable to quickly come to a solution to prevent the continuation of atrocities. Maintaining a benevolent and respected presence in diplomatic circles should be a less important goal than preventing or stopping mass killings, rapes, and destruction.

To accomplish this role the United States must be free from the greatly limiting rules of the International Criminal Court. This is not to say the United States will be committing war crimes and needs to be free from judgment, but to realize that the same forces that may use loyalties with Security Council members to delay or prevent intervention by the United Nations, would very well use the I.C.C. as a means of hampering or preventing the United States from acting unilaterally to intervene, even if it is the only way to stop atrocities from being committed.

II. Lawfare

Lawfare is a weapon designed to destroy the enemy by, using, misusing, and abusing the legal system and the media in order to raise a public outcry against the enemy.⁷² Lawfare is not always used in an improper manner, however, and has been used by many actors, including the United States, to accomplish certain objectives where military force is not a viable answer.⁷³ It is

⁷² Susan F. Tiefenbrun, *Semiotic Definition of "Lawfare"*, 43 CASE W. RES. J. INT'L L. __, 1 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1866448.

⁷³ Orde Kittrie, *Lawfare and U.S. National Security*, 43 CASE W. RES. J. INT'L L. 393, 398-99 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1779562.

also a means by which both state actors and non-state actors can bring legal action against state actors purely for the purpose of deterring them from achieving an objective.⁷⁴

The Rome Statute, with its broad application to all members of a state party⁷⁵, outlines many offenses that, while unlikely to lead to a conviction in the I.C.C., could effectively be used to stymie the actions of that state party that may be performing humanitarian efforts in good faith.

Potential Charges Applicable to Military Humanitarian Intervention

Unfortunately there are a number of crimes outlined in the Rome Statute that would be applicable in today's post-conventional warfare environment. That environment includes a number of belligerents who are well aware of how to wage a powerful propaganda and psychological battle in the international realm.

In today's post-cold war era, most entities that wish to commit atrocities know that if they are engaged in conventional combat by a superior force such as the United States or another N.A.T.O. force they are likely to take heavy losses.⁷⁶ They therefore disperse their fighters amongst the unarmed population and often place major weapon emplacements near hospitals, schools, and other neutral structures so as to maximize collateral damage and to provide human shields for their operations.⁷⁷ Spreading false reports about civilian casualties and damage is a

⁷⁴ *Id.* at 397.

⁷⁵ Rome Statute of the International Criminal Court art. 12, 13.

⁷⁶ Dr. Carsten Bockstette, *Jihadist Terrorist Use of Strategic Communications Management Techniques*, George C. Marshall European Center for Security Studies No. 20 (December 2008), 7-8.

⁷⁷ Michael N. Schmitt, *Human Shields and International Humanitarian Law*, Israel Yearbook on Human Rights Vol. 38 (2008) at 20.

mission for many of these forces who wish to weaken their opponent by siphoning of international and public support for intervention.⁷⁸

A peacekeeping force in a humanitarian effort can be expected to be accused of committing war crimes which are outlined within Article 8 of the Rome Statute if they are facing a legally educated opponent. Within the setting of an international armed conflict, which would necessarily be met in the case of humanitarian intervention, there are many opportunities by the enemy to set up the peacekeeping forces for a legal attack.

Article 8 (2)(b)(i) lists “Intentionally directing attacks against the civilian population such or against individual civilians not taking direct part in hostilities” as a war crime.⁷⁹ This crime, while well intentioned, could easily be deemed to warrant an investigation by the I.C.C. without there actually being many or even any civilian casualties.

Most post-conventional fighters do not wear uniforms or insignias that distinguish themselves from the civilian population.⁸⁰ This does not fit into the requirements for lawful combatants under the Geneva Conventions.⁸¹ This approach presents many benefits to the fighters. First, it allows them to blend in easily to the population which can make it much easier

⁷⁸ Al-Qaeda, Al-Qaeda Training Manual, (outlining the main required missions of their military operations to include: “Spreading rumors and writing statements that instigate people against the enemy”).

⁷⁹ Rome Statute of the International Criminal Court art. 8.

⁸⁰ Jack Goldsmith, *Long-Term Terrorist Detention and Our National Security Court*, unpublished manuscript available at http://www.brookings.edu/~/media/research/files/papers/2009/2/09%20detention%20goldsmith/0209_detention_goldsmith, 9.

⁸¹ Geneva Convention Relative to the Treatment of Prisoners of War, art.4 A. 2 (b), Aug. 12 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

to move freely.⁸² This freedom of movement allows the fighters to prepare ambushes, explosive devices, and perform battlefield exfiltration with much greater ease than a uniformed force.⁸³ Second, it makes the process of positively identifying a target much harder for the responding forces.⁸⁴ Third, it greatly increases the chances of civilian casualties if in a heavily populated area.⁸⁵

Perhaps one of the biggest problems with this for conventional troops is it makes positive target identification after combat much more difficult to differentiate from civilian casualties. This increases the ease in which, after being killed or disabled by opposing fire, friendly non-conventional fighters can remove the implements and arms of war from the fallen and make them appear to be a non-fighting civilian. One of the only defenses to this would be to individually test the hands of the fallen individuals with a solution to determine if any gunpowder residue is present.⁸⁶ That practice, however, is extremely unlikely to occur given the operational tempo of the fight and the security dangers that would present themselves when a force would go out to perform this duty.⁸⁷

A trained and intelligent enemy would be best served by attacking the peacekeeping forces while disguised as members of the local population, inflict as many peacekeeper fatalities as possible and then flee the scene while leaving behind their fallen comrades to appear as

⁸² Goran Peic, *State Authority and Insurgency: Information, Power, and Civilian Defense Forces*, available at http://userwww.service.emory.edu/~gpeic/CDF_paper.pdf, (Apr. 26 2012), 6-7.

⁸³ *Id.*

⁸⁴ Center for Army Lessons Learned, *Afghanistan Civilian Casualty Prevention: Observations, Insights, and Lessons*, Center for Army Lessons Learned No. 12-16 (Jun. 2012), 5-6.

⁸⁵ *Id.* at 68-70 (laying out possible and frequently encountered scenario).

⁸⁶ R.K. Sharma, *Concise Textbook of Forensic Medicine & Toxicology 2nd Edition*, Elsevier 2008, at 89.

⁸⁷ Department of the Army, *Site Exploitation Operations*, ATTP 3-90.15 (FM 3-90.15) (June 2010) at 3-2.

civilians that got caught hit by peacekeeping forces. Non-fighting members of this group would then simply have to make the claim there was no combat and that these civilians died as a result of barbaric activities by the peacekeeping forces.⁸⁸ This can be especially damning if local government or religious leaders, for whom the population holds great trust in, are the ones making this claim.⁸⁹

Disruption of Military and Humanitarian Activities

What the defenders of the Rome Statute do not take notice of is that, while claiming that a fair trial is supposedly guaranteed, the mere initiation of a criminal investigation at the international level may be enough to achieve the actor's goals of deterring or delaying a responding humanitarian intervention force.

One would hope that with all of the protections contained within the Rome Statute the chances of a United States citizen being charged and convicted of one of the enumerated offenses contained in Articles 6 through 8 is fairly low. This, however, does not prevent the investigation, that it is the prosecutor's duty to launch under Article 53, from greatly disrupting peacekeeping efforts.⁹⁰

While defenders of the Rome Statute note, correctly, that a state party may avoid this investigation by the prosecutor if they open and perform their own full investigation⁹¹, what they do not discuss is the hindrances that this would place upon the humanitarian effort.

⁸⁸ Center for Army Lessons Learned, *Afghanistan Civilian Casualty Prevention*, *supra*, at 68-70.

⁸⁹ Marine Corps Intelligence Activity, *Afghan Insurgent Tactics, Techniques, and Procedures Field Guide*, (Jan. 2009), 65 (describing one of many instances of local leaders contributing to propaganda war).

⁹⁰ Rome Statute of the International Criminal Court, art. 53.

⁹¹ *Id.* art. 17(1).

Individual's being investigated would more likely than not be temporarily relieved of their position as the investigation is performed.⁹² This relief from command could drastically alter the tempo of the peacekeeping efforts. If forced to stop and change command elements after any major engagement, peacekeeping forces could be slowed to a point where they may not be able to quickly respond to instances of mass killings, rapes, and other destruction.

It is critical to remember that in Rwanda it only took 100 days for the Hutu rebels to kill as many as 800,000 people⁹³; all of this with at least some United Nations force in the nation.⁹⁴ When it comes to rapidly evolving scenarios, even a mere hour's time might result in the death of a great many people.

Unsanctioned Humanitarian Efforts and Interventions

Much debate has occurred after the international community's failure to stop the violence in Rwanda and the former Yugoslavia.⁹⁵ This debate centered on what could be done to ensure that the international community would no longer sit idly by while atrocities were being committed.⁹⁶ Out of this debate the International Commission on Intervention and State Sovereignty published a report that put forward a new (or possibly old) way of looking at how

⁹² Adam Aston, *Army investigation backs Madigan leader, finds Col. Dallas Homas did not use position to influence PTSD diagnoses*, The News Tribune, Dec. 2, 2012, available at <http://www.thenewstribune.com/2012/12/02/2388479/army-investigation-backs-madigan.html#storylink=cpy>, (an example of commander typically relieved during investigation).

⁹³ Rep. of the Independent Inquiry Rwanda, *supra*, at 3, 29.

⁹⁴ *Id.* at 35-40.

⁹⁵ *Id.* at 53-59.

⁹⁶ *Id.*

the international community deals with humanitarian crises.⁹⁷ This idea was known as “responsibility to protect”.

Responsibility to protect, or R2P, takes a different approach to the standards in which humanitarian intervention is allowed and applied.⁹⁸ First, instead of trying to determine the point in which a country commits enough atrocities to permit the breaching of its sovereignty, R2P presents that all countries have a duty to intervene and protect innocent civilians when the host country either lacks the power to act in their defense or is the cause of the crisis.⁹⁹ This intervention is to be applied in the economic and political forms first, if feasible.¹⁰⁰ Military intervention is to be used only as a last resort.¹⁰¹

The idea of responsibility to protect caught on with certain actors and was adopted by various countries and alliances such as the European Union¹⁰² and the African Union.¹⁰³

However, there were countries that believed that R2P was a great threat to national sovereignty.¹⁰⁴ These countries were: Algeria, Belarus, Cuba, Egypt, Iran, Pakistan, the Russian Federation, and Venezuela.¹⁰⁵

At the 2005 World Summit, the United Nations affirmed its commitment to the concept of R2P but made all interventions or actions subject to a United Nations Security Council vote.¹⁰⁶

⁹⁷ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001), (hereinafter *Responsibility to Protect*).

⁹⁸ *Responsibility to Protect*, *supra*, at 11.

⁹⁹ *Id.* at 13-18.

¹⁰⁰ *Id.* at 19-31.

¹⁰¹ *Id.* at 31.

¹⁰² Oxfam International, *The Responsibility to Protect and the European Union*, *supra*.

¹⁰³ Constitutive Act of the African Union, art.4(j), (h), July 11, 2002, OAU Doc. CAB/LEG/23.15.

¹⁰⁴ Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 *AM. J. INT’L L.* 99, 108 (2007).

¹⁰⁵ *Id.*

This condition meant that R2P, at least at the U.N., was not going to be observed unless the permanent five Security Council members were able to get past their usual biases and state interests for long enough to do the right thing.¹⁰⁷

Without either the United Nations Security Council or the alliance or country acknowledging that there were atrocities being committed there would be no responsibility to protect. Without the responsibility there is no intervention under this doctrine.¹⁰⁸

This was illustrated by the European Union and the United Nations reluctance to call what was happening in Darfur in 2004-2005 as anything to the level of atrocities.¹⁰⁹ In fact, only one country in the permanent five actually recognized at the time that what was going on in Darfur was genocide, the United States.¹¹⁰ Unfortunately for the civilians who likely lost their lives as a result of the greatly delayed intervention, the United States does not strictly follow the principle of R2P.¹¹¹

Looking forward, the United States must strictly adopt the principles of responsibility to protect. As perhaps one of the few countries that can act both economically, politically, and militarily to prevent or halt atrocities from being committed, the United States owes a moral duty to intervene in humanitarian crises.

¹⁰⁶ *Id.* at 109.

¹⁰⁷ *Id.*

¹⁰⁸ Responsibility to Protect, *supra*, at 32-35.

¹⁰⁹ ; International Commission of Inquiry on Darfur, *Report of International Commission of Inquiry on Darfur to the United Nations Secretary-General*, International Commission of Inquiry on Darfur (Sep. 18 2004), at 124-130

¹¹⁰ Paul Kubicek and Dana Parke, *European Union and Humanitarian Intervention*, *supra*, at 64-67.

¹¹¹ Carsten Stahn, *Responsibility to Protect*, *supra*, at 108.

The United States must bind itself to this responsibility. This would do three things: first, it would ensure that humanitarian crises are responded to quickly, before many more lives could be lost; second, it would serve as a serious deterrent to the entities that wish to commit atrocities, knowing that they would certainly have to deal with consequences from their actions; third, it would allay much of the criticism from the international community that the United States was adopting this foreign policy doctrine solely as a ruse to allow it to enter sovereign nations to further its own self-interest.

This is also important as certain international bodies (the European Union) have manipulated their responsibility to protect in a way that they have avoided invoking their responsibility.¹¹² Without being bound to act, internal political forces may apply enough pressure to the responsible parties to prevent them from fulfilling their duty under the established doctrine.

Conclusion

Providing for aid and intervention in humanitarian crises is too much of a necessity for the preservation of innocent life for any humanitarian crisis to be ignored. Affirmative actions need to be taken in order for those that cannot help themselves to be protected. Speed and directness are essential elements for those actions to be successful.

The international community has so far not been able to establish a fail-proof method of dealing with these international crises in a way that successfully deters, prevents, or stops them from occurring. While some type of reform may change how the international community deals

¹¹² Paul Kubicek and Dana Parke, *European Union and Humanitarian Intervention*, *supra*, at 64-67.

with these crises, for the moment they cannot be fully counted on to deal with all of the crises that may occur.

One of the actors in the world that has the capabilities to respond to these is the United States. With the economic, logistical, and military capabilities to respond to almost any future humanitarian crisis (measured against all previous crises), the United States can now be one of the best actors in the event of a humanitarian crisis. In order to maintain that position, they have to avoid being subjected to external forces that can act upon them to deter them from intervening, if necessary. One of the main things they need to avoid is ratifying the Rome Statute as it would likely lead their humanitarian forces to be subject to “lawfare”.

That lawfare could be used to interfere with the military operations in a way that U.S. military officials are relieved from their command and the operational tempo is reduced while the perpetrators of the atrocities are able to continue harming innocent civilians.

Finally, the United States has the moral obligation to adopt “responsibility to protect” and should do so in a way that it alleviates any concerns about improper motives for adopting it as well as binds the United States in a way that its responsibility cannot be avoided by making determinations that exempt it from its duty.

As one of the world’s last remaining super-powers the United States must start leading the cause of humanitarian intervention from the front and put that consideration parallel to its commitment to national self-defense. Only then will the United States be worthy of the title that it gives itself, that of “leader of the free world”.