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The Legality of Using Drones to Unilaterally Monitor Atrocity Crimes

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THE LEGALITY OF USING DRONES TO UNILATERALLY MONITOR ATROCITY CRIMES

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INTRODUCTION

Intrastate crises in which states perpetrate acts of atrocity against their own people, or manifestly fail to protect their citizens from these acts, pose difficult legal, political, and moral dilemmas for the global community.¹ Since the North Atlantic Treaty Organization's ("NATO") intervention in Kosovo, scholars of international law have vigorously debated when, and by what criteria, a forceful intervention not authorized by the United Nations Security Council ("UNSC") is justified on humanitarian grounds.² In comparison, relatively little attention has been paid to developing criteria to determine the permissibility of intermediary humanitarian response mechanisms, or nonforceful measures, preceding armed intervention.³ The term "atrocity crime" encompasses the four gravest violations of international law: (1) genocide, (2) war crimes, (3) crimes against humanity, and (4) ethnic cleansing.⁴ The use of intermediary

1. See, e.g., Presidential Study Directive on Creation of an Interagency Atrocities Prevention Board and Corresponding Interagency Review, PSD-10, 2011 DAILY COMP. PRES. DOC. 549 (Aug. 4, 2011) [hereinafter PSD-10] (announcing the creation of the Atrocities Prevention Board); Press Release, Secretary-General Presents His Annual Report to General Assembly, U.N. Press Release SG/SM/7136, GA/9596 (Sept. 20, 1999) [hereinafter UN Press Release] ("The inability of the international community in the case of Kosovo to reconcile these two equally compelling interests—universal legitimacy and effectiveness in defence of human rights—can only be viewed as a tragedy."); *Interview Madeleine Albright*, FRONTLINE—PBS (Apr. 1, 2004), <http://www.pbs.org/wgbh/pages/frontline/shows/ghosts/interviews/albright.html> ("[I]t's all fine for people to comment years later . . . about what could have happened. The timing and the resources and the approach of the international community just could not make it happen . . . I wish I had fought for it. But even if I had, nothing would have happened.").

2. See, e.g., Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743, 1750–51 (2000) (arguing that the United Nations ("UN") Charter supports humanitarian intervention in response to "affirmative human rights concerns"); Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS 232, 252–55 (J.L. Holzgrefe & Robert O. Keohane eds., 2003) (encouraging the incremental development of an international norm rather than a deliberate construction of legal guidelines).

3. See SARAH SEWALL ET AL., MASS ATROCITY RESPONSE OPERATIONS: A MILITARY PLANNING HANDBOOK 5 (2010) ("The Mass Atrocity Response Operations (MARO) Project seeks to enable the United States and the international community to stop genocide and mass atrocity as part of a broader integrated strategy by explaining key relevant military concepts and planning considerations."); see also Robert I. Rotberg, *Deterring Mass Atrocity Crimes: The Cause of Our Era*, in MASS ATROCITY CRIMES: PREVENTING FUTURE OUTRAGES 1, 16–21 (Robert I. Rotberg ed., 2010) (emphasizing the need for early warning information as well as military planning).

4. G.A. Res. 60/1, ¶¶ 138–40, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) (narrowing applicability of Responsibility to Protect ("R2P") doctrine to the four most egregious crimes in

mechanisms may deter or halt the commission of these crimes, but they also likely constitute breaches of state sovereignty not rising to the level of force under international law.⁵

This Note focuses on the legality of employing unmanned aerial vehicles (“UAVs”), often referred to as “drones,” to gather information about the commission of atrocities in another state without that state’s consent.⁶ The relevance of UAVs to the collection and dissemination of visual evidence of atrocity crimes is acute.⁷ As states reduce their citizens’ free access to technology as a means of retaining power, the resulting difficulty in receiving reliable data on ongoing atrocities will likely increase the value of intermediary mechanisms. UAVs may, therefore, constitute a legitimate intermediary humanitarian interference mechanism, given their ability to provide useful atrocity response services without recourse to force. Because of this, greater attention should be paid to delineating the legal limits surrounding the use of UAVs to deter atrocity crimes.

The modern system of global governance, with the United Nations (“UN”) at its pinnacle, is founded on the long-established principle of state sovereignty.⁸ Under the UN Charter, the UNSC is

international law); see Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III) A, U.N. Doc. A/RES/260(III), art. 2 (Dec. 9, 1948) (defining the crime of genocide); see also Rome Statute of the International Criminal Court arts. 5–8, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (limiting the court’s jurisdiction to the most egregious within the international system); Martha Minow, *Naming Horror: Legal and Political Words for Mass Atrocities*, 2 GENOCIDE STUD. & PREVENTION 37, 38 (2007) (encouraging use of the term “atrocity crimes” to refer to these four categories).

5. See Sarah E. Kreps, *Social Networks and Technology in the Prevention of Crimes Against Humanity*, in MASS ATROCITY CRIMES: PREVENTING FUTURE OUTRAGES, *supra* note 3, at 175, 175–77, 184–88 (exploring the use of technology and social media to deter crimes against humanity); see also PSD-10, *supra* note 1, at 1 (stating that US government action should include a range of options).

6. For a list of other terms used in reference to unmanned aerial vehicles (“UAVs”), see ELIZABETH BONE & CHRISTOPHER BOLKCOM, CONG. RESEARCH SERV., RL31872, UNMANNED AERIAL VEHICLES: BACKGROUND AND ISSUES FOR CONGRESS 1 (2003).

7. See Rajan Menon, *Pious Words, Punny Deeds: The “International Community” and Mass Atrocities*, 23 ETHICS & INT’L AFF. 235, 236–38 (2009) (calling for new methods of atrocity prevention that focus more on protection of civilians); see also Andrew Stobo Sniderman & Mark Hanis, Op-Ed, *Drones for Human Rights*, N.Y. TIMES, Jan. 30, 2012, at A25 (arguing the merits of allowing drones to monitor for human rights abuses in Syria); Micah Zenko, *The Power of Witness: Imagery and Mass Atrocities*, COUNCIL ON FOREIGN REL. BLOG (Mar. 29, 2012), <http://blogs.cfr.org/zenko/2012/03/29/the-power-of-witness-imagery-and-mass-atrocities/> (exploring the power of imagery in forcing action to stop atrocity crimes).

8. U.N. Charter art. 2, paras. 1, 3–4, 7 (listing the major founding principles of the United Nations (“UN”)).

empowered to authorize military and nonforceful interventions into a sovereign state.⁹ Historically, however, the UNSC has rarely authorized either type of intervention.¹⁰ States wishing to intervene to protect civilians in another state without UNSC authorization face difficult evidentiary and legal hurdles in claiming humanitarian justifications.¹¹

The criteria presented in Part II and analyzed in Part III are intended to assist in determining the permissibility of states unilaterally using UAVs to monitor mass atrocities perpetrated within the borders of a nonconsenting state. For the purposes of this Note, “intervention” will be used to refer to forceful action, whereas “interference” will denote nonforceful actions. This Note concludes that sending UAVs into the sovereign airspace of a state, without the intruded-upon state’s permission, does not constitute an illegal action under international law if the action meets the following criteria: (1) the humanitarian situation within the monitored state is so severe as to warrant action in advance of, or without, formal UNSC approval; (2) there is a reliable basis for believing that the monitored state is committing, or is manifestly failing to protect civilians against, atrocities; (3) the monitoring state has a reasonable expectation that sending UAVs to monitor will result in the collection of useful information potentially demonstrative as to the monitored state’s complicity in the alleged atrocities; and (4) there are limits on the type and use of the information collected and upon whom may carry out these monitoring missions.

9. *Id.* arts. 39, 41–42 (authorizing the UN Security Council (“UNSC”) to intervene on the basis of “any threat to the peace, breach of the peace, or act of aggression”).

10. See Matthew Jamison, *Humanitarian Intervention Since 1990 and ‘Liberal Interventionism,’* in HUMANITARIAN INTERVENTION: A HISTORY 365, 365–71 (Brendan Simms & D.J.B. Trim eds., 2011) (providing a brief overview of the effects of the end of the Cold War on UNSC politics and humanitarian interventions). See generally Michael J. Glennon, *Why the Security Council Failed*, 82 FOREIGN AFF. 16 (2003) (describing the politics of UNSC decisionmaking).

11. See S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999) (providing *ex post facto* approval of the North Atlantic Treaty Organization’s (“NATO”) air campaign in Kosovo and eliminating the need for NATO to address the legality of its actions); INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT ¶1.7 (2001) [hereinafter RESPONSIBILITY TO PROTECT] (stating one of the goals of R2P is to build a greater understanding of the issues in overcoming the legal hurdles posed by state sovereignty in the context of atrocity response operations); see also Stromseth, *supra* note 2, at 248–51 (setting out a series of elements in support of a global norm of intervention that fits within the existing framework of international law).

In proposing unilateral use of UAVs as an intermediary humanitarian interference option, this Note will proceed in three Parts. Part I outlines essential points of international humanitarian law applicable to the proposal and describes UAVs and the grounds for their increasing use by the United States. Part II examines the evolution and transition over time of the concept of state sovereignty. Part III proposes that, within set parameters, unilateral use of UAVs to monitor mass atrocities is a logical extension of the Responsibility to Protect (“R2P”) doctrine.

1. *MASS ATROCITY PREVENTION AND RESPONSE ACTIONS IN INTERNATIONAL LAW*

Part I proceeds in two parts. Section A provides background information about UAVs, their use, and important operational considerations. Section B describes key principles of international humanitarian law and the evolution of R2P. Together, these Sections provide the technical and legal background necessary for exploration of the current debate on humanitarian intervention contained in Part II.

A. *Unmanned Aerial Vehicles: Use, Operational Considerations, and Proliferation*

US government use of UAVs has grown since the late 1990s as developments in technology have improved UAV efficiency and situational adaptability.¹² The US Department of Defense (“DoD”), in particular, has invested in developing UAV capabilities to meet a wide array of situational needs.¹³ Currently, these capabilities include

12. See Jim Garamone, *From U.S. Civil War to Afghanistan: A Short History of UAVs*, AM. FORCES PRESS SER.—U.S. DEP’T DEF., Apr. 16, 2002, available at <http://www.defense.gov/news/newsarticle.aspx?id=44164> (providing a brief history of UAV technology in the US military); see also James Dao & Steven Lee Myers, *Military Finds Short Supplies of Spying Craft as Need Rises*, N.Y. TIMES, Oct. 1, 2001, at B1 (describing improving UAV technology and increasing military demand). See generally LAURENCE R. NEWCOME, UNMANNED AVIATION: A BRIEF HISTORY OF UNMANNED AERIAL VEHICLES (2004) (explaining the history of UAVs and changes in UAV technology).

13. See Press Release, U.S. Senate Comm. on Armed Servs., Senate Armed Services Committee Completes Markup of National Defense Authorization Bill for Fiscal Year 2001 (May 10, 2000), available at <http://armed-services.senate.gov/press/01mark.pdf> (showing Senate support for Department of Defense UAV development); see also Joe Pappalardo, *The Future for UAVs in the U.S. Air Force*, POPULAR MECHANICS (Feb. 26, 2010, 12:00 AM),

remote navigation, advanced loitering abilities, varied surveillance technology, and the unique durability of specific UAV models in changing environmental and combat conditions.¹⁴ The US military's growing arsenal of UAVs ranges in size from the small hand-launched Raven to the large Global Hawk.¹⁵

UAVs are referred to as unmanned, but the term "remotely manned" is more accurate.¹⁶ Remote pilots operate UAVs and are often located thousands of miles away from the UAV's actual location.¹⁷ For example, pilots at Nellis Air Force Base near Las Vegas operate Predator drones in Afghanistan and Iraq through satellite communications links.¹⁸ Remote piloting is particularly

<http://www.popularmechanics.com/technology/aviation/military/4347306> (discussing drones in the Air Force).

14. See *The Drones of War*, 15 STRATEGIC COMMENTS, no. 4, June 2009, at 1–2 (discussing the benefits of using UAVs in place of traditional technology); see also CHRISTOPHER BOLKCOM, CONG. RESEARCH SERV., RS21698, HOMELAND SECURITY: UNMANNED AERIAL VEHICLES AND BORDER SURVEILLANCE 3 (2005) (describing advantages of UAV technology, including cameras, which "can identify an object the size of a milk carton from an altitude of 60,000 feet").

15. See Kimberly Johnson, *Army Finds Raven UAVs Unsuitable for Baghdad Use*, AVIATION WEEK, Sept. 6, 2005, http://www.aviationweek.com/aw/generic/story_generic.jsp?channel=aerospacedaily&id=news/RAVE09065.xml&headline=Army%20Finds%20Raven%20UAVs%20Unsuitable%20For%20Baghdad%20Use (describing the Raven); see also *Predator RQ-1/MQ-1/MQ-9 Reaper—United States of America*, AIRFORCE-TECHNOLOGY.COM, <http://www.airforce-technology.com/Projects/predator-uav/> (last visited Jan. 30, 2012) (providing an overview of the specifications of the Predator UAV, which is larger than the Raven and smaller than the Global Hawk); *Factsheet: RQ-4 Global Hawk*, U.S. AIR FORCE (Jan. 27, 2012), <http://www.af.mil/information/factsheets/factsheet.asp?id=13225> (explaining the capabilities of the Global Hawk).

16. See BONE & BOLKCOM, *supra* note 6, at 1 (defining UAVs alternatively as "remotely piloted vehicles"); Justin M. Boling, *Face of Defense: Unmanned Aerial Vehicle Operator Guides Peers*, AM. FORCES PRESS SERV.—U.S. DEP'T DEF., Sept. 21, 2011, available at <http://www.defense.gov/news/newsarticle.aspx?id=65403> (explaining how remote piloting works).

17. See, e.g., Marc Pitzke, *How Drone Pilots Wage War*, SPIEGEL ONLINE, Mar. 12, 2010, <http://www.spiegel.de/international/world/0,1518,682420,00.html> (depicting CIA drone pilots operating from command center over 6800 miles away from target); see also BONE & BOLKCOM, *supra* note 6, at 3 (describing this distance as a benefit).

18. See David A. Fulghum, *Rapid Expansion of UAV Units Planned*, AVIATION WEEK, Sept. 25, 2005, http://www.aviationweek.com/aw/generic/story_generic.jsp?channel=awst&id=news/09265p01.xml&headline=Rapid%20Expansion%20of%20UAV%20Units%20Planned (explaining the central hub established for UAV piloting and data collection); see also Noah Shachtman, *Attack of the Drones*, WIRED, June 2005, <http://www.wired.com/wired/archive/13.06/drones.html> (explaining how remote piloting works).

advantageous because UAV pilots cannot be injured or captured by enemy forces in the course of their duties.¹⁹

UAVs also offer a range of particularly valuable surveillance and monitoring technologies that may be directly applicable to atrocity response operations. Unlike satellites or planes, UAVs can remain over a specific location for an extended period of time.²⁰ This “loitering” capability is particularly beneficial, because it increases the amount of data collected from a predefined surveillance area.²¹ While loitering, UAVs may take video or still photos in visual, infrared, or radar imagery, and transmit “live” footage of a scene to decisionmakers.²² Additionally, unlike satellites, which orbit anywhere from 180 to more than 42,000 kilometers above Earth, UAVs fly much closer to Earth’s surface. This decreases the cost of loitering as well as the cost of transmitting data to analysts on the ground.²³

The use of military resources, like UAVs, for humanitarian purposes is not without precedent.²⁴ The adoption of counterinsurgency strategy by US forces in Iraq and Afghanistan, in particular, has encouraged acceptance of unconventional, civilian-

19. See Shachtman, *supra* note 18 (explaining the advantages of remote piloting); see also Pitzke, *supra* note 17 (describing the safety of the drone pilot).

20. See BOLKOM, *supra* note 14, at 2–4 (explaining the general capabilities and benefits of UAV technology); see also *The Drones of War*, *supra* note 14, at 1–2 (discussing use of UAVs for surveillance and armed combat).

21. See NEWCOME, *supra* note 12, at 101–16 (explaining specialized surveillance capabilities of UAVs); see also CHAD C. HADDAL & JEREMIAH GERTLER, CONG. RESEARCH SERV., RS21698, HOMELAND SECURITY: UNMANNED AERIAL VEHICLES AND BORDER SURVEILLANCE 3 (2010) (“The ability of UAVs to loiter for prolonged periods of time has important operational advantages over manned aircraft.”).

22. See P. W. Singer, *Military Robots and the Laws of War*, NEW ATLANTIS, Winter 2009, at 25, 37–39, <http://www.thenewatlantis.com/publications/military-robots-and-the-laws-of-war> (describing UAV surveillance techniques).

23. See *Predator UAV*, ABC NEWS, Jan. 7, 2006, <http://abcnews.go.com/US/story?id=92357&page=1> (explaining that the Predator UAV can loiter for up to forty hours and has a “maximum ceiling of 25,000 feet”); see also *Suspended Animation: Unmanned Craft Loitering in the Stratosphere May Soon Supplant Satellites*, ECONOMIST, July 5, 2003, at 70 (explaining that UAVs are closer to the ground than satellites, so their transmitters and receivers can be less powerful and more cost effective); Holli Riebeck, *Catalog of Earth Satellite Orbits*, NASA–EARTH OBSERVATORY (Sept. 4, 2009), <http://earthobservatory.nasa.gov/Features/OrbitsCatalog/> (noting the distance from Earth at which satellites orbit).

24. See JOINT CHIEFS OF STAFF, U.S. DEP’T OF DEF., JP 3-07.6, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR FOREIGN HUMANITARIAN ASSISTANCE, at vii (2001) (outlining official US Department of Defense (“DoD”) tactics in using military resources to provide humanitarian assistance).

focused operations.²⁵ The DoD's Mass Atrocity Prevention and Response Options ("MAPRO") program is an attempt to write plans for potential military responses to future international humanitarian crises.²⁶ MAPRO is particularly focused on developing effective plans for responding to the commission of atrocities, meaning "widespread and systematic use of violence by state or nonstate armed groups against noncombatants."²⁷ Nontraditional forms of information are critical to MAPRO actions, including influencing public opinion to support greater action to stop or deter atrocities.²⁸

B. *International Law and Atrocity Crimes*

International law encompasses the binding rules governing relations between sovereign states.²⁹ The UN Charter is at the heart of our modern international law regime and contains the guiding principles governing relations between UN member states.³⁰ Other sources of modern international law include, in descending degree of authority: treaties and international conventions; customary international law ("CIL"); *jus cogens*, or the "general principles of law recognized by civilized nations;" and the opinions of highly

25. See U.S. ARMY, FM 3-24, MCWP 3-33.5, COUNTERINSURGENCY, at 2-1 (2006) (explaining the importance of integrating military and civil efforts and framing response civilian needs as an essential aspect of military strategy); see also Athanasia G. Austin, *Development of US Irregular Warfare Capabilities*, J. JOINT AIR POWER COMPETENCE CTR., no. 6, 2007, at 1, available at http://www.japcc.de/fileadmin/user_upload/journal/Ed_6/070717_Austin_Article_-_US_Irregular_Warfare.pdf (arguing that the US Air Force should develop permanent irregular warfare policies to better address the realities of the US military missions today).

26. See generally SEWALL ET AL., *supra* note 3 (providing the basis for current DoD Mass Atrocity Prevention and Response Options program ("MAPRO") efforts).

27. *Id.* at 17.

28. See *id.* at 43 (explaining that nontraditional sources of information are critical to MAPRO); see also Alan J. Kuperman, *Mass Atrocity Response Operations: Doctrine in Search of Strategy*, 6 GENOCIDE STUD. & PREVENTION 59, 60-65 (2011) (critiquing attempts to enshrine MAPRO principles within military doctrine).

29. See LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 1 (1995) ("International law is the law of the international system of nation states."); see also Yuen-Li Liang, *United Nations: Documents on the Development and Codification of International Law*, 41 AM. J. INT'L L. SUPP. 29, 32-35 (1947) (describing the advent of international law and its primary purpose of regulating relations between states).

30. See U.N. Charter art. 2 (outlining the guiding principles of the UN); see also HENKIN, *supra* note 29, at 14-15 (discussing the role of the UN in the international system).

qualified national jurists.³¹ Determining the legality of using UAVs to unilaterally monitor atrocity crimes, therefore, must begin with an exploration of these foundational principles and their continued applicability in the midst of the commission of atrocity crimes.

1. General Principles of Public International Law: Prohibition on the Use or Threat of Force and the Principle of Nonintervention

Article 2(4) of the UN Charter enumerates the general prohibition on intervention.³² The Article prohibits the “threat or use of force” by UN member states against another state.³³ The Charter, however, recognizes two exceptions to this prohibition: states may use force if they are acting in self-defense and states may take forceful action if the UNSC authorizes that action in question.³⁴

“Use of force” is not explicitly defined in any international instrument. Under the prevailing view, however, “force” is limited to armed force.³⁵ Economic and other types of coercion are considered separate from armed force under the general principle of nonintervention.³⁶ The UN General Assembly’s Declaration on Friendly Relations (“Declaration”) supports this interpretation of

31. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter ICJ Statute] (listing these sources as the definitive statement of the sources of international law).

32. U.N. Charter art. 2(4) (providing the general prohibition against using force against the “territorial integrity or political independence of any state”). *But see* Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1, 1–5 (1999) (arguing that states have an obligation to respect and protect the basic human rights of all individuals and that where a state is in violation, the other may “lawfully consider itself legally ‘injured’ and is thus entitled to resort to countermeasures”).

33. U.N. Charter art. 2(4).

34. *Id.* arts. 38–42, 51 (outlining the circumstances and providing the authority by which the UN or its member states may intervene); *see* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 176, 249 (June 27) (exploring the parameters of “use of force” within international law).

35. U.N. Charter art. 2(4) (lacking explicit definition of “force”); *see* Albrecht Randelzhofer, *Article 2(4)*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 106, 108–18 (Bruno Simma et al. eds., 1994) (arguing that Article 2(4) prohibits all uses of armed force not specifically approved under the UN Charter); *see also* Timothy Kearley, *Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent*, 3 WYO. L. REV. 663, 670 (2003) (providing various views on the definition of “force” in the UN Charter).

36. *See* Randelzhofer, *supra* note 35, at 112 n.25 (“The term does not cover any possible kind of force, but is, according to the correct and prevailing view, limited to armed force.”); *see also* Matthew C. Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)*, 36 YALE J. INT’L L. 421, 427–30 (2011) (outlining the development of “use of force” under Article 2(4), as it pertains to new technologies).

“force” as denoting military coercion.³⁷ The Declaration has long been held to be a persuasive source of international law regarding the relations between states and the legitimate use of force.³⁸

A general prohibition against intervention by one state in another state’s domestic affairs is a historic fixture of CIL.³⁹ Article 2(7) of the UN Charter reaffirms this prohibition, by proscribing intervention by the UN and its member states in issues within a state’s “domestic jurisdiction.”⁴⁰ The legal and theoretical basis for Article 2(7) is rooted in the equality of all UN members in their sovereignty.⁴¹ Article 2(7) provides an exception by empowering the UNSC to approve a domestic intervention if it determines that a threat of aggression or danger to peace may exist.⁴²

37. See G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625(XXV) (Oct. 24, 1970); see also Randelzhofer, *supra* note 35, at 112 (“When interpreting the Principle that states shall refrain in their international relations from the threat or use of force, the *Declaration* deals solely with military force.”).

38. See G.A. Res. 2625 (XXV), *supra* note 37 (reaffirming the “importance of the [UN Charter] in the promotion of rule of law among nations”); see also Robert Rosenstock, *The Declaration on Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT’L L. 713, 715–16 (1971) (proposing that the purpose of the Declaration was “to clarify the standards and thereby to make more accurate the evaluation by states of how far they can go without provoking a reaction arising out of another state’s view of what is acceptable”).

39. ICJ Statute, *supra* note 31, art. 38(1) (listing customary international law (“CIL”) as one of the four sources of international law); see *Nicaragua*, 1986 I.C.J. 14, at ¶ 34 (reaffirming the prohibition as CIL); see also JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, at xlvi (2009) (accepting the prohibition as CIL); Albert Bleckmann, *Article 2(1)*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 35, at 77, 80 (“The principle of sovereignty is not a rule of public international law which could be directly applied to factual situations. It is rather a ‘principle’ from which certain legal rules of customary international law, such as state immunity or the prohibition of intervention have evolved in the context of competing principles.”).

40. U.N. Charter art. 2, para. 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter . . .”).

41. *Id.* art. 2(1); see Felix Ermacora, *Article 2(7)*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 35, at 139, 143 (“[R]espect for matters which are essentially within the domestic jurisdiction of a state has as its legal basis the respect for the sovereign equality of all members (Art. 2(1)).”).

42. U.N. Charter arts. 2 paras. 7, 39–42 (outlining the circumstances under which and the means by which the UNSC may take collective action against a member state).

2. Classification of Conflicts: Noninternational Armed Conflicts in a Legal Regime Intended to Regulate International Armed Conflicts

The law of armed conflict (“LOAC”) refers to the body of public international law that governs a state’s decision to go to war (*jus ad bellum*) and the conduct of belligerents once a conflict has commenced (*jus in bello*).⁴³ In making the decision to go to war, states and their leaders premise their reasoning upon various philosophical and ethical frameworks.⁴⁴ “Just war” theory is one such doctrine on military ethics and the ethical use of force.⁴⁵ At its core, just war theory seeks to impose ethical rules upon both the decision to go to war and the conduct of hostilities once they begin.⁴⁶ This theory is particularly relevant to current US policy discussions surrounding the use of force.⁴⁷ *Jus ad bellum* principles govern the circumstances under which a state may resort to force, and by analogy may also provide persuasive guidance as to when a state may violate another

43. See KEIICHIRO OKIMOTO, THE DISTINCTION AND RELATIONSHIP BETWEEN *JUS AD BELLUM* AND *JUS IN BELLO* 7–12 (2011) (explaining the remaining distinctions between *jus ad bellum* and *jus in bello*); Carsten Stahn, ‘*Jus ad Bellum*,’ ‘*Jus in Bello*’ . . . ‘*Jus post Bellum*’?—Rethinking the Conception of the Law of Armed Force, 17 EUR. J. INT’L L. 921, 921–24 (2007) (theorizing different applications of the law of armed conflict (“LOAC”) at various phases of a conflict).

44. See, e.g., CARL VON CLAUSEWITZ, ON WAR (Anatol Rapoport ed., Penguin Books 1968) (1873) (representing an influential view of the nature of warfare and motivations for engaging in it); SAINT AUGUSTINE, THE CITY OF GOD bk. XIX, at 515, 517–18, in 18 THE CONFESSIONS: THE CITY OF GOD; ON CHRISTIAN DOCTRINE 165 (Marcus Dods trans., Robert Maynard Hutchins, ed., Encyclopedia Britannica, Inc. 1989) (examining free choice, warfare, and related theological issues).

45. See John Langan, *The Elements of St. Augustine’s Just War Theory*, 12 J. RELIGIOUS ETHICS 19, 25–37 (1984) (explaining the basics of just war theory from a Catholic perspective); see also Ross Douthat, *Just War and Modern Warfare*, ATLANTIC (Jan. 5, 2009, 11:58 AM), <http://www.theatlantic.com/personal/archive/2009/01/just-war-and-modern-warfare/55891/> (analyzing the application of just war theory to a recent conflict).

46. See Langan, *supra* note 45, at 24–27 (examining underlying themes of St. Augustine’s just war theory); see also 2 ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA OF SAINT THOMAS AQUINAS II-II.40.1, at 578–79 (Robert Maynard Hutchins ed., Fathers of the English Dominican Province trans., Encyclopedia Britannica, Inc., 1989 ed.) (examining the conditions whereby a war may be found just).

47. See Michael Walzer, *The Triumph of Just War Theory—and the Dangers of Success*, 69 SOC. RESEARCH 4, 4–6 (2009) (discussing the United States’s return to just war theory after World War II); see also Roger Wertheimer, *Introduction: A Great Awakening*, in EMPOWERING OUR MILITARY CONSCIENCE: TRANSFORMING JUST WAR THEORY AND MILITARY MORAL EDUCATION 1, 1–11 (Roger Wertheimer ed., 2010) (discussing the development of ethics training within the armed forces).

state's territorial sovereignty for humanitarian purposes.⁴⁸ Historically, just war theory has asserted six criteria necessary to determine if the use of force is appropriate: (1) just cause, (2) right intention, (3) proper authority, (4) last resort, (5) probability of success, and (6) proportionality.⁴⁹ Just war theory and *jus ad bellum* criteria remain relevant because they provide a framework for evaluating the permissibility of humanitarian interference operations.⁵⁰

Within the LOAC, there are two distinct types of armed conflicts: international armed conflicts ("IAC") and noninternational armed conflicts ("NIAC").⁵¹ IACs occur between two or more sovereign states and are governed by the entire corpus of the LOAC, including all the Geneva Conventions.⁵² NIACs, on the other hand, take place within the borders of a single state and likely involve

48. See Sean D. Murphy, *Protean Jus Ad Bellum*, 27 BERKELEY J. INT'L L. 22, 22–26 (2009) (analyzing *jus ad bellum* in a changing international law context); see also Stahn, *supra* note 43, at 924–26 (noting the possibility of “a new normative dispensation, according to which egregious violations of *jus in bello* [such as the commission of atrocity crimes] could be regarded as the trigger for rights under the *jus ad bellum*”).

49. See Eric A. Heinze & Brent J. Steele, *Introduction: Non-State Actors and the Just War Tradition*, in ETHICS, AUTHORITY, AND WAR: NON-STATE ACTORS AND THE JUST WAR TRADITION 1, 5–6 (Eric A. Heinze & Brent J. Steele eds., 2009) (listing the just war criteria: just cause, right authority, right intention, proportionality of ends, last resort, and reasonable prospect for success).

50. See Walzer, *supra* note 47, at 934–36 (explaining the continued applicability of just war theory in contemporary conflicts); see also Wertheimer, *supra* note 47, at 1–11 (discussing the continued demand for just war ethics education).

51. See Geneva Convention Relative to the Treatment of Prisoners of War (III) art. 2(1), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (providing the generally accepted definition of an international armed conflict (“IAC”) as “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if a state of war is not recognized by one of them”); *id.* art. 3 (defining a noninternational armed conflict (“NIAC”) as a “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”).

52. Geneva Convention Relative to the Treatment of Prisoners of War (III), *supra* note 51, art. 2 (applying to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war *is not recognized by one of them*” (emphasis added)); see Int’l Comm. of the Red Cross, Nov. 26–30, 2007, *30th International Conference of the Red Cross and Red Crescent: International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 30IC/07/8.4, at 4–8 (2007), available at <http://www.icrc.org/eng/assets/files/other/ihl-challenges-30th-international-conference-eng.pdf> (“A fragmentary approach to IHL contradicts the essential IHL principle of humanity, which must apply equally to all victims of armed conflict if it is to retain its inherent meaning at all.”).

nonstate actors.⁵³ Article 3 common to all four Geneva Conventions of 1949 (“Common Article 3”) and Additional Protocol II to the 1949 Geneva Conventions are the only portions of the LOAC that explicitly govern NIACs.⁵⁴

The distinction between IACs and NIACs relates to the permissibility of unilateral atrocity monitoring in two ways. First, the existence of an NIAC may indicate that an internal disturbance has risen to a level justifying unilateral monitoring. Second, because different aspects of the LOAC apply in IACs and NIACs, determining the permissibility of a monitoring state’s actions may differ in these two contexts.⁵⁵ Recent history also suggests that NIACs are now more prevalent than IACs.⁵⁶

The presence of an “armed conflict” distinguishes NIACs from other situations of internal disturbances or internal tensions.⁵⁷ In the 1997 case *Prosecutor v. Tadic*, the International Criminal Tribunal for the Former Yugoslavia outlined a two-prong test for determining the existence of an armed conflict: (a) the intensity of the conflict and (b) the organization of the parties.⁵⁸ Under the first prong in *Tadic*, an armed conflict only exists when a situation rises to a level of violence that is not a normal or routine extension of tense internal discourse, or

53. See Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT’L REV. RED CROSS 69, 70–75 (2009) (describing the characteristics of a typical conflict in an NIAC context).

54. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War (IV) art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Common Article 3]; see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II] (developing Common Article 3 and expanding the range of conflicts brought under its jurisdiction).

55. See ANTHONY CULLEN, *THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW* 8–23 (2010) (examining the traditional determination as to what aspects of international law applied in a given conflict). See generally François Bugnion, *Jus ad Bellum, Jus in Bello and Non-International Armed Conflicts*, in 6 YEARBOOK OF INT’L HUMANITARIAN LAW 167 (2003) (examining the distinction between *jus ad bellum* and *jus in bello* in the context of an NIAC).

56. See Nils Petter Gleditsch et al., *Armed Conflict 1946–2001: A New Dataset*, 39 J. PEACE RES. 615, 616 (2002) (discussing the increasing number of NIACs as compared to IACs).

57. *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 94 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (discussing the factors relevant to determining the existence of an “international” armed conflict).

58. *Id.* ¶ 562 (providing a formula for determining the characterization of an armed conflict).

a momentary civil disturbance.⁵⁹ The second prong in *Tadic* requires that the groups involved meet a minimum level of organization.⁶⁰ These two components are evaluated on a case-by-case basis utilizing indicative factors like the intensity of the particular conflict.⁶¹

3. Evolution of the Principle of Nonintervention

The prevailing understanding of Article 2(7), addressing a general prohibition against intervention, has changed over time.⁶² Early scholars of the UN Charter described Article 2(7) as regulating the UN's relations *with* member states, not as embodying the general principle of nonintervention *among* member states.⁶³ The legality of humanitarian interventions was previously thought to rest on general international law or on the customary principle of nonintervention.⁶⁴

59. See, e.g., Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶¶ 84, 90 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005) (using the *Tadic* test to determine whether an armed conflict existed); Sylvain Vit , *supra* note 53, at 69, 77 (explaining that internal disturbances "cover less violent circumstances involving, for example, mass arrests, . . . torture . . . forced disappearance and/or the suspension of fundamental judicial guarantees"); see also Int'l Comm. of the Red Cross, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, at 3–5 (Mar. 2008) (providing the ICRC's view of how "armed conflict" should be interpreted under the LOAC). See generally Pascale Chifflet, *The First Trial of Former Members of the Kosovo Liberation Army: Prosecutor v. Fatmir Limaj, Haradin Bala, and Isak Musliu*, 19 LEIDEN J. INT'L L. 459, 459–65 (2006) (examining the contribution *Limaj* made to the definition of armed conflict in international jurisprudence).

60. *Tadic*, Case No. IT-94-1-I, ¶¶ 66–70; see *Limaj*, Case No. IT-03-66-T, ¶ 90; see also Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgement, ¶ 60 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008) (providing a comprehensive review of the factors taken into account by the International Criminal Tribunal for the Former Yugoslavia in its armed conflict determination).

61. Prosecutor v. Rutaganda, Case No. ICTR 96-3-T, Judgement and Sentence, ¶ 93 (Dec. 6, 1999) ("[T]he definition of an armed conflict *per se* is termed in the abstract, and whether or not a situation can be described as an 'armed conflict,' meeting the criteria of Common Article 3, is to be decided upon a case-by-case basis."); see *Haradinaj*, Case No. IT-04-84-T, ¶ 49 ("Trial Chambers have relied on indicative factors relevant for assessing the 'intensity' criterion . . .").

62. See, e.g., Ermacora, *supra* note 41, ¶¶ 26–27, at 149 (arguing that Article 2(7) contains three specific rules governing the UN's relationship with member states); c.f. J.S. Watson, *Autointerpretation, Competence, and the Continuing Validity of Article 2(7) of the UN Charter*, 71 AM. J. INT'L L. 60, 60, 66 (1977) (providing an example of an older understanding of Article 2(7)).

63. See, e.g., Ermacora, *supra* note 41, ¶ 29, at 150 ("The rule of Art. 2(7) is merely a detail of the general rule of non-intervention . . . a delimitation of competence between the state and the organs of the UN.").

64. See *id.* ¶ 31, at 150–51 (stating that the legality of humanitarian interventions undertaken by member states is judged under general international law, not Article 2(7)); see

In the mid-to-late 1990s, however, this perception changed; the end of the Cold War shifted attention to effective responses to humanitarian crises.⁶⁵

For the purposes of this Note, humanitarian intervention is defined as:

[T]he *threat* or *use of force* across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than [the acting state's] own citizens, without the permission of the state within whose territory force is applied.⁶⁶

This definition encompasses the generally understood definition of humanitarian intervention and provides a starting point from which to explore changing state practice regarding the protection of civilians.⁶⁷

A state's decision whether or not to employ an intermediary humanitarian interference option against another state can be likened to one state's decision to use force against another.⁶⁸ In both situations, the intervening state must justify its breach of another state's inherent sovereignty.⁶⁹ Without a justification of its actions, the intervening state is vulnerable to charges of violation of the

also MICHAEL NEWMAN, HUMANITARIAN INTERVENTION: CONFRONTING THE CONTRADICTIONS 8–11 (2009) (arguing that after World War II the state was the central element of the international order).

65. See NEWMAN, *supra* note 64, at 38–39 (explaining the effect of the end of the Cold War on the development of the doctrine of humanitarian intervention); JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 3–4 (2006) (exploring the responsibilities of acting states following an intervention and their potential humanitarian responsibilities).

66. J.L. Holzgrefe, *The Humanitarian Intervention Debate*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS, *supra* note 2, at 15, 18 (emphasis added).

67. See NEWMAN, *supra* note 64, at 3 (describing the varied terminology used in reference to humanitarian actions); see also Bernard Kouchner, *The Right to Intervention: Codified in Kosovo*, 16 NEW PERSPECTIVES Q., Summer 1999, at 4, 4 (providing an older conception of humanitarian intervention as a “right”).

68. See U.N. Secretary-General's High-Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, ¶¶ 199–203, U.N. Doc. A/59/565 (Dec. 2, 2004) (demonstrating the trajectory towards acceptance of humanitarian intervention to protect human rights); see also L. C. Green, *Enforcement of International Humanitarian Law and Threats to National Security*, 8 J. CONFLICT & SEC. L. 101, 113–15 (2003) (discussing the issues raised by humanitarian intervention regarding the acted-upon state's sovereignty).

69. U.N. Charter, art. 2, paras. 4, 7; see RESPONSIBILITY TO PROTECT, *supra* note 11, ¶¶ 4.18–4.27 (explaining that a state is required to justify its actions and provide reasonable evidence of its humanitarian purpose prior to any R2P intervention).

prohibition against use of force enshrined in Article 2(4) of the UN Charter.⁷⁰

4. International Humanitarian Law and the Protection of Civilians

Ethical imperatives have shaped the development of the LOAC and, consequently, have influenced the development of humanitarian norms in customary international law.⁷¹ In turn, as developments in modern weaponry have raised ethical and moral concerns they have also influenced the formation of LOAC norms.⁷² The Saint Petersburg Convention of 1868, which banned the use of certain projectiles, is an example of this strong ethical influence on the LOAC in light of the increasingly brutal human costs of modern warfare.⁷³

In the 1949 *Corfu Channel* case, the International Court of Justice (“ICJ”) ruled that certain “elementary considerations of humanity” embodied in the Hague Conventions of 1907 were part of customary international law and applied even during peacetime.⁷⁴ In that case, the ICJ held that Albania had a legal obligation to warn an

70. See, e.g., Simma, *supra* note 32, at 15–21 (showing that even where a state claims humanitarian justifications it is still vulnerable to charges of illegality); see also Jonathan E. Davis, *From Ideology to Pragmatism: China’s Position on Humanitarian Intervention in the Post-Cold War Era*, 44 VAND. J. TRANSNAT’L L. 217, 254–64 (2011) (examining China’s position on R2P and humanitarian response operations from 2005 onward).

71. Hague Convention (II) with Respect to the Laws and Customs of War on Land, pmbl., July 29, 1899, 32 Stat. 1803; see BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 145–47 (2010) (“[The] evolution of international humanitarian law was largely inspired by perceived ethical imperatives.”).

72. See Jakob Kellenberger, President, Int’l Comm. of the Red Cross, Keynote Address at the 34th Round Table on Current Issues of International Humanitarian Law, International Humanitarian Law and New Weapon Technologies (Aug. 9, 2011) (laying out principles used by the International Committee of the Red Cross to inform the approach of LOAC towards new means and methods of warfare); see also ELIZABETH G. FERRIS, THE POLITICS OF PROTECTION: THE LIMITS OF HUMANITARIAN ACTION 2 (2011) (arguing that developments in humanitarian law were often a result of changes in warfare).

73. Saint Petersburg Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297, available at <http://www.icrc.org/LOAC.nsf/FULL/130?OpenDocument> [hereinafter Saint Petersburg Declaration]; see Bonnie Docherty, *Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law*, 31 HUM. RTS. Q. 934, 935–40 (2009) (examining a more recent attempt to ban new weaponry based).

74. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9) (basing its decision on “elementary considerations of humanity,” which it held to be “even more exacting in peace than in war”); see LEPARD, *supra* note 71, at 146 (noting that *Corfu Channel* implies that “elementary considerations of humanity” may be a basis for recognizing a customary legal obligation).

approaching British warship of minefields in its territorial waters.⁷⁵ Additionally, the court explained that norms that had previously applied only in wartime, also applied in peacetime because of their status as customary international law.⁷⁶ This decision laid the groundwork for later cases that expanded the applicability of LOAC norms to nontraditional, nonarmed conflict contexts.⁷⁷

LOAC treaties have increasingly paid heed to the importance of civilian protection.⁷⁸ Some of these protective norms have also found their way into customary international law.⁷⁹ For example, in *Military and Paramilitary Activities in and Against Nicaragua* (“*Nicaragua*”), the ICJ found that Common Article 3 of the 1949 Geneva Conventions was equally applicable during both NIACs and IACs.⁸⁰ The ICJ’s holding appeared to declare that Common Article 3 could be considered at the level of customary international law.⁸¹

The *Legality of the Threat or Use of Nuclear Weapons* (“*Nuclear Weapons Advisory Opinion*”), an ICJ advisory opinion of 1996, built upon the foundation laid by the Saint Petersburg Declaration of 1868 and Article 36 of the Additional Protocol I of 1977, encompassing the customary prohibition on the use of certain weapons included in those documents.⁸² The Nuclear Weapons Advisory Opinion declared that

75. *Corfu Channel*, 1949 I.C.J. at 23.

76. *Id.* at 22.

77. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 214 (June 27) (finding that laying mines in a harbor infringed freedom of communications and maritime commerce); *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (providing most thorough analysis to-date for determining the existence of an armed conflict under international law).

78. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 250–65 (2000) (examining the increasing focus of the LOAC on the protection of civilians); FERRIS, *supra* note 72, at 2–6 (discussing the term “protection” from a humanitarian aid perspective).

79. See *Nicaragua*, 1986 I.C.J. ¶ 218 (stating that Common Article 3 constitutes a minimum level of rights applicable in armed conflicts and equating Common Article 3 with CIL); see also LEPARD, *supra* note 71, at 146–47 (“Effectively, the Court concluded that these rules had passed into customary international law in part because of their fundamental humanitarian character.”).

80. *Nicaragua*, 1986 I.C.J. ¶ 218 (“[T]hese rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts.”).

81. See LEPARD, *supra* note 71, at 148; see also HENCKAERTS & DOSWALD-BECK, *supra* note 39, at 3–14 (arguing that Common Article 3 must now be considered customary international law).

82. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8); see Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 36,

the basic rules of LOAC are to be “intransgressible principles of international customary law.”⁸³ The ICJ held several fundamental principles of the LOAC to be applicable in a nonconflict setting.⁸⁴ One of these, the principle of distinction, distinguishes combatants from noncombatants by prohibiting the use of weapons incapable of differentiating between military and civilian targets.⁸⁵ Another bars the use of weapons that caused needless suffering in order to protect combatants from undue misery.⁸⁶ The ICJ, drawing on the overarching value of humanity, concluded that LOAC rules apply continuously regardless of technological advances in weaponry.⁸⁷

Corfu Channel, Nicaragua, and the Nuclear Weapons Advisory Opinion together demonstrate that the humanitarian aspects of the LOAC are, indeed, international law.⁸⁸ These cases also exemplify the role of ethical reasoning in the ICJ decisionmaking process.⁸⁹ Respect

June 8, 1977, 1125 U.N.T.S. 3 (describing obligation of a contracting party to ensure that employment of a new weapon or technology would not violate international law); Saint Petersburg Declaration, *supra* note 73 (exemplifying the prohibition of weaponry based on humanitarian justifications).

83. Legality of the Threat or Use of Nuclear Weapons, *supra* note 82, ¶ 79 (asserting that the basic rules of the LOAC “are so fundamental to the respect of the human person and ‘elementary considerations of humanity’” that these rules now “constitute intransgressible principles of international customary law”).

84. *Id.* ¶ 78 (listing “cardinal principles” of LOAC including: distinction, prohibition on indiscriminate weapons, prohibition against unnecessary suffering, and restrictions on weaponry); see Louise Doswald-Beck, *International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, 316 INT’L REV. RED CROSS 35, 36–37 (1997) (providing an overview of the ICJ’s reasoning).

85. Legality of the Threat or Use of Nuclear Weapons, *supra* note 82, ¶ 78 (describing the principle of distinction).

86. *Id.* (explaining the prohibition on unnecessary suffering).

87. *Id.* ¶ 86 (noting the “intrinsic humanitarian character of the [LOAC] legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, *those of the past, those of the present and those of the future*” (emphasis added)).

88. See *supra* notes 74, 80, 83–86 and accompany text (discussing these cases).

89. See GENTIAN ZYBERI, *THE HUMANITARIAN FACE OF THE INTERNATIONAL COURT OF JUSTICE: ITS CONTRIBUTION TO INTERPRETING AND DEVELOPING INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW RULES AND PRINCIPLES* 257 (2008) (exploring the ICJ’s general willingness to apply humanitarian/moral principles to its decision-making process); see also Vincent Chetail, *The Contribution of the International Court of Justice to International Humanitarian Law*, 85 INT’L REV. RED CROSS 235, 235–36, 36 n.2 (2003) (stating that rulings of the ICJ are the best formulation of international law on this topic).

for these humanitarian principles helps states maintain and rebuild civilized society during and after armed conflict.⁹⁰

5. Evolution of UN Humanitarian Actions in Member States

The system of nation states that emerged from the 1648 Peace of Westphalia recognized the internal sovereignty and external equality of a community of states governed by commonly recognized rules of coexistence.⁹¹ Under the Westphalian system of sovereign equality, external interference in the internal affairs of another state was prohibited, except in those matters implicating international obligations.⁹² Even then, the international community discouraged the forceful intervention of one state into the domestic affairs of another offending state.⁹³ In the political and legal discourse that emerged during this period, a state's sovereignty was an essential characteristic, not to be interfered with by external actors.⁹⁴

During the twentieth century the attention of state leadership turned increasingly from a focus on interactions between states to the interactions of the state with its citizens.⁹⁵ In part, the shift was due to

90. See Wolff Heintschel von Heinegg, *Factors in War to Peace Transitions*, 27 HARV. J. L. & PUB. POL'Y 843, 845–55 (2004) (exploring war-to-peace transitions and related LOAC issues).

91. See HANS BLIX, SOVEREIGNTY, AGGRESSION AND NEUTRALITY 10–11 (1970) (describing the post-World War II international system of governance as one between equally sovereign states). *But see* Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT'L ORG. 251, 254–60 (2001) (claiming that “Westphalian” sovereignty is a construction of the nineteenth and twentieth centuries).

92. See Daniel Philpott, *Westphalia, Authority, and International Society*, 47 POL. STUD. 566, 570–89 (1999) (providing background of the Westphalian system of statehood); *see also* Brendan Simms, *'A False Principle in the Law of Nations': Burke, State Sovereignty, [German] Liberty, and Intervention in the Age of Westphalia*, in HUMANITARIAN INTERVENTION: A HISTORY, *supra* note 10, at 89, 89–92 (examining state intervention in early-modern Europe).

93. BLIX, *supra* note 91, at 12 (“[I]n matters which fall under the exclusive domestic jurisdiction of a state, another state is not entitled to make any requests at all.”); *see* D. F. B. Trim & Brandon Simms, *Towards a History of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: A HISTORY, *supra* note 10, at 1, 21 (linking current support for humanitarian intervention to older religious and moral support frameworks).

94. See Osiander, *supra* note 91, at 255–58 (providing argument against the largely accepted discourse of Westphalian sovereignty); *see also* Trim & Simms, *supra* note 93, at 12–13 (discussing historical developments of state sovereignty).

95. Kofi Annan, Secretary-General of the United Nations, Ditchley Foundation Lecture XXXV (June 26, 1998), *available at* <http://www.ditchley.co.uk/page/173/lecture-xxxv.htm> (“The fact that a conflict is ‘internal’ does not give the parties any right to disregard the most basic rules of human conduct.”). *See generally* Susan C. Breau, *The Impact of the Responsibility to Protect on Peacekeeping*, 11 J. CONFLICT & SEC. L. 429 (2007) (examining

the adoption of the UN's Universal Declaration on Human Rights ("UDHR"), the subsequently increasing acceptance of human rights norms as part of the larger canon of international law, and resulting changes to elements of state and UN practice with regard to who were considered "subjects" of international law.⁹⁶ Prior to the adoption of the UDHR, only states were considered to be subjects of international law.⁹⁷ With the advent of the UN and the international human rights movement, the individual became a subject of international law. As a consequence, the treatment of citizens by their government became an integral component of relationships between states and a subject for routine consideration by the UN.⁹⁸

6. R2P and Humanitarian Intervention and Interference

A state's obligation to protect its own population from atrocity crimes is widely accepted in the international community.⁹⁹ It was not until relatively recently, however, that the international community began to recognize the legitimacy of interventions by external states to prevent these violations.¹⁰⁰ The following Sections explain the

intervention from the view of collective security and the impact of R2P on UN peacekeeping operations).

96. See, e.g., Rosalyn Higgins, *Conceptual Thinking About the Individual in International Law*, 4 BRIT. J. INT'L STUD. 1, 1–10 (1978) (developing concept of the individual as a subject of international law); Rene Provost, *Reciprocity in Human Rights and Humanitarian Law*, 65 BRIT. Y.B. INT'L L. 383, 383–84 (1994) (examining the intersections of human rights and humanitarian law).

97. Universal Declaration of Human Rights, G.A. Res. 217A (III), pmbl., U.N. Doc. A/RES/217 (Dec. 10, 1948) (stating explicitly that individuals have rights under international law); HENKIN, *supra* note 29, at 7–10 (explanation of the pre-UN system of statehood and its antecedent, the European "princeloms").

98. See G.A. Res. 60/251, U.N. Doc. A/RES/60/251, at 2 (Apr. 3, 2006) (establishing the Human Rights Council and affirming its reporting power); see also Rep. of the Human Rights Council, 5th Sess., June 11–18, 2007, U.N. Doc No. A/62/53; GAOR, 62d Sess., Supp No. 53, at 48 (2007) (establishing a new complaint procedure).

99. See EDWIN MONTEFIORE BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 296–97 (1915) (claiming that states have a right to protect their citizens); see also, e.g., John R. D'Angelo, Note, *Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and Its Legality Under International Law*, 21 VA. J. INT'L L. 485, 486–90 (1981) (exploring legality of the US attempted rescue mission of its nationals held captive in Iran).

100. See, e.g., World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 18, U.N. Doc. A/CONF.157/23 (July 12, 1993) (recommending that the General Assembly establish the High Commissioner for Human Rights); see NEWMAN, *supra* note 64, at 46–49 (explaining the effects of the rise of international human rights law on the humanitarian intervention debate); see also

relevance of the doctrine of humanitarian intervention and its corollary, R2P, as they relate to the use of UAVs to unilaterally monitor atrocity crimes.¹⁰¹

States have claimed humanitarian grounds to justify intervening in the affairs of another state as early as the nineteenth century.¹⁰² More recently, following the 1999 NATO Kosovo operation and the retroactive legitimacy granted to the mission by UNSC Resolution 1244, humanitarian justifications as the sole purpose for intervention gained legitimacy.¹⁰³ The doctrine of R2P developed in response to the humanitarian intervention “dilemma” of the 1990s and subsequent calls for a global consensus on the legality of humanitarian response operations.¹⁰⁴

R2P shifts the debate from whether a state has a “right” to intervene to a discussion of when a state has a “responsibility” to intervene.¹⁰⁵ In 1999, then-UN Secretary General Kofi Annan challenged the international community to develop a consensus on the

RESPONSIBILITY TO PROTECT, *supra* note 11, ¶ 2.6 (holding that states have a responsibility to protect even nonnationals from atrocity crimes).

101. See RESPONSIBILITY TO PROTECT, *supra* note 11, ¶¶ 1.10–1.31 (providing an overview of the links between R2P and older conceptions of humanitarian intervention); see also GARETH EVANS, *THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL* 32–38 (2008) (describing the theories of humanitarian intervention that directly contributed to the development of R2P).

102. See David Rodogno, *The ‘Principles of Humanity’ and the European Powers’ Intervention in Ottoman Lebanon and Syria in 1860–1861*, in *HUMANITARIAN INTERVENTION: A HISTORY*, *supra* note 10, at 159, 159–61 (proposing that the European system of statehood hindered unilateral interventions in Europe, but empowered European states to undertake such actions elsewhere, thus encouraging the beginning of European colonialism); see also Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 *CAL. W. INT’L L.J.* 203, 206–13 (1974) (providing brief overview of historical perspective on humanitarian intervention, highlighting importance of European powers’ actions in Eastern Europe during the Cold War).

103. S.C. Res. 1244, *supra* note 11, ¶ 5 (authorizing the NATO mission in Kosovo). But see Louis Henkin, *Kosovo and the Law of “Humanitarian Intervention,”* 93 *AM. J. INT’L L.* 824, 825–30 (1999) (challenging the assertion that NATO’s unilateral actions in Kosovo were legal prior to UNSC authorization).

104. See RESPONSIBILITY TO PROTECT, *supra* note 11, ¶¶ 1.1–1.9 (discussing the birth of the R2P movement after the mass atrocities committed in Kosovo, Rwanda, and Somalia and describing the demand at the time for a more flexible approach to humanitarian crises); see EVANS, *supra* note 101, at 38–43 (describing the progression from formation of the International Commission on Intervention and State Sovereignty (“ICISS”) to presentation of the R2P Report to the international community).

105. See RESPONSIBILITY TO PROTECT, *supra* note 11, ¶¶ 2.28–2.33 (attempting to shift discourse away from a “right” to intervene towards a “responsibility” to act in the face of mass atrocity).

authoritative foundation for humanitarian intervention.¹⁰⁶ Specifically, he urged deliberation on the basic questions of “when,” “by whom,” and “how” armed intervention should be permitted.¹⁰⁷ In response, the government of Canada sponsored the formation of the independent International Commission on Intervention and State Sovereignty (“ICISS”).¹⁰⁸ In December 2001, ICISS published its report, *The Responsibility to Protect*.¹⁰⁹ According to the report states cannot exert unlimited power within their domestic jurisdiction.¹¹⁰ Instead, the report outlines a state’s obligations to respect human rights and LOAC obligations within their own borders, and to ensure the protection of these principles abroad.¹¹¹ The report introduced a new concept, “sovereignty as responsibility.”¹¹²

In its report, ICISS laid out six criteria for military intervention that encompass general *jus ad bellum* principles and build on the just war tradition.¹¹³ These criteria are: (1) right authority, (2) just cause, (3) right intention, (4) last resort, (5) proportional means, and (6) reasonable prospects.¹¹⁴ The ICISS report detailed the meaning of these criteria in relation to determining the necessary threshold for legitimate military intervention for humanitarian purposes.¹¹⁵

106. See UN Press Release, *supra* note 1 (“[The conflict in Kosovo] has cast in stark relief the dilemma of what has been called humanitarian intervention . . .”); see also RESPONSIBILITY TO PROTECT, *supra* note 11, ¶ 1.6 (quoting former Secretary General Kofi Annan, who asked: “[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to . . . gross and systematic violations of human rights that offend every precept of our common humanity?”).

107. See generally UN Press Release, *supra* note 1 (calling on the international community to act to stop atrocities as they take place).

108. See RESPONSIBILITY TO PROTECT, *supra* note 11, ¶¶ 1.1–1.9 (explaining the origins and goals of ICISS and its R2P Report).

109. See generally *id.* (arguing that the principle of nonintervention must yield to the “responsibility to protect” where a population is suffering serious harm and a state is unwilling or unable to halt or avert the harm).

110. See *id.* ¶¶ 2.28–2.33 (shifting the debate on humanitarian intervention from a “right to intervene” towards acceptance of a “responsibility to protect”).

111. See *id.* ¶¶ 4.20–4.22, 6.16–6.18 (listing violations that may trigger R2P, including violations of Geneva Conventions, which encompass the LOAC legal corpus, as well as human rights norms, and examining legal capacity for R2P).

112. *Id.* ¶¶ 2.14–2.15 (advocating for a recharacterization of sovereignty from “sovereignty as control” to “sovereignty as responsibility”).

113. Compare *id.* ¶ 4.16, with Langan, *supra* note 45, at 25–37 (explaining the just war criteria).

114. RESPONSIBILITY TO PROTECT, *supra* note 11, ¶ 4.16 (listing the six criteria for intervention).

115. See *id.* ¶¶ 4.18–4.23 (explaining the criteria for justified humanitarian military intervention).

According to ICISS, violence in a state only rises to an actionable level when it “shock[s] the conscience of mankind” or “present[s] such a clear and present danger to international security, that they require coercive military intervention.”¹¹⁶

A monitored state may have “just cause” to act unilaterally under R2P if the humanitarian crisis in a monitored state reaches a certain threshold level of severity and the UNSC has not or is not expected to intervene.¹¹⁷ The “systematic and widespread” criterion is part of the standard used to determine the existence of an atrocity crime; the existence of one of these four egregious crimes is the foundation for the justification of humanitarian intervention or interference.¹¹⁸

NATO applied R2P principles when it intervened in Libya in March 2011 to protect civilians in the context of an NIAC.¹¹⁹ UNSC Resolution 1973 authorized international intervention in Libya through establishment of a “No Fly” zone and interdiction of Libyan Armed Forces attacks on its citizens in order to protect Libyan civilians from violence committed by their own government.¹²⁰ The UNSC’s approval of NATO military action provided a measure of legitimacy the doctrine of humanitarian intervention in international law.¹²¹ Growing state acceptance of the legality of R2P principle can

116. *See id.* ¶ 4.13.

117. *See id.* ¶ 4.19 (describing the just cause requirement in terms of two broad categories: (1) large scale loss of life, or (2) large scale “ethnic cleansing”).

118. *See* Theodor Meron, *War Crimes Law Comes of Age*, 92 AM. J. INT’L L. 462, 464 (1998) (explaining the origins of the widespread or systematic criterion in the International Criminal Tribunal for the Former Yugoslavia); *see also* EVANS, *supra* note 101, at 11–13 (exploring the modern definition of mass atrocity).

119. *See* Jayshree Bajoria, *The Dilemma of Humanitarian Intervention*, COUNCIL ON FOREIGN REL. (Mar. 24, 2011), <http://www.cfr.org/human-rights/dilemma-humanitarian-intervention/p16524> (discussing the legal aspects of NATO’s intervention in Libya); Daniel Serwer, *The Strikes on Libya: Humanitarian Intervention, Not Imperial Aggression*, ATLANTIC, Mar. 19, 2011, <http://www.theatlantic.com/international/archive/2011/03/the-strikes-on-libya-humanitarian-intervention-not-imperial-aggression/72740/> (arguing that NATO’s air support to Libyan rebels constituted an act of humanitarian intervention); *see also* Robert Marquand, *How Libya’s Qaddafi Brought Humanitarian Intervention Back in Vogue*, CHRISTIAN SCI. MONITOR, Mar. 28, 2011, <http://www.csmonitor.com/World/Middle-East/2011/0328/How-Libya-s-Qaddafi-brought-humanitarian-intervention-back-in-vogue> (discussing the resurgence in the debate over humanitarian intervention after NATO’s actions in Libya).

120. *See* S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011) (authorizing NATO member states’ actions in Libya); *see also* Press Release, Security Council Approves ‘No-Fly Zone’ over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilian, by Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011).

121. *See* Bajoria, *supra* note 119 (describing the importance of the events in Libya to the evolution of the R2P doctrine); *see also* Jeremy Kinsman, *Libya: A Case for Humanitarian*

provide legal support for less intrusive actions taken for similar purposes.¹²²

II. *UNILATERAL STATE ACTION: STATE SOVEREIGNTY VERSES HUMANITARIAN RESPONSIBILITY*

There is conflict between an absolutist view of traditional territorial state sovereignty and the still-evolving position suggesting that armed interventions are justifiable for limited humanitarian purposes. Part II discusses how R2P can be used to justify a specific humanitarian interference, namely operating UAVs for the purpose of monitoring conditions in a nonconcurring state such that their use does not rise to the level of armed intervention. Intermediary humanitarian interference mechanisms may provide a bridge between blind respect for state sovereignty and respect for individual rights. Part II outlines issues central to the application of R2P criteria in nonforceful operations and provides context for Part III's application of these criteria to a specific humanitarian interference mechanism, unilateral UAV monitoring.

Section A explores the basis for determining if a state's alleged violations have risen to a level of severity permitting unilateral intervention. Section B presents different positions on how to determine when a humanitarian crisis is so severe as to warrant action without UNSC authorization. Section C then presents the goals of monitoring and documentation of atrocity crimes, while Section D describes suggested limitation on the extent of permissible monitoring activity. Finally, Section E presents a need for state control over monitoring personnel.

A. Basis for Determining Whether a State's Violations Have Risen to a Level that Permits Unilateral Interference

For a state to take unilateral action against another state, the acting state must provide a legal basis for its actions.¹²³ If it cannot

Intervention, POL'Y OPTIONS, Oct. 2011, at 81, 82–87 (arguing that the UNSC's authorization of NATO's mission in Libya demonstrates that the issue of "liberal humanitarian intervention" is neither "fully validated nor discredited").

122. See RESPONSIBILITY TO PROTECT, *supra* note 11, ¶ 1.38, ¶ 4.13 (advocating attention to nonmilitary actions in addition to military actions).

123. See U.N. Charter art. 2, para. 7 (prohibiting intervention in the domestic affairs of another state).

provide such a basis, then its actions are illegal under international law.¹²⁴ For a monitoring state to have a humanitarian justification for unilateral interference, it must provide a reliable evidentiary basis to demonstrate that the monitored state is committing atrocity crimes, or refusing to stop atrocity crimes against its own people.¹²⁵ To protect a government's credibility on the world stage, state officials often attempt to provide minimum levels of evidence to support potentially unpopular decisions.¹²⁶ Without such proof, a state desiring to take unilateral action cannot overcome its first legal hurdle.¹²⁷

Some types of data, like video footage, may be more compelling than others in demonstrating the complicity of the monitored state in the commission of atrocity crimes.¹²⁸ At a minimum, prior proof should include information from multiple, independently verifiable sources; distinguishable primary and secondary sources; reliable eyewitness testimony, at least some of which can be independently verified; and evidence of a reoccurring pattern of testimony of abuse indicating potential systemic violations.¹²⁹ Evidence of this type can

124. *See id.* art. 2, paras. 4, 7; *see also* Stromseth, *supra* note 2, at 251 (suggesting that intervening states must provide legal justification).

125. *See* RESPONSIBILITY TO PROTECT, *supra* note 11, ¶¶ 4.18–4.31 (placing the greatest emphasis on establishing just cause); *see also* Tony Blair, Former Prime Minister, U.K., Speech Before the Chicago Economic Club, Doctrine of the International Community (Apr. 22, 1999), available at http://www.pbs.org/newshour/bb/international/jan-june99/blair_doctrine4-23.html (identifying five criteria for unilateral interference, including a just cause).

126. *See* EVANS, *supra* note 101, at 235 (“A further critical ingredient in the fashioning of political will is the existence of institutional processes capable of translating knowledge, concern, and confident belief in the utility of action into actual action.”); *see also* James Traub, *In the Beginning, There Was Somalia*, FOREIGN POL’Y, July/Aug. 2010, http://www.foreignpolicy.com/articles/2010/06/21/in_the_beginning_there_was_somalia (describing the effects of America’s failed Somalia mission on later humanitarian actions).

127. *See* RESPONSIBILITY TO PROTECT, *supra* note 11, ¶¶ 4.18–4.31 (discussing the R2P just cause requirement); *see also* U.N. Charter art. 2, para. 7 (providing the legal foundation for the just cause requirement).

128. *See* Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 70–75 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (listing evidentiary grounds for determining the existence of an armed conflict); *see also* G.A. Res. 60/1, *supra* note 4, ¶ 138 (narrowing applicability of R2P doctrine to the four most egregious crimes in international law).

129. *See* Théo Boutruche, *Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice*, 16 J. CONFLICT & SEC. L. 1, 10 (2011) (providing guidance for the collection of verifiable information on LOAC violations from the field); *see also* SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE 96–97 (2007) (describing the failure of US officials to treat eyewitness testimony of refugees fleeing the Khmer Rouge as credible).

help protect a government's credibility and rally support for potentially unpopular, but ethically necessary, decisions.

B. Determining When a Humanitarian Crisis Warrants Action Without United Nations Security Council Authorization

Under the UN Charter, the UNSC has the authority to intrude upon a sovereign domestic jurisdiction.¹³⁰ These UNSC intervention powers are not limited to military intrusions, and may include economic sanctions and other less coercive means.¹³¹

In contrast, a state acts “unilaterally” when it intervenes in the internal affairs of another sovereign state either independently or as a part of a regional grouping or other coalition without the approval of the UN.¹³²

For states intending to execute unilateral humanitarian intervention, the ideal situation is to gain UNSC approval and, in so doing, international recognition of the mission's legitimacy.¹³³ The differing political interests of the five permanent members of the UNSC may be the largest obstacles to UNSC authorization or the most likely to delay the decision.¹³⁴ One solution suggested by some international law scholars to remedy the at times lethargic pace of approval of the UNSC system has been for a state or coalition of

130. See U.N. Charter arts. 39–42 (granting UNSC the power to authorize military and nonforceful interventions).

131. See *id.* (outlining UNSC powers, including military and nonforceful interventions); see also RESPONSIBILITY TO PROTECT, *supra* note 11, ¶¶ 1.37–1.41 (explaining that “intervention” can also refer to nonmilitary actions).

132. See, e.g., *NATO's Role in Relation to the Conflict in Kosovo*, NATO, <http://www.nato.int/kosovo/history.htm> (last updated July 15, 1999) (providing a brief overview of NATO's role in the conflict in Kosovo—an example of a unilateral action undertaken by a collation of states).

133. See JUDITH GARDAM, *NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES* 186 (2004) (“[I]n light of the dubious legality of such actions, their necessity and proportionality must be established beyond doubt by demonstrating that every possible alternative has been exhaustively pursued and that the forceful response was in no manner excessive.”); see also Claire Appelegrath & Andrew Block, *Acting Against Atrocities: A Strategy for Supporters of R2P*, in *MASS ATROCITY CRIMES: PREVENTING FUTURE OUTRAGES*, *supra* note 3, at 128, 130–32 (arguing that recent UN action on R2P shows a continued support for R2P and room for UN legitimization of such actions).

134. See, e.g., DAVID M. MALONE, *THE INTERNATIONAL STRUGGLE OVER IRAQ: POLITICS IN THE UN SECURITY COUNCIL 1980–2005*, at 30–36 (2006) (discussing the political in-fighting and competing interests of UNSC members); see also Raymond Dennett, *Politics in the Security Council*, 3 *INT'L ORG.* 421, 422–25 (1949) (exploring political divisions among UNSC members at the very beginning of the UN).

states to undertake an intervention and “seek to legitimate their actions retrospectively at the UN.”¹³⁵ NATO used this approach following its 1999 bombing campaign in Kosovo as exemplified in UNSC Resolution 1244, which granted legitimacy to a NATO civil and military presence in Kosovo and established the UN Mission in Kosovo.¹³⁶ The resolution operated as a retroactive approval of NATO actions in Kosovo to that point in time.¹³⁷ Given the entrenched political division among UNSC’s members, it appears the R2P may support the position that failure to gain UNSC approval should not forestall the possibility of an intermediary interference if it meets certain requirements.¹³⁸

C. Goals of Unilateral Monitoring and Documentation

Since the end of World War II, there has been a general consensus in the international community that the documentation of atrocities has worth, even where it fails to immediately halt these crimes. The goals of documentation are to deter the future commission of unacceptable acts or atrocities and to bring to justice those who committed the acts.¹³⁹ Reliable and comprehensive

135. See Nicholas J. Wheeler, *Legitimizing Humanitarian Intervention: Principles and Procedures*, 2 MELB. J. INT’L L. 550, 562–66 (2001) (discussing the use of retroactive UNSC authorizations). See generally Anne Ryniker, *The ICRC’s Position on “Humanitarian Intervention,”* 83 INT’L REV. RED CROSS 527 (2001) (laying out the International Committee of the Red Cross’s position on humanitarian intervention).

136. See S.C. Res. 1244, *supra* note 11, ¶ 7 (authorizing an international security presence in Kosovo); Press Release, NATO, Statement Issued at the Extraordinary Ministerial Meeting of the North Atlantic Council Held at NATO Headquarters, M-NAC-1(99)51, (Apr. 12, 1999), available at <http://www.nato.int/docu/pr/1999/p99-051e.htm> (provides outline of NATO goals for its Kosovo mission); see also Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS, *supra* note 2, at 204, 225 (arguing that UNSC Resolution 1244 should be interpreted as tacit acceptance of the NATO action).

137. See Alain Pellet, *State Sovereignty and the Protection of Fundamental Human Rights: An International Law Perspective*, PUGWASH ONLINE (Feb. 2000), <http://www.pugwash.org/reports/rc/pellet.htm> (arguing that UNSC’s recognition demonstrates the legality of the action.); see also Henkin, *supra* note 103, at 827–28 (viewing Resolution 1244 as laying a solid foundation for similar actions in the future).

138. See RESPONSIBILITY TO PROTECT, *supra* note 11, ¶¶ 4.18–4.43 (laying out R2P criteria, which directly parallel older Just War criteria).

139. See G.A. Res. 677, U.N. GAOR, 63d Sess., U.N. Doc. A/63/677, ¶ 9, (Jan. 12, 2009) (emphasizing the crucial role early warning systems (which include human rights documentation) play in atrocity response operations); see also Nathan Hodge, *Making Plans to Stop Mass Murder*, WALL ST. J., May 10, 2011, at A6 (describing the Pentagon’s MAPRO program and the continued influence of the MAPRO Handbook).

information can help shift policy debates from *whether* to intervene to *how* to do so.¹⁴⁰ Release of documentary evidence collected by one state against another is a difficult and delicate balancing act between respect for state sovereignty and distribution of the information to organizations best positioned to help those most affected.¹⁴¹

The recent collaboration between US Southern Command (“USSOUTHCOM”) and a number of nongovernmental organizations (“NGOs”) following the January 2010 earthquake in Haiti is an example of a military-civilian information sharing operation.¹⁴² In January 2010, a Global Hawk UAV was deployed over Haiti to document the extent of the damage caused by the January 12, 2010, earthquake.¹⁴³ USSOUTHCOM released thousands of the images to NGOs and other trusted organizations over the Internet, with the hope that making the information more readily available would ease overall reconstruction efforts.¹⁴⁴

140. See SEWALL ET AL., *supra* note 3, at 5–6 (emphasizing the debilitating effect a failure to adequately plan can have on the US government’s ability to prevent or respond to atrocities); see also PSD-10, *supra* note 1 (outlining the goals of developing a national atrocity response doctrine).

141. See, e.g., *USAID Post-Earthquake Response*, USAID/HAITI, <http://www.usaid.gov/ht/helphaiti.html> (last visited Jan. 21, 2012) (providing a central clearing house of information on US relief efforts in Haiti). See generally Hezekiah Barge, Jr. et al., *Field Level Information Collaboration During Complex Humanitarian Emergencies and Peace Operations* (June 2003) (unpublished M.S. thesis, Naval Postgraduate School) (on file with the Naval Postgraduate School Library system) (analyzing practices during past civilian-military partnerships in complex humanitarian emergencies).

142. See Russell P. Petcoff, *Global Hawk Collects Reconnaissance Data During Haiti Relief Efforts*, U.S. AIR FORCE, (Jan. 15, 2010), <http://www.af.mil/news/story.asp?id=123185754> (describing how the US Air Force sent a UAV to fly over Haiti after the January 2010 earthquake and then released photos to trusted organizations to help distribute aid); see also Paul McLeary, *Global Hawk Flying Over Haiti*, AVIATION WEEK (Jan. 15, 2010, 8:42 AM), <http://www.aviationweek.com/aw/blogs/defense/index.jsp?plckController=Blog&plckBlogPage=BlogViewPost&newspaperUserId=27ec4a53-dcc8-42d0-bd3a-01329aef79a7&plckPostId=Blog%3A27ec4a53-dcc8-42d0-bd3a-01329aef79a7Post%3A297f878f-4b3e-4888-9b55-9f2587cae9bf&plckScript=blogScript&plckElementId=blogDest> (describing the US Air Force’s mission over Haiti and the distribution of the collected photographs).

143. See McLeary, *supra* note 142 (explaining the method of distribution of these photographs); see also U.S. ARMY UAS CTR. OF EXCELLENCE, “EYES OF THE ARMY”: U.S. ARMY ROADMAP FOR UNMANNED AIRCRAFT SYSTEMS 2012–2035, at 19 (2010) (describing the environment in which UAVs will have to be deployed).

144. See Judith Snyderman, *Global Hawk Photographs Damage to Help Relief Efforts*, AIR FORCE PRINT NEWS TODAY (Jan. 15, 2010), http://www.acc.af.mil/news/story_print.asp?id=123185881 (explaining use of Global Hawk to photograph damage to help triage relief efforts); see also Nathan Hodge, *US Diverts Spy Drone from Afghanistan to Haiti*, DANGER ROOM: WIRED (Jan. 15, 2010, 11:35 AM), <http://www.wired.com/dangerroom/2010/01/>

Collaboration between interagency groups, NGOs, and the military provided USSOUTHCOM with information as to which targets were more critical to document given the overwhelming destruction in the country following the earthquake and the need to triage humanitarian resources.¹⁴⁵ To access the images USSOUTHCOM put on the Internet, individuals or groups had to be members of the All Partner Access Network (“APAN”).¹⁴⁶ USSOUTHCOM’s release of the Global Hawk’s Haiti images via APAN is an example of a successful military-civilian collaboration.¹⁴⁷

Effective documentation and monitoring programs can also assist prosecutors in bringing domestic or international cases against the perpetrators of atrocities.¹⁴⁸ Cases in the International Criminal Tribunal for the Former Yugoslavia have affirmed that the principle of individual criminal responsibility is applicable to breaches of LOAC in both the IAC and NIAC contexts.¹⁴⁹ In NIACs, individual

pentagon-shares-earthquake-images-from-high-flying-spy-drone/ (showing photos from the Global Hawk’s flight over Haiti in 2010).

145. See McLeary, *supra* note 142 (describing the military-civilian coordination involved in the Global Hawk’s flight); see also VT GROUP, CASE STUDY: DEVASTATING EARTHQUAKE IN HAITI; PIONEERING TECHNOLOGY APPLICATION SAVES TIME & RESOURCES (2010), available at www.vt-group.com/media/11406/haitiearthquakecasestudy.pdf (describing the use of a private contractor to send a UAV to check on an orphanage in Haiti after the 2010 earthquake).

146. See *Disaster Response: APAN Aids in Haiti Relief Efforts*, APAN, https://community.apan.org/p/featured_haiti.aspx (last visited Jan. 21, 2012) (describing APAN’s role in the postearthquake relief effort).

147. See Volker Franke, *The Peacebuilding Dilemma: Civil-Military Cooperation in Stability Operations*, 11 INT’L J. PEACE STUD. 5, 6–9 (2006) (examining issues of military-civilian cooperation during humanitarian operations); see also Andrew Harris & Peter Dombrowski, *Military Collaboration with Humanitarian Organizations in Complex Emergencies*, 8 GLOBAL GOVERNANCE 155, 157–59 (2002) (discussing the challenges to successful military-civilian partnerships).

148. See Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS., no. 4, Autumn 1996, at 127, 130–45 (1996) (discussing accountability mechanisms after the commission of atrocities); see also U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, HR/P/PT/7, TRAINING MANUAL ON HUMAN RIGHTS MONITORING ¶¶ 33–34 (2001) (explaining the appropriate role of human rights monitors vis-à-vis domestic judicial systems).

149. See *Prosecutor v. Tadic*, Case No. IT-94-I-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 96–127 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (extending the substantive law applicable to NIAC); *id.* ¶¶ 128–34 (describing individual criminal responsibility in an NIAC); see also Thomas Graditzky, *Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflicts*, 332 INT’L REV. RED CROSS 29, 37–40 (1998) (explaining the limitations of individual criminal responsibility in NIACs).

criminal responsibility accrues to both state and nonstate actors.¹⁵⁰ An analogous role may be foreseen in possible criminal prosecutions based on the information collected through unilateral UAV monitoring.¹⁵¹

D. *Appropriate Limitations on the Extent of Monitoring and the Type of Data Collected*

Two precautions can be taken with regard to the collection of data via monitoring. First, the data collected can be limited to that concerning the commission of atrocities in violation of LOAC.¹⁵² Unilateral monitoring of the storage locations of weapons not alleged to have been used to commit atrocities is still prohibited.¹⁵³ Second, the data collected cannot be used to undermine the sovereignty of the monitored state except to the extent necessary for effective monitoring.¹⁵⁴ The goal of all humanitarian action governed by LOAC is to ease the transition from armed conflict back to peace.¹⁵⁵

150. See, e.g., Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), ¶ 22 (May 31, 2004) (finding that nonstate parties are bound by LOAC).

151. See Wendy S. Betts et al., *The Post-Conflict Transitional Administration of Kosovo and the Lessons-Learned in Efforts to Establish a Judiciary and Rule of Law*, 22 MICH. J. INT'L L. 371, 375–78 (2001) (outlining the hurdles and reforms undertaken by the transitional administration in Kosovo after the war). See generally Rachel Brett, *Human Rights and the OSCE*, 18 HUM. RTS. Q. 668 (1996) (documenting the Organization for Security and Co-operation in Europe's evolving treatment of human rights issues).

152. See RESPONSIBILITY TO PROTECT, *supra* note 11, ¶ 4.39 (detailing the “proportional means” criterion); see also Jean Bethke Elshtain, *Just War and Humanitarian Intervention*, 17 AM. U. INT'L L. REV. 1, 9–15 (2002) (examining humanitarian intervention from a just war perspective and addressing the “just cause” criterion).

153. See G.A. Res. 2625 (XXV), Annex, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/5217, at 123 (Oct. 20, 1970) (expanding the concept of noninterference in a nonbinding resolution by stating that “[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State”); *Q & A: US Targeted Killings and International Law*, HUM. RTS. WATCH (Dec. 19, 2011), <http://www.hrw.org/news/2011/12/19/q-us-targeted-killings-and-international-law> (arguing that attack on sites similar to these would be a violation of international law).

154. See RESPONSIBILITY TO PROTECT, *supra* note 11, ¶¶ 4.39–4.40 (explaining that the second criterion is based on the underlying principle of proportionality of response).

155. See Mark Freeman & Dražan Djukić, *Jus Post Bellum and Transitional Justice*, in *JUS POST BELLUM: TOWARDS A LAW OF TRANSITION FROM CONFLICT TO PEACE* 213, 213–30 (Carsten Stahn & Jann K. Kleffner eds., 2008) (advocating for the development of *jus post bellum*). See generally VERONIQUE DUDOUET, BERGHOF RESEARCH CTR. FOR CONSTRUCTIVE CONFLICT MGMT., BERGHOF REPORT NR. 16, *SURVIVING THE PEACE: CHALLENGES OF WAR-TO-PEACE TRANSITIONS FOR CIVIL SOCIETY ORGANIZATIONS* (2007) (discussing the challenges of returning to peace).

Due regard, therefore, can be paid to the potential deleterious effects an overly broad release of data may have on the monitored state's ability to rebuild after hostilities.¹⁵⁶ Limiting the scope of the data collected to only that necessary to achieve the goals of the monitoring mission may fulfill R2P's proportionality criterion and protect the sovereignty of the affected state.¹⁵⁷ Together, these limitations provide the monitoring state further support for its claims to humanitarian legitimacy.¹⁵⁸

E. State Control of Monitoring Personnel

Both military and civilian forces utilize UAVs to carry out tasks ranging from army reconnaissance to crop fertilization.¹⁵⁹ Under current US government policy, even when UAVs are used for official government purposes, the personnel piloting them still may be civilian.¹⁶⁰ Under international law, however, the actions of both civilian and military personnel under the "command" or "control" of a state can sometimes be attributed to that state's military or civilian leadership.¹⁶¹ In this manner, international law encourages a state to

156. See MARK DUFFIELD, *IDS BULLETIN* 25.4, COMPLEX EMERGENCIES AND THE CRISIS OF DEVELOPMENTALISM §§ 6.5, 7 (1994) (critiquing how aid is integrated with the dynamics of violence). See generally Michael Pugh, *Challenges of Post-Conflict Intercession: Three Issues in International Politics*, in *JUS POST BELLUM: TOWARDS A LAW OF TRANSITION FROM CONFLICT TO PEACE*, *supra* note 156, at 115 (exploring a liberal interpretation of postconflict reconstruction).

157. See *RESPONSIBILITY TO PROTECT*, *supra* note 11, ¶ 4.39 ("The means have to be commensurate with the ends, and in line with the magnitude of the original provocation."); see also Gary Chapman, *National Security and the Internet* (July 1998) (unpublished manuscript), available at <http://www.utexas.edu/lbj/21cp/isoc.htm> (exploring what data lies within a state's national security interests).

158. See *RESPONSIBILITY TO PROTECT*, *supra* note 11, ¶ 4.39 (explaining R2P's just cause criterion).

159. See *Factsheet: Unmanned Aircraft Systems*, FED. AVIATION AGENCY (July 15, 2010), http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=6287 (explaining the developing nonmilitary uses of UAVs in the United States); see also Owen Bowcott & Paul Lewis, *Attack of the Drones*, *GUARDIAN* (U.K.), Jan. 16, 2011, at 10 (examining increase in the use of UAVs outside of the military context).

160. See Jeff Wise, *Civilian UAVs: No Pilot, No Problem*, *POPULAR MECHANICS* (Oct. 1, 2009, 12:00 AM), <http://www.popularmechanics.com/science/space/4213464> (looking at the growing use of UAVs by civilian agencies and nongovernmental groups); see also Malia Wollan, *In this Sky, the Planes Fly Alone*, *N.Y. TIMES*, May 15, 2011, at B1 (examining the rise of civilian use of UAVs in the United States and the growing nongovernmental UAV sector).

161. See Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 1, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 (codifying the basic principle of command responsibility); see also *In Re Yamashita*, 327 U.S. 1, 13–18 (1946) (exploring the

exercise responsible control over operations carried out in its name.¹⁶² States protect themselves from perceptions of lack of responsible control by establishing clear chains of command, educating personnel on LOAC principles, and maintaining control over personnel involved in state-supported missions.¹⁶³

III. DETERMINING THE PERMISSIBILITY OF HUMANITARIAN INTERFERENCE OPERATIONS: CRITERIA FOR PERMISSIBLE UNILATERAL UAV MONITORING

UN member states should be encouraged to take action to deter atrocities as they take place. One way to do so is to provide permissible intermediary humanitarian interference mechanisms that meet R2P-based criteria.¹⁶⁴ On the humanitarian response continuum, permissible interference operations lie between complete inaction and forceful intervention. This position is valuable for the flexibility it affords decisionmakers, enabling quick escalation or cessation of state involvement. The unilateral use of UAVs to monitor mass atrocities perpetrated within the borders of a nonconsenting state is an example of only one such option. Suggested criteria for determining the permissibility of specific UAV monitoring missions could be used by extension to evaluate the permissibility of similar mechanisms.

Part III is divided into three sections. Section A argues that humanitarian interference operations fit into the trajectory of state acceptance of R2P and general humanitarian actions. Second, Section

issue of command responsibility in the American legal context); Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 *YALE J. INT'L L.* 89, 92–93 (2000) (exploring the manner in which the Rome Statute holds civilian as well as military leaders accountable under command responsibility).

162. See generally DAVID S. ALBERTS & RICHARD E. HAYES, DEP'T OF DEF., *COMMAND & CONTROL RESEARCH PROGRAM, UNDERSTANDING COMMAND AND CONTROL* (2006) (providing a thorough explanation of command and control theory inside the US military, including the distinction between control and command); see also Ross Pigeau & Carol McCann, *Re-Conceptualizing Command and Control*, *CANADIAN MIL. J.*, Spring 2002, at 54, 54–55 (exploring the various ideas behind the military sense of “command” and arguing that command is distinct and more complex than control).

163. See DEP'T OF DEF., *DIRECTIVE NO. 2311.01E, DoD LAW OF WAR PROGRAM § 4* (2006) (stating that DoD policy is to apply the LOAC in all conflicts by all components of the Department of Defense, even those run by contractors); see also INT'L & OPERATIONAL LAW DEP'T, U.S. ARMY JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., *OPERATIONAL LAW HANDBOOK* 49–67 (2008) (providing nuanced instruction for the applicability of LOAC principles in different conflicts).

164. See *supra* notes 117–18 and accompanying text (discussing the “systematic and widespread” aspect of the standard for threshold level of severity).

B applies the criteria used to justify R2P interventions to humanitarian interference operations. These include (i) right authority and last resort, (ii) just cause and right intention, (iii) reasonable prospects, and (iv) proportional means. Third, Section C proposes restrictions on *who* may carry out unilateral UAV monitoring by analyzing (i) the illegality of a nonstate actor carrying out a humanitarian interference mission, and (ii) a requirement that a monitoring state only entrust personnel under its direct control with the monitoring mission.

A. Analogizing Humanitarian Interference and Humanitarian Intervention Operations

Analogizing R2P military intervention to humanitarian interference options accomplishes two important things. First, it uses a set of criteria to judge the permissibility of unilateral UAV monitoring for humanitarian purposes that are already familiar to the international legal community because of the broad discussions surrounding the development of R2P.¹⁶⁵ Additionally, the R2P criteria are based on the *jus ad bellum* Just War criteria, which respect the idea of inherent state sovereignty and similar historical principles of international law.¹⁶⁶ After the publication of the 2001 ICISS report and the 2005 adoption of the R2P doctrine by the UN, these criteria, which enable military intervention based on humanitarian justifications, have found some acceptance in the international community.¹⁶⁷ As this Note proposes the legality of a unilateral action without prior UNSC authorization, it is even more important to abide by criteria that respect the principles governing the international legal system and that are already familiar to the international legal community.¹⁶⁸

Second, use of the R2P criteria holds unilateral humanitarian interference missions to a high level of scrutiny because these R2P

165. *See supra* notes 106–22 and accompanying text (describing the genesis of the R2P project and the continuing need for atrocity response operations as well as the specific R2P criteria).

166. *See supra* notes 8, 91–95 and accompanying text (showing the continued importance of sovereignty under the UN Charter and international law).

167. *See supra* notes 11, 102–63 and accompanying text (explaining the origins of R2P).

168. *See supra* notes 62–70, 91–98 and accompanying text (explaining the general prohibition on the use of force and the tension between this and the moral need to act in the face of atrocity crimes).

criteria are intended to judge the permissibility of *military* interventions.¹⁶⁹ Given that these criteria were designed to judge forceful actions, they may arguably be stricter than necessary for nonforceful humanitarian interference missions.¹⁷⁰ Additionally, UNSC authorization of NATO's mission in Libya beginning in May 2011 shows a continuation of the trend of state acceptance of R2P criteria and of humanitarian intervention-type missions in general.¹⁷¹

Permissibility criteria for nonforceful humanitarian interference operations should be based on the military intervention standards of the R2P doctrine for two reasons.¹⁷² First, the R2P criteria are well known, were widely debated in the international community, and are derived from the Just War tradition.¹⁷³ Second, using the heightened level of scrutiny applied to a use of force helps the monitoring state meet higher justification standards of unilateral actions taken outside of UNSC authorization.¹⁷⁴ The following section explores the use of R2P intervention criteria in the context of nonforceful humanitarian interference operations.

B. *Criteria for Permissible Unilateral UAV Monitoring of Atrocities*

It is critical to balance the need for a heightened justification standard for unilateral actions with the dire need for the development of permissible *intermediary* humanitarian actions, including the collection of reliable information in the midst of the commission of atrocity crimes.¹⁷⁵ To do this, this Note proposes the use of the R2P standard of judging military intervention for an analogous purpose in determining the permissibility of nonforceful humanitarian

169. See *supra* notes 111–16 and accompanying text (discussing the R2P criteria by which military intervention is justified for humanitarian purposes).

170. See *supra* notes 2, 11 and accompanying text (discussing nonforceful humanitarian intervention actions).

171. See *supra* notes 119–22 and accompanying text (explaining the resurgence of the humanitarian intervention debate following NATO's actions in Libya in 2011).

172. See *supra* notes 113–18 and accompanying text (listing threshold criteria to determine the permissibility of forceful humanitarian interventions).

173. See *supra* notes 44–50, 113–14 and accompanying text (explaining the origins of R2P and its adoption of criteria analogous to *jus ad bellum* just war criteria).

174. See *supra* notes 117–18 and accompanying text (explaining that military intervention is permissible under R2P only in extreme cases and discussing the skewed degree of attention given to military intervention versus other nonforceful actions).

175. See *supra* notes 2–3 and accompanying text (discussing the UN's encouragement of the development of nonforceful atrocity response actions, with an emphasis on documentation).

interference operations. The remainder of this Section discusses the R2P intervention criteria specifically in relation to the unilateral use of unarmed UAVs to monitor a state's commission of atrocity crimes within its domestic borders.

1. Right Authority & Last Resort

Permitting unilateral UAV monitoring is part of a wider trend in international law towards greater state acceptance of unilateral action based on humanitarian justification.¹⁷⁶ Beginning with the UNSC's retroactive authorization of NATO's intervention in Kosovo in 1999 and moving through the UNSC's authorization of NATO's actions in Libya in 2011, UN action shows a general progression of increasing involvement in, or authorization of, humanitarian missions.¹⁷⁷ The trend of increasing UN humanitarian action, with parallel and greater encouragement of nonmilitary humanitarian actions, demonstrates that unilateral monitoring is a legitimate intermediary step between complete inaction and military intervention.¹⁷⁸

Defining a permissibility standard for humanitarian interference is the next logical step towards effective implementation of R2P.¹⁷⁹ Unilateral UAV monitoring, unlike a military intervention, does not rise to the level of force under Article 2(4) of the UN Charter.¹⁸⁰ Article 2(4) prohibits the threat or use of force by states, however, "force" under Article 2(4) is widely understood to be limited to armed force.¹⁸¹ Because UAV monitoring does not involve the use of force, the standard applied to this method of unilateral interference should be less than that applied to forceful humanitarian intervention.¹⁸²

176. *See supra* notes 2, 65, 106 and accompanying text (discussing greater acceptance of humanitarian intervention actions following NATO's actions in Kosovo).

177. *See supra* notes 2, 65, 106, 122–24 and accompanying text (discussing the effects of NATO's actions in Kosovo and Libya on the acceptance of humanitarian intervention and R2P).

178. *See supra* notes 32–37 and accompanying text (discussing the ongoing tension between increasing acceptance of the legitimacy of humanitarian intervention or interference actions and the general prohibition on the use or threat of force).

179. *See supra* notes 3, 11 and accompanying text (explaining and supporting nonforceful actions to stop or prevent atrocities).

180. *See supra* notes 32–38 and accompanying text (discussing nonintervention and the general prohibition on the use of force).

181. *See supra* notes 35–36 and accompanying text (explaining the meaning of "force").

182. *See supra* notes 35–38 and accompanying text (explaining the various degrees of "force" in the international context).

2. Just Cause and Right Intention

For unilateral UAV monitoring to be permissible, monitoring states must have a reasonable basis for believing that the monitored state is committing, or is complicit in the commission of, atrocities.¹⁸³ This is the just cause element, whereas sending UAVs to monitor solely based on suspicions of atrocity crimes fulfills the second criterion of right intention.¹⁸⁴ The justification standard used to judge these criteria should be similar to that used under the R2P doctrine, which requires evidence of violence, that “shock[s] the conscience of mankind” or which presents a “clear and present danger to international security.”¹⁸⁵ The decision to implement a unilateral monitoring mission should be based on a similar, but slightly less strict standard.¹⁸⁶ A flexible standard protects a monitoring state from allegations of illegal actions while simultaneously protecting the monitored state’s sovereignty.

Unilateral UAV monitoring is not justified, however, when it is undertaken *solely* with the intent to collect evidence for future cases against perpetrators.¹⁸⁷ While supporting a potential future criminal prosecution may be a complementary function to UAV monitoring, it should not serve as the primary justification. If monitoring states are too closely tied with prosecutions, it may open the door to charges of selective information-gathering, or selective justice in the eyes of the global public.¹⁸⁸

3. Reasonable Prospects

In order to justify a unilateral monitoring mission, an acting state should have a reasonable expectation that the operation will result in

183. *See supra* notes 11, 49, 113–14 and accompanying text (listing just cause as a just war and R2P criterion).

184. *See supra* notes 49, 114 and accompanying text (listing right intention as a just war and R2P criterion).

185. *See supra* notes 111–16 and accompanying text (discussing the R2P standards).

186. *See supra* notes 36–38 and accompanying text (explaining that economic and other nonforceful methods of intervention are exceptions to the general prohibition on the use of “force”).

187. *See supra* notes 130–38 and accompanying text (describing when the UNSC may intervene within a state (not including for the purposes of prosecutions) and exploring analogous situations in which a state may act unilaterally).

188. *See supra* notes 152–59 and accompanying text (discussing the dangers of monitoring).

relevant data collection.¹⁸⁹ UAV monitoring is not a solution in and of itself. Unilateral UAV monitoring is most appropriate where the geographical and other elements of the conflict lend themselves to both UAV surveillance and the likelihood of collection of clear evidence.¹⁹⁰ Simply collecting data does not save human lives, but the effective use of reliable evidence within a larger arsenal of atrocity response operations may provide invaluable support for actions that do directly save lives.¹⁹¹

There are three likely results to a unilateral UAV monitoring mission. First, the evidence collected might show the monitored state to be committing, or complicit in the commission of, atrocities. If this were to occur, the monitoring state has recourse to already established methods of actions under R2P and developing UN and state practice regarding humanitarian crises.¹⁹² Second, evidence might be uncovered that the monitored state is *not* committing or permitting the commission of atrocities. In this situation, the monitoring state should immediately cease all monitoring operations as its justifications for doing so disappear as soon as the evidence shows that the monitored state is not guilty of the believed crimes.¹⁹³ Third, the monitoring state may be unable to come to a firm conclusion as to whether or not the monitored state is committing or complicit in the commission of atrocities. If, after a reasonable period of monitoring, a state cannot come to a firm determination as to the monitored state's guilt or complicity, it will likely lose any legal justification for continued unilateral action.¹⁹⁴

189. *See supra* notes 111–16 and accompanying text (listing reasonable prospects as a just war and R2P criterion and explaining these categories in light of customary law).

190. *See supra* notes 12–23 and accompanying text (discussing the benefits and limitations of UAV technology).

191. *See supra* notes 12–15, 20–28 and accompanying text (discussing the technological benefits of UAVs in a number of environments and their possible use in atrocity response operations).

192. *See supra* notes 2, 104, 119–22 and accompanying text (providing examples of the growing acceptance).

193. *See supra* notes 113–18 and accompanying text (listing just cause as a just war and R2P criterion and the requirements of the just cause criterion).

194. *See supra* notes 113–18 and accompanying text (discussing the criteria of just cause and reasonable prospects).

4. Proportional Means

If each of the other criteria is met, a monitoring state must still use proportional means in its conduct of the monitoring mission.¹⁹⁵ Thus the monitoring state would have to balance the action employed and the underlying goal justifying the mission.¹⁹⁶ For example, if State *X* were to suspect State *Y* of large-scale ethnic cleansing, the presence of State *Y*'s death squads may provide State *X* justification for sending UAVs to unilaterally monitor an area suspected to be a locus of atrocities. State *X* may, however, lack similar justification for using the same UAV to simultaneously collect intelligence on State *Y*'s unrelated weapons systems. This Section examines the potential effects of a proportional means criterion through two related points: first, it explores possible restrictions the criterion may place on the subsequent use of compiled information; second, it proposes that adherence to this criterion may support the potential deterrence effect of UAV monitoring.

C. Restrictions on the Release of Compiled Data

Release of data collected through a unilateral monitoring mission poses serious questions regarding infringements on the monitored state's sovereignty.¹⁹⁷ Releasing collected information to the public at large might have collateral consequences unrelated to the commission of atrocities. Instead, if a monitoring state decides to distribute compiled data to the public, it should do so via credible and reliable means to protect a monitored state's legitimate national interests.¹⁹⁸

The information collected from UAV monitoring missions might be distributed to trusted international organizations (e.g., the Red Cross), NGOs, or news outlets.¹⁹⁹ Following the January 2010 earthquake in Haiti, USSOUTHCOM created a military-civilian

195. See *supra* notes 49, 114 and accompanying text (listing proportional means as a just war and R2P criterion).

196. See *supra* notes 49, 114 and accompanying text (explaining the intricacies of proportionality and the use of force).

197. See *supra* notes 8–10, 32–34 and accompanying text (discussing the continued relevance of sovereignty and the rights of nations).

198. See *supra* notes 142–47 and accompanying text (describing the US government's use of the Global Hawk UAV over Haiti following the 2010 earthquake and the protections used in the release of the collected data).

199. See *supra* notes 145–47 and accompanying text (describing the release of data following the 2010 Haitian earthquake).

information-sharing system that could serve as an example of an appropriate collaboration.²⁰⁰ This type of system, in which information is released to known, responsible parties, and not directly to the public at large, would provide a layer of due diligence and fact-checking between the monitoring state and the global public. Together, these various humanitarian players may provide the global public a more nuanced and neutral understanding of a state-perpetrated atrocity as it develops.

1. Deterrence

The benefits of unilateral UAV monitoring derive mainly from the reliable evidentiary basis it can provide to states for further action.²⁰¹ In this way unilateral monitoring can provide potentially dispositive evidence as to a state's participation or innocence in alleged atrocity crimes. UAV technology may have a direct effect on the ability of prosecutors to build a future case against the perpetrators by enabling the collection of relevant data and evidence.²⁰² In these ways, UAV monitoring might also act as a deterrent if perpetrators begin to fear the public release of information concerning, or evidence of, their crimes.

Informing the monitored states of the mission may increase any potential deterrent effect of unilateral monitoring.²⁰³ Once UAVs are in the air, there is no reason not to inform a monitored nation that UAVs are in the sky recording its actions. Informing the monitored state of the UAV mission serves two functions. First, it puts the monitored state on guard, hopefully encouraging it to stop committing atrocities or to protect its citizens from such acts. Second, it might promote the credibility of the monitoring state.

Taken together, the criteria listed in Part II.B above provide a basis for determining whether or not a unilateral monitoring mission

200. *See supra* notes 145–47 and accompanying text (explaining past American civilian-military partnerships).

201. *See supra* notes 12–23 and accompanying text (explaining the technological developments in UAV technology).

202. *See supra* notes 8, 11, 49, 113–14 and accompanying text (explaining that without justification, states cannot overcome the presumption of illegality).

203. *See supra* note 12–15, 20–28, 131 and accompanying text (discussing the benefits of UAV surveillance technology and effective guidelines for the collection and dissemination of eyewitnesses testimony and its value as an early warning tool).

is justified on humanitarian grounds.²⁰⁴ Use of the heightened military intervention criteria put forth by R2P helps to address the higher justification threshold that attaches to actions not authorized by the UNSC.²⁰⁵ Based on these criteria, unilateral UAV monitoring is a permissible humanitarian interference and an intermediary action available to states wishing to act to halt or deter the commission of atrocity crimes.²⁰⁶ Building off the base laid by Part II.A and II.B, the following section explores the question of *who* may use UAVs to unilaterally monitor mass atrocities.

2. Restrictions on Who May Carry Out Unilateral UAV Monitoring as Part of a Permissible Humanitarian Interference Mission

Our modern system of international governance is still based on statehood and the rights and responsibilities of states vis-à-vis other sovereign states.²⁰⁷ This Note argues that humanitarian interference operations are only permissible if carried out by a *state* against another *state*, and even then only if the monitoring state maintains direct control over the monitoring personnel. This Section examines the question of *who* may legally carry out a unilateral UAV monitoring mission from two angles. First, it inquires into the level of control a monitoring state should maintain over the personnel it tasks with collecting the information. Second, it suggests that the same arguments that support the permissibility of unilateral humanitarian interference missions carried out by *states* forbid the execution of these missions to nonstate actors.

3. Prohibition on Unilateral Monitoring by Nonstate Parties

UAV monitoring and other humanitarian interference options should not be considered legitimate if carried out by a nonstate party.²⁰⁸ Nonstate actors, like Human Rights Watch, should be

204. See *supra* notes 11, 101–22 and accompanying text (outlining the general principles of the R2P project).

205. See *supra* notes 8, 11, 102–15, 130–38 and accompanying text (explaining UNSC intervention powers and R2P criteria for determining permissibility of humanitarian interventions).

206. See *supra* notes 8, 25–37, 130–38 and accompanying text (discussing the importance of sovereignty to the international system).

207. See *supra* notes 8–9, 39–42, 68–70 and accompanying text (discussing the modern, state-centered international system).

208. See *supra* notes 91–98 and accompanying text (discussing the subjects of international law and excluding nonstate actors).

prohibited from engaging in the type of unilateral UAV monitoring advocated in this Note.²⁰⁹ Some, like NGOs, remain under the legal jurisdiction of the state in which they take an action. This could create a perverse financial incentive on the part of UAV service providers to lobby NGOs for monitoring at the expense of an NGO more carefully weighing the consequences of a decision to monitor.²¹⁰ To protect the principle of sovereign equality between states within the international system, it is thus necessary to prohibit nonstate actors from carrying out unilateral UAV monitoring missions.

C. Requirement that Monitoring State Maintain Direct Control over Monitoring Personnel

A monitoring state should exert positive control of its monitoring mission through direct command of the pilots of UAVs or direct control of the process that programs autonomously operating UAVs used in unilateral monitoring.²¹¹ By limiting itself to UAV pilots or operators under its direct command, a monitoring state ensures that those operating UAVs have been briefed on the applicable LOAC.²¹² Additionally, the monitoring state ensures that it can effectively control the scope of the surveillance undertaken; the nature of the information collected, and implement necessary restrictions on the distribution of the information.²¹³ A monitoring state should maintain direct control over the personnel it employs to carry out a unilateral monitoring mission in order to preserve the humanitarian justifications supporting the action.

This Section applied traditional *jus ad bellum* criteria to analyze the legality of unilaterally monitoring atrocity crimes in an NIAC with unarmed UAVs. In doing so, it demonstrated use of these criteria to evaluate permissibility of a single humanitarian inference mechanism, but also highlighted necessary restrictions like the prohibition of such actions by nonstate actors. This analysis is

209. See *supra* notes 8, 39–42, 68–70 and accompanying text (describing principles applicable in state-to-state relations).

210. See *supra* notes 159–63 and accompanying text (discussing humanitarian intervention from a *jus post bellum* perspective).

211. See *supra* notes 159–63 and accompanying (discussing command responsibility and its potential effect on humanitarian interference operations).

212. See *supra* notes 159–63, 172 and accompanying text (explaining DoD's LOAC policies).

213. See *supra* notes 159–63 and accompanying (discussing command responsibility, an important issue in data distribution).

intended to encourage states to add use of unarmed UAVs to their humanitarian interference “toolkit.”

CONCLUSION

States must be encouraged and empowered to act to deter systematic and widespread violence against civilians. To accomplish this, practical intermediary humanitarian interference mechanisms must be developed that do not resort to the use of force. The development of these mechanisms should include a debate on the appropriate criteria by which to determine their permissibility when undertaken unilaterally and without UNSC authorization.

The use of UAVs to unilaterally monitor a state committing, or complicit in the commission of, atrocity crimes against its civilian population in the course of an NIAC is an acceptable and legally defensible action. The legitimacy of unilateral UAV missions rests on the ability of the monitoring state to prove that it has met requisite R2P humanitarian justification criteria. The technology and legal basis exist for the unilateral use of UAVs to monitor atrocities in NIACs. What is missing is state acceptance of the legitimacy of this intermediary option. It is time, therefore, to develop a range of effective and accepted criteria to determine the legitimacy of nonforceful humanitarian interference operations. The unilateral use of UAVs to monitor state commission of atrocities should be one of many options available in a developing arsenal of intermediary humanitarian atrocity prevention and response operations.

NOTES AND OBSERVATIONS