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TREATY INTERPRETATION: THE AUTHORITY OF INTERPRETIVE COMMUNITIES

*Ian Johnstone**

INTRODUCTION

Among the various sources of international law, treaties are generally regarded as resting on the firmest theoretical foundation.[1] The existence of a binding commitment expressly assented to and formalized in a signed document does not seem problematic within a consent-based theory of law. Yet, even a casual glance at the debate among legal and literary scholars concerning the stability of meaning and the creative role of the interpreter undermines this comforting picture of international conventional law.[2] The defining issue in both legal and literary interpretation can be characterized as follows: to what extent does the text have a determinate meaning, and to what extent is the reader free to interpret it as he or she chooses?[3] This question is especially relevant to treaty interpretation where, more often than not, the contracting parties themselves have the final say about the meaning of particular provisions of the agreement in ques-

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1. The Statute of the International Court of Justice, article 38(1), lists the following sources of international law:

   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, art. 38(1), 15 U.N.C.I.O. Docs. 355, 360 (1945).

2. For a good sample of the various points of view, see the series of articles emerging from a symposium on law and interpretation published in 60 TEX. L. REV. (1982). *See also* Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984).

3. The theoretical extremes can be elaborated along the following lines: on one side is the belief in the determinacy of meaning in the text and in the validity of interpreting the text's linguistic elements; on the other side is the contention that each reader determines his or her own meaning without objective linguistic or contextual limitations. The middle ground is occupied by a variety of positions and methodological approaches. *See* Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 115, 116-17 (S. Levinson & S. Mailloux eds. 1988).

tion (a phenomenon that can be labelled "auto-interpretation"). Because many international instruments do not provide for the submission of disputes to impartial tribunals, interpretation is a responsibility of domestic officials who are institutionally predisposed to interpretations preferred by their State and government.

Skepticism about the determinacy of meaning combined with the absence of an impartial interpreter can lead to the discomforting conclusion that treaty auto-interpretation is an unconstrained activity determined entirely by short-term national interests and power politics. In this article, I seek to counter that perception by positing the existence of a structure of constraints embedded in the process of treaty interpretation despite the absence of a disinterested interpreter. Interpretive authority, it will be argued, resides in neither the text nor the reader individually, but with the community of professionals engaged in the enterprise of treaty interpretation and implementation. This "interpretive community" is defined and constituted by a set of conventions and institutional practices that structure the interpretive process.

My purpose here is not to compare or evaluate interpretive techniques and strategies.[4] Rather, Part I of this paper sets out a theory of interpretation (drawing on Stanley Fish's idea of interpretive communities) relevant to all interpretive techniques. In Part II, a conception of the purposes and conventions of treaty practice is offered with the aim of shedding light on the interpretive constraints structuring that enterprise. Part III identifies two interpretive communities associated with treaty practice (one narrow, the other broad) and describes their operation in the interpretive process. Special attention is paid to the government legal advisor, who plays a key role within the relevant interpretive communities. Part IV is a case study of the ABM Treaty reinterpretation debate ignited by the U.S. Strategic Defense Initiative; this debate is chosen because the treaty's "political" character[5] renders it typical of international instruments not likely to be submitted to

4. Interpretive methods or strategies can be classified roughly into four categories: textual, contextual, subjective and teleological. *See* Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of the Treaties Before the Vienna Diplomatic Conference*, 18 INT'L & COMP. L.Q. 318 (1969). *See also* A. MCNAIR, THE LAW OF TREATIES (1961). For a recent overview of the various approaches to the interpretation of international agreements, see E. YAMBRUSIC, TREATY INTERPRETATION: THEORY AND REALITY (1987). For the most influential American contribution to the literature, see M. MCDOUGAL, H. LASSWELL & J. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE (1967) [hereinafter M. MCDOUGAL ET AL.].

5. *See* L. HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 80 (2d ed. 1979), where he singles out laws and treaties involving "international peace and stability, or the security, integrity, and independence of nations" as the agreements that "the student of foreign affairs may have in mind when he asserts that international law is widely disregarded."

impartial tribunals for authoritative interpretation. My aim is not to enter the debate but to assess it in light of the notion that interpretive communities are the ultimate source of authority. The final part of the article consists of a brief discussion of interpretive disputes over the Non-Proliferation Treaty and the United Nations Charter, illustrating how the theory applies to multilateral and constitutional instruments as well as bilateral treaties. These less fully-developed case studies are offered in support of the proposition that, while the interpretive process is apt to be more diffuse with respect to norms embodied in more general instruments, the authority of interpretive communities is no less significant.

I. INTERPRETATION THEORY

The suggestion that treaty interpretation is a subjective process is not radical in the study of international relations since it is consistent with political realist theory.[6] However, as a matter of legal theory, the position is associated with what one writer has described as the nihilist challenge to law.[7] This theory of legal interpretation emphasizes the creative role of the interpreter and denies that objectivity is possible given the ambiguous nature of words and their imperfection as modes of communicating meaning. It is the polar opposite of the "textualist" approach, according to which language is determinate, and meaning can be discovered and extracted from a text by a reader who employs the correct process.

Whatever its merits as a theory of interpretation in domestic settings, the "textualist" approach is particularly implausible in the international context. Language is a communal institution, and shared

6. Political realism is a theory of international relations that sees world politics as determined entirely by the power relations of sovereign States. The creation and decline of international rules and institutions, and the degree to which States respect them, depend solely on existing power alignments. A contrasting body of theory, which has come to prominence quite recently, does not deny the importance of power but emphasizes the impact of interdependence and posits the existence of regimes (the most formal of which is law) as mediating the effect of power on interstate relations. For the classic modern articulation of political realism, see H. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (4th ed. 1967). The seminal work on interdependence is R. KEOHANE AND J. NYE, POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION (1977). The best collection on regimes is a series of articles published in INTERNATIONAL REGIMES (S. Krasner ed. 1983). For a recent overview of international relations theory, see Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989).

7. Fiss, *supra* note 2, at 740-44. Fiss describes the nihilist challenge as follows: "The nihilist would argue that for any text . . . there are any number of possible meanings, that interpretation consists of choosing one of those meanings, and that in this selection process the judge will inevitably express his own values. All law is masked power." *Id.* at 741. The contrasting perspectives in international relations scholarship parallel their opposites in domestic legal theory, where the traditional view of law as neutral and determinate is challenged by those who claim it is all politics and masked power.

understandings are dependent on a common language and culture between speaker and listener.[8] In the notoriously heterogeneous international system, treaties are typically concluded by States with different cultures and, often, different languages. Thus, the notion that the interpreter's task is merely to construe the words of the instrument, with little recourse to context or extrinsic evidence, has been largely discredited.[9]

Rejection of textualism would seem to suggest that contextualism is the key to interpretation. The methodology employed by McDougal, Lasswell and Miller, described in the following passage, is essentially contextualist: "[t]he communications which constitute an international agreement, like all other communications, are functions of a larger context, and the realistic identification of the content of these communications must require a systematic, comprehensive examination of all the relevant features of that context, with conscious and deliberate appraisal of their significance."[10] While more sophisticated, this method does not settle the deeper theoretical questions concerning interpretation. Instead, it transfers the inquiry to another level: how the relevant contexts are identified and how such contextualist reading takes place.[11]

In discussing domestic adjudication, Owen Fiss provides one answer, borrowing the idea of interpretive communities from literary theorists.[12] The term does not lend itself to easy definition and is best understood as a way of speaking about the power of institutional settings, within which assumptions and beliefs count as established facts.[13] In responding to what he calls the nihilist challenge to law, Fiss posits a theory of "bounded objectivity," whereby legal interpretation is constrained by a set of disciplining rules recognized as authoritative by an interpretive community. The objective quality of interpretation is bounded because the constraints are not transcendent, not imposed by some "brooding omnipresence in the sky," but rather consist of the set of rules that are accepted as being authoritative for a given institution. Fiss focuses on adjudication and identifies judges as

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8. K. Greenawalt, Objectivity and Law 5-11 (unpublished manuscript). *See also id.* at 2-7.

9. In the international sphere, textualism is associated with Vattel's antiquated injunction: "It is not permissible to interpret what has no need of interpretation." *See* Falk, *On Treaty Interpretation and the New Haven Approach: Achievements and Prospects*, 8 VA. J. INT'L L. 323, 333 (1968); Jacobs, *supra* note 4, at 322.

10. M. MCDOUGAL ET AL., *supra* note 4, at 11.

11. Levinson & Mailloux, *Forward* to INTERPRETING LAW AND LITERATURE, *supra* note 3, at xii.

12. The term "interpretive community" was coined by Stanley Fish. *See* S. FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980).

13. Abraham, *supra* note 3, at 122.

the relevant interpretive community.[14]

The Fiss argument has been criticized as a theory of judicial interpretation.[15] For present purposes it is sufficient to note that, on its own terms, the argument has limited application to the process of treaty auto-interpretation. Fiss emphasizes that the interpretive community of judges has authority to confer on particular interpretations because judges belong to the community, not as a result of shared views, but "by virtue of their office," which carries with it "a commitment to uphold and advance the rule of law itself."[16] Thus, the claim of authority is extrinsic to the process of interpretation, which, in Fiss' view, is what distinguishes the judge from the literary critic or moral philosopher who must rely on intellectual authority alone.[17] This neat division between the process of interpretation and the authority of the interpreter cannot be sustained in the context of treaty auto-interpretation. The entities responsible for interpretation are the parties to the treaty; they do not occupy a position from which authoritative interpretations can be issued simply by virtue of the office.

The problem of authoritative decision-making in international society relates, then, to its decentralized character. This decentralization is symbolized by the absence of an international tribunal for resolving all interpretive disputes, but the problem is not merely institutional. Because an international tribunal cannot fully reflect the value diversities of all States subject to it, it can never receive the degree of acceptance and confidence bestowed on domestic courts.[18] However, this weakness of international adjudication does not render international law meaningless; it merely highlights its communicative function. As a form of social communication, law shapes State behavior by expres-

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14. Among the disciplining rules he specifies are judicial independence, the concept of non-discretionary jurisdiction, and the duty to base decisions on universalizable grounds. Fiss, *supra* note 2, at 754.

15. One of Fiss' most forceful critics is Stanley Fish, from whom he borrowed the idea of interpretive communities. *See* Fish, *supra* note 2. *See also* Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 401 (1982); Brest, *Interpretation and Interest: Comment on Fiss*, 34 STAN. L. REV. 765 (1982).

16. Fiss, *supra* note 2, at 746.

17. *Id.* at 757.

18. As Julius Stone states:

> [W]e still lack international tribunals which can reflect the socio-ethical convictions of the aggregate of States, in a manner corresponding to that in which municipal judges reflect the convictions of a nation. And it is this relation between judges and community which, in the final resort, renders judicial law-creation tolerable and consistent with liberty.

Stone, *Fictional Elements in Treaty Interpretation—A Study in the International Judicial Process*, 1 SYDNEY L. REV. 344, 364 (1954). Along similar lines, Falk argues that "the authoritativeness of an interpretation derives, in part, from the cohesiveness of the elite creating an aura of objectivity for its interpretative claims and, thereby, soliciting voluntary acquiescence from the general public." Falk, *supra* note 9, at 326.

sing and developing a "climate of opinion" about the nature of transnational relationships.[19] Law structures the relations among States by providing a common frame of reference. It is the language of international society: to present one's claims in legal terms means to signal which norms one considers relevant and to indicate which procedures one intends to follow and would like others to follow.[20] As Hedley Bull states:

> [I]nternational law provides a means by which states can advertise their intentions with regard to the matter in question; provide one another with reassurance about their future policies in relation to it; specify precisely what the nature of the agreement is, including its boundaries and limiting conditions; and solemnise the agreement in such a way as to create an expectation of permanence.[21]

The interpreter of a treaty has a special role that a literary critic does not, but it is worth exploring the theory of interpretive communities as it has emerged from literary criticism since both disciplines are characterized by the absence of a central organ authorized to render final interpretations. Stanley Fish has developed a "conventional" theory of interpretation which seeks to avoid the pitfalls of both pure subjectivity and pure objectivity. He never defines the concept of an interpretive community but rather explains it in terms of its function in interpretive practice. The following passage provides one of his more detailed explanations and is worth quoting at length:

> The notion of 'interpretive communities' was originally introduced as an answer to a question that had long seemed crucial to literary studies. What is the source of interpretive authority: the text or the reader? Those who answered 'the text' were embarrassed by the fact of disagreement. Why, if the text contains its own meaning and constrains its own interpretation, do so many interpreters disagree about that meaning? Those who answered 'the reader' were embarrassed by the fact of agreement. Why, if meaning is created by the individual reader from the perspective of his own experience and interpretive desires, is there so much that interpreters agree about? What was required was an explanation that could account for both agreement and disagreement and that explanation was found in the idea of an interpretive community, not so much

19. W. COPLIN, THE FUNCTIONS OF INTERNATIONAL LAW: AN INTRODUCTION TO THE ROLE OF INTERNATIONAL LAW IN THE CONTEMPORARY WORLD 168-95 (1966). *See also* F. KRATOCHWIL, RULES, NORMS AND DECISIONS 251 (1989); Falk, *supra* note 9, at 327.

20. Hoffman, *Introduction* to INTERNATIONAL LAW & POLITICAL CRISIS at xii (L. Scheinman & D. Wilkinson eds. 1968). As McDougal, Lasswell and Miller put it, "[e]very type of prescription or agreement . . . is a communication in which parties seek through signs and deeds to mediate their subjectivities. " M. MCDOUGAL ET AL., *supra* note 4, at xi. Law, by increasing the ability of States to communicate, "adds to the common grammar of statecraft." Keohane & Nye, *Power and Interdependence Revisited*, 41 INT'L ORG. 725, 746 (1987). On the significance of communication to regime building and regime maintenance generally, see Keohane, *The Demand for International Regimes*, in INTERNATIONAL REGIMES, *supra* note 6, at 141, 164.

21. H. BULL, THE ANARCHICAL SOCIETY 142 (1977).

> a group of individuals who shared a point of view, but a point of view or way of organizing experience that shared individuals in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance were the content of the consciousness of community members who were therefore no longer individuals, but, in so far as they were embedded in the community's enterprise, community property. It followed that such community-constituted interpreters would, in their turn, constitute, more or less in agreement, the same text, although the sameness would not be attributable to the self-identity of the text, but to the communal nature of the interpretive act. Of course, if the same act were performed by members of another community — of some rival school of criticism informed by wholly different assumptions — the resulting text would be different, and there would be disagreement; not, however, a disagreement that could be settled by the text because what would be in dispute would be the interpretive 'angle' from which the text was to be seen, and in being seen, made.[22]

Fish argues that Fiss' disciplining rules cannot serve as objective constraints on interpretation because they are in need of interpretation themselves.[23] However, Fish does not see this as cause for despair: there is no need for external constraints on interpretation because the interpreter is already constrained by the "assumptions and categories of understanding" that are embedded in the practice in which he or she has been trained and participates.[24] The interpreter is "not only possessed *of* but possessed *by* . . . a tacit knowledge that tells him not so much what to do, but already has him doing it as a condition of perception and even of thought."[25] Thus, the disinterestedness the reader may feel in interpreting a text is the result of membership in a community whose beliefs have become matters of common sense, in the words of Kenneth Abraham, "so indisputable that their role in constituting the very objects of understanding goes unrecognized."[26]

The idea of internal constraints put forward by Fish need not be understood as suggesting it is intellectually impossible for a member of a given interpretive community to arrive at an interpretation divergent from the categories and assumptions of that community. Rather, di-

22. S. FISH, DOING WHAT COMES NATURALLY 141-42 (1989).

23. Fish, *supra* note 2, at 1326.

24. *Id.* at 1333. "[W]hereas Fiss thinks that readers and texts are in need of constraints, I would say that they *are* structures of constraint, at once components of and agents in the larger structure of a field of practices, practices that are the content of whatever 'rules' one might identify as belonging to the enterprise." *Id.* at 1339. Falk makes a similar point when he states that "the style of persuasion is conditioned by the value expectations that dominate the community and are presumably represented in those chosen to interpret—positions of honor and substance—who are thoroughly socialized by the community that they serve and represent." Falk, *supra* note 9, at 326.

25. Fish, *supra* note 2, at 1333.

26. Abraham, *supra* note 3, at 122.

vergence from the conventions and practices of the relevant interpretive community signifies that the interpreter has taken himself or herself out of it altogether. All professional interpreters are situated within an institutional context, and interpretive activity only makes sense in terms of the purposes of the enterprise in which the interpreter is participating, whether it be literary criticism, religious interpretation or legal interpretation. Furthermore, a given text is always encountered in a situation or field of practice and therefore can only be understood in light of the position it occupies in that enterprise. According to Fish, texts do not have properties before they are encountered in situations; the meanings they have are always a function of the circumstances in which they are encountered.[27] Thus, interpretation is constrained not by the language of the text, nor its context, but by the "cultural assumptions within which both texts and contexts take shape for situated agents."[28] The text is not an object entirely independent of its reader, nor is interpretation an entirely individual and subjective activity; meaning is produced by neither the text nor the reader but by the interpretive community in which both are situated.

The idea of interpretive communities runs counter to the view that meaning is radically indeterminate. The meaning of a word or set of words is always either clear or capable of being clarified because communication occurs within situations and "to be in a situation is already to be in possession of (or to be possessed by) a structure of assumptions, of practices understood to be relevant in relation to purposes and goals that are already in place. . . ."[29] Rational discourse about competing interpretations within an enterprise is possible as long as there is an understanding, largely tacit, of the enterprise's general purpose.[30] Disputes between interpreters are resolvable, not according to rules of interpretation in Fiss' sense, but by the "conventions of description, argument, judgment, and persuasion as they operate in this or that profession or discipline or community."[31]

The practices and conventions of a given community constrain interpretive discretion, although the constraint is not an "objective" or external force.[32] The art of persuading another to accept a particular

27. Fish, *supra* note 2, at 1335.

28. S. Fish, *supra* note 22, at 300.

29. S. Fish, *supra* note 12, at 318.

30. Fish, *supra* note 2, at 1343.

31. S. Fish, *supra* note 22, at 116.

32. As Fish states:

An interpretive community is not objective because as a bundle of interests, of particular purposes and goals, its perspective is interested rather than neutral; but by the very same reasoning, the meanings and texts produced by an interpretive community are not subjective

reading of a text does not entail demonstrating its "true meaning," but rather convincing the person that, in effect, he or she belongs to the same community of interpretation.[33] The process, however, need not be conscious. Rather, the interpretive techniques employed, substantive arguments made and underlying assumptions relied upon are all characteristic of a certain interpretive community. If the listener is persuaded, it is not because the truth of the interpretation has been demonstrated (although both people may perceive it that way), but because the listener and speaker have settled on certain common beliefs and categories of understanding, and therefore have become members of the same interpretive community. As Abraham states, these common beliefs are, for that community, "facts," which are not immutable but provide objectivity within a community of interpretation where they need not be questioned.[34]

The professional interpreter is a participant in a particular field of practice and is engaged in interpretive activity that must be persuasive to others. In that capacity, he or she acts as an extension of an institutional community; failure to act in that way would be stigmatized as inconsistent with the conventions and purposes of that community. In other words, if the interpreter proffers an interpretation that reaches beyond the range of responses dictated by the conventions of the enterprise, he or she ceases to act as a member of the relevant community.

A troubling feature of Fish's theory is that the strength of the constraint on any interpreter seems to depend on the extent to which the interpretive community is unified. Ronald Dworkin argues that the constraint imposed by the practices of the professional literary com-

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because they do not proceed from an isolated individual but from a public and conventional point of view.

S. Fish, *supra* note 12, at 14.

33. Abraham, *supra* note 3, at 124. The way in which people change their minds is not straightforward in the theory of interpretive communities because, if consciousness is informed by community assumptions, it is not clear how appeals from outside the community can have an impact on consciousness. Furthermore, appeals from within the community would never be necessary because presumably members who share assumptions and categories of understanding would interpret a text the same way. Fish responds by pointing out that it is misleading to think of change as a process by which something from the outside penetrates the inside of a consciousness or community:

> Even though the mind is informed by assumptions that limit what it can even notice, among those is the assumption that one's assumptions are subject to challenge and possible revision under certain circumstances and according to certain procedures when they are set in motion by certain persons. What this means is that the mind is not a static structure, but an assemblage of related beliefs any one of which can exert pressure on any other in a motion that can lead to self-transformation. In short . . . rather than being an object of which one might ask, 'how does it change,' the mind (and by extension the [interpretive] community) is an engine of change.

S. Fish, *supra* note 22, at 146.

34. *Id.* at 124.

munity are so weak that, despite Fish's protests to the contrary, interpretation is effectively rendered "wholly subjective" by his theory.[35] It is not necessary for present purposes to assess the force of this criticism as it pertains to literary interpretive communities. The argument being made here is that treaty practice is a distinctly *legal* enterprise characterized by the absence of an overarching authority to settle differences of interpretation, but which nevertheless exhibits certain interpretive constraints that inhere in the conventions of the enterprise.

II. Treaty Practice and Interpretation

If interpretive activity is enterprise-specific, then to understand the constraints on treaty interpretation one must have some conception of the distinctive purposes and conventions of that enterprise.[36] Not all treaties and international agreements are the same: interpretive practices vary with the subject matter, the number of contracting parties and the context in which the treaty is made and implemented. Nevertheless, certain generalizations can be made about the nature of the enterprise that apply, in varying degrees, to all international agreements.

Of primary importance is the notion that treaties, unlike works of literature, embody a commitment to a distinctive process of interpretation. This commitment is rooted in the fact that a treaty is the product of the consensual activity of two or more States, and its terms embody the collective expectations and interests of the parties. Because the parties to the treaty comprise the collective norm-creating body, the competence of authoritative interpretation is vested in the composite organ they form rather than either of them individually.[37] If the treaty does not provide for a dispute resolution procedure, then an authoritative interpretation can only result from a process that embodies this notion of the parties as a composite law-making entity in some other way. In entering into a treaty, a State binds itself not only

35. Dworkin, *My Reply to Stanley Fish*, in THE POLITICS OF INTERPRETATION 287, 294 (W. Mitchell ed. 1982). *See also* R. DWORKIN, LAW'S EMPIRE 425 n.23 (1986); Brest, *supra* note 15, at 770.

36. Obviously not everyone has the same conception of the enterprise, but it is not necessary that they do for the theory of interpretive communities to have explanatory power. The crucial point is that arguments about the adequacy of various interpretations are, at their root, arguments about competing conceptions of the enterprise. Furthermore, these arguments are themselves constrained, not by objective factors, but by the conventions within which this level of discourse takes place. Ultimately, the accuracy of a given conception cannot be "demonstrated"; the most one can hope to do is persuade an audience to a point of view on the nature of the enterprise. *See* S. FISH, *supra* note 12, at 368, for a discussion of this point as it pertains to the enterprise of literary criticism and theory.

37. Gross, *States as Organs of International Law and the Problem of Autointerpretation*, in LAW AND POLITICS IN THE WORLD COMMUNITY 59, 81 (G. Lipsky ed. 1953).

to the terms of the instrument (however interpreted) but also to a process of intersubjective interpretation: the interpretive task is to ascertain what the text means to the parties collectively rather than to each individually.[38] The activities and perspectives of the interpretive communities associated with this enterprise render treaty auto-interpretation something other than the exercise of unilateral political will.

The interpretive process, then, must be understood as part of an ongoing relationship in which the parties generate, elaborate and refine *shared* understandings and expectations. McDougal, Lasswell and Miller describe the aim of interpretation as follows:

> It is to discover the shared expectations that the parties to the relevant communication succeeded in creating in each other. It would be an act of distortion on behalf of one party against another to ascertain and to give effect to his version of a supposed agreement if investigation shows that the expectations of this party were not matched by the expectations of the other.[39]

The authors were mainly concerned with articulating a theory of interpretation that international tribunals could adopt in interpreting treaties, and it must be refined in the context of auto-interpretation. The argument being presented in this article is that, in entering into a treaty, the parties assent not only to the terms of the agreement but also to a process of interpretation whose goal is an intersubjective understanding of the treaty terms. In Fish's terminology, the parties create an "interpretive community." The interpretive task is to "uncover together" the meaning of the treaty; while auto-interpretation is carried on by individual participants, the process is essentially interactive.[40] Intersubjective interpretation is not simply a matter of finding

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38. It must be emphasized that the theory of interpretive communities does not depend on particular conceptions of the various enterprises in which interpretation occurs. Interpretive communities constrain social practices however conceived. Thus, in the context of treaty interpretation, the theory does not derive its explanatory power from the conception of treaty practice herein advanced, although the centrality of the norm of reciprocity to international relations does render the theory particularly apposite to this interpretive activity. *See infra* note 43.

39. M. McDOUGAL ET AL., *supra* note 4, at xvi. A more controversial aspect of the authors' suggested strategy urges recourse to the "basic constitutive policies of the larger community which embraces both parties and decision-maker," whenever the search for genuine shared expectations "must falter or fail because of gaps, contradictions, or ambiguities in the parties' communication." In addition, the authors argue that to protect "overriding common interests . . . decision-makers should refuse to give effect to the expectations of the parties . . . when grave contradictions are found between the explicit expectations of parties to an agreement and the requirements of fundamental community policy." *Id.* at 41. Thus, as Richard Falk points out, the interpretive theory of the New Haven school ultimately subordinates the genuine expectations of the parties to the basic norms of world legal order. Falk, *supra* note 9, at 338. How great one views this departure as being from a pure "shared expectations" approach depends on one's view of the depth and breadth of consensus on the existence and ordering of world community policies.

40. *See* Postema, *'Protestant' Interpretation and Social Practices*, 6 LAW & PHIL. 283, 308 (1987), where he makes this point about all interpretive activity.

the points of agreement between the parties; it is to engage in a "collectively meaningful activity, in an activity collectively understood."[41]

The parties can be viewed as having implicitly agreed to a process of intersubjective interpretation because, while they expect disagreement over the meaning of terms, they do not expect every disagreement to signify a desire on the part of one or the other to revoke the treaty or terminate the relationship embodied in it. States comply with treaties primarily because they have an interest in reciprocal compliance by the other party or parties.[42] Reciprocity is particularly important to security-related agreements because the parties' mutual interest in preserving them extends beyond the perceived advantages of the treaties themselves. Security relations in the nuclear age thrust every nation into a continuing relationship with every other nation, a relationship that outlives particular agreements.[43] Thus, decision-makers in each State are conscious of the effects of their immediate actions on future relations. Arms control treaties and other security-related arrangements are important events in the overall relationship, but not the complete embodiment of it. It is precisely because they are situated within a broader relationship that such agreements exist and are complied with even in the absence of enforcement mechanisms.

To understand what it means to say that interpretation entails a good faith effort by each side to arrive at an understanding of what the treaty means to the parties collectively, an analogy can be drawn to friendship. In an article on social practices in general, Gerald Pos-

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41. *Id.* at 288.

42. As McDougal, Lasswell and Miller state: "What restraint there is upon arbitrary decision, and it is not insignificant, is afforded by the same sanction which supports all international law: common interest, policed by need for reciprocity and fear of retaliation." M. McDOUGAL ET AL., *supra* note 4, at 28. *See also* H. BULL, *supra* note 21, at 139; R. BILDER, MANAGING THE RISKS OF INTERNATIONAL AGREEMENT 8 (1981).

43. R. BILDER, *supra* note 42, at 11. The broader relationship between parties to treaties is what permits order in the international system, and it rests on the norm of reciprocity. As David Hume theorized, conventions, arising out of interactions that prove mutually beneficial, structure expectations and make international agreements possible, even in the absence of an enforcement mechanism:

> This convention is not of the nature of a promise. . . . It is only a general sense of common interest. . . . When this common sense of interest is mutually expressed and known to both, it produces a suitable resolution and behavior. And this may properly enough be called a convention or agreement betwixt us though without the interposition of a promise, since the actions of each of us have a reference to those of the other and are performed upon the supposition that something is to be performed on the other part . . . . [I]t is only on the expectation of this that our moderation and abstinence are founded. In like manner are languages gradually established by human convention, without any promise.

F. KRATOCHWIL, INTERNATIONAL ORDER AND FOREIGN POLICY 17 (1978) (quoting Hume). *See* R. AXELROD, THE EVOLUTION OF COOPERATION (1984), for a detailed and fascinating study of reciprocity as the source of international cooperation. Much of the writing on regimes focuses on the role of conventionalized behavior in generating recognized norms, principles and procedures. *See, e.g.,* Young, *Regime Dynamics: The Rise and Fall of International Regimes*, in INTERNATIONAL REGIMES, *supra* note 6, at 93-96.

tema characterizes friendship as an interpretive concept and offers this explanation of the interpretive activity:

> [T]he focus of 'interpretive' attention in our friendship would not be on what our culture means by friendship, but what our friendship, our relationship, means or requires. That is, the 'interpretation' would focus on the dynamics, the history, and the developments of this specific relationship, not on the abstract concept of friendship, or the general practice of friendship in the culture (if there is such a thing). Moreover, friends would seek an understanding of what this specific relationship has come to mean, as they would say, to *us* — not to each of us individually (us *in sensu diviso),* but to us together *(in sensu composito).* The history of the friendship is a common history, and the complex meaning of the relationship is collectively constructed over the course of this history. When friends share a common history, Aristotle points out, it is not like cows sharing a pasture, for the shared life of friends engenders common perception, a common perspective, and common discourse. Friendship is characterized, ultimately, not by sympathy or consensus (*homonoia*), but by common deliberation and thought. . . . [A] friend's understanding of the relationship could only be achieved through interaction with the other. . . . *To regard the meaning of that relationship as the private interpretive construct of one or the other, or some ideal limit of such constructs, fails to recognize the common perspective and discourse which structures the relationship.*[44]

The analogy is not perfect because friendships entail trust, while relationships between signatories to international agreements do not necessarily. Nevertheless, the idea of a relationship whose meaning is constructed "collectively" over time and which is characterized by common perceptions, perspectives and deliberation brings out an important feature of the relations between parties to such agreements. While the parties may disagree about the meaning of the terms of the treaty, the treaty remains in force as long as there is sufficient impetus for preserving the relationship.[45] Treaty interpretation occurs within the framework of an explicitly consensual relationship, terminable at the instigation of either party. Yet, as long as the relationship embodied in the treaty continues to exist, the parties are engaged in an enterprise that shapes the spirit in which interpretations are constructed

44. Postema, *supra* note 40, at 309-10 (emphasis added).

45. Treaties are more like *relations* than *transaction* contracts, a distinction drawn by some contract theorists. Many contracts are not one-time transactions but rather long-term relationships, like many employment contracts, where the parties seek not only to fix specific terms but also to structure their relationships in mutually benficial ways. As Patrick Atiyah points out:

> [The] obligations and rights of the parties are constantly modified and adapted as time goes on, and what is more, many of these modifications are less the result of day-to-day adjustments which are in some vague way acquiesced in by the parties . . . . A concept of 'good faith' or of the fidelity to the relationship becomes important. Dispute-settlement procedures may come to be needed which are not so adversary as those involved in litigation, because parties may want to settle an argument amicably, while continuing their relations.

P. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACTS 55-56 (4th ed. 1989).

and debated.[46] Conversely, the relationship exists as long as the parties continue to engage in the form of interpretive activity consistent with the conventions and purposes of the enterprise. The relationship or community *is*, in part, the interpretive process. The interpretive process is one in which the understandings of each participant must be addressed to other participants and sensitive to their understandings, with the shared goal of maintaining the relationship.[47] Meaning is not simply the product of explicit agreement between the States at the moment of interpretation (although interpretive disputes can be settled or made to go away by explicit agreement), but the interpretive process is shaped and thereby constrained by the conventions and practices of an enterprise characterized by reciprocity.[48]

At a certain point, however, disagreement over the meaning of terms rises to an altogether different level where the treaty itself is threatened. In Postema's view, this level of disagreement puts "the identity and integrity of the community and its commitments . . . at stake."[49] A treaty ceases to exist as a normative instrument when consent is withdrawn. Consent is withdrawn in one of two ways: 1) by explicit withdrawal from, or abrogation of, the treaty;[50] or 2) by im-

46. This point is made by Postema in reference to interpretive activity within all social practices, which, he argues, depends on a substantial degree of consensus but does not depend on agreement in individual beliefs:

> This consensus does not obviate the need for interpretations, nor does it guarantee univocality of the interpretations. But it does decisively shape the spirit in which interpretations are constructed and debated. Controversy, then, is possible, even at what we might call the 'constitutional' level of the practice, without jeopardizing the practice as a whole (and it may even be healthy for it). It is possible because there is a deeper and broader continuity of experience and discipline. Where this continuity is threatened or weakened, there the practice itself is threatened.

Postema, *supra* note 40, at 319.

47. *Id.* at 304. *See also* Fish, *supra* note 2, at 1332.

48. The idea of interpretive communities does not have any specific implications for the *practice* of interpretation. All interpretive methods are consistent with the idea, and it certainly does not imply that describing a particular interpretation as being "right" or "wrong" is nonsensical. Believing that one interpretation is better than another is a pre-condition of interpretive activity. The interpreter's self-assurance is not undercut by the theory of interpretive communities because doubt on that level is not possible. As explained by Fish:

> Doubting, like any other mental activity is something that one does *within* a set of assumptions that cannot at the same time be the object of doubt . . . . The project of radical doubt can never outrun the necessity of being situated; in order to doubt *everything*, including the ground one stands on, one must stand somewhere else, and that somewhere else will then be the ground on which one stands.

S. Fish, *supra* note 12, at 360.

49. Postema, *supra* note 40, at 317.

50. The consequences of treaty termination vary depending on the terms of the particular treaty. All bilateral and multilateral arms control agreements contain a "withdrawal clause," which appeared for the first time in the Partial Test Ban Treaty of 1963. Article IV of that treaty is typical:

> Each party shall in exercising its national sovereignty have the right to withdraw from the treaty if it decides that extraordinary events, related to the subject matter of this treaty, have jeopardized the supreme interests of its country.

plicit abrogation in the form of a persistently forwarded "unconventional" construction of the treaty. An unconventional construction is one that is inconsistent with the purposes, understandings and underlying assumptions of the enterprise. When a party puts forward an interpretation that is obviously "wrong," it is recognized as such because it cannot be reconciled with the conventions and practices of the interpretive communities associated with the enterprise. In light of the conception of treaty practice presented above, it is submitted that sustained insistence on such an interpretation reflects a disregard for the intersubjective nature of the process and is symptomatic of a breakdown in the relationship or a dissolution of the community. Insistence on extreme constructions deviates from accepted treaty practice and reflects inappropriate behavior by the interpreter given his or her institutional role. The interpreter, in other words, steps out of the interpretive community associated with the treaty and takes on some other role.

III. The Interpretive Communities of Treaty Practice

In understanding how treaty auto-interpretation is constrained, two interpretive communities can be identified: the community of interpreters directly responsible for the conclusion and implementation of a particular treaty, and a broader, international community consisting of all experts and officials engaged in the various professional activities associated with treaty practice. The conventions and institutional practices of both interpretive communities have a constraining effect, although the contribution of the latter is derivative in that its authority can be traced to the implicit agreement between the parties to engage in intersubjective interpretation.

A. *The Narrow Interpretive Community*

The exercise of formulating, negotiating, ratifying, and implementing a treaty generates an interpretive community of individuals within each contracting party who share what Fish calls "assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance."[51] That is, the process of producing and living under a treaty generates a community (not out of whole cloth but out of al-

Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, art. IV, 14 U.S.T. 1313, 1319, T.I.A.S. No. 5433, at 7, 480 U.N.T.S. 43, 49. This clause, while it purports to grant a unilateral right of withdrawal, is subject to interpretation and therefore raises the same interpretive questions as any other treaty term. Is the process entirely unconstrained, or are there features of the enterprise of making and withdrawing from treaties that mitigate the apparent subjectivity of the exercise? *See infra* note 60.

51. S. Fish, *supra* note 22, at 141.

ready existing communities with an elaborate web of relationships to the new community) of people and institutions associated with the treaty. These people are the officials within each State (from the leader down) who have or had responsibility for any of the various steps involved in producing the treaty.

The constraining effect of this narrow interpretive community is felt, in part, through the expectations and beliefs controlled by the agreement.[52] In the period prior to the making of an agreement, some sort of relationship exists (or the agreement would not have been possible) that generates a body of knowledge shared by the parties.[53] Officials within each State learn about the others' interests, values and assumptions, as well as their perspectives on the various components of the relationship. An agreement "crystallizes the learning of a particular period"[54] and the contacts made help spread common understandings about the precise terms of the agreement as well as its significance to the broader relationship. The agreement becomes a focal point around which expectations converge.[55] Furthermore, by communicating and exchanging information the governments come to *know* their partners in the agreement and not merely know *about* them.[56] The participants in the enterprise come to inhabit a common world — a world that does not simply come out of the shared beliefs and attitudes of its inhabitants but in fact generates those beliefs and attitudes through common participation.[57]

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52. Robert Jervis states that the main purpose of arms control agreements is to control expectations and beliefs, not arms. R. JERVIS, THE MEANING OF THE NUCLEAR REVOLUTION 225 (1987).

53. With respect to bilateral arms control, four decades of living with nuclear weapons generated a core of consensual knowledge shared by the superpowers that influenced beliefs, sometimes but not always resulting in explicit cooperation. *See* Nye, *Nuclear Learning and U.S.-Soviet Security Regimes*, 41 INT'L ORG. 371, 382-83 (1987).

54. *Id.* at 398.

55. *Id.* at 399. *See also* T. SCHELLING, THE STRATEGY OF CONFLICT 54 (1963).

56. Robert Keohane argues that any government contemplating international cooperation must know its potential partners in this way:

> The information that is required in entering into an international regime is not merely information about other governments' resources and formal negotiating positions, but rather knowledge of their internal evaluations of the situation, their intentions, the intensity of their preferences, and their willingness to adhere to an agreement even in adverse future circumstances.

Keohane, *The Demand for International Regimes*, in INTERNATIONAL REGIMES, *supra* note 6, at 141, 162-63.

57. In discussing social practices generally, Postema describes what it means to inhabit a common world as follows:

> This common world . . . is not constructed out of individual participants' beliefs or attitudes or intentions or purposes. Instead, we participants have the beliefs and attitudes about it that we have—we understand it as we do—by virtue of our common participation in it. Similarly, moving about in this common world is not a matter of forming expectations about the behavior of other participants, and their expectations of one's own behavior, through observing their behavior or attempting to replicate their practical reasoning. Rather, we

Subjective interpretation is constrained, both in terms of interpretations that are actually proffered and those that become authoritative, not by external rules of interpretation but by the existence of a relatively unified interpretive community. When disputes over the meaning of the text do arise, members of the community operate within a common frame of reference as to how the dispute should be resolved. Furthermore, the members share a predisposition toward arriving at a mutually acceptable interpretation. Agreement is far from automatic, because many words (and the rules, principles, purposes and policies they convey) are ambiguous and manipulable, and the interests of the parties will remain, in some respects, divergent. But the criterion of mutual acceptability sets an outer limit on the extent to which they can be manipulated. The limit is not a rule of interpretation but a convention of the enterprise. The parties can argue with one another about the meaning of words, but the mere fact that they argue *with one another* (and not only within domestic constituencies) reflects their continuing commitment to the relationship. The debate is constrained because governments are impelled to justify their positions on grounds other than national self-interest.[58] Otherwise their arguments would not be persuasive to others nor accepted by members of the relevant interpretive communities. The outer limit of an acceptable interpretation is not determined according to transcendent standards but according to the shared standards and expectations of the relevant community.

The process differs from negotiation in that the parties operate within an institutional and intellectual framework already in place, a framework they have implicitly agreed to respect.[59] Failure to respect

> have expectations of the behavior and expectations of others because we recognize that we participate in a common world.

Postema, *supra* note 40, at 313.

58. "The fact that nations feel obliged to justify their actions under international law, that justifications must have plausibility, that plausible justifications are often unavailable or limited, inevitably affects how nations will act." L. HENKIN, *supra* note 5, at 45. *See also* Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 9, 59 (1982).

59. Thus Gloria Duffy overstates the point when she writes:

> [B]ecause of the lack of enforcement mechanisms in the international arena, arms control treaties are not like criminal statutes. Resolving disputes related to treaties, therefore, requires a continuing negotiation rather than a simple determination of guilt or innocence. What are claimed to be right and wrong interpretations of a treaty will be less persuasive than what continues to be in the interests of both parties. What was intended when a treaty was negotiated is likely to be less important than what the parties can continue to agree on over time. And, when one or both sides refuse to participate in the ongoing negotiation, the process cannot work.

G. DUFFY, COMPLIANCE AND THE FUTURE OF ARMS CONTROL 201 (1988). While her analysis may be correct descriptively, it is less helpful as a means of understanding the interpretive process. Her focus on the importance of mutuality is appropriate, but to suggest that all interpretive disputes should be resolved by renewed negotiations goes too far. Rational discourse over the meaning of a treaty term is possible. If one side insists on an interpretation that diverges from

that framework represents something more serious than a decision not to agree on the specific terms of the relationship embodied in the treaty — it represents a breakdown of that relationship. Obviously, the constraint is not absolute, because, as indicated above, sovereign States can withdraw from the relationship if they perceive that it is in their interest to do so. But the constraint on interpretation does exist insofar as certain interpretive activities and positions will be regarded as inconsistent with the enterprise in which the text and interpreter are situated. States may be able to abrogate a treaty but, as long as the relationship embodied in the treaty continues to exist, the constraints of treaty practice (of being in a relationship) limit interpretive discretion.[60]

The conventions of the enterprise operate within the interpretive community not only through expectations and beliefs, but also at the institutional level. For example, in addition to creating international obligations, a treaty acts as an internal directive guiding bureaucratic behavior.[61] Bureaucracies are notoriously status quo oriented; caution rather than creativity and risk-taking characterizes bureaucratic behavior. Violation of an international agreement is not among the options that would typically be suggested by low-level officials when decisions are being made within bureaucracies.[62] Furthermore, a treaty inhibits not only conduct that is clearly prohibited by its terms, but also activities falling within the doubtful zone.[63] Low-level officials do not normally have any incentive to take responsibility for an action that may become the basis for a charge of treaty violation. Of course high-level officials are not inhibited in this way and the top leadership sets goal priorities and policies. However, subordinates influence policy by providing information which effectively defines the situation for superiors. The information provided by these low-level

the purposes and conventions of the interpretive community, then the other side should not be expected to participate in renewed negotiations. It may choose to do so because its interest in preserving the relationship outweighs its interest in insisting on its own interpretation, but that is not inherent in the interpretive process. To argue that it is suggests there really are no interpretive constraints.

60. Even the decision to withdraw from an arms control treaty under the terms of a withdrawal clause is subject to indirect community judgment. The withdrawal right is explicitly made a unilateral decision, but most treaties limit the exercise of the right to circumstances in which "extraordinary events . . . have jeopardized the supreme interests of its country." There is no explicit provision for community judgment as to the adequacy of the justification for withdrawal, but such judgment will work its way into the unilateral decision because any government considering the exercise of its right will take into account the probable evaluations of its rationale by other States. Chayes, *An Inquiry Into the Working of Arms Control Agreements*, 85 HARV. L. REV. 905, 959 (1972). *See also* R. BILDER, *supra* note 42, at 54.

61. Chayes, *supra* note 60, at 935.

62. *Id.* at 935-36.

63. *Id.* at 937.

officials is a product of the climate of opinion that arose from the process of negotiating and ratifying the treaty.[64] This climate of opinion pervades the environment within which all political and bureaucratic actors must function.[65] It is not easily overridden and thus the actors must, in some measure, either adapt to the climate of opinion or reject it with serious consequences. In this way, the interpretive community that crystallizes around a treaty perpetuates itself. The decision to break a treaty or withdraw from it will occur at the highest levels, but interpretation is shaped by the underlying bureaucratic and organizational structure of any less-than-monolithic government.

B. *The Broader Interpretive Community*

Beyond the immediate interpretive community centered around the treaty itself, interpretation is constrained by an amorphous community of all those regarded as possessing the knowledge of an expert or professional in the relevant field. As Schachter explains, governments cannot escape legal appraisals of their conduct by other governments (expressed either individually or in collective bodies), political parties, international lawyers, non-governmental organizations and other organs of public opinion.[66] In the realm of military security, this community judgment is influenced by the opinions of governmental and non-governmental experts on international law, world politics and strategic affairs. The competency or expertise comes from training and immersion in some feature of the enterprise in which the experts are engaged.[67] As participants in the field of practice, they have come

64. Phillip Trimble, in an illuminating account of the bureaucratic dimension of international negotiation, makes the point that, while strong leadership can act innovatively in international negotiations, the bureaucratic process "defines the options" and protects entrenched interests and perspectives. Trimble, *Arms Control and International Negotiation Theory*, 25 STAN. J. INT'L L. 543, 573 (1989). With respect to negotiations, the bureaucratic factor can inhibit initiative, but it has the advantage of assuring compromise and protecting the important interests of particular segments of the population. *Id.* at 571. With respect to interpretation, the bureaucracy plays a similar role in assuring compliance with the treaty as understood by the interpretive community that crystallized around it.

65. Another way of characterizing this "climate of opinion" is suggested by Nye's notion of an "institutional memory" that is generated as bureaucracies and groups function within a regime. Nye, *supra* note 53, at 398.

66. Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259, 264 (1989).

67. In the field of public international law, Oscar Schachter has identified what he terms "the invisible college of international lawyers":

> That professional community, though dispersed throughout the world and engaged in diverse occupations, constitutes a kind of invisible college dedicated to a common intellectual enterprise. As in the case of other disciplines, its members are engaged in a continuous process of communication and collaboration. Evidence of this process is found in the journals and yearbooks of international law, in the transnational movement of professors and students, and in the numerous conferences, seminars and colloquia held in all parts of the globe. But this communication is by no means confined to the realm of scholarship. For the international bodies and conferences of an official character are largely composed of jurists

to understand its purposes and conventions, learned not merely as a set of abstract rules but through the acquisition of know-how, a mastering of the discipline or technique.[68] Having participated in the techniques and discourse of international law, treaty interpretation and/or the subject matter of the treaty, they have become competent in the field.[69]

The outlying interpretive community represents the institutional mechanism closest to an impartial arbiter that the structure of treaty auto-interpretation provides. It constrains interpretation primarily because States have an interest in maintaining a reputation for good faith adherence to treaties. As Henkin states:

> Every nation's foreign policy depends substantially on its "credit" — on maintaining the expectation that it will live up to international mores and obligations. Considerations of "honor," "prestige," "leadership," "influence," "reputation," which figure prominently in governmental decisions, often weigh in favor of observing law. Nations generally desire a reputation for principled behavior, for propriety and respectability.[70]

This interest combined with the implicit agreement between the parties to engage in intersubjective interpretation means the outlying interpretive community effectively checks and structures the interpretive activities of the parties. An interpretation put forward by an official agent does not acquire authoritative status by that fact alone. Rather, it works as a signal within an interpretive system or "mechanism for the endless negotiation of what will be authorized or

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> who are part of the active professional community and who maintain intellectual contact with the scholarly side of the profession. The invisible college thus extends into the sphere of government, resulting in a *pénétration pacifique* of ideas from the nongovernmental into official channels.

Schachter, *The Invisible College of International Lawyers*, 72 NW. U.L. REV. 217, 217 (1977).

68. Postema, *supra* note 40, at 304. Postema relies on Wittgenstein's philosophy of language in making this point: "To understand a sentence means to understand a language. To understand a language means to be master of a technique." L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, para. 199 (1953). *See also* Fish, *supra* note 2, at 1331-32, where Stanley Fish makes a similar argument invoking Thomas Kuhn's position in T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 46 (2d ed. 1970).

69. Article 38(1)(d) of the ICJ Statute stipulates that the teachings of only the "most highly qualified publicists" should be consulted in ascertaining the law. *See supra* note 1. Presumably the "interpretive community" confers the status of "most highly qualified publicist" on some of its members and not on others.

70. L. HENKIN, *supra* note 5, at 52. Of course the importance of reputation does not always produce restraint, as States also have a stake in a reputation for resolve and for carrying through on threats, etc. *See* R. JERVIS, THE LOGIC OF IMAGES IN INTERNATIONAL RELATIONS 78-83 (2d ed. 1989). This highlights one advantage of bilateral and multilateral treaties over customary law and other less formal norms, principles and procedures that permeate international affairs: the former engage a country's honor in a way that the latter may not. The desire to maintain a reputation for toughness and resolve will rarely suffice as a reason for overriding a treaty commitment. In fact, emphasis on the importance of compliance with a particular treaty can operate as a face-saving way of exercising restraint when concerns about reputation generate pressure to act forcefully.

nonauthorized."[71] It is evaluated by the outlying community and judged in terms of its conformity with the conventions and purposes of the enterprise.[72] In this way, the international interpretive community monitors the parties and provides indirect reassurance to each that the other or others will not engage in subjective interpretation. The influence of this community is felt directly in terms of explicit evaluations of the appropriateness of a particular interpretation and indirectly in the way States measure their own interpretations against anticipated judgment of the international community. Because all States have a stake in maintaining a reputation for good faith compliance with treaty commitments, they will hesitate before publicly announcing a construction likely to be branded as improper or far-fetched. Of course, they may elect to do so, but that only signifies that the constraint is not absolute: it does not count as an argument against the existence of a constraint.

C. *The Legal Adviser*

Within this interpretive system, government legal advisers play a special role. They have been described variously as the "custodians and exponents" of international law[73] and as "partisans in an intense global struggle . . . [in which] elaborate claims are made about motivations, historical destiny, about who is oppressing whom, and about who is aggressor and who victim."[74] In the literature on legal advisers,[75] much is made of the tension between their role as advocates for particular government positions and as objective interpreters of international law. While this tension is important in practice, it is less

71. S. FISH, *supra* note 12, at 357. Fish is referring to the literary field where even the idea of an "interpretive system" is controversial. His description, if anything, is more apposite to treaty interpretation, where the very enterprise assumes the existence of some sort of system or mechanism for authoritative interpretation.

72. The treaty itself or the customary practice of the parties may specify the methodology to be adopted in interpreting the treaty (*e.g.*, the extent to which the negotiating record should be relied upon and the significance of subsequent practice). More general interpretive conventions are embodied in the Vienna Convention on the Law of Treaties, decisions of the ICJ, State practice and the writings of legal scholars.

73. Macdonald, *The Role of the Legal Adviser of Ministries of Foreign Affairs*, RECUEIL DES COURS 377, 386 (1977).

74. Falk, *supra* note 9, at 329.

75. Several general studies on legal advisers have been undertaken. *See* LEGAL ADVISERS AND FOREIGN AFFAIRS (H. Merillat ed. 1964); Macdonald, *supra* note 73. *See also* Fitzmaurice, *Legal Advisers and Foreign Affairs (Review Article)*, 59 AM. J. INT'L L. 72 (1965); Gutteridge, *Foreign Policy and the Government Legal Adviser*, 2 GA. J. INT'L & COMP. L. (Supp. 2) 71 (1972); Schwebel, *Foreign Policy and the Government Legal Adviser*, 2 GA. J. INT'L & COMP. L. (Supp. 2) 77 (1972); Darwin, *Foreign Policy and the Government Legal Adviser*, 2 GA. J. INT'L & COMP. L. (Supp. 2) 85 (1972); P. CORBETT, LAW IN DIPLOMACY (1959). For a detailed study focusing on the American situation, see Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633 (1962).

problematic as a matter of theory. The legal adviser is the main connection between the international legal system and the domestic political process. Like all government officials involved in foreign policy, he or she must appeal to both domestic and international constituencies. But more than any other government official, the legal adviser must be concerned with the acceptability of interpretations to the international community and thus has a unique institutional responsibility to ensure that the conventions of the relevant interpretive community are respected. The institutional role requires a responsiveness to the practices of that community; training and immersion in those practices means that the legal adviser will tend to conform to the conventions out of professional habit.

Various commentators have characterized the role of legal adviser in terms that correspond to the idea of an authoritative interpretive community. Thomas Franck emphasizes the adviser's role in broadening the frame of reference within which the national interest is defined by including perspectives other than "the constituency perspective, the Parliamentary perspective, even the here-and-now perspective."[76] Louis Henkin describes the legal adviser as "the conscience of the foreign office, as the spokesman for . . . his country's long-term interest in legal order and stability—as against the claims of some immediate advantage."[77] Joyce Gutteridge states that, because legal advisers (in the United States at least) do not rotate as often as other foreign policy personnel, they function as an institutional memory, providing continuity and stability to aspects of foreign affairs.[78] And because they are in constant contact, formally and informally, with many operatives within the domestic political and bureaucratic process, they serve as a channel of communication between the mem-

76. Franck, *Discussion of Address by Allan E. Gotlieb*, 1972 PROC. CONF. CAN. COUNCIL ON INT'L L. 165.

77. L. HENKIN, HOW NATIONS BEHAVE, *supra* note 5, at 67. *See also* LEGAL ADVISERS AND FOREIGN AFFAIRS, *supra* note 75, at 16.

78. Gutteridge, *supra* note 75, at 73. *See also* Bilder, *supra* note 73, at 641-42. Writing in 1959, Percy Corbett offers this account of the stabilizing influence of the legal office:

> Prudent governments have always deliberated before taking decisive action, and an adventurous one will despise established routine; but the internal reference to legal advisers which is now normal constitutes one of the more constant factors making for order and peaceful settlement in the relations of States. . . . Even if they had no further result, standing arrangements for consultation impose a *spatium deliberandi* between stimulus and response, a cooling-off period in which the impulse to violence often loses its force. But it would be quite unrealistic to rate their effect so low. Certainly the British record shows that the officers to whom the Foreign Office has turned for legal advice have not merely delayed action; they have at times determined policy.

P. CORBETT, *supra* note 75, at 35.

For a discussion of the various systems of legal counselling in foreign offices, see LEGAL ADVISERS AND FOREIGN AFFAIRS, *supra* note 75, at 1-14; Macdonald, *supra* note 73, at 414-53.

bers of that community.[79]

Another way of looking at the role of the legal adviser is as the medium through which law is transmitted in the international system. Interstate communication is imperfect: international institutions and law ameliorate the situation by providing a common frame of reference. The legal adviser is the person who has prime responsibility for articulating and expressing the law to the interested community, within both the domestic and international settings. Coordination and compliance are not automatic but, by ensuring that legal forms of argument are introduced into decision-making processes, the legal adviser has an important stabilizing influence.

In performing this communicative function a legal adviser "will be expected to . . . express an opinion or give a ruling that will meet the test of legal credibility."[80] Credibility flows from the degree to which the legal adviser is responsive and responsible to the relevant interpretive communities. Since the enterprise is intersubjective, legal advisers can be expected to address themselves to the assumptions and understandings of the other parties to the treaty. This is not to say that legal advisers have an institutional responsibility to accept the other parties' interpretations. Rather, the interpretive activity is shaped by the adviser's consideration of whether a given interpretation is likely to be acceptable to other parties and, if not, why not. Furthermore, this intellectual exercise requires legal advisers to be sensitive to the unique position they occupy within the interpretive system given their proximity to the politics of situations and access to confidential facts.[81] Interpretations based on undisclosed facts and unstated assumptions are not likely to be accepted.

Finally, legal arguments and interpretive strategies will take a certain form that must be respected by the legal adviser if they are to meet the test of credibility. These forms and strategies are not infinitely manipulable because, beyond an outer limit, they will not be persuasive nor even recognized as legal by the interested community. Anyone engaging in international legal discourse is necessarily constrained by the argumentative techniques of that enterprise. Conceivably, the relevant actors could simply refuse to conform to the conventions of the activity but, as will be shown by the following case study, legal discourse *is* a vital feature of relations between States even in the realm of military security.

79. Bilder, *supra* note 75, at 642.

80. Schachter, *supra* note 58, at 50.

81. Bilder, *supra* note 75, at 674.

IV. Case Study: The ABM Reinterpretation Debate

A. *Introduction*

Before turning to the ABM reinterpretation debate, several general points relevant to the operation of interpretive communities associated with superpower arms control can be made. Nuclear politics are conditioned by the long-term relationship between the superpowers (and other interested States) — a relationship they have a mutual stake in preserving given the alternative of nuclear war. A common aversion to nuclear war both makes arms control agreements possible and provides some assurance that both sides will adhere to the treaty even in the absence of an enforcement mechanism, and even when it may not be in the *immediate* interest of one or the other to do so. Thus, while an arms control agreement is in some respects like a contract without sanctions, it is a contract situated within a relationship of indefinite duration based on reciprocity. This situation, in turn, structures interpretation of the agreement.

Arms control is fundamentally a political process. As Joseph Nye argues, in a sense all of arms control is a confidence- and security-building measure in that it increases communication and transparency.[82] Negotations provide a means of reducing uncertainty: the development of common perceptions is often more important to the process than the exchange of concessions.[83] All negotiators are engaged partly in finding a common definition of the subject of the negotiations; in arms control the situation to be defined is strategic. In strategic relations, "reality" is inextricably intertwined with the subjective perceptions of each superpower. The beliefs each side holds about the many questions of nuclear politics constitute an important part of the reality with which the other has to contend.[84] Thus, one cannot describe a perception of some aspect of the strategic situation as being accurate without reference to the other side's perceptions.[85] In a sense, through their ongoing interaction, the superpowers construct the reality within which they form judgments about one another. The entire process of entering into an arms control agreement and conducting the relationship according to its terms is a process of

82. Nye, *Arms Control After the Cold War*, 68 Foreign Aff., Winter 1989/90, at 42, 45.

83. Winham, *Negotiation as a Management Process*, 30 World Pol. 87, 97 (1977).

84. *See* R. Jervis, *supra* note 52, at 7.

85. For example, the strategic significance of a particular weapon system does not turn on its "objective" qualities so much as the qualities each side perceives it as having. Furthermore, the perceived qualities of a weapon system are only part of the strategic reality; as important are the perceptions each side has of the State's willingness to use it, in what circumstances and to what end.

constructing reality together. Thus, the language and the context of the treaty are instrumental in defining the reality that it purports to regulate.

Institutionally, the making of an arms control agreement results in the alignment of political and bureaucratic forces pushing in the direction of compliance. Politically, arms control agreements generate shared perceptions about common interests.[86] Within each State, the negotiation and ratification process subjects the treaty to consensus-building around the norms contained in it, a situation Abram Chayes describes as follows:

> (1) by the time the treaty is adopted, a broad consensus within governmental and political circles will be arrayed in support of the decision; (2) meanwhile, principal centers of potential continuing opposition will have been neutralized or assuaged . . . ; and (3) many officials, leaders of the administration or regime and opponents as well, will have been personally and publicly committed to the treaty, creating a kind of political imperative for the success of the policy.[87]

These phenomena are manifest in a predisposition towards compliance, not shared by everyone, but sufficiently widespread to dominate the climate of opinion and direction of policy.

These shared perceptions may become institutionalized in bilateral mechanisms for communication, like the hotline and the Standing Consultative Commission, which make it easier for the States to explain why they are behaving as they are.[88] Not only is consultation easier in the event of a dispute, but mutual awareness of interests, perspectives and expectations is also enhanced. Furthermore, even without direct communication, bureaucratic forces within each State generate an institutional phenomenon having the same effect. The negotiation and ratification process produces a set of standard operating procedures and organizational routines that tend to induce compliance.[89] Furthermore, new coalition opportunities for subnational actors arise and institutional contacts may produce attitudinal changes

86. For example, as Robert Jervis states:

> Arms agreements show that the United States and the USSR realize that arms levels are a matter of mutual concern that must be negotiated rather than being produced by unilateral decisions. They acknowledge that the Soviet-American competition is not total, that what is often more important than unilateral advantage is reaching settlements that are good for both sides, and that limiting national autonomy can help reach common objectives.

R. JERVIS, *supra* note 52, at 224.

87. Chayes, *supra* note 60, at 920.

88. Jervis, *From Balance to Concert: A Study of International Security Cooperation*, in COOPERATION UNDER ANARCHY 58, 73-74 (K. Oye ed. 1986).

89. R. BILDER, *supra* note 42, at 9. *See also* F. IKLÉ, HOW NATIONS NEGOTIATE 8 (1964), where he points to the "institutional obstacles" to violation of a treaty. A seminal book analyzing the impact of the organizational process and bureaucratic politics on foreign policy in the United States and the Soviet Union is G. ALLISON, THE ESSENCE OF DECISION (1971). For a

among those who were previously opposed to the agreement.[90] A parallel phenomenon occurs within the government of the other party to the treaty, so a bilateral community with shared interests and perceptions emerges as an institutional check on the less cooperative forces within the respective systems.[91]

B. *The ABM Treaty Reinterpretation*

The saga of the debate over interpretation of the ABM Treaty is well-documented. It is not my purpose to enter that debate but rather to analyze it with a view to drawing conclusions about the significance of "interpretive communities" to the interpretive process.[92] As a preliminary observation, the reinterpretation gave rise to debate on two related but distinct issues: the factual merits of the new interpretation and the constitutional authority for asserting it.[93] Most of the debate within the United States has centered on the constitutional issue, obscuring the purely international legal question. The present discussion focuses on the latter, but it will be apparent that the two are intertwined.

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more recent discussion of bureaucratic influences on the American side of arms control negotiations, see Trimble, *supra* note 64.

90. Nye offers the following quote from a chairman of the Joint Chiefs of Staff as evidence of a change in bureaucratic definitions of self-interest: "As we got deeper into arms control came recognition of its increasing importance—that neither side could gain through nuclear war." Nye, *supra* note 53, at 395.

91. Less is known about the negotiating and decision-making process in the Soviet Union than in the United States, but even in 1972 it was possible to get some sense of a bureaucratic and political process not wholly unlike that in the United States. Chayes, *supra* note 60, at 909. An illuminating recent discussion of the similarities and differences between the American and Soviet systems can be found in G. DUFFY, *supra* note 59. The author points out that the Soviet Union lacks the legislative and public constituencies that lobby for compliance with arms control agreements in the United States. *Id.* at 139. Clearly, fewer checks and balances operate on permissive interpretation in the Soviet Union, but the system has never been so monolithic (and is becoming less so) that important foreign policy decisions could be made without some form of political consensus extending beyond the top leadership. Apparently the SALT regime tipped the balance between contending long-run expectations about the United States in Soviet Politburo politics in the moderate direction. Nye, *Nuclear Learning*, *supra* note 53, at 395. *See also* Jackson, *Soviet Images of the U.S. as Nuclear Adversary, 1969-1979*, 33 WORLD POL. 614, 619-20 (1981). Gloria Duffy speculates that the U.S. use of the Standing Consultative Commission in 1981-83 might have brought compliance issues to the attention of a wider spectrum of actors within the Soviet government, *i.e.*, other than the military. Furthermore, apparently Gorbachev made institutional changes in the domestic Soviet structure for formulating arms control policy, creating new departments that "could play an internal advocacy role . . . for a more conservative approach to arms control compliance," thereby institutionalizing interests in compliance. G. DUFFY, *supra* note 59, at 161.

92. This is not to say that assessments of correctness are pointless or nonsensical. Indeed, the thesis of this paper is that the activity of the interpretive community revolves around disputation and the presentation of evidence in an effort to persuade the unconvinced of the correctness of a particular interpretation.

93. Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353, 1370 (1989).

The Treaty on the Limitation of Anti-Ballistic Missile Systems was signed in May 1972, along with the SALT I Interim Agreement.[94] It came after a period in which both the United States and the Soviet Union had tried, unsuccessfully, to find a defense against nuclear weapons. Ultimately, the decision-makers concluded that, not only would an ABM system not work, it would touch off a spiraling offensive/defensive arms race and increase the risks of nuclear war.[95] After one unsuccessful attempt to bring the Soviets to the negotiating table, followed by the invasion of Czechoslovakia in 1968, negotiations were conducted from 1969 to 1972 culminating in the signing of the ABM Treaty along with the SALT I Agreement.

Through a series of quantitative and qualitative limits on ABM systems and components, the Treaty was designed to prevent either side from constructing a nationwide defense against strategic ballistic missiles.[96] The main disagreement that subsequently arose between the two sides of the debate was over the scope of restraints on exotic space-based technology (*i.e.*, the Strategic Defense Initiative). The Treaty divides the steps involved in construction of an ABM system into four phases: research, development, testing and deployment. Initially, SDI was billed as a *research* program, which all agree would be permitted by the ABM Treaty as long as the program remains in its research phase. There is also now agreement that *deployment* of SDI would be a violation of the Treaty unless it is amended by mutual agreement. The issue is whether the intermediate phases, *development* and *testing*, are permissible. On October 6, 1985, National Security Adviser Robert McFarlane announced that "on research involving new physical concepts, . . . that activity, as well as testing, as well as development, indeed, are approved and authorized by the treaty."[97] Dismayed reactions from Congress and NATO allies led to a meeting of senior Reagan Administration officials, the result of which was a compromise position announced by Secretary of State George Schultz on October 14, claiming that the new interpretation was "fully justified" but "a moot point" because the administration would continue to conduct the program "in accordance with a restrictive interpretation of the treaty's obligations."[98] Political controversy was temporarily quieted, but the underlying issue was not resolved, and the option of

94. Treaty on the Limitation of Anti-Ballisitic Missile Systems, May 26, 1972, United States - U.S.S.R., 23 U.S.T. 3435, T.I.A.S. No. 7503.

95. ARMS CONTROL ASS'N, ARMS CONTROL AND NATIONAL SECURITY 70 (1989).

96. *Id.* at 71.

97. *Mr. McFarlane's Interview on "Meet the Press,"* 85 DEP'T ST. BULL. 32, 33 (Dec. 1985).

98. Schultz, *Arms Control, Strategic Stability, and Global Security*, 85 DEP'T ST. BULL. 20, 23 (Dec. 1985).

adopting the reinterpretation as official policy in the future was left open. The debate in policy-making and legal circles has ebbed and flowed ever since.[99]

The main legal issue revolves around the interpretation of articles II and V and Agreed Statement D; specifically, whether the ban on development and testing of space-based and mobile systems applies only to technology that existed in 1972.[100] An ABM system is defined in article II as "a system to counter strategic ballistic missiles or their elements in flight trajectory, *'currently consisting of'* " ABM interceptor missiles, launchers and radars.[101] Under article III, each party "undertakes not to deploy ABM systems or their components except" designated fixed land-based systems at two sites each, reduced to one by a 1974 protocol. Article IV stipulates that the limitations provided for in article III do not apply to ABM systems or their components used for "development and testing, and located within current or . . . agreed test ranges." Under article V, "[e]ach party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, or mobile land-based." Only research on these systems is permitted. The parties also dealt with "exotic" systems in Agreed Statement D, which provides that "in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion . . . and agreement."

The core issue is whether article II defines an ABM system func-

99. At this point, the debate has subsided. It was put to rest indefinitely with Congress' vote to maintain defense spending within the limits of the traditional interpretation (*see infra* note 111 and accompanying text). Since then, political events in the Soviet Union and Eastern Europe have overtaken the arms control process. Discussions over alternative strategic roles for SDI continue, but it is unlikely that the traditional interpretation will be contravened in the near future. Congress continues to tie spending authorizations to the traditional interpretation, and the program itself is being scaled down. The latest blow to the program came in late October 1990, when Congress voted to end its financing of X-ray laser research as a separate item in the Federal budget. *Congress Deals Near-Fatal Blow to 'Star' of Star Wars Plan*, N.Y. Times, Oct. 21, 1990, at A29, col. 3. Meanwhile, the Soviet Union has dropped its earlier position that no START (Strategic Arms Reduction Treaty) agreement could be signed until the two countries agreed on an interpretation of the ABM Treaty, although it continues to insist that any U.S. violation of the restrictive interpretation would be considered grounds for withdrawal from START. The issue will probably not stand in the way of signing the treaty, although it could resurface when START is presented to the Senate for ratification. MacDonald, *Falling Star: SDI's Troubled Seventh Year*, 20 ARMS CONTROL TODAY, Sept. 1990, at 7, 9.

100. For a detailed synopsis of the points of disagreement on each article, see S. NUNN, INTERPRETATION OF THE ABM TREATY. PART I: THE SENATE RATIFICATION PROCEEDINGS 14-19, *reprinted in* 133 CONG. REC. 5302, 5304-05 (1987).

101. Treaty on the Limitation of Anti-Ballistic Missile Systems, *supra* note 94, at art. II (emphasis added).

tionally, with "current" components mentioned for illustrative purposes, or whether it is a limiting definition, indicating that it applies only to those types of systems specifically mentioned in the article (i.e. interceptor missiles, launchers and radars). A functional definition of article II, preferred by the strict interpretationists, would indicate that whenever the term "ABM system" is employed in the Treaty text, it includes future as well as current technology. Thus, according to the restrictive interpretation, article V bans the development, testing and deployment of all space-based/mobile exotics, and article IV would allow development and testing of fixed, land-based exotics at agreed test ranges. Agreed Statement D simply clarifies and strengthens the restriction on deployment of fixed ABM systems to two sites. If testing or deployment of land-based exotics pursuant to article IV leads either side to propose deployment of such a system, then limitations should be negotiated at that time. Barring agreement, the prohibition on deployment remains presumptively in effect.[102]

According to proponents of the broad interpretation, while the functional approach is plausible, a better reading of article II defines an ABM system as "one that serves the functions described *and* that consists of the type of components that existed 'currently' (that is, at the time the Treaty was signed)."[103] On this reading, the article V ban on testing and development of space-based and mobile "ABM systems" would not include those based on "other physical principles." Agreed Statement D, then, would be the only provision governing future technologies, and since it only mentions deployment, it should be read as banning *deployment* of exotics but not their *testing and development.*[104]

C. *The Interpretive Community and the ABM Treaty*

There is little doubt that a vital "interpretive community" has been at work throughout the reinterpretation debate. The mere fact that the debate has persisted for more than five years is evidence that, despite the crucial policy issue at stake, the Treaty, even with its impreci-

102. S. NUNN, *supra* note 100, at 7.

103. Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 HARV. L. REV. 1972, 1974 (1986).

104. Resolution of the debate as outlined above one way or the other will not solve all of the interpretive problems. If the narrow interpretation is adhered to, questions remain as to the meaning of "develop," "test" and "component" within article V. *See* T. LONGSTRETH, J. PIKE & J. RHINELANDER, THE IMPACT OF THE U.S. AND SOVIET BALLISTIC MISSILE DEFENSE PROGRAMS ON THE ABM TREATY 23-30 (3d ed. 1985). If the reinterpretation governs, what constitutes a "new physical principle" becomes a an issue. R. GARTHOFF, POLICY VERSUS THE LAW: THE REINTERPRETATION OF THE ABM TREATY 92 (1987). *See also* Harbour, *The ABM Treaty, New Technology and the Strategic Defense Initiative*, 15 J. LEGIS. 119, 133 (1989).

sion and ambiguity, has served as a constraint on American decision-makers.[105] While much of the debate has been over constitutional questions rather than international law per se, it is clear that international legal constraints have played a significant role. Furthermore, the constitutional battle operated as a forum for airing the international legal issues. It is reasonable to conclude that if the constitutional battle had not occurred, as lively a debate would have occurred within the international legal community, if not in Congress.

It is impossible to establish what weight various factors have carried in the reluctance to embrace fully the broad interpretation as official policy. Undoubtedly, the decisions made by the Reagan and Bush administrations at each step of the way have been based on perceptions of national interest. The constraining effect of the interpretive community was probably felt most strongly at the start of the debate. Even when the initial reinterpretation was announced, skepticism within the Reagan Administration precipitated the compromise position in which the United States committed itself to abide by the traditional limits without disavowing the reinterpretation.

That the decisions were made primarily on the basis of national interest does not mean that legal considerations were irrelevant. National interest depends in part on intangibles like a reputation for adhering to agreements. Endorsing the reinterpretation would have had a significant impact on U.S.-Soviet relations and on the United States' reputation in the international community. The knowledge that the United States could not afford to ignore the legal opinions of the relevant interpretive communities influenced the decisions. Before the constitutional issues came to the fore, and even after they did, American officials were constrained by the concern that Soviet decision-makers would regard the reinterpretation as a disingenuous means of circumventing the treaty's limitations, and by criticism from a significant body of international experts whose views influence world public opinion.

Tangible evidence of a functioning "interpretive community" can

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105. That this point needs to be made at all may seem surprising, but some have argued that the "fundamental question" was solely whether SDI was in the national security interest of the United States, and that to question the legal propriety of the reinterpretation of the ABM Treaty was like arguing about "how many angels dance on the head of a pin." *The ABM Treaty and the Constitution: Joint Hearings before the Senate Comm. on Foreign Relations and the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 2-3, 17 (1987) (statement of Senator Evans) [hereinafter *Joint Hearings*]. In the same hearings, Senator Wallop stated that "questions of interpretation are a lawyer's exercise . . . [the fundamental question is whether the ABM Treaty remains valid] in terms of our own national security." R. GARTHOFF, *supra* note 104, at 97. In rejoinder, Senator Biden stated: "What is at issue here is decidedly *not* a lawyers' quarrel. We are witnessing a major assault on the premises and structure of a national nuclear strategy. . . ." *Joint Hearings*, *supra* at 263.

be found, first, by identifying the main protagonists in the debate. Within the United States, the key actors were government officials with special responsibilities and expertise in the field. The leading spokesperson for the broad interpretation is Abraham Sofaer, the State Department Legal Adviser. His involvement began shortly after he was named to the post, when he reported to Secretary of State Schultz and Ambassador Paul Nitze, on October 3, 1985, that the negotiating record could support the broad interpretation of the Treaty.[106] He testified to that effect in House Arms Control hearings in 1985,[107] and contributed a detailed article to the Harvard Law Review in 1986.[108] Sofaer's main ally in presenting the arguments for a broad interpretation was Paul Nitze (a member of ABM Treaty negotiating team), who testified in the 1985 hearings and prepared a statement for the Department of State Bureau of Public Affairs in 1986.[109]

Key American proponents of the narrow interpretation are most of the senior members of the ABM Treaty negotiating team, including Ambassador Gerard Smith, legal adviser John Rhinelander, senior advisor Raymond Garthoff and Lieutenant General Royal B. Allison.[110] Congress, led by Senator Sam Nunn, the influential ranking Democrat on the Senate Armed Services Committee, joined the fray and ultimately came down on the side of the narrow interpretation, effectively forcing the Reagan Administration to abide by the traditional limits established by the Treaty.[111] The release of Nunn's analysis of the text, ratification process and subsequent practice was a crucial event in the debate.[112] Academic experts, especially legal scholars, have writ-

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106. R. GARTHOFF, *supra* note 104, at 8.

107. *ABM Treaty Interpretation Dispute: Hearing Before the Subcomm. on Arms Control, International Security and Science of the House Comm. on Foreign Affairs*, 99th Cong., 1st Sess. 4, 13 (1985).

108. Sofaer, *supra* note 103, at 1972. *See also* Sofaer's three-part analysis reprinted in the Congressional Record. A. SOFAER, THE ABM TREATY, *reprinted in* 133 CONG. REC. 12,839-910 and 133 CONG REC. daily ed. Sept. 16, 1987) S12, 181-84.

109. BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, CURRENT POLICY NO. 886, PERMITTED AND PROHIBITED ACTIVITIES UNDER THE ABM TREATY (1986).

110. *See* R. GARTHOFF, *supra* note 104; Rhinelander & Ruben, *Mission Accomplished: An Insider's Account of the ABM Treaty Negotiating Record*, 17 ARMS CONTROL TODAY, Sept. 1987, at 3.

111. Both the Senate and the House amended their respective defense appropriations bills declaring that no funds could be used for SDI tests other than those previously announced, which had already been determined to conform with the narrow interpretation. National Defense Authorization Act for FY 1988 and 1989, Pub. L. No. 100-180, 101 Stat. 1019, 1056 (1987). *See also The ABM Treaty Interpretation Resolution*, S. Rep. No. 164, 100th Cong., 1st Sess. (1987).

112. *See* S. Nunn, *supra* note 100. Nunn's prominence in the debate, of course, is attributable to the constitutional dimensions of the issue. Nevertheless, his contribution was in the form of traditional legal analysis, from which constitutional implications flowed. Furthermore, the active involvement of Congress in the debate is, in itself, evidence of an institutionalized interpre-

ten extensively on the issue.[113] Also, a number of interest groups, such as the Lawyers Alliance for Nuclear Arms Control, the Arms Control Association and the Committee to Save the ABM Treaty, mobilized against the reinterpretation.[114] Finally, the Soviets expressed consistent and strong opposition to the reinterpretation, nowhere more than in the START negotiations, and even a number of important U.S. allies had serious reservations about the new interpretation or were opposed to it.[115]

Second, the debate has been carried on in distinctly legal terms, with the protagonists relying on the standard materials and techniques of treaty interpretation. In accordance with the Vienna Convention on the Law of Treaties (signed but not ratified by the United States), the American Law Institute Restatement of the Foreign Relations Law of the United States, and customary law principles, most of the argument has been over text, subsequent practice, the negotiation records and material from the Senate ratification process. For present purposes, it is most interesting that these principles, and the manner in which they have been applied, indicate implicit recognition of the authority of interpretive communities. The weight given to subsequent statements and practice, for example, is consistent with the idea that the meaning of the relationship is constructed collectively, over time.[116] To the extent that subsequent practice is accorded independ-

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tive community: an unsurprising fact as a matter of constitutional law but nevertheless relevant to the thesis here advanced.

113. A significant early contribution is from Abram Chayes, a former State Department Legal Adviser. *See* Chayes & Chayes, *Testing and Development of "Exotic" Systems Under the ABM Treaty: The Great Reinterpretation Caper*, 99 HARV. L. REV. 1972 (1986). *See also* COMMITTEE ON INTERNATIONAL ARMS CONTROL AND SECURITY AFFAIRS, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE ABM TREATY INTERPRETATION DISPUTE (1988); Sherr, *Sound Legal Reasoning or Policy Expedient?*, 11 INT'L SECURITY 71 (1986-87); Harbour, *supra* note 104, at 119. A recent series of articles and commentaries on the constitutional issues raised by the reinterpretation can be found in 137 U. PA. L. REV. 1353-1559 (1989).

114. Trimble, *supra* note 89, at 558, n.32.

115. Koplow, *supra* note 93, at 1372; R. GARTHOFF, *supra* note 104, at 3, 16, 81-89. For many years, the START negotiations were held up by, among other things, the Soviet insistence that no START agreement would be signed without a repudiation of the ABM Treaty.

116. *See* Postema, *supra* note 40, at 309. In this regard, Judge Sofaer's comment on the relevance of post-negotiation statements, while constitutionally suspect, is interesting for the light it sheds on the notion of intersubjective interpretation:

> In examining these post-negotiation statements, one must remember that they are unilateral pronouncements. Even if they clearly demonstrated a consistent United States view—which they do not—they cannot bind the Soviet Union to that view. The strongest evidence of what the parties agreed is the Treaty itself, supported by its negotiating record.

Sofaer, *supra* note 103, at 1984-85. For a recent reiteration and elaboration of his view, see Sofaer, *Treaty Interpretation: A Comment*, 137 U. PA. L. REV. 1437 (1989). His argument in the case of the ABM Treaty would be stronger if there were more evidence of a Soviet position that deviated from the statements and practice of American officials in the ratification process and afterwards. In fact, the preponderance of evidence indicates that the Soviet position was consonant with the narrow interpretation, thus American statements and practice along those lines

ent weight and not merely treated as evidence of original intentions,[117] the procedure is not totally unlike the activities of literary critics who are necessarily influenced by the interpretations of a text espoused by their predecessors. Those interpretations form part of the institutional context that shapes the perspectives of subsequent professional readers.

Another feature of treaty interpretation relevant to this discussion of interpretive communities is the fact that less weight is assigned to negotiating records than to text and subsequent practice,[118] partly because the records are often classified or unpublished.[119] Rational discourse and persuasion is not possible if the material treated as relevant to the interpretive enterprise is accessible only to a few. The point is not purely academic: in late 1985, Senator Nunn and other senators began pressing the administration for release of the negotiating record of the ABM Treaty, which was finally done in August 1986, under strict rules of access.[120] It has been suggested that the controversy will not be resolved finally until the record is made available to the public or a bipartisan review commission.[121] Yet, for international purposes (i.e. apart from constitutional considerations), access to the negotiating record is not essential to the resolution of interpretive disputes. Examination of the record is only required to the extent that it is accepted practice: the parties to the ABM Treaty agreed that the record

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was not "unilateral." *See* R. GARTHOFF, *supra* note 104, at 80-88. The constitutional wrangle was settled with the INF Treaty ratification to which the Senate attached a condition requiring that the treaty be interpreted "in accordance with the common understanding of the treaty shared by the President and the Senate at the time that the Senate gave its advice and consent . . . and the United States shall not agree to or adopt an interpretation different from that common understanding except pursuant to Senate advice and consent to a subsequent treaty or protocol, or the enactment of a statute." ARMS CONTROL ASS'N, THE ABM TREATY AND NATIONAL SECURITY 71-72 (1990).

117. "Action by the parties in reliance upon asserted or implicit interpretations during the course of performing an agreement is appropriately regarded as reliable evidence of shared subjectivities and may be given priority over contradictory evidence even from the outcome phase." MCDOUGAL ET AL., *supra* note 4, at 58-59.

118. Article 32 of the Vienna Convention reads:

> Recourse may be had to *supplementary* means of interpretation, including the preparatory work of the treaty and the circumstance of its conclusion, in order to confirm the meaning resulting from the application of article 31 [text, context and subsequent practice], or to determine the meaning when the interpretation according to article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 32, U.N. Doc. A/Conf.39/27 (1969), *reprinted in* 8 I.L.M. 679, 692 (1969).

119. P. REUTER, INTRODUCTION TO THE LAW OF TREATIES 76 (2d ed. 1989).

120. R. GARTHOFF, *supra* note 104, at 11. Not surpisingly, the main protagonists in the interpretive debate were those who had access to the record, like Senator Nunn, and those who participated in the negotiations, such as Smith, Garthoff and Rhinelander.

121. G. DUFFY, *supra* note 59, at 129.

would not be public.[122] Nevertheless, one would expect the interpreters to be sensitive to the fact that relevant audiences will not easily be persuaded by an interpretation based on evidence to which they have no access.[123]

While there is evidence of an active interpretive community in the ABM Treaty reinterpretation debate, there is also evidence that the Reagan Administration failed to respect the conventions of that community. First, the Administration's contradictory signals regarding the ABM Treaty hampered debate and, given the avowed intention to remain within the narrow interpretation, much of it has been carried on in the abstract.[124] Furthermore, the origins of the reinterpretation are suspect in that it was put forth (within the U.S. government) by a young Department of Defense lawyer who had no experience with arms control or treaty interpretation.[125] When the matter was turned over to the State Department's Legal Adviser's Office, three new attorneys appointed by Sofaer were given the task of reviewing the record. The process lasted two and a half weeks, during which only some of the relevant material was reviewed and none of the ABM Treaty negotiators other than Paul Nitze was consulted.[126] Meanwhile, simultaneous analyses conducted by the Department of Defense assistant general counsel and the general counsel of the Arms Control and Disarmament Agency rejected the reinterpretation.[127] These assessments were either overridden or not brought to the attention of policymakers before the Administration position was announced.[128] Furthermore, the Administration's case for the broad interpretation, when announced, was based almost entirely on the negotiating record rather than subsequent practice, contrary to accepted treaty interpretation principles. In fact, Sofaer's study of subsequent practice was not com-

122. Nor is it a convention of treaty interpretation generally. *See* Vienna Convention, *supra* note 118, art 32. *See also* Jurisdiction of the European Commission of the Danube, 1927 P.C.I.J. (ser. B) No. 14, at 32 (Dec. 8) (refusal by the Permanent Court of International Justice to consider "confidential" negotiating record).

123. Abram Chayes' sensitivity to this point is revealed in the following comment made prior to the release of the ABM Treaty record to the senators:

> [T]he Legal Adviser's reliance on the still-classified negotiating record raises an issue of principle that is not affected by the actual content of that record. . . . If the Legal Adviser continues to rely for his conclusion on an admittedly arguable reading of the negotiating record, it seems to us that he is under an obligation to make relevant portions public. If that is impossible because of the requirements of confidentiality in international negotiations, then interpretation of the Treaty must be based solely on the text and the public record.

Chayes & Chayes, *supra* note 113, at 1968.

124. G. DUFFY, *supra* note 59, at 129.

125. R. GARTHOFF, *supra* note 104, at 7.

126. *Id.* at 7-8.

127. *Id.* at 8-9.

128. *Id.* at 8-9, 18.

pleted until nearly two years after the broad interpretation was announced.[129]

The Reagan Administration was also criticized for its failure to consult with the Soviets through the Standing Consultative Commission ("SCC") or any other diplomatic procedure.[130] The SCC was set up to deal with questions of compliance and other ambiguous matters.[131] As a deliberative body to which the parties have no express obligation to consult, its effectiveness has tended to vary with the changes in the Soviet-American relationship.[132] It is not surprising that the SCC was not used to address the reinterpretation issue, but, under the circumstances, the failure to do so can be viewed as a departure from what had been accepted practice in the superpower relationship. This failure to use a mechanism designed to preserve the treaty relationship in the face of disputes is symptomatic of a gradual dissolution of the bilateral interpretive community.

Some have characterized the ABM reinterpretation as an implicit abrogation of the Treaty. John Rhinelander described the Administration's remarks as, "in effect, a repudiation and abrogation of the treaty" and Ambassador Smith stated that the reinterpretation would render the Treaty a "dead letter."[133] In 1986, Abraham Chayes argued that "[w]e are going to keep making up ad hoc and increasingly skimpy legal defenses of particular projects and activities. In the end the treaty will be destroyed, whether we withdraw from it or not."[134] Most tellingly, Marshall Sergei Akhromeyev, Chief of the Soviet Gen-

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129. ARMS CONTROL ASS'N, *supra* note 116, at 68. Generally, according to Raymond Gartoff, the whole process was not consistent with the established practices of treaty interpretation. As Garthoff states:

> The express language of the treaty was challenged on the basis of the logic of its construction rather than its intent. Then a reconstruction of the logic of the language was justified by a reading of parts of the negotiating record. Subsequent practice had not been given more than a superficial review before the new interpretation was adopted. . . . Subsequent efforts have concentrated on justifying a decision already made, and convenient to the administration's other purposes (minimizing constraints on the SDI program), rather than on weighing the evidence.

R. GARTHOFF, *supra* note 104, at 18.

130. G. DUFFY, *supra* note 59, at 173-76.

131. Treaty Limiting Anti-Ballistic Missile Systems, May 26, 1972, United States - U.S.S.R, art. XIII, 23 U.S.T. 3435, T.I.A.S No. 7503, amended by Protocol of July 3, 1974, 27 U.S.T. 1645, T.I.A.S. No. 8276.

132. *See* G. DUFFY, *supra* note 59, at 165-66. For an interesting proposal to create a new, more effective institutional mechanism to mediate relations between the superpowers on arms control issues, see Trimble, *Beyond Verification: The Next Step in Arms Control*, 102 HARV. L. REV. 885, 897-911 (1989). Trimble argues that if an institution requiring notification and consultation had been in place, the reinterpretation may never have occurred, partly because the "prospect of another legal review . . . would itself deter precipitous action." *Id.* at 911.

133. F. BOYLE, THE FUTURE OF INTERNATIONAL LAW AND AMERICAN FOREIGN POLICY 387 (1989).

134. G. DUFFY, *supra* note 59, at 130.

eral Staff, called the reinterpretation a "deliberate deceit," insofar as the United States was thereby really withdrawing from the Treaty.[135]

From the perspective of legal interpretive communities, the reinterpretation can be branded as a divergence from the conventions, assumptions and practices of arms control and international law experts. The people levelling the critique are justified in so doing because they are working within the assumptions and categories of the interpretive community. Their authority derives from membership in the relevant community, and their influence hinges on the degree to which each is recognized as an expert in the field. To the extent that the judgment represents the dominant view of the interpretive community, it has a constraining effect. While the critique usually takes the form of stating explicitly "that reading is wrong," the thrust of the criticism is that the interpretation represents an implicit abrogation of the treaty. By insisting on the broad interpretation, those who advance it fail to engage in the process of intersubjective interpretation which the relationship entails. They are not functioning as members of the interpretive community whose focal point is the treaty, but instead are acting as members of the domestic political community. They are getting it "wrong" in the sense that they have ceased to be interpreters of an arms control treaty and have become advocates for a new strategic policy.

V. MULTILATERAL TREATIES AND CONSTITUTIONAL INSTRUMENTS

A. *Introduction*

The theory of interpretive communities is not limited to bilateral

135. F. BOYLE, *supra* note 133, at 388. The idea of implicit abrogation through unconventional interpretation is also captured in the remarks of those who insisted that if the United States really wanted to pursue SDI it should do so frontally, by withdrawing from the Treaty, rather than "skirting the issue." *Joint Hearings*, *supra* note 105, at 17 (statement of General Allison). The following exchange between Senator Jesse Helms and Professor Louis Henkin is also revealing:

> Professor Henkin: I should say also, Senator, if we are talking about the security of the United States, I wonder whether this particular means is the way of addressing our security concerns; that is by trying to reinterpret the treaty in a way different from the way the Senate understood it . . . . [S]ince we have a 6-month clause in this particular treaty, we could give a 6-month notice and get out of the treaty that way.
>
> Senator Helms: Excuse me, sir. Then there would be another select committee on both sides of the Congress condemning the President, saying that he is a warmonger and all the rest of it.
>
> Professor Henkin: Perhaps, sir, and so be it.

Id. at 91-92. Professor Henkin's point was that the reinterpretation was being used as a means of circumventing the Treaty's limits, without taking the politically difficult step of withdrawing from it.

treaty interpretation, although its application is most easily discernible in that context. Multilateral treaties and constitutional instruments (like the United Nations Charter) tend to be more open-textured than bilateral treaties, because they must capture a broader range of interests, concerns and understandings. The interpretive process tends to be more evolutionary as shared meanings are worked out over time. The interpretive community is likely to be less unified and diverging interpretations more difficult to reconcile through consultation and negotiation because tampering can unravel the whole fabric.

Nevertheless, to the extent that the relevant interpretive community is unified, its conventions guide interpretive activity. The degree of unity is dependent, in part, on the extent to which the participants in the enterprise share an interest in preserving the overall relationship. Robert Keohane's distinction between specific and diffuse reciprocity is instructive:

> To expand the range of cooperation in world politics, it may be necessary to go beyond the practice of specific reciprocity and to engage in diffuse reciprocity: that is, to contribute one's share, or behave well toward others, not because of ensuing rewards from specific actors, but in the interests of continuing satisfactory overall results for the group of which one is a part, as a whole.[136]

While specific reciprocity depends on partners exchanging items of equal value, diffuse reciprocity connotes conformity with generally accepted standards of behavior.[137]

B. *Article IV of the NPT*

The Treaty on the Non-Proliferation of Nuclear Weapons ("NPT") is at the heart of what many analysts regard as a moderately effective, if imperfect, security regime.[138] It represents a multilateral bargain whereby non-nuclear-weapon State-parties agree not to manufacture or to acquire nuclear weapons in exchange for commitments from nuclear States to: i) pursue negotiations toward disarmament; and, ii) assist in civilian nuclear programs. The two obligations imposed on the nuclear States have been the subject of debate throughout the life of the Treaty. While the former, embodied in article VI, is the more important of the two, the commitment to assist in peaceful nuclear programs provides a more manageable case for analysis of the

136. Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1, 20 (1986).

137. *Id.* at 4.

138. *See, e.g.*, Nye, *Sustaining Non-Proliferation in the 1980s*, in NUCLEAR WEAPONS PROLIFERATION AND NUCLEAR RISK 104 (J. Schear ed. 1984).

operation of interpretive communities because it gave rise to a reasonably focused legal debate in the late 1970s.

Article IV of the Treaty bestows an "inalienable right" on all parties to develop research, production and use of peaceful nuclear energy, and includes an undertaking "to facilitate . . . the fullest possible exchange" of equipment, materials and information for that purpose. It also requires parties in a position to do so to "cooperate in contributing alone or together with other States or international organizations to the further development of the applications of nuclear energy. . . . " Debate over the nature and scope of the obligation imposed by article IV came to a head in the late 1970s when the United States adopted restrictive nuclear export policies perceived by some to be in violation of the provision. The debate was carried on over a period of years in a number of fora. The following issue was central: does article IV represent a promise to facilitate and to guarantee the right to participate in *all* types of nuclear cooperation, including the most sensitive, or do suppliers have discretion to deny access to certain forms of technology deemed by them to be proliferation-prone?

The history of the debate can be traced to a number of disturbing events in the mid-1970s, including the detonation of a "peaceful" nuclear device by India, which prompted American policy-makers to undertake a series of steps to tighten access to sensitive elements of the nuclear fuel cycle. In October 1976, President Ford announced a deferral of plutonium reprocessing until proliferation problems could be resolved.[139] The policy was carried forward by the Carter Administration, culminating in the enactment of the Nuclear Non-Proliferation Act of 1978 ("NNPA"). The Act legislated an embargo on enrichment and reprocessing plants and stipulated that new commitments to export significant amounts of separated plutonium and highly enriched uranium were to be avoided. Prior U.S. consent was required for the reprocessing, enrichment (over 20%) or alteration of U.S.-supplied nuclear materials, as well as the retransfer to other countries of U.S.-supplied spent reactor fuel or fuel used in U.S.-supplied reactors.[140] Most countries did not react favorably to the American policy shift (the stiffest opponents being the Germans and the

139. U.S. policy was motivated by the conviction that plutonium-producing technology could not be adequately safeguarded. Reprocessed (or separated) plutonium is usable as both a reactor fuel and directly in nuclear weapons. It poses a special proliferation risk because, unlike uranium, the plutonium used in bombs is identical to that which is used commercially.

140. STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, THE NPT: THE MAIN POLITICAL BARRIER TO NUCLEAR WEAPON PROLIFERATION 27 (1980). For a detailed analysis of the Act, see Bettauer, *The Nuclear Non-Proliferation Act of 1978*, 10 LAW & POL'Y INT'L BUS. 1105 (1978).

Japanese), charging a violation of the NPT "bargain" and an intrusion into their nuclear programs.[141]

The most obvious evidence of the operation of a multilateral interpretive community is the emphasis American officials placed on the need to build an international consensus in support of U.S. policy. The President's statement on signing the NNPA in March 1978 read, in part, as follows:

> I am persuaded that the new criteria, incentives, and procedures in this act . . . will help to insure that access to nuclear energy will not be accompanied by the spread of nuclear explosive capability. While I recognize that some of these provisions may involve adjustments by our friends abroad, this more comprehensive policy will greatly increase international security. I believe they will ultimately join us in our belief that improved world security justifies the steps which we all must take to bring it about.[142]

To forge that consensus, considerable effort was made by officials responsible for presenting the policy to international audiences to reconcile it with the dictates of article IV.[143] Furthermore, much of the

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141. Winkler, *Nuclear Proliferation in the 1980s: Perceptions and Proposals*, in NUCLEAR PROLIFERATION IN THE 1980S 139, 145-46 (W. Kincade & C. Bertram eds. 1982).

142. Carter, *Nuclear Policy: Non-Proliferation Act of 1978*, 78 DEP'T ST. BULL. 49, 50 (Apr. 1978). Joseph Nye, in testifying before a Senate subcommittee in 1977 on the pending legislation said:

> This strategy places a high degree of emphasis on intensive diplomatic and technical cooperation with other nations . . . . [T]he central long-term goal of our strategy is to build a broad consensus on political and technical means to make the commercial nuclear fuel cycle as proliferation resistant as possible in the face of technological change.

Nuclear Non-Proliferation Policy Act of 1977: Hearings on S. 897 and S. 1432 Before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources, 95th Cong., 1st Sess. 170 (1977).

143. In a representative statement, Joseph Nye, Deputy to the Under Secretary for Security Assistance, offered this legal defense of the decision to defer reprocessing at an IAEA-sponsored Conference in Salzburg:

> I would emphasize categorically that this decision does not mean that the United States has failed to support article IV of the NPT. On the contrary, we recognize that, as a nuclear-weapons state, the United States has a special responsibility to share with others the benefits of nuclear energy. Our policies are aimed at fulfilling this responsibility, while directed against those activities proscribed in articles I and II of the treaty. But in doing so, we must not imperil the objectives of articles I and II. When, for such reasons, we decide to deny ourselves commercialization of reprocessing, it hardly seems required to export it.

Nye, *United States Policy on Nuclear Technology: Combining Energy and Security*, 76 DEP'T ST. BULL. 550, 551-52 (May 1977). Implicit in the quote is the idea that the United States deliberately deferred its own reprocessing program to avoid running afoul of article IV of the NPT, rather than for economic reasons. Some evidence that this was in fact the case can be found in the Ford/Mitre report, a private study in which the authors concluded that, by deferring plutonium recycling and breeder commercialization, the United States could "preempt charges of discrimination, of failure to honor NPT commitments." FORD FOUNDATION NUCLEAR ENERGY POLICY STUDY GROUP AND MITRE CORPORATION REPORT, NUCLEAR POWER ISSUES AND CHOICES 37 (1977). The study is regarded as having had a marked influence on the Carter administration's policy, given that many people involved in its preparation went on to take up important posts in the administration, including Joseph Nye, Spurgeon Keeny, Harold Brown and Albert Carnesale. *See* M. BRENNER, NUCLEAR POWER AND NON-PROLIFERATION: THE REMAKING OF U.S. POLICY 118-19 (1981).

effort at justification revealed an intersubjective approach to interpretation. For example, in a statement before the Senate Subcommittee on Arms Control, Oceans and International Environment, Robert Fri expressed his support for the Administration's draft bill in the following terms: it "reflects our determination to avoid actions that could be seen by others as raising questions under article IV of the Nonproliferation Treaty."[144] The statement reveals that the implict interpretation of the NPT represented by the NNPA was evaluated not according to objective criteria, but in terms of its acceptability to other countries.[145]

Nevertheless, American policy was not well-received by other NPT parties, partly because the concerns and understandings of the multilateral interpretive community were not fully addressed in the American decision-making process. Divisions within the Carter Administration between the "purists" and the "pragmatists" meant that contradictory signals were transmitted abroad. Unlike the pragmatists, who understood that positive collaboration of foreign governments within the NPT framework was a condition for building a proliferation-resistant regime, the purists were more inclined to try to impose U.S. values on the rest of the world.[146] At various points, the purists seemed to control the process and statements were issued that reflected a unilateralist approach.[147] Described by Michael Brenner as parochial and "novices in the field of international politics," the purists were less sensitive to the NPT bargain and the impact that

144. *Nuclear Nonproliferation and Export Controls: Hearings Before the Subcomm. on Arms Control, Oceans and International Environment of the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 41 (1977) (statement of Robert Fri). For a similar comment, see *Nuclear Nonproliferation Act of 1977: Hearings Before the Subcomm. on Energy, Nuclear Proliferation and Federal Services of the Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess. 345 (1977) (statement of Richard Kennedy, Commissioner of the Nuclear Regulatory Commission).

145. Also noteworthy is the fact that, as Director of Energy Research, Development and Administration (ERDA), Fri had an institutional stake in the position he espoused. As Michael Brenner points out, among the several factions within the bureaucracy, those who were most disposed to promote nuclear exports were located in ERDA. While the agency lost some of its institutional dominance during the Carter years, it remained "at the center of an international network of communications among atomic energy agencies, industrial enterprises and research laboratories." M. BRENNER, *supra* note 143, at 127-29. ERDA was, in many respects, the domestic institutional mouthpiece of international advocates of liberal nuclear transfers under article IV of the NPT.

Charles Van Doren had a similar institutional role as spokesperson for U.S. policy at the NPT Review Conference in 1980. *See* 1980 REVIEW CONFERENCE OF THE TREATY ON NON-PROLIFERATION OF NUCLEAR WEAPONS, ACDA SPECIAL REPORT (1980) for samples of Van Doren's statements at the Conference. *See also Second Nuclear Nonproliferation Treaty Review Conference: Implications of Recent Nuclear Developments: Hearing Before Subcomms. on International Security and Scientific Affairs and on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 17-18 (1979), for Van Doren's testimony at hearings prior to the Conference.

146. M. BRENNER, *supra* note 143, at 125.

147. Nye, *supra* note 138, at 107.

restrictive American policies would have on its political influence within the community of NPT members.[148]

Furthermore, the timing of the enactment of the NNPA was not ideal. It was viewed by many as a unilateral prejudging of the outcome of the International Fuel Cycle Evaluation ("INFCE"), which had been instigated by the Carter Administration in 1977 to provide a two-year period in which nations could re-examine assumptions about the benefits and risks associated with various aspects of the nuclear fuel cycle. While asserting that it does not prejudge the objectivity or outcome of the INFCE, a number of provisions and conditions in the NNPA concerning reprocessing appear to do just that.[149]

Finally, there is little evidence in the public record of U.S. experts and officials ever subjecting article IV to systematic legal analysis.[150] Given the propensity of foreign critics to couch their arguments in legalistic terms, the failure of the United States to respond in kind is noteworthy. Germany, in particular, repeatedly justified its own policies and criticized the American position on the basis of its interpretation of article IV. In a 1977 symposium in New York, the German Consul General briefly reviewed the history of the Treaty, explained that his government "attached great importance to those provisions in the NPT laid down in the preamble and article IV" and recalled the following assurance given by the U.S. Ambassador to the United Nations in May 1968:

> Any concern is unfounded that this treaty imposed interdictions or limitations to non-nuclear-weapon states concerning the possibility to develop their abilities in the field of nuclear science and technique. This treaty requires no state to accept the status of technological dependence or to be excluded from developments of nuclear research. The entire

148. M. BRENNER, *supra* note 143, at 125.

149. Bettauer, *supra* note 140, at 1179. *See also* Kaiser, *The Great Nuclear Debate: German-American Disagreements*, 30 FOREIGN POL'Y 83, 105 (1978); Goldschmidt & Kratzer, *Peaceful Nuclear Relations: A Study of the Creation and Erosion of Confidence*, in WORLD NUCLEAR ENERGY 19, 46 (I. Smart ed. 1982).

150. In responding to a question from Senator Glenn at Congressional hearings, one administration official said "we are working on a number of memoranda and studies . . . one of these is a very specific analysis from the legal people." Nuclear Non-Proliferation Act of 1977: *Hearings Before the Subcomm. on Energy, Nuclear Proliferation and Federal Services of the Senate Comm. on Government Affairs*, 95th Cong., 1st Sess. 138 (1977) (statement of Thomas Davies, Assistant Director of the Arms Control and Disarmament Agency). If such an analysis was done, it did not figure prominently in the debate, either domestically or internationally. The most extensive input from Administration legal advisers on the public record is the article written by Ronald Bettauer, Department of State Assistant Legal Adviser for Nuclear Affairs, *after* the NNPA was enacted. *See* Bettauer, *supra* note 140. John Palfrey, a legal consultant to the Arms Control and Disarmament Agency, testified at hearings, but in a personal rather than official capacity. *Nuclear Nonproliferation and Export Controls: Hearings Before the Subcomm. on Arms Control, Oceans and International Environment of the Senate Comm. on Foreign Relations, 95th Cong., 1st Sess. 192-99 (1977) (statement of John Palfrey).*

> field of nuclear science connected with the production of electricity will be available, pursuant to the NPT, to all of those who want to use it. This includes not only the present generation of nuclear reactors but also the more advanced technology of fast breeder reactors.[151]

If the U.S. decision-makers were convinced that their interpretation of article IV was better, one would have expected more evidence of efforts to reconcile the statements of Ambassador Goldberg with U.S. policy. Leaving aside the question of whether U.S. policy was sustainable under law, it is clear that the legal analysis and argumentation throughout the policy-making process was inadequate.[152] The failure to engage in systematic legal analysis can fairly be branded as a divergence from the accepted practices of the interpretive community associated with the Non-Proliferation Treaty. Partly because of the legal criticism from members of that community, the policy had to be reformed.

This cursory analysis illustrates that interpretation of a provision, even as imprecise as article IV of the NPT, is subject to the conventions and assumptions of the multilateral interpretive community associated with the Treaty. If more direct attention had been paid to international legal considerations, American policy might have been executed in a manner more conducive to international acceptance.[153] Furthermore, the United States might have been more successful in persuading other countries to follow its lead. As it turns out, the United States was vindicated in its judgment that there was no immediate economic justification for plutonium reprocessing and breeder commercialization,[154] but most European countries and Japan contin-

151. *Approaches to the Prevention of Diversion of Nuclear Fuel to Military Uses*, 16 COLUM. J. TRANSNAT'L L. 451, 458 (1977) (statement by Werner Ungerer, German Consul General to the United States).

152. For a contemporary legal analysis of the nature of the obligation assumed by the parties to the NPT under article IV, see Greig, *The Interpretation of Treaties and Article IV.2 of the Nuclear Non-Proliferation Treaty*, 6 AUSTL. Y.B. INT'L L. 77, 92-93 (1978). For a detailed analysis of the negotiation records, see M. SHAKER, THE NUCLEAR NON-PROLIFERATION TREATY: ORIGIN AND IMPLEMENTATION, 1959-1979 (1980). *See also* M. WILLRICH, NON-PROLIFERATION TREATY: FRAMEWORK FOR NUCLEAR ARMS CONTROL (1969).

153. For example, the timing of the NNPA could have been different. President Carter signed it into law on March 10, 1978, despite continued Administration objections that a section proscribing new reprocessing violated the common decision of INFCE countries to study the matter further. Franko, *U.S. Regulation of the Spread of Nuclear Technologies Through Supplier Power: Lever or Boomerang?*, 10 LAW & POL'Y INT'L BUS. 1181, 1199 (1978).

154. Plutonium has proven to be economically unattractive as a nuclear fuel. The global demand for nuclear energy has continued to decline, partly because electricity demand has slowed and partly because of safety concerns. Also, new reserves of natural uranium have been discovered, and the reprocessing of spent fuel has proved to be more costly and difficult than expected. In addition to the United States, Canada and Sweden have foregone reprocessing and the development of breeder reactors. A number of European States are going ahead with plans to separate and recycle plutonium, but the development of breeder reactors is being curtailed. Even the Japanese, who have the world's most ambitious reactor program, have determined that

ued with their programs despite American urgings.[155] Even some of the architects of the U.S. policy made the point that, despite the rhetoric, a major flaw was its overly unilateralist approach.[156] Article IV of the NPT had generated a set of mutual expectations about acceptable nuclear policy. To the extent that the United States failed to alter those expectations on a multilateral basis, its policy fell short of the hopes entertained for it. Thus, while the interpretive community associated with the NPT seems not to have constrained aspects of American non-proliferation policy in the short term, it eventually contributed to a felt need to shift to a more internationally accepted approach to nuclear export restraints.

C. *Article 51 of the United Nations Charter*

Interpreting the United Nations Charter is, at root, a matter of uncovering shared expectations about international life. Occasionally the International Court of Justice is called on to interpret the Charter, but on the whole, its meaning is shaped by the actions and reactions of States and the opinions of publicists and scholars.[157] As with bilateral and multilateral treaties, the authority of an interpretation will turn on the extent to which the relevant interpretive community is persuaded by it, and, in order to persuade, the accepted conventions of the enterprise must be respected.[158] Interpretations must be justified, not on the basis of self-interest, but "in terms of the 'shared values' expressed in the Charter or through other consensual procedures."[159] It is possible for the meaning of a provision to be clear in the sense that "its meaning is taken for granted . . . a 'given datum,' not subject to question at that time."[160] Furthermore, even when the specific provision is not clear, the "shared values" or "common interests" that guide the

breeders would not become commercially viable until the year 2020. *See generally* W. SWEET, THE NUCLEAR AGE: ATOMIC ENERGY, PROLIFERATION AND THE ARMS RACE 47-64 (2d ed. 1988); Walker, *Nuclear Trade Relations in the Decade to 1995*, in NUCLEAR NON-PROLIFERATION: AN AGENDA FOR THE 1990s 64-81 (J. Simpson ed. 1987).

155. Smith & Rathjens, *Reassessing Nuclear Nonproliferation Policy*, 59 FOREIGN AFF. 875, 882 (1981).

156. *See id.* at 882; Nye, *supra* note 138, at 108.

157. Henkin, *Use of Force: Law and U.S. Policy*, in RIGHT V. MIGHT 37, 40 (1989).

158. As Henkin asserts, "an interpretation that does not accord with text, purpose, design, history, and other accepted principles of treaty construction will persuade nobody and will serve no purpose." *Id.* at 59.

159. Schachter, *Interpretation of the Charter in the Political Organs of the United Nations*, in LAW, STATE AND INTERNATIONAL LEGAL ORDER 269, 280 (S. Engel & R. Métall eds. 1964).

160. *Id.* at 274-75. In 1964, shortly after the Cuban Missile Crisis, Oscar Schachter identified the threat of nuclear disaster and the demands for effective recognition of human dignity as "hard facts" which find their expression in the Charter and more specific norms emanating from the United Nations. *Id.* at 281-82.

interpretive task may be. The "meaning" or "shared values" or "common interests" embodied in a Charter provision are those attributed to it by the global interpretive community. They are not immutable, but as common beliefs widely accepted at a given time they are not seriously questioned within the community of interpretation.

A brief review of the legal events surrounding the Cuban Missile Crisis illustrates the point. The Soviet placement of offensive nuclear missiles in Cuba in 1962 set off a crisis that brought the superpowers to the brink of nuclear war. When the United States acquired certain evidence of the emplacement on October 14, President Kennedy summoned a group of advisers, later known as the Executive Committee of the National Security Council ("ExCom"). Three options were considered seriously: bilateral diplomacy, a naval blockade and direct military intervention in the form of a surgical airstrike.[161] On October 22, the President announced a "defensive maritime quarantine" to prevent the further introduction of missiles and to induce the Soviets to withdraw those already in place.[162] The announcement of the quarantine was quickly followed by a unanimous resolution of the Organization of American States recommending, pursuant to the Rio Treaty, that members "take all measures . . . which they may deem necessary" to prevent Cuba from continuing to receive missiles which may threaten the peace and security of the Continent.[163] The quarantine took effect on October 24 and, by October 28, the Soviet Union agreed to discontinue bringing missiles into Cuba and to dismantle and remove those that had been installed.

A key legal aspect of the crisis was the American decision not to invoke article 51 of the United Nations Charter.[164] Briefly, article 51 permits the use of force in self-defense "if an armed attack occurs,"

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161. L. HENKIN, *supra* note 5, at 285, 287.

162. *Id.* at 280.

163. *See id.* at 281 for the text of the resolution.

164. A separate legal issue involved the decision to characterize the quarantine as "enforcement action" through the Organization of American States, pursuant to articles 52 and 53 of the Charter. The legal advice provided by Leonard Meeker on October 19, 1962, on behalf of the Department of State Office of the Legal Adviser, was that, while unilateral use of force could not be justified, the law would support a "defensive quarantine" if authorized by the O.A.S. under the Rio Treaty. Article 52 of the United Nations Charter permits regional arrangements to deal with matters relating to the maintenance of international peace and security, but according to article 53 any "enforcement action" taken by such arrangements must be authorized by the Security Council. During the crisis, the Legal Adviser's Office took the position that the quarantine was not an enforcement action because it was recommendatory rather than obligatory. However, later justifications downplayed the "enforcement action" argument and emphasized that "authorization" by the Security Council need be neither "prior" nor "express"—inaction constitutes implicit authorization. *See* A. CHAYES, THE CUBAN MISSILE CRISIS 60-61 (1974); Chayes, *Law and the Quarantine of Cuba*, 41 FOREIGN AFF. 550, 556 (1963); Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L. 515, 520-22 (1963).

but in 1962 it was still a matter of debate whether the article impaired the customary law "inherent right" of defense short of an armed attack. Abram Chayes, who was State Department Legal Adviser at the time, states that the looser interpretation of article 51 was not adopted by American officials partly because it would have set a "bad precedent" weakening the "normative atmosphere" in which States act.[165]

Much has been written about the Cuban Missile Crisis, and there is little doubt that legal issues were discussed and considered at various points in the American decision-making process. However, some have concluded that the legal rhetoric was nothing more than a gloss on decisions that had nothing to do with law. One of the most trenchant analyses along these lines is provided by William Gerberding, whose views echo the nihilist challenge to law alluded to in Part I of this article:

> [The] elaborate and often self-defeating defense of the legality of the blockade points to the central facts about international law in international politics, namely, its amorphousness and its irrelevance to important political matters. It follows from the expediential character of most of the governmental pronouncements and even scholarly discourses on the blockade, from the susceptibility of documents and alleged "norms" and "principles" to almost any interpretation, and from the absence of authoritative and legitimate institutions to create, interpret, and enforce the "law" that it can be and is used in whatever manner governments choose to use it. It does not have a valid life of its own; it is a mere instrument, available to political leaders for their own ends, be they good or evil, peaceful or aggressive.[166]

Gerberding asks whether legal criteria and principles were consciously applied in the decision-making process and, based on his reading of accounts of what happened by those involved, answers with an emphatic "no."[167] Considerable evidence to the contrary can be found,[168] but more importantly, if the interpretive community idea has any validity, it is not necessary to identify instances of a conscious

165. A. CHAYES, *supra* note 164, at 65. In the ExCom meeting on October 19, the Deputy Attorney General Nicholas Katzenbach expressed the view that use of force would be justifiable in self-defence. *Id.* at 62. A number of scholars also took that position. *See, e.g.*, McDougal, *The Soviet–Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 598-604 (1963).

166. Gerberding, *International Law and the Cuban Missile Crisis*, in INTERNATIONAL LAW AND POLITICAL CRISIS 175, 209 (L. Scheinman & D. Wilkinson eds. 1968).

167. *Id.* at 200-01.

168. The most obvious decision made for conscious and explicit legal reasons was the decision to term the blockade a "quarantine." R. GARTHOFF, REFLECTIONS ON THE CUBAN MISSILE CRISIS 49 (2d ed. 1989). The idea of using the term "defensive quarantine" rather than blockade originated with Leonard Meeker, Deputy Legal Adviser, because it had the advantage of not implying a characterization of the situation as a "war", the only circumstance in which, according to traditional U.S. doctrine, a blockade could be instituted. Avoidance of the harsher term thus contributed to the effort to communicate restraint as well as firmness. A. CHAYES, *supra* note 164, at 14 n.33 (1974). *See also* J. Trojacek, The Influence of International Legal

application of the law to prove its relevance. Seven of the key people involved in the ExCom deliberations were lawyers (all but one advised restraint), and there is reason to believe that most of them were familiar with the legal questions and arguments before the crisis began.[169] Bureaucratic routine ensured that legal considerations were given a hearing at various points in the process.[170] To focus solely on whether legal criteria were applied consciously misses the point that all considerations operate on decision-making "not directly, but mediately, filtered through the different purposes, perspectives, and susceptibilities of the players in the central game."[171] Few would argue any steps were taken in order to conform with international law despite better political judgment. Rather, legal norms, procedures and structures formed part of the context in which decisions were made, channelling the crisis towards a peaceful resolution.[172] As Raymond Garthoff points out, many actions were undertaken on what one might term " 'inertial guidance'—something moving by its own momentum but no longer controlled or even remembered."[173] The impact of law was felt as much on this "inertial guidance" as an external constraint on that inertia. In other words, law and the legal interpretive community operated not so much as a constraint *on* decision-making as *within* decision-making.

Regarding the American decision not to invoke article 51 of the Charter, Chayes states that to have accepted a reading of "armed attack" to include this Soviet conduct would have trivialized the whole effort at legal justification: it would make the occasion for forceful response essentially a question for unilateral national decision that would be not only formally unreviewable, but "not subject to intelligent criticism, either."[174] Intelligent criticism is the professional task

Considerations in the Cuban Missile Crisis 1962 (1977) (unpublished manuscript available at Columbia University School of Law Library).

169. Most had seen either a Justice, State or Defense Department memo on the legal issues distributed in the months before the crisis. A. CHAYES, *supra* note 164, at 24.

170. In his important study of the crisis, Allison concludes that many important details of implementation of the policy followed from organizational routine rather than central choice. G. ALLISON, *supra* note 89, at 246. Chayes applies this insight in his analysis of legal factors in the bureaucratic process. A. CHAYES, *supra* note 164, at 30-35. For a discussion of the divisions within Soviet political and bureaucratic circles drawing on recent revelations about the crisis, see R. GARTHOFF, *supra* note 168, at 74-81.

171. A. CHAYES, *supra* note 164, at 30; J. Trojacek, *supra* note 168, at 41, 47.

172. In a recent account of the role of international law in foreign policy, Daniel Patrick Moynihan writes, "international law is not a scheme for surrender; it is not a suicide pact. To the contrary, where relevant, it is a framework for deciding how and when to use force." D. MOYNIHAN, ON THE LAW OF NATIONS 149 (1990).

173. R. GARTHOFF, *supra* note 168, at 155.

174. A. CHAYES, *supra* note 164, at 65.

of the interpretive community. Self-defense could have been forwarded as legal justification, but if accepted in this instance it would have deviated from the purposes and practices of the interpretive community as understood by Chayes (who, as Legal Adviser, held a key position within that community). Whether or not Chayes' understanding is "correct" (or whether some other conception of the enterprise allowing for this reading may not, in fact, be better), the important point is that his characterization of the legal dilemma comes close to an explicit recognition of the authority of interpretive communities.[175]

Another illuminating feature of the crisis is the supposed "penchant for legalities" held by the Soviets.[176] One can speculate that the perceived illegality of an airstrike tipped the scales in the favor of a blockade among American decision-makers. By attempting to remain within the law, the United States was able to lessen the prospects of escalation. If the United States had taken action regarded by the Soviets (and the rest of the world) as a blatant violation of international law, it would have been more difficult for the Soviets to back down and still save face.[177] The stakes in many conflicts are images of resolve rather than substantive gains and losses.[178] Governments, especially of major powers, do not wish to appear constrained by a rival power.[179] Law can have a stabilizing influence in crises because the exercise of restraint can be signaled as compliance with law rather than lack of resolve. While States may not wish to appear constrained by the rival power, appearing to be constrained by law makes a virtue of necessity.

Thus, as can be seen from this example, international law is a useful instrument for crisis management. Describing it as an instrument does not undermine its validity because it is not an instrument of a

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175. The same can be said about his comment that the relevant question is not whether the United States was "right" as a matter of law, but "whether there was a professionally serious and responsible effort to deal with the legal issues." *Id.* at 49.

176. Apparently the Executive Committee's request for a review of the legal situation was stimulated by the remark by Ambassador Llewellyn Thompson, who had just returned from his posting to the Soviet Union, that the Soviets had a penchant for legalities and would be impressed by a good legal case. *Id.* at 14.

177. The importance of finding a face-saving way out was recognized by President Kennedy in drawing the moral of the crisis:

> 'Above all, while defending our own vital interests, nuclear powers must avert those confrontations which bring an adversary to the choice of either a humiliating defeat or a nuclear war. To adopt that kind of course in the nuclear age would be evidence only of the bankruptcy of our policy—or of a collective death-wish for the world.'

G. ALLISON, *supra* note 89, at 61.

178. R. JERVIS, THE LOGIC OF IMAGES IN INTERNATIONAL RELATIONS 20 (2d ed. 1989).

179. Puchala & Hopkins, *International Regimes: Lessons from Inductive Analysis*, in INTERNATIONAL REGIMES, *supra* note 6, at 61, 88.

particular State but of the community as a whole. Law is not infinitely manipulable. It cannot be wielded randomly, as Gerberding suggests, because if its invocation is to have the desired effect, the proffered interpretation must be credible to intended addressees. After all, if the relevant interpretive communities do not attach any credibility to a State's claim that its actions are within the law, the claim would be meaningless and therefore pointless.

Generally, by taking action for which the best legal case could be made, it was easier for the United States to persuade other States to cooperate and to persuade the Soviets to react moderately.[180] In light of interpretive theory, persuasion rather than demonstration is the aim of the enterprise. Even if the American action was not unanimously accepted as lawful, at most it was a narrow extension of the law.[181] The interpretive community is not static; incremental shifts in categories of understanding are possible. As members of the interpretive community, American decision-makers were, in effect, advocating a slight shift that could be seen as a necessary evolution from the accepted conventions and categories of understanding rather than a sharp break. A sharp break cannot be justified in "legal" terms because the audience one is attempting to persuade will understand the arguments as a rejection of the norms of the community. Arguments for incremental change, on the other hand, build on the conventions recognized by the interpretive community. The interpretive process, while embedded in accepted understandings and strategies, allows for departures as long as they cohere with those understandings and strategies.

CONCLUSION

Law mediates the relations between States through the activities of interpretive communities. The strength of the mediating influence turns on the extent to which the relevant communities are unified. This article has focused on nuclear relations, where unity flows from the common interest States have in avoiding nuclear disaster and finds expression in arms control treaties and UN Charter rules on the use of force. Now that the Cold War is over and international affairs, in all probability, will no longer be dominated by superpower conflict, a new

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180. L. HENKIN, supra note 5, at 289.

181. *Id.* at 293. *See also* Christol & Davis, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Matériel to Cuba 1962*, 57 AM. J. INT. L. 525, 527, 531-33 (1963). The official position on article 53 did not convince most governments and legal commentators. Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1640 (1984). *See, e.g.*, Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 558-59 (1963).

era of collective security and international law may be upon us. Future disputes, more than in the recent past, will be disputes over the meaning of legal texts and legal norms. There will continue to be much room for argument, but the form the arguments take will be constrained by the distinctive purposes and practices of the legal enterprise. The existence of a legal text or norm is evidence of a commitment to the relationship embodied therein. The relationship represents, on one level, a set of shared understandings about the terms of the relationship. But the generalized character of words and the elusiveness of meaning indicate that the commitment is and must be something more than an agreement to abide by substantive rules of behavior. It is also a commitment to a process of constructing the meaning of the relationship together.

There are, however, limits to the influence of interpretive communities within the existing international legal system. Many if not most international legal disputes (like domestic legal disputes) turn on facts as opposed to law. Yet access to these facts is much more restricted than access to the legal materials. Thus, while members of a community can often be counted on to interpret a legal norm (written or unwritten) in common, such communities rarely exist when it comes to factual assessments. To the extent that the "facts" of international life are not self-evident, what actually happened is less important than what relevant legal authorities think (or say) happened.[182] If the relevant authority is the interpretive community, as I have argued, then the facts that count are those upon which there is consensus among members of the community. While interpretive communities perform the task of authoritative interpretation admirably, their capacity to identify and evaluate relevant facts is much more restricted. The facts that surface in international disputes do so through an imperfect process, dominated by the selective revelations of national governments. Thus, perhaps the most important lesson for the international legal system to be learned from this examination of the role of interpretive communities is the need for new institutions and procedures, not for authoritative legal interpretation, but for fact-finding and fact-assessment.

182. In proposing a new methodology for legal analysis which focuses on the reactions of national decision-makers to international incidents, William Reisman posits a version of this theme, "what is important in this exercise is not so much what happened as what effective elites think happened and how they react." W. REISMAN & A. WILLARD, INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS 21 (1988).