1994

Nationalism and Internationalism: The Wilsonian Legacy

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NATIONALISM AND INTERNATIONALISM: THE WILSONIAN LEGACY

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I. INTRODUCTION

No twentieth-century leader has had greater influence on the parallel development of both nationalism and internationalism than Woodrow Wilson. Wilson gave expression to the nationalist aspirations of peoples around the world, through his endorsement of the principle of self-determination. He also initiated the first institution that had as its objective the organization of the international community to apply concerted power in support of universal values. My task is to examine one contemporary problem—intervention—in the light of some of the themes implicit in the Wilsonian legacy. Among these themes will be the establishment (and now the invigoration) of collective organs for the achievement of community objectives; the engagement of the United States in those collective activities; the advancement of democracy through U.S. initiatives, whether alone or in combination with like-minded states; and the articulation of normative principles against which all the above activities could be measured.

Debates in the 1990s about the wisdom or justification of intervention must reckon not only with Wilsonian ideals, but also with the imprint of American interventions during Wilson's presidency. In the second half of 1993, plans were underway to send an international mission to Haiti as part of a series of efforts to quell disorder and to achieve democratic governance there.[1] Wilson sent the U.S. Marines to Haiti in 1915 with some of the same objectives; they stayed until 1934.

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* Professor of Law, Columbia of University. This paper draws upon several recent writings of the author on related topics, especially ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS (Lori Fisler Damrosch ed., 1993), and *Changing Conceptions of Intervention in International Law, in* EMERGING NORMS OF JUSTIFIED INTERVENTION (in L.W. Reed & C. Kaysen eds., 1993). Many thanks to the organizations sponsoring those two projects, and to the participants in their respective studies on intervention, for incalculable contributions to my own efforts.

1. *See infra* text accompanying notes 7-21 (concerning the origins and the collapse, or at least the interruption, of these plans).

By beginning with this example, I am not venturing to predict the duration of a possible U.N. intervention in Haiti nor am I urging any particular "exit strategy." Rather, I present this example to serve as a reminder that the historical record of unilateral U.S. interventions in the hemisphere—pursued not only by Wilson,[2] but also by many of his predecessors and successors—has led to strenuous objections from states that have been (or feared that they might become) targets of U.S. interventions. Those objections have been expressed emphatically in legal documents codifying a norm of *non*-intervention, which remains the starting point for discourse on the subject among international lawyers.

The Wilson presidency heightened concerns about such abuses, but, paradoxically, Wilsonianism in the larger sense has contributed to the development of norms and institutions through which opposition to unilateral intervention could be mobilized. To bring the irony full circle, the same institutions are now the ones through which Presidents Bush and Clinton have transformed unilateral into collective interventions and have thereby sought to multiply U.S. leverage over foreign developments.

In the post-Cold War period, international law is moving beyond a system of constraints on *unilateral* state action to become a more effective system aimed at channeling the *collective* efforts of the international community toward the realization of widely shared values. The norm of nonintervention retains vitality—some might say deserves revitalization—when the question is restraining states from *unilateral* projections of power into what international law has traditionally viewed as the "internal affairs" or "domestic jurisdiction" of other states. With respect to *collective* activities, the U.N. Charter embodies provisions indicative of the constraints on the organization that were appropriate in 1945, but those provisions need not thwart the development of powers to "intervene" in situations that press a claim on the conscience of all humanity. The challenge is to clarify normative conceptions and procedural safeguards that render it acceptable for collective organs to do what no one state should be allowed to do alone.

The U.N. Security Council's application of the concept of "threat to peace" has undergone a dramatic evolution in the

2. In Haiti, Mexico, Nicaragua, and the Dominican Republic.

three years since it authorized a collective response to Iraq's invasion of Kuwait. The Council has found "threats to peace" in Iraq's repression of its Kurdish population in 1991,[3] in the chaos gripping Somalia in 1992-93,[4] in Haiti's political crisis (which began in 1991 but was characterized as a "threat to peace" for the first time in June 1993),[5] and in several other cases that likewise push well beyond traditional conceptions.[6] Large segments of the international community have been willing to endorse strong collective action in a wide range of situations, of which the following are illustrative, though not exclusive:

— Genocide, "ethnic cleansing," war crimes, crimes against humanity, and similar atrocities entailing loss of life on a mass scale;
— Interference with the delivery of humanitarian relief to endangered civilian populations;
— Violations of cease-fire agreements;
— Collapse of civil order, entailing substantial loss of life and precluding the possibility of identifying any authority capable of granting or withholding consent to international involvement; and
— Irregular interruption of democratic governance.

Three contemporary cases—Haiti, Yugoslavia, and Iraq—illustrate the interplay of differing aspects of the Wilsonian legacy with respect to the twin themes of nationalism and internationalism.

3. S.C. Res. 688, U.N. SCOR, 46th Sess., U.N. Doc. S/INF/47, at 31 (1991) discussed in the text accompanying note 43 *infra*.

4. S.C. Res. 794, U.N. SCOR, 47th Sess., U.N. Doc. S/INF/48, at 63 (1992).

5. S.C. Res. 841, U.N. Doc. S/RES/841 (June 16, 1993).

6. For aspects of the situation in the former Yugoslavia, *see infra*, text at note 29. Other recent innovations are found in the Security Council's responses to continuing strife in Liberia (*see* S.C. Res. 788, U.N. SCOR, 47th Sess., U.N. Doc. S/INF/48, at 99 (1992)) and Angola (*see* S.C. Res. 864, U.N. Doc. S/RES/864 (Sept. 15, 1993)). The unique case of Cambodia is discussed in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 241-73, 382-84 (Lori Fisler Damrosch ed., 1993).

II. CURRENT CASES

A. *Haiti*

I will begin the Haitian story not on the island of Hispaniola, but in Mexico during Wilson's presidency, and then I will turn not to Port-au-Prince but to Santiago de Chile in 1991.

International law casebooks take note of Wilson's position on a matter of considerable doctrinal importance, namely, whether a regime that comes to power extraconstitutionally, or in violation of democratic processes, should be granted diplomatic recognition. In the case of General Huerta's overthrow of President Madero's government in Mexico in 1913, Wilson refused recognition, explaining that "a just government rests always upon the consent of the governed."[7] International lawyers have generally agreed with politicians, political scientists and historians that Wilson's policy with respect to Huerta was ill-suited to be (or to become) a "principle"—it simply could not be applied to anything like a consistent category of cases.[8]

The Mexican government itself later formulated what also purported to be a statement of principle, taking the opposite position from Wilson. The "Estrada Doctrine," named for Mexico's foreign minister, insisted that it was improper to use the grant or denial of recognition as a means of passing judgment on the legitimacy or illegitimacy of other governments.[9] One might have thought that such a "doctrine" of dealing with any government in effective control, would be susceptible to consistent application. Mexico itself, however, apparently refrained from relations with the Franco government of Spain for over three decades.[10] In view of such discrepancies between proclaimed doctrine (whether Wilson's or Estrada's) and actual practice, various commentators have concluded

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7. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, sec. 203, note 1 (1987) (citing HACKWORTH, DIGEST OF INTERNATIONAL LAW, vol. 1, p. 181 (1940)).

8. As then-Deputy Secretary of State Warren Christopher put it in a 1977 address, "Wilson's exception proved too rigid in practice and it rather quickly succumbed to the stress of reality." LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 243 (2d ed. 1987).

9. Statement of Mexican Foreign Minister Estrada (1930), excerpted in 2 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 85-86 (1963).

10. HENKIN ET AL., *supra* note 8, at 248.

that governmental behavior with respect to recognition tends to reflect expediency rather than principle.

Yet in Santiago, Chile, in June 1991, at a moment when the countries of the American hemisphere all possessed governments with some color of democratic legitimacy,[11] the Organization of American States adopted a declaration that led within a few months to collective implementation of something rather like Wilson's policy toward Huerta. The operative passage of the Santiago Declaration commits the OAS to act collectively "in the event of any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization's member states."[12] Within four months, this declaration was called into play upon the overthrow of President Aristide's government in Haiti. Among the first decisions the OAS took in response to the Haitian crisis was to decide that only President Aristide's representatives would be viewed as legitimate within the organs of the inter-American system, and furthermore to "recommend, with due respect for the policy of each member state on the recognition of states and governments, action to bring about the diplomatic isolation of those who hold power illegally in Haiti."[13] The first wave of OAS-recommended economic sanctions followed a few days later, as did a resolution of the U.N. General Assembly appealing to the United Nations that all member states take measures in support of the OAS actions.[14]

Despite a crippling but porous hemispheric embargo, Haiti's de facto government remains in power and President Aristide remains in exile more than two years later. Haiti's military rulers did not take the international efforts seriously until June 1993, when the U.N. Security Council imposed a mandatory oil embargo and related sanctions (including an embargo on arms, police equipment, and petroleum products, and a freeze of the assets of the Haitian government and de facto authori-

11. Cuba is the notable exception.

12. *Representative Democracy*, OAS Doc. AG/RES 1080 (June 5, 1991).

13. *Support to the Democratic Government of Haiti*, OAS Doc. MRE/RES 1/91 (Oct. 3, 1991).

14. G.A. Res. 46/7, U.N. GAOR, 46th Sess., Supp. No. 49, at 13 (1991).

ties).[15] The U.N. embargo of Haiti is noteworthy as a new step in the Security Council's willingness to deal with an internal political crisis as a threat to international peace and security. The Haitian sanctions resolution goes farther than any other to date in applying universal, mandatory, and severe economic sanctions to influence a domestic political crisis over democratic governance. Its cautious wording (stressing more than once the "unique and exceptional" circumstances) cannot hide its precedential significance.

The Security Council suspended sanctions on August 27, 1993, after the U.N. Secretary-General reported that the de facto authorities had begun implementing in good faith the July 1993 Governors Island Agreement for reinstating President Aristide's government.[16] The outright political murder of Aristide's supporters, including his minister of justice, after suspension of the sanctions shattered any illusion of compliance with this good faith standard.[17]

A crucial step in the U.N. plan was to have been the deployment of international personnel to ensure a peaceful transition and to begin the rebuilding of a shattered nation. The Security Council approved the dispatch of a 1,300-member force on September 23, 1993,[18] but a violent demonstration orchestrated by the de facto authorities blocked the debarkation of the first contingent arriving on a U.S. troop carrier, which then withdrew from Haitian waters.[19]

On October 13, 1993, the Security Council unanimously voted to reimpose the suspended sanctions.[20] Doubts are growing as to whether this effort to restore democratic governance through nonforcible collective pressure can work, and in the meantime public health experts state that as many as 1,000 Haitian children per month could be dying from the cumulative effects of the political crisis, the domestic turmoil, and the

15. S.C. Res. 841, U.N. Doc. S/RES/841 (June 16, 1993).

16. S.C. Res. 861, U.N. Doc. S/RES/861 (Aug. 27, 1993).

17. *See* Howard W. French, *Haiti Justice Minister Slain in Defiance of U.S. Warning to Military to Keep Peace*, N.Y. TIMES, Oct. 15, 1993, at A1.

18. S.C. Res. 867, U.N. Doc. S/RES/867 (Sept. 23, 1993).

19. Steven A. Holmes, *Bid to Restore Haiti's Leader is Derailed: U.S. Withdraws Ship and Asks Sanctions*, N.Y. TIMES, Oct. 13, 1993, at A1.

20. S.C. Res. 873, U.N. Doc. S/RES/873 (Oct. 13, 1993).

hardships inflicted by the sanctions.[21] Yet, those who argue for an external military intervention—whether unilateral or collective—do not always try to explain how they would overcome the failure of Wilson and his successors who tried to transplant American-style democracy to Haiti through military means.

Is the nonforcible international response to the Haitian crisis capable of serving as a precedent in other such cases, in this hemisphere or elsewhere? My tentative answer is affirmative, with some qualifications that I have discussed elsewhere.[22] Although collective, nonforcible sanctions may be an imperfect policy instrument, their contribution to norm-reinforcement can be substantial, especially if the relevant regional and international organizations do in fact build on past precedents toward a genuine structure of principle (in the dual sense of normative commitments and consistency of application). The objection, that certain collective sanctions might not be effective—at least in the short term—against countries that have the economic wherewithal to resist them deserves attention both in general and in the context of particular cases; but the examples of Rhodesia and South Africa support the view that a longer-term horizon may be more appropriate for evaluating such measures. Within the Americas, although the hemispheric embargo of Haiti failed to deter two Venezuelan coup attempts and the *auto-golpe* in Peru, it is at least arguable that swift hemispheric pressure (following the Haitian precedent) did contribute to bringing about a prompt restoration of democratic governance following the Guatemalan coup of June 1993.

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21. Howard W. French, *Study Says Haiti Sanctions Kill Up to 1,000 Children a Month*, N.Y. TIMES, Nov. 9, 1993, at A1; *cf.* Howard W. French, *Doctors Question Haiti Health Data*, N.Y. TIMES, Nov. 24, 1993, at A1 (finding flaws in the projectino that the embargo iss causing deaths on the scale of 1,000 a month); Lincoln C. Chen & Winifred Mm. Fitzgerald, *Haitians Suffer With and Without Sanctions*, N.Y. TIMES, Nov. 16, 1993, at A26 (stressing cumulative effects of mulitiple causes of suffering).

22. In my chapter entitled *The Civilian Impact of Economic Sanctions*, *in* ENFORCING RESTRAINT, *supra* note 6, I discuss moral, political, and legal constraints on collective responses that have a devastating effect on the very people whose interests they are supposed to serve. *See also* Lori Fisler Damrosch, *The Collective Enforcement of International Norms Through Economic Sanctions*, 8 ETHICS & INTERNATIONAL AFFAIRS 59 (1994).

B. *Yugoslavia*

1. *Self-Determination or Secession?*

Yugoslavia's relation to Wilsonian principles and programs, and in particular to the principle of self-determination, has always been highly ambiguous. The establishment of the state of Yugoslavia corresponded to Point XI of Wilson's Fourteen Points; the demise of the same state came about because of a possibly misguided application of the self-determination notion which is associated with Wilson.

In the wake of the Yugoslav crisis, sharp controversy has focused on whether self-determination does or does not, or should or should not, embody any right of secession from an existing state. The literature on this question suggests that Wilson himself may have had no intention of equating self-determination with secession.[23] Looking at the question from the perspective of an international legal system under considerable strain, I endorse the position that the world has been better served by principles emphasizing the integrity of existing territorial boundaries—no matter how unjust those boundaries may be in particular cases—than by opening up those boundaries to nonconsensual change.

Prior to the Yugoslav crisis, the norm of self-determination seemed to have had a settled meaning in international law: colonized peoples were entitled to eventual independence, to be sure, but other peoples (including ethnic minorities within existing states) would have to be content with "internal self-determination"—that is, rights of political participation, rights to practice their language and culture, and possibly some acknowledgment of the special status of certain groups.[24] Following the disintegration of Yugoslavia, commentators have rushed to review those supposedly settled points. Some have endorsed an activist approach that would involve the United States (or other outside states) in deciding whether

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23. Cf. Max M. Kampelman, *Secession and the Right of Self-Determination: An Urgent Need to Harmonize Principle with Pragmatism*, WASH. Q., Summer 1993 at 5-7 (citing Michla Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Conception*, 70 AM. J. INT'L L. 1, 2 n.3 (1976)).

24. For the claim that self-determination has had a determinate meaning and that that meaning did not necessarily entail a right to secession, see Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 52, 54-55, 58-59 (1992).

to support the emergence of a new state as the most desirable outcome of an unresolved secessionist struggle.[25] Among the attractions of this approach is that it could give policymakers a range of nonforcible, yet proactive, policy options with respect to some kinds of ethnic conflicts.

Nonetheless, I remain doubtful of the prudence of relaxing the restraints found in traditional international law on outside encouragement of movements whose goal is the breakup of existing states. In various parts of the world there are cohesive groups with unsatisfied nationalist aspirations, whose claims to separate statehood are at least as meritorious in historical, philosophical, or moral terms as those of the Croatians or other ex-Yugoslav groups. But it is far from clear that an activist approach to encouragement of secession is a salutary development for the evolution of international law or international relations. Such an approach could open up opportunities for mischief on the part of states interested in undermining the territorial integrity of existing states.[26]

The norm of nonintervention should serve the dual objectives of preventing, or at least containing, conflict on the one hand, and enhancing autonomy on the other.[27] The international legal system has long wrestled with the potential tension between these two objectives and has attempted to find ways to vindicate each one without sacrificing the other. In the case of national and ethnic groups aspiring to separate from a territorially unified state, the international legal system has properly emphasized the fulfillment of the internationally protected human rights of individuals and, in some cases, of groups. Achievement of *internal* autonomy is entirely compatible with this approach, as is external pressure to ensure that the human rights of individuals and minorities are respected. But

25. *See* Morton H. Halperin & David Scheffer, SELF-DETERMINATION IN THE NEW WORLD ORDER 71-93 (1992).

26. Thus, for example, the reunification of Germany renewed fears in many quarters that Germany might seek to repossess lands given to Poland after World War II. Germany's position on Croatia—that "self-determination" entails the right of territorially concentrated ethnic groups to separate from a state, and that outside powers may encourage such separation—does nothing to allay such fears, and indeed could have exacerbated them.

27. I elaborate on the objectives of conflict containment and autonomy as elements of the nonintervention norm in ENFORCING RESTRAINT, *supra* note 6, at 8-9.

external encouragement of separatism poses risks to the conflict prevention objective which the international legal system has heretofore considered to be unacceptable.

In the Yugoslav case, the balance struck between these two objectives shifted decisively, partly to give greater weight to autonomy considerations, but also out of a consequentialist calculation that intervention by means of recognizing Croatian independence would help mitigate that particular conflict. This judgment was not universally shared. U.N. Secretary-General Javier Pérez de Cuéllar, on the recommendation of his personal envoy Cyrus Vance, predicted that "any early, selective recognition could widen the present conflict and fuel an explosive situation," especially in Bosnia-Herzegovina.[28] Subsequent tragic events have caused many to regret that this warning was not heeded at the time. For the foreseeable future, it may be best to conclude that whatever Wilson may have meant by self-determination, the dangers of either unrestrained nationalism or external support for secessionist movements are now all too evident.

2. *U.N. Involvement*

The dissolution of Yugoslavia, once it had occurred, changed the legal situation in notable respects. In particular, the conflict was indisputably an international one by early 1992 at the latest. Characterizations of Serbia as an aggressor and Croatia and Bosnia-Herzegovina as victims of aggression had become routine.[29] Nonetheless, the Wilsonian notion of collective security against aggression was not applied in the

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28. REPORT OF THE SECRETARY-GENERAL PURSUANT TO SECURITY COUNCIL RESOLUTION 721, U.N. Doc. S/23280 (1991), para. 25 and Annex IV.

29. The U.N. Security Council has not applied the term "aggression" but has repeatedly found "threats to the peace" (beginning in Resolution 713 of September 25, 1991), and has noted that "all parties bear some responsibility for the situation" (*e.g.*, in Resolution 757 of May 30, 1992). The Council has targeted its severest measures against the Federal Republic of Yugoslavia (Serbia and Montenegro), beginning with Resolution 757 , which imposed a comprehensive economic embargo. Later resolutions (*e.g.*, Resolution 820 of April 17, 1993) have made the Bosnian Serbs a target of sanctions. *See* S.C. Res. 713, U.N. SCOR, 46th Sess., U.N. Doc. S/INF/47, at 42 (1991); S.C. Res. 757, U.N. SCOR, 47th Sess., U.N. Doc. S/INF/48, at 131 (1991); S.C. Res., U.N. Doc. S/RES/820 (Apr. 17, 1993).

clearcut fashion that had just occurred in the case of Iraq and Kuwait.

Even though the U.N. measures have been utterly inadequate to abate the ongoing carnage, they are important all the same. Those measures include: imposition of an arms embargo on all of the former Yugoslavia;[30] comprehensive economic sanctions against Serbia-Montenegro;[31] authorization of forcible measures in the furtherance of specified purposes (to ensure delivery of humanitarian relief,[32] to enforce the economic sanctions,[33] to enforce the no-fly zone over Bosnia-Herzegovina,[34] and to protect Sarajevo and other locations that the Security Council has proclaimed as "safe areas");[35] establishment of the U.N. Protection Force, which has been carrying out peacekeeping functions in Croatia and providing humanitarian relief in Bosnia-Herzegovina;[36] and a protective deployment in Macedonia,[37] which has helped discourage the conflict from spreading there.

If the international response to the Yugoslav crisis deserves any credit at all, the best that can be said is that to date it has helped to contain the conflict within the boundaries of the former Yugoslavia—and indeed has confined it to only some of the former Yugoslav republics and has restrained its spread to other vulnerable Yugoslav regions, such as Kosovo. Past Balkan crises have been not only virulent, but also contagious. Perhaps the international measures in Yugoslavia are analogous to early public health achievements in breaking the chain of transmission of infectious diseases, so as to avoid or mitigate an epidemic, even though breakthroughs in treatment or cure still lie in the future.

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30. S.C. Res. 713, U.N. SCOR, 46th Sess., U.N. Doc. S/INF/47, at 42 (1991).

31. S.C. Res. 757, U.N. SCOR, 47th Sess., U.N. Doc. S/INF/48, at 13 (1992).

32. S.C. Res. 770, U.N. SCOR, 47th Sess., U.N. Doc. S/INF/48, at 24 (1992).

33. S.C. Res. 820, U.N. Doc. S/RES/820 (Apr. 17, 1993), para. 29 (reaffirming S.C. Res. 787 of Nov. 16, 1992).

34. S.C. Res. 816, U.N. Doc. S/RES/816 (Mar. 31, 1993).

35. S.C. Res. 836, U.N. Doc. S/RES/836 (June 4, 1993), para. 10.

36. S.C. Res. 743, U.N. SCOR, 47th Sess., U.N. Doc. S/INF/48, at 8 (1992).

37. S.C. Res. 795, U.N. SCOR, 47th Sess., U.N. Doc. S/INF/48, at 37 (1992).

C. *Iraq/Kurdistan*

Kurdish advocates frequently point out that the Kurds are the largest ethnically distinct and territorially concentrated group on the planet to have been promised but denied statehood, and indeed that the Kurds have been chronically thwarted in their quest for self-determination even in more modest forms (such as autonomy or effective protection of their rights to maintain their own ethnic identity within existing states). Wilson's legacy is once again ambiguous: he is implicated both in raising and in dashing Kurdish hopes.

Point XII of Wilson's Fourteen Points declared that the non-Turkish minorities of the Ottoman Empire should have the right to "autonomous development." Under the Treaty of Sèvres of 1920, which never went into effect, the Kurds were supposed to have "local autonomy" in the first instance, and then they would have the right to apply to the League of Nations for the establishment of a Kurdish state within borders to be determined through League processes.[38] This commitment fell apart when Ataturk repudiated the Treaty of Sèvres and renegotiated new terms in the Lausanne Treaty of 1923.[39] With respect to the particular aspects of the plan for which Wilson himself was responsible, his actions disappointed the Kurds bitterly. The following account criticizes Wilson's role as the arbitrator of the Turkish-Armenian frontier:

> President Wilson's verdict flew in the face of his own principles concerning the rights of peoples to self-determination. Without pausing to consult the local population or to determine its ethnic composition, he allocated to the Armenian state (which was to be placed under U.S. mandate) several territories whose population was mainly Kurdish . . . in other words a further third of Ottoman Kurdistan.[40]

In the end, the great powers of the interwar period divided oil-rich areas in a manner that left what is now Iraqi Kurdistan under British mandate until the creation of the state of Iraq in 1931.

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38. Treaty of Peace U.K.-Allied Powers-Turkey (unratified), arts. 62-64, *in* 113 BRITISH FOREIGN AND STATE PAPERS 652, 666-67.

39. Treaty of Peace, July 24, 1923, 28 L.N.T.S. 12.

40. Kendal, *The Kurds Under the Ottoman Empire, in* A PEOPLE WITHOUT A COUNTRY: THE KURDS AND KURDISTAN 35 (Gerard Chaliand, ed., 1993).

Iraq's genocidal repression of its Kurdish population antedated its invasion of Kuwait, yet the international community essentially ignored the well-documented reports of chemical weapons attacks, eradication of villages, and extermination of many tens of thousands of Kurds in the final days of the Iran-Iraq war.[41] Although the devastating campaign against the Kurds from 1987 to 1989 elicited no meaningful international response, Saddam Hussein's attack on Kuwait brought about the first real application of Wilson's conception of a collective security system, initially through concerted economic sanctions of the sort that Wilson had contemplated for the League, and a few months later through a multilateral military action authorized by the U.N. Security Council to eject Iraq from Kuwait.

In the aftermath of Iraq's military defeat, the Kurds in the north and Shi'ites in the south mounted uprisings which Saddam Hussein moved brutally to crush. Within days of the Security Council's imposition of intrusive cease-fire terms,[42] the Council adopted Resolution 688,[43] which called upon Iraq to end the repression and to begin "an open dialogue . . . to ensure that the human and political rights of all Iraqi citizens are respected;" the resolution also insisted that Iraq must allow the operation of humanitarian relief efforts. The wording of the resolution reflects the ambivalence of member states towards the theory underlying their decision, in that it stresses the effects of Iraq's actions on other states in the region. The preamble expresses concern over repression of civilians but hastens to link that repression to transboundary impacts:

> *Gravely concerned* by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas which led to a massive flow of refugees towards and across international frontiers and to cross border incursions,

41. For the most complete account to date, see MIDDLE EAST WATCH, GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS (1993). For the text of President Wilson's arbitral award, see "The Frontier Between Armenia and Turkey as Decided by President Woodrow Wilson, Nov. 22, 1920" (published by the Armenian National Committee).

42. S.C. Res. 687, U.N. SCOR, 46th Sess., U.N. Doc. S/INF/47, at 27 (1991).

43. S.C. Res. 688, U.N. SCOR, 46th Sess., U.N. Doc. S/INF/47, at 31 (1991).

> which threaten international peace and security in the region . . . ."[44]

While the resolution addresses itself to Iraq in emphatic fashion, it stops short of formal invocation of Chapter VII: on this basis, China was willing to abstain (but had made known that a more intrusive approach would elicit a veto).

In the ensuing period, multinational military forces entered Iraqi Kurdistan to provide humanitarian relief. A small contingent of U.N. guards was later deployed for humanitarian purposes pursuant to a memorandum of understanding with Iraq,[45] but the guards' position has been tenuous in view of the need to secure Iraqi consent to periodic renewal of the memorandum of understanding, as well as an adequate measure of Iraqi cooperation with their activities. Coalition forces operating out of Turkey and the Persian Gulf have afforded continuous military protection to Iraqi Kurdistan north of the 36th parallel and have designated the Shi'ite marshland area south of the 32nd parallel as a no-fly zone. The multinational military activities, including the establishment and surveillance of the no-fly zones, have proceeded on a de facto basis in view of China's attitudes (which have precluded any more explicit endorsement of these activities than can be inferred from the normative content of the series of resolutions).[46]

Partition of Iraq continues to be actively discouraged, while the international community has recognized the dissolution of Yugoslavia and moved closer to accepting a partition of Bosnia-Herzegovina. Concerns about the breakup of existing states (suggested in the Yugoslav section above) also apply to Kurdish separatism, whether in Iraq, Turkey, or elsewhere.

While I do not argue for the creation of a Kurdish state at the present time, I do believe that the international community has a responsibility to ensure effective protection of the Iraqi Kurds against any renewal of the repression that both preceded and followed the genocide of the late 1980s. This

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44. *Id.* pmbl.

45. LETTER DATED 30 MAY 1991 FROM THE SECRETARY-GENERAL ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL, U.N. Doc. S/22663 (May 31, 1991).

46. For discussion of the points in this paragraph, see Jane Stromseth, *Iraq's Repression of Its Civilain Population: Collective Responses and Continuing Cahllenges, in* ENFORCING RESTRAINT, *supra* note 6, at 77, and see also "Concluding Reflections" *Id.* at 348, 357.

responsibility is currently being discharged through the policing of the no-fly zones; forcible responses to any Iraqi threat to the Kurdish region would also be justified in my view. The Clinton Administration has renewed the previous sharp warnings (in which the U.N. delegates of the U.S., U.K., France and Russia had joined earlier in the year) promising a "firm and united response" to any Iraqi attack on the Kurdish region.[47] Thus, we see a new variant on Wilsonian collective security, offered to victims of internal rather than external aggression.

III. CONCLUSION

As a lawyer concerned with the operation of principles within institutions, I conclude with a few observations on the problem of "principles" more generally.[48] My concern here is not the substantive merit of particular claims of principle, but rather the cross-cutting issues of whether formulation of general principles on intervention is even possible, and whether the system is capable of acting consistently across substantially similar cases.

Some scholars have called for new treaties on intervention as a means of advancing the effort to crystallize a normative consensus.[49] While such measures are conceivable on a regional, or subglobal, as well as a general basis, any attempt to codify a consensus that is still in the process of formation would not only be premature, but could even be counterproductive. Rigid verbal formulations could retard necessary evolution and work against flexibility; insistence that states go on record for or against proposals might polarize their positions rather than promote consensus. In any event, the very regimes whose repressive character would make them the most appropriate targets for justifiable intervention would be the least likely to agree to such a system.

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47. See Douglas Jehl, *Christopher Warns Iraqi Chief Not to Attack Kurds in North*, N.Y. TIMES, May 25, 1993, at A8. The warning applies not only to the northern no-fly zone, but also to territories south of the zone under Kurdish control.

48. *See Concluding Reflections*, *in* ENFORCING RESTRAINT, *supra* note 6, at 360-63, as well as my *Civilian Impact* chapter in *id.* at 305-07.

49. Two different treaty proposals can be found in Stanley Hoffmann, *Delusions of World Order*, N.Y. REV. OF BOOKS, Apr. 9, 1992, at 37, 51; Tom J. Farer, *A Paradigm of Legitimate Intervention*, *in* ENFORCING RESTRAINT, *supra* note 6, at 316, 322.

In my view, a better alternative to the unlikelihood of a general codification of evolving norms is the current approach of arriving at a case-specific consensus within the Security Council and then building on each new precedent as newer cases arise. This approach, however, is vulnerable to the criticism that it results in selective and inconsistent collective responses, and thus is "unprincipled" in the sense of proceeding only on the basis of interest. This criticism should be taken seriously but also placed in perspective.

The objective of treating like cases alike is fundamental to the evolution of a system based on law rather than only on raw power. Legal scholars have underscored that in order for a system to be viewed as legitimate and for its rules to exert a normative "pull" toward compliance, those rules must be seen as fitting within a coherent structure of principle, with consistent application in similar cases.[50] It may be a long time before the international community will be able to act on the principle of treating like cases alike—even as to well-established norms with determinate content and acknowledged pedigree,[51] let alone norms that are still in flux, as is surely the case with norms of intervention. But with a view toward achieving the realization of that objective sooner rather than later, it may be helpful to identify some of the factors that hamper principled collective action and to consider how they may be overcome.

The political reality is that effective action comes about when one or more strong states have interests that motivate them to take initiatives; otherwise, inertia generally prevails. Institutions provide arenas for coordinating state initiatives and mobilizing pressure for action, but they have heretofore lacked autonomous capabilities. Interventions are costly, not only financially, but also in risk to human life. Thus, the international community has chosen to act selectively—where the likelihood of achieving the desired result is substantial, where the expected benefits outweigh the expected costs, and where one or more states have been motivated to exercise leadership. In view of obvious limitations on resources and political will, it

50. *See* T. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 150-82 (1990).

51. Franck elaborates on the concepts of determinacy and pedigree. *See* Franck, *supra* note 49, at 41-110.

may be ambitious enough to seek to address a few problems in an admittedly ad hoc and imperfect way.

Fears about establishing potentially unwise precedents have motivated some actors to prefer no action to ill-advised action. But to offer the concept of principle as a rationale for inaction would be a misuse of the concept. The fact that the system is incapable of responding effectively to all (or even to very many) crises is not a valid excuse for failing to act. When some action is possible, small achievements will lead to greater ones, and eventually to patterns that will reflect underlying principles. Thus, paradoxically, the strategy of choosing to respond selectively in the near term may produce the body of experience that will be necessary to realize the longer-term objective of treating like cases alike.