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A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations

JOST DELBRÜCK*

INTRODUCTION

The international system has undergone dramatic changes in recent years. Politically, the Cold War has come to an end and has given way to growing cooperation between the former ideological camps in the East and the West. Structurally, the bipolar distribution of power that dominated the international system for well over thirty years has vanished as a result of the decline of the status of the former Soviet Union as a rival superpower of the United States. The cooperation between the United States and the Soviet Union during the Gulf War crisis most poignantly highlights the extent to which the international scene has changed. This cooperation enabled the United Nations (UN) to function for the first time in full accord with the provisions of the UN Charter in a case of blatant aggression by one member state, Iraq, against another, Kuwait. The Security Council, acting under Chapter VII of the United Nations Charter, could promptly react to the Iraqi aggression: it consecutively condemned the invasion of Kuwait as an “act of aggression” according to Article 39 of the Charter; decided on severe economic sanctions and their enforcement, by military means if necessary; and ultimately authorized the member states cooperating with Kuwait to use all means necessary to liberate Kuwait from Iraqi occupation and to restore peace and security “in the area.”

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4. S.C. Res. 678, 45 U.N. SCOR (2963d mtg.) at 27, U.N. Doc. S/INF/46 (1990) (resolution of Nov. 29, 1990) [hereinafter S.C. Res. 678]. This mandate to the military coalition against Iraq lends support to the view that the military enforcement measures against Iraq were taken under Chapter VII of the UN Charter (Articles 39, 40-42, and 48), rather than under Article 51. While a mandate restricted to the liberation of Kuwait could have come under Article 51 as a measure of “collective self-defence,” U.N. CHARTER art. 51, the actual mandate authorizing the “restoration of peace and security in the area,” S.C. Res. 678, supra
The later measures authorized by the Security Council for the rescue of the oppressed minorities inside Iraq are of even greater interest in the present context. The newly established basic consensus among the Soviet Union, the United States, and the other great western powers allowed for measures to be taken inside a sovereign member state, to protect minority groups from massive human rights violations that, at times, amounted to acts equivalent to genocide. In other words, the international community witnessed a case of intervention by the United Nations within the borders of a member state, in pursuit of protecting the most fundamental human rights being violated by that member state's own government.

These events have pushed the United Nations into the public limelight to an almost unprecedented degree. They have also raised the difficult question of whether the UN Charter can generally justify such interventions or whether this particular instance of intervention by the United Nations must be seen as a follow-up measure unique to the police action against Iraq, which, outside of the Gulf crisis context, would constitute a violation of the principle of nonintervention enshrined in Article 2(7) of the Charter. In other words, the question raised is whether the Security Council's competence to use force under Chapter VII of the Charter is confined to (emphasis added), definitely was broader in scope than what a "collective self-defence" operation could legally achieve. The same view is taken by Partsch, Von der Souveränität zur Solidarität: Wandelt sich das Völkerrecht? [From Sovereignty to Solidarity: Is International Law Changing?], 18 EUROFÄSCHE GRUNDBRECHTE ZEITSCHRIFT 469, 471 (1991); see also Heinz, Philipp & Wolfrum, Zweiter Golfkrieg: Anwendungsfall von Kapitel VII der U.N.-Charta [The Second Gulf War: A Case of Applying Chapter VII of the U.N. Charter], 39 VEREINTE NATIONEN 121, 126 (1991).

5. See S.C. Res. 688, reprinted in 30 INTERNATIONAL LEGAL MATERIALS 858 (1991) (resolution of Apr. 5, 1991) [hereinafter S.C. Res. 688] [Subsequent page references are to 30 INTERNATIONAL LEGAL MATERIALS.].

cases of military aggression or military threats to international peace and security. If that were the case, enforcement actions to rescue oppressed people within the territory of a member state from grave violations of their most basic human rights committed at the hands of their own government could not be brought within the scope of Chapter VII of the UN Charter. Such intervention actions would have to be considered illegal.

In order to answer this question, one has to go back to the text, the intent, and the drafting history of the relevant articles of the UN Charter, on the one hand, and, on the other hand, to the development of the actual practice of the main political organs of the UN, the Security Council, and the General Assembly in the interpretation and application of such articles. Furthermore, a look at general international law with regard to the principle of nonintervention and its rationale may shed some light on the problem. The following argument, therefore, will be developed in three steps. Part I provides a short summary of the content and rationale of the principle of nonintervention under general international law and an exposition of the Charter law under Article 2(7) and Chapter VII. Part II presents a survey of UN practice with regard to the relevant Charter provisions in cases of grave human rights violations. Finally, in Part III an attempt is made to answer the question of whether the Charter actually does provide for the Security Council’s authority to intervene in the internal affairs of a member state in cases of grave human rights violations and to use military force if necessary.

I. THE PRINCIPLE OF NONINTERVENTION
UNDER GENERAL INTERNATIONAL LAW AND UNDER THE UN CHARTER
IN CASES OF GRAVE HUMAN RIGHTS VIOLATIONS

A. The Principle of Nonintervention
Under General International Law

The principle of nonintervention is deeply enshrined in general international law. It has its legal basis and legal policy foundations in the principles of the sovereignty and equality of states, the constitutive elements of the international legal order. Recognition of sovereignty—the independence and freedom of states from any external dominance in the determination of their domestic and foreign policies and the equality of states under law—excludes, in principle, the permissibility of interventions by third parties.

The scope, however, of the prohibition against intervention in the internal or domestic affairs of states is still controversial. On the one hand, there

7. See Ermacora, Commentary on Article 2(7) no. 10 and 12, in DIE CHARTA DER VEREINten NATIONEN-KOMMENTAR 103-04 (B. Simma ed. 1991) (calling the principle a “constitutional principle of the World Community”).
are those who support a broad construction of the concept of nonintervention that is based on a corresponding expansive interpretation of the concept of sovereignty. If sovereignty not only is to denote the legal independence and self-determination of states, but also is supposed to have a substantive meaning in the real world of international relations, it is argued, it must be protected from violations as a matter of law. Hence, a principle of nonintervention commensurate in scope to that of the principle of sovereignty must be recognized under international law.8 Others, on the other hand, advocate a restrictive interpretation of the principle of nonintervention. They argue that a broadly construed concept of sovereignty and a corresponding broad interpretation of the principle of nonintervention no longer meets the demands of the growing internationalization of states' responsibilities for the maintenance of international peace and security as well as for the protection of human rights.9 If such growing international responsibilities are recognized as a matter of law, sovereignty must be viewed as legally more limited than in the past. This, in turn, must result in a restrictive interpretation of the scope of the principle of nonintervention, leaving room for international interventions in the domestic affairs of states—if not generally, then at least under certain well-defined circumstances.

Qualifying the permissibility of international interventions in this way, however, indicates that within this second school of thought as well there is, as of now, no consensus as to the criteria or the circumstances allowing for interventions. Nor is there general agreement as to what kind of actions taken in the course of interventions could be considered legal; that is, whether such interventions could be carried out by the use of (military) force or whether they must be restricted to measures short of the use of force. According to widespread opinion, the general prohibition against the use of force under international law does not allow for unilateral forcible interventions by individual states even for the purpose of rescuing citizens of third states, or their own, from threats to their lives and physical safety. That is to say, so-called humanitarian interventions, once accepted as legal, are widely viewed as illegal today.10 Countermeasures even against grave and massive human rights violations are, for good reason, considered to be

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restricted to economic and diplomatic sanctions below the threshold of the use of force: Allowing military enforcement measures based on the "isolated" decisions of individual states would lead to an erosion of the general prohibition against the use of force and against "dictatorial interference[s]." Since the assessment of the factual situation, the determination of the appropriate means to be applied, and the execution of the intervention would all be administered by the intervening state, the door to purely arbitrary intervention, that is, acts of aggression in disguise, would be wide open.

In a world community heeding diverse values and pursuing different, often antagonistic, interests, it is easy to conceive of states invoking all kinds of justae causae as a justification for intervention. This objection to a more liberal regime governing the law of intervention need not necessarily hold true if interventions in the internal affairs of a state that commits grave human rights violations are decided on the basis of an orderly and lawful procedure and are executed by an international organization such as the UN as the representative of the international community of states. The question is, therefore, what the authority of the UN is in this regard.

B. The Principle of Nonintervention Under Article 2(7) and the Authority of the UN Security Council Under Chapter VII of the UN Charter

The United Nations possesses broader authority to act in cases of threats to and breaches of international peace and security than did the League of Nations. Under Chapter VI, the UN Charter provides conciliatory and investigatory powers to the General Assembly and the Security Council. Chapter VII empowers the Security Council to take binding enforcement measures "to maintain or restore international peace and security" after it has decided under Article 39 that an act of aggression or a threat to or a breach of international peace and security has occurred. However, in taking action, the main political organs of the United Nations under the

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11. The term "dictatorial interference"—a very telling description of what constitutes an illegal intervention—is used by L. Oppenheim, International Law 305 (Lauterpacht 8th ed. 1955); see also A. Verdross & B. Simma, Universelles Völkerrecht—Theorie und Praxis § 490, at 300 (3d ed. 1984).

12. The General Assembly may also recommend enforcement measures under The Uniting for Peace Resolution. G.A. Res. 377(v), 5 U.N. GAOR (302d plen. mtg.) Supp. (No. 20) at 20, U.N. Doc. A/1775 (1950). For discussion of the historical and legal aspects of this resolution, see Nolte, Uniting for Peace, in Handbuch Vereinte Nationen 950 (R. Wolfrum 2d rev. ed. 1991); Randelzhofer, Article 2(4) no. 42, in Die Charta der Vereinten Nationen-Kommentar, supra note 7, at 81; Stein & Morrissey, Uniting for Peace Resolution, in 5 Encyclopedia of Public International Law, supra note 8, at 379.


14. Id.
Charter are subject to the principle of nonintervention just as states acting outside the United Nations are bound by this principle according to the principles of international law. Article 2(7) of the Charter provides that "[n]othing 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."\(^5\) This basic principle, which normally governs the relationship between the organs of the United Nations and the member states, provides, however, for an important exception. Article 2(7) continues by stating that "this principle shall not prejudice the application of enforcement measures under Chapter VII."\(^6\) Invoking this exception presupposes that the Security Council has made the decision to intervene according to Article 39. This decision under Article 39, in turn, implies that the Security Council has come to the conclusion that the matter on which it desires to act does not constitute a matter "essentially within the domestic jurisdiction"\(^7\) of the state concerned.

In cases of acts of aggression and threats to international peace and security, it is perfectly clear that these per definitionem cannot be matters essentially falling within the domestic jurisdiction of the state or states concerned. And yet, in cases of even grave violations of fundamental human rights, it may be doubtful whether they constitute "matters . . . essentially within the domestic jurisdiction"\(^8\) of the state, or states, concerned. Human rights are to govern the relationship between governments and citizens. Therefore, it may well be argued that human rights violations are only of domestic concern. Furthermore, experience shows that even grave violations of the most fundamental human rights, at first glance, do not always entail direct (transborder) threats to international peace.

If one accepts this view, the Security Council is barred from intervening even in cases of grave violations of fundamental human rights since under Article 2(7) these would have to be considered matters essentially within the domestic jurisdiction of the state concerned. By the same token, they would not per se constitute a threat to international peace, thus excluding the applicability of the exception provided for in Article 2(7) in favor of enforcement measures under Chapter VII of the Charter, that is, measures taken against acts of aggression or against threats to international peace. This interpretation of Article 2(7), which would restrict the right of the Security Council (or the General Assembly, for that matter) to intervene into the internal affairs of a member state to cases of outright acts of aggression, threats to, or breaches of international peace, would clearly be

\(^{15}\) U.N. CHARTER art. 2, para. 7.
\(^{16}\) Id.
\(^{17}\) Id.
\(^{18}\) Id.
in line with the opinion prevailing at the San Francisco Conference of 1945. Most governments participating in the founding of the United Nations favored an extensive interpretation of the principle of nonintervention as a restriction on the powers vested, for instance, in the Security Council. This interpretation is, however, neither the only possible one nor is it the one that the main political organs of the United Nations followed in dealing with human rights questions.

From the very beginning, the main political organs of the United Nations have concerned themselves with cases of grave human rights violations. The most important cases were the fight against the South African government's apartheid policies and other instances of human rights violations by racist or terrorist regimes. In all of these cases the offending states raised the objection that the General Assembly or the Security Council were in violation of the principle of nonintervention contained in Article 2(7) of the Charter. The two organs have consistently held, however, that Article 2(7) could not be invoked by the states concerned because as member states of the United Nations they were bound by the Charter provisions protecting human rights, such as Article 1(3) and Article 55. Thus, the human rights violations dealt with by the political organs of the UN no longer constituted "matters essentially within the domestic jurisdiction" of the states concerned. In view of this consistent UN practice, present international law can be safely interpreted as considering human rights violations within the border of member states not as "matters essentially within [their] domestic jurisdiction." Public discussion of such human rights violations in the political organs of the United Nations, therefore, would no longer violate the principle of nonintervention. This would hold true regardless of the severity of the human rights violations the UN organs are addressing.

19. For a summary review of the opinions voiced at the San Francisco Conference, see Ermacora, supra note 7, at 102-03.
20. See generally id.
21. Ermacora, supra note 7, at 104-06, provides a list of the most important cases that the Security Council and/or the General Assembly of the United Nations have dealt with.
23. U.N. Charter art. 1, para. 3.
26. For a representative treatment of this subject, see Ermacora, supra note 7, at 106-10, who points out, however, that one rarely finds a detailed consideration by the organs involved of the relevant international legal argument. This is due to the fact that the United Nations perceives itself as a primarily political organization. Therefore, in practice political and humanitarian reasons for the respective decisions predominate over strictly legal reasons. With regard to this self-perception of the United Nations, see Delbrück, Peacekeeping by the United Nations and the Rule of Law, in DECLARATIONS ON PRINCIPLES—A QUEST FOR UNIVERSAL PEACE 73 (1977). On the reduced role of the principle of nonintervention in cases of a "consistent pattern of gross and reliably attested violations [of human rights]," see A. Verdross & B. Simma, supra note 11, at § 494, at 303.
Thus, neither the broad interpretation of the principle of nonintervention as voiced during the San Francisco Conference nor the corresponding restrictive view of the rights of intervention power vested in the political organs of the UN provide for a principled barrier to UN intervention, particularly in cases of grave violations of fundamental human rights protected under international and/or UN legal instruments.

Yet one has to recognize that the UN has adopted sanctions against grave human rights violations only in rare cases. In fact, such enforcement measures have been taken only in very severe cases such as in connection with the policies of apartheid and other forms of racist activities. Furthermore, it has to be emphasized that sanctions adopted in these cases were kept below the level of (military) enforcement measures and that sanctions were decided upon with binding effect under Chapter VII of the Charter in only two cases. The UN practice referred to here, therefore, did not take all forms of human rights violations anywhere in the world as a starting point for its decisions on sanctions. Rather, the cases on point all related to the specific situation in Southern Africa. In particular, the policies of apartheid and equivalents thereof, and only these, were gradually characterized as "disturbance[s] of international peace" and finally as "threat[s] to international peace" and security. The United Nations was not ready, however, to conclude generally that all grave human rights violations qualify as threats to the peace under Chapter VII or as a separate basis for UN action apart from the circumstances named in Article 39 of the Charter, namely "act[s] of aggression" and "threat[s] to the peace [and] breach[es] of the peace."

28. See supra note 19 and accompanying text.
29. Id.
30. These cases were Southern Rhodesia (Zimbabwe), S.C. Res. 253, 23 U.N. SCOR (1428th mtg.) at 5 (1968) (extending the previous oil embargo of S.C. Res. 221, 21 U.N. SCOR (1277th mtg.) at 5 (1966), and calling for extensive additional economic sanctions against Southern Rhodesia (Zimbabwe); and South Africa, S.C. Res. 418, 32 U.N. SCOR (2046th mtg.) at 5 (1977) (calling for a mandatory arms embargo against South Africa). For a comprehensive survey of the handling of the Zimbabwe case by the Security Council, see Stoll, Konflikte, Rhodesien/Zimbabwe, in HANDBUCH VEREINTE NATIONEN, supra note 12, at 501, 503-04, and of the South Africa case, see Stoll, Konflikte, Südafrika, in HANDBUCH VEREINTE NATIONEN, supra note 12, at 505, 511.
31. See Delbrück, supra note 26, at 87 (citations omitted).
32. U.N. CHARTER art. 39. The objections raised by this author against a general qualification of unjust situations or actions violating human rights as "threat[s] to the peace" in the sense of Chapter VII of the Charter are not abandoned here. However, the concern here is that the use of military force against the life and liberty of people, as occurred in the Iraqi government's persecution of the Kurdish minority, or genocide-like, systematic human rights violations, should, if necessary, be condemned as threats to international peace and security. This would enable the United Nations to take enforcement measures under Chapter VII of the Charter in order to prevent or stop such criminal activities. For a statement of the former, now modified, position, see Delbrück, Rechtsprobleme der Friedenssicherung durch Sicherheitsrat und Generalversammlung der Vereinten Nationen [Legal Problems Relating to the
The Security Council’s adoption of Resolution 688 on April 5, 1991 may indicate a change in the former practice of the Council. In this resolution, the Security Council in strong language requested Iraq to end the repression of the Kurds and other minorities in Iraq and to grant international humanitarian organizations that were offering aid for the oppressed people access to its territory. Furthermore, Resolution 688 asked the UN Secretary General to support the refugees with all necessary means available.

In Resolution 688, the Security Council, without expressly referring to Article 39 or Chapter VII as a whole, characterized the persecution of the Kurdish people by the Iraqi government as “threatening international peace and security.” Article 39 evidently was seen by the Council as the legal basis of its decision, a decision that in view of this legal basis must be considered binding upon Iraq in all parts. The Iraqi government has challenged this view, pointing out that the resolution’s mandate conferred on the UN Secretary General a certain degree of political discretion as to how he would implement his task. Furthermore, the Iraqi government emphasized that the UN Secretary General had based the mandated relief actions for the Kurds on a Memorandum of Understanding with the Iraqi government that expressly recognized “respect for the territorial integrity, the political independence and the principle of nonintervention.” Thus, according to the Iraqi position, the presence of the UN-sponsored relief units and their camps on Iraqi territory legally rested on the Iraqi government’s sovereign consent, not on any binding decision of the UN Security Council. This view, however, reflects neither the legal nature of Resolution 688 nor the intentions of the Security Council. The clear assessment of the

33. See S.C. Res. 688, supra note 5.
34. Id. at 859.
35. Id.
36. Id.
37. See id. (resolution preamble, para. 3; operative portion of resolution, no. 1). Doubts as to whether the Security Council did, indeed, base its decision on Article 39 and Chapter VII in general are voiced by Partsch, supra note 4, at 475.
38. See respective statements in Memorandum of Understanding, reprinted in 30 INTERNATIONAL LEGAL MATERIALS 860, 1991, and summary of the Iraqi position by Heinz, Philipp & Wolfrum, supra note 4, at 125.
39. Memorandum of Understanding, reprinted in 30 INTERNATIONAL LEGAL MATERIALS 860 (1991). The consensual method chosen by Secretary General Perez de Cuellar to implement his mandate was not only politically expeditious, but was also in line with his personal view expressed earlier in an address he gave at Bordeaux on “International Law and Morality” (excerpts published in U.N. WEEKLY OF MAY 2, 1991, AT 2), in which he had characterized the Kurdish problem as an internal matter of Iraq. The Secretary General in this address advocated a reconsideration of this position pro futuro, however. Id.
40. See Heinz, Philipp & Wolfrum, supra note 4, at 125.
41. For a summary of the Iraqi position, see id.
Iraqi oppression of the Kurds and other minorities within Iraq as a threat to international peace and security, as well as the total absence of any hint by the Council that this resolution was meant to be only a recommendation, clearly contradicts the Iraqi point of view. In addition, the Security Council clearly acquiesced in the temporary presence of American, British, and French military forces in Northern Iraq to provide support and protection for the Kurds against genocidal attacks by Iraqi government forces. The Council could not have tolerated these activities under Resolution 688 if aid and protection for the Kurds on Iraqi territory had been meant to be dependent on Iraqi consent.

However, the dispute over whether the relief action for the Kurds ordered by the Security Council did or did not need Iraqi consent demonstrates the persisting insecurities with respect to the assessment of UN interventions directed at preventing or ending grave human rights violations. In view of the increasing number of violent acts of oppression against minorities in various countries, particularly those involving the use of armed force against civilians, there is a clear need to develop more satisfactory answers with regard to the question whether the United Nations Charter allows for an interpretation that would enable the Security Council to deal more effectively with grave human rights violations.

II. IS THERE MORE EFFECTIVE INTERNATIONAL PROTECTION OF FUNDAMENTAL HUMAN RIGHTS UNDER GENERAL INTERNATIONAL LAW AND THE UN CHARTER?

A. General International Law

Under general international law, ways of dealing more effectively with grave violations of fundamental human rights that would go beyond the present law as outlined previously,42 are difficult to conceive. The International Court of Justice, in the Barcelona Traction Case,43 has certainly recognized the concept of an erga omnes-effect of fundamental human rights norms (for example, prohibiting genocide, racism or apartheid, or torture), a notion that had been put forward in earlier legal writings.44 Furthermore, modern international law increasingly recognizes the right of

42. See supra Part I.
44. For a concise study of the meaning and scope of the so-called erga omnes norms, including a critical discussion of the respective statements by the International Court of Justice in Barcelona Traction, see Frowein, Die Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung (Obligations erga omnes in International Law and Their Enforcement), VÖLKERRECHT ALS RECHTSORDNUNG—INTERNATIONALE GERICHTSBARKEIT—MENSCHENRECHTE 241 (Festschrift Mosler), (Bernhardt & Geck eds. 1983) (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol. 81).
individual states to enforce fundamental or constitutional norms of the international community in the general interest of all states. In regard to the necessity of maintaining the comprehensive validity of the general prohibition against the use of force, one has to recognize, however, that such enforcement measures have to stay below the threshold of the use of military force. Thus, as of now, general international law does not offer any legal basis for more effective, that is, possibly military, enforcement mechanisms in cases of grave violations of human rights. If anywhere, such means could only be found within the institutional structure of the United Nations or of regional institutions acting within the United Nations framework and Charter law.

**B. The Charter of the United Nations**

In finding means within the legal and institutional framework of the United Nations to protect more *effectively* international human rights against flagrant violations of fundamental human rights norms, one has to begin with the interpretation of Chapter VII of the Charter, on the one hand, and Article 2(7), on the other hand. First, a literal and systematic interpretation of the relevant provisions shows that the scope of the powers of the Security Council under Chapter VII must extend beyond the power to fend off or prevent acts of aggression or military breaches of or threats to international peace and security. Otherwise, the exception to the general rule of the principle of nonintervention granted by Article 2(7) with regard to measures taken under Chapter VII would be devoid of any substantive meaning: acts of aggression and military threats to the peace by their very nature are not internal matters of the member states. Measures taken against such acts or threats, therefore, could never constitute an illegal intervention under international law and would, therefore, not need to be expressly excepted from the nonintervention principle of Article 2(7). Obviously, Article 2(7) presupposes the possibility of measures by the Security Council under Chapter VII that—if not taken under Chapter VII—would constitute a violation of the nonintervention principle of Article 2(7). Actions by the Security Council that would fall into this category would be authorizing interventions into the territory of a member-state in order to end or prevent genocide or the equivalent thereof. An example could have been a military

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46. This was observed by Heinz, Philipp & Wolfrum, *supra* note 4, at 126.
intervention in Cambodia (Kampuchea) ordered by the Security Council to
end the genocidal massacres perpetrated by the Pol Pot regime.\footnote{47}

No such actions were taken by the Security Council, however. The reason
may be that the internal situation in Cambodia at the time was not
considered a direct threat to international peace and security. Even if the
Security Council had accepted the interpretation of Article 2(7) to the extent
that it permits forcible interventionist measures of the Security Council for
reasons other than fending off military acts of aggression or breaches of
or threats to the peace, the Council could not have reacted to the Pol Pot
massacres under Chapter VII without first deciding that the situation in
Cambodia constituted at least a threat to international peace and security.

Indeed, the analysis of a hypothetical UN intervention in Cambodia
makes it clear that interpreting Article 2(7) to allow Security Council
interventions for reasons other than combatting acts of aggression or similar
acts would not solve the problem. For if Article 2(7) permits interventions
for those other reasons, it does so only on the condition that these
interventions are measures taken under Chapter VII of the Charter, that is,
for the purpose of redressing a situation that is at least threatening to
"international peace and security"\footnote{48} in the sense of Article 39 of the Charter.
This article is the sole legal basis for enforcement actions to be taken or
authorized by the Security Council. Article 2(7), as such, does not confer
additional powers on the Council; as stated before, it only grants exceptions
from the application of the nonintervention principle with regard to measures
taken under Chapter VII. These may cover forcible interventions aimed at
ending or preventing actions by individual states other than acts of aggres-

sion or threats to or breaches of the peace, but only if the actions constitute
at least a "threat to . . . international peace and security"\footnote{49} under Article
39 of the Charter. If the Security Council is to react more effectively, that
is, possibly with the use of force, to grave violations of fundamental human
rights within the territory of an individual state, an additional step of
(re)interpretation of the Charter, specifically of Article 39, must be taken.

A suggested starting point here is to base the necessary (re)interpretation
on the notion of "threat to . . . international peace and security" as used
in Article 39 of the Charter.\footnote{50} If the notion of a "threat to . . . international
peace and security" is taken only to mean the threat of using \textit{military} force

\footnote{47. According to reliable reports, approximately one million people opposing the totalitarian
regime of the Khmer Rouge under Pol Pot were killed until the regime was ultimately toppled
during a unilateral intervention by Vietnamese military forces. For a summary report and
analysis of the events in Cambodia, see Rapp, \textit{Konflikte, Kambodscha/Kampuchea}, in \textit{Hand-
Buch Vereinte Nationen}, supra note 12, at 449.}

\footnote{48. See U.N. \textit{Charter} art. 39.}

\footnote{49. \textit{Id.}}

\footnote{50. Article 39 speaks of a "threat to the peace, breach of the peace, or act of aggression."}
in the international, transborder relations of states, situations such as the genocide in Cambodia or the treatment of the Kurds in Iraq could not be considered as a "threat to ... international peace," thus excluding any forcible intervention by the Security Council on behalf of the oppressed people. If, however, Article 2(7) presupposes the possibility of enforcement measures by the Security Council that may be directed against state actions other than military threats to international peace and that would constitute illegal acts of intervention were they not authorized or undertaken by the Council under Chapter VII, this could be in conformity with the Charter only if the notion of a "threat to ... international peace and security" as used in Article 39 has a broader meaning than that of a military threat. It must also comprise such situations that by their nature could potentially become a threat to international peace in the narrower sense of Article 39.

As a matter of fact, the Security Council has for quite some time been paving the way toward a broader understanding of the notion of "threat to ... international peace and security." In the decisions taken under Chapter VII against the apartheid regime in South Africa, the Council characterized the apartheid system as a "threat to international peace." It did so as well in its decisions on the Ian Smith Regime in Southern Rhodesia (Zimbabwe). In the recent decisions on Iraq, the Security Council has also—as mentioned previously—characterized the persecution of the Kurds as a "threat[] [to] international peace and security." This view deserves support.

It does not use the term "international" with regard to the term "peace" in the first part of the provision. It does refer to "international" peace at the end of the article where it continues that the Security Council shall determine "what measures shall be taken ... to maintain or restore "international peace and security" (emphasis added). In the language used by the Security Council in its resolutions it refers to "international peace and security." See, e.g., S.C. Res. 688, supra note 5.

51. For a closer analysis of these decisions, see Delbrück, supra note 26, at 87.
52. See supra notes 33-41 and accompanying text.
53. S.C. Res. 688, supra note 5, at 859.
54. See Freedman, supra note 6, who essentially argues from the same perspective. He correctly points out, however, that the United States was at first reluctant to intervene on behalf of the Kurds, that is, to concern itself with the "internal affairs" of Iraq. Id. at 203 (citation omitted). This reluctance, Freedman explains, may become symptomatic of the attitudes of many states in view of the increasing number of ethnic conflicts in Eastern Europe. Id. at 208. For in cases of ethnic strife of the kind experienced in Eastern Europe, the legal situation may not be as clear cut as in the case of Iraq. Id. Freedman, therefore, voices some skepticism as to whether the United Nations actions taken in the case of Iraq would be heeded as a precedent in the future. Id. That the position taken in this Article, that is, that the United Nations will play a more active role in cases of the kind dealt with here, is not wholly unrealistic can be supported by the increased willingness on the part of the United Nations to shoulder a greater responsibility in the international protection of human rights. For example, the use of UN peace-keeping forces was recently authorized for El Salvador, see Central America: Efforts Towards Peace: Report of the Secretary-General, U.N. SCOR, 46th Sess. U.N. Doc. S/22494 & Corr. 1 (1991), and the reconstruction of the internal order of Cambodia, see Address by UN Secretary General Perez de Cuéllar before the Paris Peace Conference on Cambodia, U.N. Weekly 7 (1991), No. 44, at 2.
It is only realistic to assume that massive human rights violations of genocidal dimensions will sooner or later escalate into international military conflicts in a world highly sensitized by such events. The most recent example of such a development is the war waged by the Yugoslavian—or rather Serbian—central authority against Croatia, which has demanded the free exercise of its right to national self-determination but is denied this by Serbia’s massive use of military force.\(^5\) What started as an internal conflict has taken on the character of a threat to international peace. This means, however, that in this case there is no need to operate with an extended interpretation of the notion of “threat to . . . international peace”\(^5\) since by its own dynamics the conflict has become international in the sense of Article 39 of the Charter.\(^7\) It is also correct to state that massive and gross violations of human rights of genocidal dimension, particularly if carried out by military means, are incompatible with an understanding of peace as a legal order and that they therefore constitute a threat to international peace.

**CONCLUSION**

The preceding line of argument is based in part on international treaty law under which interpretations of treaty provisions should enhance the provisions’ effectiveness.\(^8\) The argument is also in line with the developing trends of the Law of the United Nations as indicated by the practice of the main political organs, particularly of the Security Council. If followed with

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55. It is correct, however, to point out that international law as of now does not, and most likely will never, grant to minorities the right to secession as a consequence of exercising the right to self-determination in each and every case. See, e.g., Partsch, supra note 4, at 473. The principle of territorial integrity on the whole will take priority over the right to secession. However, if a clearly defined *national minority* with a distinct and verifiable political will to independence, a definable territory, and the ability to establish an effective national government asserts independence, as in the case of Slovenia and Croatia, forcible suppression of the exercise of the right to self-determination cannot be seen as justified on the basis of the principle of territorial integrity. Partsch accepts this point of view in principle but doubts whether these conditions are fulfilled in the case of Slovenia and Croatia. Id. at 474. This author bases his argument on a different evaluation of the factual situation with regard to the two states, which are now officially recognized by the member states of the European Community.

56. See U.N. CHARTER art. 39.

57. By a resolution of September 25, 1991, the UN Security Council has drawn the conclusions and has qualified the situation in Yugoslavia as a threat to international peace, see U.N. CHARTER art. 39, and has decided under Chapter VII of the Charter on an arms embargo against Yugoslavia. S.C. Res. 713, 46 U.N. SCOR (3009th mtg.) (1991).

persistence and determination, this line of reasoning could open up avenues to more effective international protection of the most fundamental human rights and, at the same time, more conflict prevention, thereby vitalizing the UN role in the maintenance of international peace and security. Those who are appalled by the idea that the United Nations could, even by using military force under its command or authority, react both to military threats to or breaches of international peace and to massive and gross violations of fundamental human rights of a genocidal dimension must consider that any such enforcement measures could only be resorted to as an ultima ratio. Such enforcement measures could only be lawfully undertaken if enforcement measures short of the use of military force have proven to be ineffective and if the military enforcement measures are applied proportionately.

The more vigorous role for the United Nations proposed and discussed here could also be played by regional institutions provided that adequate powers are vested in such institutions. Opponents of such roles must realize that to deny truly effective powers to the United Nations (or other institutions) in combatting massive and gross violations of human rights would not eliminate the ethical dilemma inherent in any use of military force, or the use of force by the police in cases of internal violence, for that matter. Standing by idly in view of genocide or equivalent crimes against humanity (or against the environment) carries with it the charge of guilt.

59. The principle of proportionality is one of the basic substantive principles of general international law that also governs the activities of the United Nations organs. See Partsch, supra note 4, at 471 (emphasizing this point). For a concise explication of the meaning and scope of the principle of proportionality, see Delbrück, Proportionality, in 7 Encyclopedia of Public International Law, supra note 8, at 396.

60. For a discussion of this aspect of a new role for the World Organization in a New World Order, which has been very topical after the oil disaster brought about by President Saddam Hussein of Iraq during the Gulf War, see Hendrikson, supra note 6, at 35.