Does the UN Charter Protect Human Rights?
"R2P" requires an answer

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> "The international community, frustrated by political inability to use authorized armed force, has heralded a new justification under the guise of a "responsibility to protect." But one should never forget that lawful goals should not be pursued by unlawful means. Humanitarian intervention must not be a cloak for concealed political objectives. The use of armed might can only be legitimate under circumstances permitted by the U.N. Charter."
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> Former Chief Prosecutor of Trials before the Nuremberg Military Tribunals (NMT), Benjamin Ferencz in 2012.[1]

The Responsibility to Protect (R2P) is the idea that the world's citizens are entitled to protection from major "atrocity crimes."

In 2009 UN Secretary-General Ban Ki-moon presented a three-pillared approach reflecting global consensus on the meaning of R2P: (1) The state carries the primary responsibility for the protection of populations from genocide, war crimes, crimes against humanity and ethnic cleansing. (2) The international community has a responsibility to assist states in fulfilling this responsibility. (3) When a state is unable or unwilling to protect civilians within its jurisdiction from atrocity crimes, the international community should use appropriate diplomatic, humanitarian and other peaceful means to protect populations. If a state fails to protect its populations or is in fact the perpetrator of crimes, the international community must be prepared to take stronger measures, including the collective use of force through the UN Security Council.

The United Nations Charter is our pre-eminent international legal framework, and the range of Responsibility to Protect practice is therefore enabled and constrained by the Charter. What is the boundary between state protection and human rights protection, under the Charter?

This essay looks first at whether the Charter protects both the Westphalian (state sovereignty) framework, and citizens from R2P-delineated mass atrocity crimes; it then considers examples of outside-the-Charter international norms and customary law that buttress protection of human rights. Finally, it offers examples of UN practice in protecting against atrocity crimes.

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[1] Benjamin B. Ferencz, "Illegal Armed Force as a Crime Against Humanity, 2012. Online at: http://crimeofaggression.info/documents/5/Ferencz_B_Illegal_Armed_Force.pdf

The essay concludes that the U.N. Charter was designed to protect national sovereignty and vulnerable small states from aggression, but also to protect citizens from major atrocity crimes within their own home states.

Original Purposes of the UN Charter

The UN Charter was not written to shield national sovereignty at the expense of human rights protection, nor was it conceived to attend only to war prevention. We know Chapter 7 of the Charter allows the UN Security Council to intervene in the event of a breach of "international peace and security", by which is meant an attack or threat of attack by one state on another, a situation that, since the end of the Cold War, has become rare.

Chapter 1, Article 2 clarifies that "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." However, this premise "shall not prejudice the application of enforcement measures under Chapter 7."

The standard interpretation of this phrasing is that enforcement measures as authorized by the Security Council (where it involves intervention in domestic jurisdiction of states) must involve evidence of a threat to international peace and security.

This framing language was intended to prevent arbitrary violation of sovereign borders and interference in internal matters by powerful states, and it seems difficult to interpret it in any other way. And yet we should go further. We need to acknowledge, as realists should insist, that while Charter constraints appear to give human rights abuse some latitude, without the protection of Westphalian sovereignty there probably would not have been a Charter or a United Nations in 1945, at least not how we think of them today.

At the same time, it can be demonstrated that the UN Charter, established in the shadow of World War II and the Holocaust and genocide, (and foreshadowing the Nuremberg principles which were to follow) was written with atrocity crimes in mind, too. We should expect the Charter authors weren't being haphazard when under Article 2 they listed as a fundamental purpose and principle of the United Nations the achievement of "international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion..."

In this language, Charter guidance is towards promoting and encouraging, and not enforcing, respect for human rights and fundamental freedoms.

There are, nevertheless, as wrote William Schabas, "several references to human rights in the UN Charter, and a role in their protection is specifically attributed to the General Assembly, the Economic and Social Council, the Commission on Human Rights and the Trusteeship Council."[2]

The Human Rights Commission was established under Article 68 of the Charter. It evolved into the Human Rights Council, and in 2006, a Universal Periodic Review was established by the General Assembly. It is a cooperative process through which all member states are expected to report (and be challenged on) the status of their adherence to human rights and fundamental freedoms. The Commission (now Council) has "no power to take any action in regard to any complaints concerning human rights."[3] But while Council recommendations may be non-binding, the effort at exposure at minimum makes states more accountable.

The human rights package that was quickly established alongside the Charter became known as the International Bill of Human Rights and includes the Universal Declaration of Human Rights (UDHR), the Civil and Political Rights Covenant, Economic and Social and Cultural Rights Covenant -- the latter two Covenants perceived as machinery for the UDHR, tabled at the UN in 1966 -- along with the two Optional Protocols to the Civil and Political Rights Covenant (adopted 1966 and 1989). Agreed principles, but again apparently without explicit enforcement mechanisms.

Westphalian principles are the foundation of state sovereignty protection upon which the Charter rests. The 1648 Peace of Westphalia ended the Thirty Years' War and deference to borders was a significant reason there was peace (between states). While it may have been a basis for stability in international law extending up to this time, it is over 360 years old and times have changed. Even a hundred years after the Peace of Westphalia, Emmerich de Vattel, a Swiss philosopher and legal expert wrote in his The Law of Nations[4] that "if tyranny becomes so unbearable as to call the Nation to rise, any foreign power is entitled to help an oppressed people that has requested its assistance."

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[2] W. A. Schabas, Canada and the Adoption of the Universal Declaration of Human Rights, McGill Law Journal, (1998) 43 McGill L.J. 403. References to human rights are found in the Charter Preamble, Articles 1(3), 13(1b), 55(c), 56, 68, 76(c).

[3] Geoffrey Robertson, Crimes Against Humanity: The Struggle for Global Justice, The New Press, New York: 1999 edition, Page 41.

[4] Full title was: The Law of Nations, or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns

The problem is we have also witnessed the less-enlightened example of Hitler claiming to be coming to the aid of German minorities in Czechoslovakia ("Sudetenland") and Poland, to offer just two examples of corruption of the concept of "assistance".

In 1998, NATO Secretary-General Javier Solana said that

> "…humanity and democracy [were] two principles essentially irrelevant to the original Wesphalian order. [That framework] had its limits. For one, the principle of sovereignty it relied on also produced the basis for rivalry, not community of states; exclusion, not integration."[5]

If he weren't NATO's representative, Solana's argument might have reached a wider and more attentive audience.

Among those most inclined towards a strict Wesphalian model have been strange bedfellows: European nationalists, sometimes the Chinese, right wing libertarians, the ultra-left, and "paleo-conservatives" such as Patrick Buchanan. The last in this list, one who frequently objected to any interference in the autonomy of American governance, once wrote:

> "Transnational institutions, the embryonic institutions of a new world government to which the elites of the West and Third World are transferring allegiance and power, include the United Nations, the EU, the World Trade Organization, the International Criminal Court, the International Court of Justice, the International Seabed Authority, the Kyoto Protocol, the IMF and the World Bank."[6]

However, as Geoffrey Robertson points out, there is a complementary interpretation which comes out of Article 4 of Chapter 1 of the Charter, the clause reading "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with purposes of the UN..."

Robertson writes that this caveat is meant to prohibit:

> "armed attacks which are inconsistent with Charter purposes, and does not necessarily exclude those which are directed to uphold those purposes (unless they are actually contrary to or condemned by a specific Security Council resolution.) This interpretation might permit the use of force where it is directed not to the conquest of territory or the overthrow of a political system, but to the rescue of innocent persons at risk of extermination."[7]

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[5] Javier Solana, "Securing Peace in Europe", November 12, 1998. Found at: http://www.nato.int/docu/speech/1998/s981112a.htm

[6] http://www.theamericancause.org/print/052206_print.htm

[7] Robertson, page 434

Mechanisms Other Than the Charter

Vaclav Havel,[8] speaking to the Canadian Parliament in April 1999 argued, with respect to NATO's bombing and intervention against Serbia in support of Kosovo, that:

> "This war places human rights above the right of the state... [Although the NATO-led intervention] has no direct mandate from the United Nations, it did not happen as an act of aggression or out of disrespect of international law. It happened on the contrary, out of respect for a law that ranks higher than the law which protects the sovereignty of states. The [NATO] alliance has acted out of respect for human rights as both conscience and international legal documents dictate."

On another front, the International Court of Justice (ICJ)[9] decided in the case of Nicaragua vs USA, that: "the UN Charter... by no means covers the whole area of the regulation of the use of force in international relations." Indeed, "customary international law continues to exist alongside treaty law", such as the UN Charter. The Charter does not invalidate or supersede customary law, but rather allows for, and works in tandem with it.

Max Yalden, a former Chief Commissioner for the Canadian Human Rights Commission, wrote that:

> "We should not be looking to the fifty-odd states that were in San Francisco in 1945 [that signed the Charter], but at the 171 that were in Vienna in 1993. There they approved a modern-day Declaration that reaffirms on something approaching a universalistic basis the values that most governments are prepared to accept as their own."[10]

Yalden was referring to the Vienna Declaration that outlined a broad description of widely shared human rights and values. However, the Vienna Declaration had no independent authority and (Clause 7) reads: "The processes of promoting and protecting human rights should be conducted in conformity with the purposes and principles of the Charter of the United Nations, and international law." And: "Article 5 of the Vienna Declaration however also states quite unequivocally that 'human rights are universal', and that 'it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all fundamental rights and freedoms."[11]

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[8] Robertson, page 433

[9] Judgement of 27 June 1986, paragraphs 266-8

[10] Maxwell Yalden, "The Universality of Human Rights" in Peace, Justice and Freedom: Human Rights Challenges for the New Millennium, University of Alberta Press, Edmonton, 2000: page 366.

[11] Yalden, page 368.

Even China, Yalden noted, a stickler for statements emphasizing the supremacy of national sovereignty, has signed the Covenant on Economic, Social and Cultural Rights and the Civil and Political Rights Covenant.

While there are other protection structures for human rights through treaties, etc. they are not universal and apply only to signatories, until such a time as their wide observance spreads into a broader norm and customary law.

The combined signatory list for the Genocide Convention and Rome Statute-International Criminal Court comprises 185 states in total. Both have impressive signatory strength, yet in neither is there an enforcement mechanism outside of the UN Charter Chapter 7. In the case of the Genocide Convention, "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article 3." The Genocide Convention was adopted by the UNGA in 1948 and came into force in 1951, but was enforced for the first time only in 1998, for Rwanda.

Similarly where a state refuses to indict an alleged criminal who has violated the International Criminal Court's list of atrocity crimes, it is the UN Security Council, operating under Chapter 7, which authorizes an indictment:

> "A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations…"

Similarly a deferral (delayed prosecution) may be authorized by the UNSC under the same Charter Chapter, in perpetuity.

Putting these international agreements together, there is no shortage of evidence that there are recognized human rights, with caveats. But are they universally recognized, and are they enforceable?

Challenges to the Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was certainly a guidepost towards what could be universally protected, but in truth the standard was not universally accepted. At the time of its creation, in 1948, Soviet satellites,[12] apartheid South Africa, and

[12] John Kenton, "Human Rights Declaration Adopted by U.N. Assembly", New York Times, December 1948 reported on the Soviet Union's abstention. Deputy Foreign Minister Andrei Y. Vishinsky of Russia expressed his fear that a challenge to absolute sovereignty was being threatened by the Declaration, and he made a "final effort to

Saudi Arabia abstained on the vote in the General Assembly, comprising a total of eight unenthusiastic states. In the end, the vote in favour was 48-0-8. Even Canada originally abstained, for fear that the UDHR would challenge assumptions about restrictions on freedom of religion and of association, but later was convinced to support the Declaration.[13]

The Cairo Declaration on Human Rights in Islam (CDHRI) was developed by the member states of the Organization of the Islamic Conference, in 1990, to present an alternative to that of the UDHR. Article 22(a) of the CDHRI, for instance, indicates that: "Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shariah [Islamic law]."[14]

Perhaps we shouldn't be surprised there are challenges to the idea that rights are universal.

Asks Tom O'Connor,[15] in a 2014 blog entitled *Debating Human Rights – universal or relative to culture?*: "How can one single document claim to represent every single person in the world, when our experiences are so different?" He continues:

> "For critics, the Universal Declaration of Human Rights is a Western-biased document which fails to account for the cultural norms and values which exist in the rest of the world. More than that, it is an attempt to impose Western values on everybody else."

Even Canadian Michael Ignatieff has written that "The West now masks its own will to power in the impartial, universalizing language of human rights and seeks to impose its own narrow agenda on a plethora of world cultures that do not actually share the West's conception of individuality, selfhood, agency, or freedom."[16]

But the Universal Declaration of Human Rights is good guidance, and notwithstanding reasonable dissent, there is a consensus on the character of the worst atrocity crimes that extends beyond relativistic "cultural differences". Many international law experts also recognize that the Universal Declaration of Human Rights is part of customary international law, which enables diplomatic and government pressure to be applied against violators.

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avert adoption of the declaration. He said that the document seemed to support the view that the conception of sovereignty of governments was outdated. He declared that only within the framework of government did human rights have a meaning." (In the end, the Soviets abstained.)

[13] This is a somewhat sordid, unexpected tale. See: W. A. Schabas, Canada and the Adoption of the Universal Declaration of Human Rights, McGill Law Journal, (1998) 43 McGill L.J. 403.

[14] http://www.developmenteducation.ie/blog/2014/02/debating-human-rights-universal-or-relative-to-culture/

[15] http://www.developmenteducation.ie/blog/2014/02/debating-human-rights-universal-or-relative-to-culture/

[16] Michael Ignatieff,"The Attack on Human Rights", in Foreign Affairs, Nov/Dec 2001. Found at: https://www.foreignaffairs.com/articles/2001-11-01/attack-human-rights

The UN Charter and Practice in Interpreting Threats to the Peace

We return to test the strength of the challenge that argues the UN Charter should not protect human rights (even for atrocity crimes) within a state – even through recourse to Chapter 7 enforcement.

Whereas Article 42 refers to International Peace and Security this way: "[The Security Council] may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security", in fact Article 39 (Chapter 7) refers not only to International Peace and Security, but also to "any threat to the peace, breach of the peace" and reads as follows:

> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

In other words, Article 39 inserts "any threat to the peace, breach of the peace" as the context for a threat to international peace and security. Similarly, Article 1.1 of the UN Charter refers to "prevention and removal of threats to the peace" as follows:

> "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace…"

As is pointed out by Monica Lourdes de la Serna Galvan,[17] "…the Charter does not contain explicitly the limits to the Security Council for the interpretation of the concept" of *threat to the peace*. The available interpretation, the author notes, is confined therefore by customary international law. Article 31, Paragraph 1 of the Vienna Convention, requires that a treaty be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

If it is ambiguous we then must look to international practice and the rules of international law. And, "there is a general agreement that according [to] Article 24 (2) of the Charter, the Security Council

[17] Monica Lourdes de la Serna Galvan, "Interpretation of Article 39", page 155. Anuario Mexicano de Derecho Internacional, vol. XI, 2011, pp. 147-185

must act in accordance with the purposes and principles of the UN and the provisions of the Charter."[18]

How has "threat to the peace" or threat to international peace and security been interpreted and applied in practice by the UN and Security Council?

During the conflict in Iraq it was agreed, as Monica Lourdes writes, that Resolution 688 (1991)

> "…was designed to address Saddam Hussein's repression of the Kurdish population in northern Iraq, which led to the flight of up to a million civilians -- many into the neighboring country Turkey. The Security Council while issuing this Resolution condemned the repression of the Iraqi civilian population and stated that the consequences threaten international peace and security in the region and demanded the immediate end of this repression."[19]

The Security Council had widened the concept of "threat to international peace and security" to include the internal repression of Kurds, but also considered this might cause a broader challenge through flow of refugees to neighbouring countries. Therefore, Lourdes concludes, most Member States saw the primary threat as the "transboundary effects (flow of refugees across international frontiers) rather than the actual suppression of the Kurds…"

In the case of Somalia (1992-1994), however, Security Council Resolution 733 (1992) was adopted unanimously, and "large flows of refugees were not mentioned by the Security Council as a possible justification" for their responsibility to respond to a threat to the peace. In the follow-up resolution 794 (1992), the concern was with disruption of distribution of humanitarian assistance, which was seen to constitute a threat to the domestic peace. Significantly, "[t]his situation has been considered as unique, because it was the first time in which the Security Council authorized military action under Chapter VII without the consent of sovereign States."[20]

For resolutions relating to the conflict in Yugoslavia, it was "widespread and flagrant [internal] violations of international humanitarian law" that constituted a threat to international peace and security and drew in NATO.

Most important for the current discussion, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, in considering the legality of the establishment of the tribunal under Chapter VII powers, decided that *even if the armed conflicts "were considered merely as an 'internal armed conflict', [they] would still*

[18] Ibid, page 159.
[19] Lourdes, page 166.
[20] Ibid, page 167.

constitute a 'threat to the peace' according to the settled practice of the Security Council and the common understanding of the UN membership in general."[21]

In the case of Rwanda in 1994, while there was certainly concern about the violence spreading past the border of Rwanda itself (ethnically, and into D.R. Congo and Burundi), the Security Council "considered as threat to the peace the killing of civilians on a genocidal scale in itself and also the fact that not bringing the persons responsible for such killings to justice constituted a continuing threat to the peace even if the actual killings stopped."[22] Other examples can be offered (Haiti, Angola, Libya (terrorism), Sudan, etc.) where the UNSC interpretation of Charter-defined threats fit this same broader, human rights-based protection framework.

We observe in these examples above both early and longstanding legitimacy being given to protecting human rights, as well as the evolution of how states assess legitimate enforcement.

We must also acknowledge real concerns: that the Security Council is only 15 out of ~195 states; that it can be tempted to run the show for its own narrower benefit; that it is capable of writing vague Resolutions (Libya) and riding roughshod over sovereignty. There are questions about the costs and benefits of an activist Security Council enacting legislation if perceived as beyond mandate, and thereby exceeding legal powers.

In this regard, Lourdes concludes that:

> "the Security Council is widening the restrictive approach taken before the Cold War to interpret 'threat to the peace', [and now is] considering also as threats, some conflicts such as serious violations of human rights, lack of democracy and anti-terrorist interventions. By considering atypical situations such as human rights violations and the extreme magnitude of human suffering, the heavy loss of human life and violations of humanitarian law as threats to the peace (Iraq, Somalia, Yugoslavia and Rwanda) the Security Council has been widening the concept of 'threat to the peace'.[23]

[21] Found in Lourdes, page 168.
[22] Lourdes, page 169.
[23] Lourdes does not believe that the Security Council should be given full legislative flexibility. She writes: "…the Security Council does not enjoy a general legislative competence on the basis of article 25 of the Charter. Even when States by joining the UN 'agree to accept and carry out the decisions of the Security Council', it is doubtful whether this article entitles the Security Council to enact international legislation. So, by these means, the Security Council while using its binding powers conferred by article 25 in conformity with article 39 and widening the term threat to the peace, is binding Member States to general and abstract norms of international law (legislation) and actually is exceeding its powers by legislating for the whole international community… [In accordance with the views of Hinojosa Martínez] three limits have to been imposed [on] the Security Council while drafting a Resolution, the Security Council has to (i) be competent to adopt such Resolution; (ii) respect the norms of general

When atrocity crimes within a state are seen as threats to international peace and security because of refugee migration, encouragement of similar crimes in neighbouring states, through ethnic incitement elsewhere, arms movements or other threats, then resorting to Chapter 7 enforcement is straightforward and less controversial. But as is clear from repeated practice of the UNSC (as described above), cross border impacts may be useful to, but not necessary in, defining a threat to the peace, or in posing a contagious undermining of international peace and security.

As Jules Deschenes wrote,[24] with reference to former Yugoslavia where he served as a judge on the International Criminal Tribunal, "It is by now a settled rule of customary international law that **crimes against humanity do not require a connection to international armed conflict**." He observes that between 1993 and 1998 reference to "armed conflict" has been in decline and the phrase "widespread or systematic attack" has been introduced.

Not everyone or every state agrees that this alters how we should read and interpret the UN Charter. We can look to China's traditional (pre-end of Cold War) position, and a piece written by Qu Xing in 2012[25] on the Syrian crisis after our having viewed the misuse of Responsibility to Protect doctrine (R2P) in Libya. It isn't certain that China dogmatically adheres to the position being advanced, (as will be clarified further), but the official Chinese government perspective (that national sovereignty must trump human rights) is instructive:

> "The military conflicts in Syria have caused significant civilian casualties, a fact that should attract the attention of the international community. The Syria issue, however, is a domestic one by nature, since Syria did not have disputes with its neighboring states, nor did it threaten to use force against its neighbors or wage a war of aggression against any states. Therefore, the Syria issue should not be discussed within the framework of the UN Security Council and the Security Council should not intervene based on Chapter VII of the Charter."

He goes on to write that: "All [military intervention] precedents ended with disastrous consequences, deviating largely from the original intention of the original concept of 'responsibility to

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international law, and (iii) respect the principle of sovereignty, limiting itself to adopt only measures which are indispensable for the maintenance of peace and security.(Lourdes, page 183)]

[24] Jules Deschenes, "Justice and Crimes Against Humanity", in Peace, Justice and Freedom, Human Rights Challenges for the New Millennium, edited by G.S. Bhatia et al., University of Alberta Press, 2000. Page 158.
[25] Qu Xing, The UN Charter, the Responsibility to Protect, and the Syria Issue, CIIS, April 16, 2012 See: http://www.ciis.org.cn/english/2012-04/16/content_4943041.htm
Qu Xing is President of China Institute of International Studies, a research institute directly administered by the Ministry of Foreign Affairs of the People's Republic of China.

protect'. The situation should not be repeated in Syria or any other place in the world."

Qu Xing raises concerns about a draft resolution on Syria that had been challenged by Russia, pointing out that

> "the draft sought to take all accusations against the Syrian government, which were filed by the opposition but not proven by any independent international investigative body, as facts that could be confirmed by the adoption of a UNSC resolution. All these accusations, meanwhile, used words describing "crimes against humanity" as outlined in existing international treaties. Once the accusations were confirmed, […] the UN could intervene based on the 'responsibility to protect'."

Russia's objections to the specific resolution language on Syria (and China agreed with Russia) may be reasonable (as would therefore also be China's solidarity with Russia in vetoing the draft).

However, there is also gamesmanship here by Russia and China. Russia might have vetoed the resolution with or without the back history of intervention in Libya or the existence of R2P, and for reasons of its well-known support for Syria's Bashar al-Assad. We need to ask whether the atrocities in Syria were at an equivalent level they were in Libya when Russia and China both supported UN resolution 1970 (including the Charter reference to International Peace and Security and the International Criminal Court.) Did they object to the Syria draft because of the controversial intervention into Libya or were there other reasons pertaining to Syria itself, or relating to their own domestic human rights practices?

UNSC Resolution 1970 was on one level more significant than the subsequent military intervention authorized by Resolution 1973 because

> "It marked the first time that a unanimous Security Council had approved the use of the International Criminal Court -- the US, Russia and China had abstained in 2005 over the referral of Darfur which led to the Bashir indictment. International criminal law had finally come of age: Resolution 1970 conferred international jurisdiction over crimes committed by a sovereign government which had determined to kill its own civilians."[26]

Resolution 1970, therefore, in an important precedent, determined that Colonel Gadhafi putting down an internal revolt

> "…could be committing a crime against humanity and b) its actions could threaten international peace and security. In other words, ten days of army killing in one region of Libya was sufficiently 'systematic' to amount to a crime against humanity. More

[26] Geoffrey Robertson, Crimes Against Humanity, The Struggle for Global Justice, 4th Edition, The New Press, New York, 2012: page 767.

> controversially, the Resolution treated an internal revolt as likely to impact upon *international* peace and security if it was countered by lethal force. The reasons for this determination were not spelled out, other than by mention of the plight of thousands of refugees who had by this time crossed into Tunis, and the assumption that a crime against humanity affects the world…
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> "It was the fact that it was putting down a peaceful protest by killing the protesters that engaged the Security Council's duty to refer this prima facie evidence of a crime against humanity to the ICC Prosecutor. Resolution 1970 is significant for confirming international jurisdiction over crimes committed in civil wars and internecine struggles by rulers who kill their own people."[27]

Similarly Russia and China, while abstaining on the intervention Resolution 1973, did not block it. They also remained empowered by the resolution[28] because of their status as members of the Sanctions Committee. All members of the Security Council could monitor how the Resolution was implemented but most chose not to be involved further. In one sense, they permitted NATO to "do its worst", and then to (with good reasons) criticize NATO after the fact. They were empowered to play the role of overseers. They could have insisted on constraint, and tethered NATO to a short leash, but they did not.

The ICC is particularly significant in this context (appearing in the text of both UNSCR #1970 and #1973) because the Court is coded for atrocity crimes, and protects human rights at least at the scale of genocide, war crimes, crimes against humanity and aggression. We may have to wait for future diplomatic memoirs before we learn the details about why #1973 was allowed to come entirely under the control of NATO and be pushed outside the orbit of the UN and Sanctions Committee. It may not matter, however, what were the original motivations of the Permanent Five if R2P has since mainstreamed. This is what Maggie Powers reports in her useful study of UN votes since 2011 (i.e. since Libya and UNSCR #1973) that relate to Responsibility to Protect doctrine.[29]

Does the UN Charter protect human rights?

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[27] Robertson, page 771-2.

[28] Clause 26 of UNSCR 1973 refers to clause 24 in UNSCR 1970: "26. Decides that the mandate of the [Sanctions] Committee as set out in paragraph 24 of resolution 1970 (2011) shall also apply to the measures decided in this resolution"[1973].

[29] Maggie Powers, "The Responsibility to Protect After Libya: Dead, Dying or Thriving?" June 24, 2014. Summarized online at: https://www.opendemocracy.net/openglobalrights-blog/maggie-powers/responsibility-to-protect-after-libya-—-dead-dying-or-thriving

The UN Charter was not written in isolation from, nor in ignorance of, threats to human rights but it had restraint measures built in designed to protect the sovereign status of states. The UNSC can agree to move forward on atrocity crimes under Chapter 7 of the Charter. If they don't, gross human rights violations may be encouraged to continue unless a state or coalition of states decides to proceed anyway, but illegally.

As Robertson notes, Charter flexibility isn't new but "is a consequence of Article 2(7) of the Charter, which allows enforcement measures ordered under Chapter VII to override the bar on UN intervention in matters that are 'essentially within the jurisdiction of any state'."[30]

As noted in 2011 by the Secretary-General,

> "the drafting committee of the San Francisco Conference in 1945 had declared that if fundamental freedoms and rights were 'grievously outraged so as to create conditions which threaten peace or to obstruct the application of provisions of the Charter, then they cease[d] to be the sole concern of each State.'"

Regarding the meaning of Article 2(7) devised at the founding of the United Nations, this clarification[31] from within United Nations repertoire documentation:

> "It was emphasized in the discussions at the San Francisco Conference that there was no intention of defining the scope of domestic jurisdiction by any rigid or legal [i.e. strict Westphalian] formula. The intention was to state a general principle."

Certain permissions were made manifest in 2011, in a benchmark UNSC Resolution (#1970) with the unanimous consent of the full 15 member Security Council -- including all five members of the veto-holding Permanent Five. It was acknowledged for the case of Libya that the UN Charter and its enforcement capacity (Chapter 7)can be used to implement legal jurisdiction over the internal affairs of states when they commit mass atrocities. This case was made even though the accused state (Libya) was not a state party to the Rome Statute, and while the majority of those authorizing jurisdiction (by withholding

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[30] Robertson, page 772.
"Article 2 (7) states that the United Nations has no authority to intervene in matters which are within the domestic jurisdiction of any State, while this principle shall not prejudice the application of enforcement measures under Chapter VII of the Charter. The [United Nations] **Repertoire** covers those cases where this principle of non-intervention by the United Nations was raised and the authority of the Council to involve itself in a particular situation was questioned".
See: http://www.un.org/en/sc/repertoire/principles.shtml#rel5.

[31] http://www.un.org/en/sc/repertoire/46-51/46-51_12.pdf#page=3

their vetoes) were themselves not official supporters of the International Criminal Court.[32]

It would appear that the strength of human rights norms and our understanding of "threats to international peace and security" have evolved and solidified; and that at least insofar as universally accepted atrocity crimes like genocide and crimes against humanity are concerned, these are legitimately within the scope of the Security Council while implementing Charter goals and purposes.

The challenge now is to find ways to make the actions of the Security Council more effective and reliable. Such as: clearer resolutions; more explicit rules of engagement that don't simply outsource enforcement measures to regional organizations (like NATO); the development of standing capacities for rapid intervention, such as the proposed UN Emergency Peace Service; and agreement to not use the veto when grave atrocity crimes are imminent or underway. These are among many measures that may allow the UN to do more in the years ahead to protect populations from the most heinous violations of human rights.

[32] Russia, China and the USA are not states party to the ICC.