
Security Council Deliberations: The Power of the Better Argument

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Abstract

Why are legal arguments used in a political forum like the United Nations Security Council? This article draws on international law and international relations theory to provide an answer to that question, supported by a case study of the debates over NATO's intervention in Kosovo. The theoretical argument is that international law operates largely through a process of justificatory discourse within and constrained by interpretive communities, composed of the participants in a field of practice who set the parameters of what constitutes reasoned argumentation for that practice. Drawing insights from the theory of communicative action, the article claims that minimal preconditions for this discursive interaction exist in and around the Security Council. The debates over Kosovo are offered as evidence that the legal discourse not only occurs but has independent influence even in that political setting. While legal considerations did not directly cause any decision, concerns about precedent and reputation did influence positions taken as well as subsequent developments in the UN and NATO. The article concludes with an illustrative suggestion as to how Security Council deliberations could be improved, namely the adoption of a set of considerations to be taken into account in debates on humanitarian intervention. The suggested reform would not do away with the influence of hard power and perceived national interest, but, to paraphrase Jurgen Habermas, would give 'the power of the better argument' a fighting chance in Council decision-making.

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1 Introduction

NATO's intervention in Kosovo was an international incident¹ of historic significance which, among other things, galvanized legal debate on the doctrine of humanitarian intervention. That debate was conducted in part in the Security Council of the United Nations, highlighting an understudied dimension of the Council's role in world politics. While first and foremost an executive body responsible for the maintenance of international peace and security, it is also a venue for heated, unsystematic but often principled debate about appropriate standards of international behaviour and the extent and limits of the Council's authority to regulate that behaviour.

In the debates over the Kosovo intervention, opinions not surprisingly were sharply divided. What may be surprising, however, is the extent to which legal arguments were used to explain and justify positions.² Such arguments were pressed with varying degrees of vigour by most members of the Security Council, including the permanent five, and many others on the periphery of the debate. In a political forum deliberating on such a sensitive issue, what explains this reliance on legal arguments by even its most powerful members? Various international relations theories suggest alternative answers to that question, from the realist claim that powerful states benefit from invoking the rules of the international system they have written and can manipulate to their advantage, to a social constructivist sense that legal claims and the compliance pull of law relate not only to interests but the very identity of states.³

Another possible answer, which builds on various strands of international relations

¹ I use the term 'incident' here in the sense conveyed by M. Reisman and A. Willard in *International Incidents: The Law that Counts in World Politics* (1988), i.e. an international event that provokes reactions of decision-makers and legal authorities which, taken as a whole, contribute to our understanding of the relevant law.

² The public versions of these claims came mostly on the day the bombing began or afterwards, but the legal issues were considered – and to an extent debated – within and between governments before the event.

³ For a thorough exposition of contending international relations theories, see P. Katzenstein, R. Keohane and S. Krasner, *Exploration and Contestation in the Study of World Politics* (1998). For a summary by an international lawyer well-versed in the literature, see A.-M. Slaughter, *International Law and International Relations*, Hague Academy of International Law Lecture 2000, Chapter 1. See also, Slaughter, Tulumello and Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship', 92 *AJIL* (1998) 367; Clark Arend, 'Do Legal Rules Matter? International Law and International Politics', 38 *Virginia Journal of International Law* (Winter 1998) 107. Two recent edited volumes on international law and relations theory are R. Beck, A. Clark Arend and R. Vander Lugt (eds), *International Rules: Approaches from International Law and International Relations* (1999) and M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000). Representative samples of leading schools of IR theory include: structural realists, K. Waltz, *Theory of International Politics* (1979); Mearsheimer, 'The False Promise of International Institutions', 19 *International Security* (1994/1995) 329; institutionalists, R. Keohane, *International Institutions and State Power: Essays in International Relations Theory* (1989); liberal theorists, Doyle, 'Liberalism and World Politics', 80 *American Political Science Review* (Dec. 1986) 4 and Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', 51 *International Organizations* (1997) 513; social constructivists, J. Ruggie, *Constructing the World Polity: Essays on International Institutionalization* (1998), F. Kratochwil, *Rules, Norms and Decisions* (1989) and A. Wendt, *Social Theory of World Politics* (1999); and critical theory, R. Cox and T. Sinclair, *Approaches to World Order* (1996).

and international legal theory, is that the use of legal arguments is part of a broader discursive process in which norms are invoked to explain, defend, justify and persuade. Drawing on Jurgen Habermas' theory of communicative action, Thomas Risse and others suggest that argument is a distinctive form of social action and claim that certain forms of argument work better in some settings than others.⁴ From this perspective, the Security Council can be seen as a forum for deliberation on some of the most divisive issues of world politics. While legal arguments are never decisive in Council deliberations, they do shape the debates and often have an impact on positions taken, at least indirectly. The purpose of this article is to explore why that is the case.

The article proceeds as follows. I begin in the second section by outlining a conception of international law as operating largely through a process of 'justificatory discourse' within and constrained by 'interpretive communities', composed of the participants in a field of practice who set the parameters of what constitutes reasoned argumentation for that practice.⁵ I then turn to a specific enterprise, Security Council deliberations, and draw on the theory of communicative action to argue that legal discourse within an interpretive community occurs even in that highly political setting. The fourth section is devoted to an examination of the debates over the Kosovo intervention. I chose Kosovo as a case study because it provoked sharp debate on a relatively well-defined though far-reaching legal issue: Is humanitarian intervention lawful in the absence of an explicit Security Council authorization? Because the debate was over a sensitive security matter where one would expect legal considerations to be

⁴ Risse, 'Let's Argue!: Communicative Action in World Politics', 54 *International Organization* (Winter 2000) 1; Muller, 'International Relations as Communicative Action', in K. Fierke and K. E. Jorgensen (eds), *Constructing International Relations: the Next Generation* (2001) 160; Lose, 'Communicative Action and the World of Diplomacy', in *ibid.*, 179.

⁵ On the concept of justificatory discourse, I rely mainly on the works of Abram Chayes and Antonia Handler Chayes, and Thomas Franck. See in particular A. Chayes and A. H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995); T. Franck, *Fairness in International Law and Institutions* (1995). The idea of interpretive communities comes from Stanley Fish, a literary theorist who has written extensively on interpretation of domestic but not international law. See especially, *Is There a Text in this Class? The Authority of Interpretive Communities* (1980) and *Doing What Comes Naturally* (1989). For an extended application of the theory of interpretive communities to treaty interpretation see Johnstone, 'Treaty Interpretation: The Authority of Interpretive Communities', 12 *Michigan Journal of International Law* (1991) 371. For other references to the concept by international relations and law scholars, see Keohane, 'International Relations and International Law: Two Optics', 38 *Harvard International Law Journal* (1997) 487, at 491; Chayes and Chayes, *supra* this note, at 279; Alvarez, 'Constitutional Interpretation in International Organizations', in J.-M. Coicaud and V. Heiskanen (eds), *The Legitimacy of International Organizations* (2001), at 133–135; Koh, 'Why do Nations Obey International Law?', 106 *The Yale Law Journal* (1997) 2599, at 2639; Hurrell, 'International Law and the Changing Constitution of International Society', in Byers, *supra* note 3, at 331; Van Alstine, 'Dynamic Treaty Interpretation', 146 *University of Pennsylvania Law Review* (1998) 687, at 776; Howse, 'The Early Years of WTO Jurisprudence', in J. H. H. Weiler (ed.), *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade* (2000) 35, at 57. While interpretive communities have points in common with epistemic communities, (see Haas, 'Introduction: Epistemic Communities and International Policy Coordination', 46 *International Organization* (1992) 1) the intellectual debt in the international legal field is owed more to Oscar Schachter's idea of an invisible college of international lawyers. Schachter, 'The Invisible College of International Lawyers', 72 *Northwestern Law Review* (1977) 217.

dwarfed by politics, evidence that legal arguments mattered in that context would be especially revealing. I do not try to prove that legal considerations affected the decision to intervene itself, but rather that the positions taken in those debates can only be explained by the notion of discourse within an interpretive community, and that ultimately the discourse affected how the Kosovo episode played out and subsequent developments. The article concludes by using the analysis to support the oft-heard suggestion that the Council should formulate a set of considerations (not criteria) to be taken into account in future decisions on humanitarian intervention.

2 Legal Discourse within an Interpretive Community

A Law as a Process of Justificatory Discourse

In explaining the significance of law to world politics, many legal scholars and an increasing number of international relations theorists see law as operating largely through a particular form and process of discourse.⁶ Building on insights supplied by international law and international relations theory, as well as their own governmental experience, Abram Chayes and Antonia Handler Chayes offer a fully developed version of this position in positing a ‘management model’ of compliance with law (contrasted with an enforcement model).⁷ Their central argument is that ‘the interpretation, elaboration, application and ultimately enforcement of international rules is accomplished through a process of (mostly verbal) interchange among interested parties’.⁸ International relations are conducted in large part through ‘diplomatic conversation — explanation and justification, persuasion and dissuasion, approval and condemnation. . . . In this discourse, the role of legal norms is large.’⁹ Similarly, Thomas Franck claims that much of international relations is characterized by ‘fairness discourse’, which combines conceptions of procedural legitimacy and substantive justice, embedded in the rule structures of the international system.¹⁰ International institutions play a central role in this process and indeed Franck claims that fairness discourse is *necessary* for decision-making in international organizations. Thus both the Chayes’ and Franck stress the felt need of states to justify actions on the

⁶ See for example Abbott *et al.*, ‘The Concept of Legalization’, 54 *International Organization* (2000) 401, at 409 and 419.

⁷ Chayes and Chayes, *supra* note 5 at 26–27. The writings of Thomas Franck (a lawyer) and Friedrich Kratochwil (an international relations theorist) figure prominently in the Chayes’ theoretical analysis. For a clear and thorough account of the tradition from which *The New Sovereignty* emerged, see Koh’s review essay ‘Why Do Nations Obey International Law?’ *supra* note 5, at 2599.

⁸ Chayes and Chayes, *supra* note 5, at 118.

⁹ *Ibid.*, at 119. See also Setear, ‘An Iterative Perspective on Treaties: A Synthesis of International Relations and International Law Theory’, 37 *Harvard International Law Journal* (1996) 139. For a critique of Setear, see Byers, ‘Taking the Law out of International Law: A Critique of “The Iterative Perspective”’, 38 *Harvard International Law Journal* (1997) 201.

¹⁰ Franck, *supra* note 5, esp. Chapter 1. See also, Franck, ‘Bringing Down the Global Democratic Deficit’, Proceedings of the Annual Conference of the American Society of International Law, 6 April 2001.

basis of law and argue that international law is interpreted and applied through the discursive interaction of relevant actors, usually in response to specific disputes or international incidents and often in international organizations.

The felt need to justify has been emphasized by other scholars of both law and international relations and is seen as evidence that power alone is not determinative in world politics. As Oscar Schachter states, whatever their motives for acting, in order to be persuasive governments are impelled to justify their positions on grounds other than national interests: 'True, in some cases, they depend on power to be persuasive. But even in these cases, governments . . . generally base their legal case on grounds that are logically independent of their own interests and wishes.'¹¹ Similarly, Andrew Hurrell writes: 'being in a political system, states will seek to interpret their obligations to their own advantage. But being in a legal system that is built on the consent of other parties, they will be constrained by the necessity of justifying their actions in legal terms'.¹² Thus there is a substantial tradition of legal writing which, recognizing that international rules are rarely enforced but usually obeyed,¹³ presents a conception of law as fundamentally a discursive process.

What explains the felt need to engage in the discourse, to justify actions on the basis of law? Two sets of reasons can be posited. The first relates to instrumental calculations of interest. Governments cannot escape collective judgment of their conduct by other governments (expressed either bilaterally or in multilateral institutions), international lawyers and organs of public opinion.¹⁴ These appraisals matter for various interest-based reasons: states have an interest in reciprocal compliance by others on the particular matter; they have a stake in future cooperation with others and therefore want to preserve a reputation for reliability as well as 'good standing in the regimes that make up the substance of international life';¹⁵ and they have a long-term interest in the predictability and stability of a law-based international system.¹⁶

In addition to these instrumental benefits, claims of law-compliance may also relate the sense of obligation that comes through institutionalization and internalization of the law. The Chayes' complain that an interest-based account of legal regimes leaves out their role in 'modifying preferences, generating new options, persuading the

¹¹ O. Schachter, 'International Law in Theory and Practice', *RdC* (1985) at 59.

¹² Hurrell, 'International Society and the Study of Regimes: A Reflective Approach', in V. Rittberger (ed.), *Regime Theory and International Relations* (1993) 49, at 61.

¹³ As Louis Henkin put it many years ago, 'most states obey most law most of the time', L. Henkin, *How Nations Behave* (1968), at 253.

¹⁴ Schachter, 'Self-Defense and the Rule of Law', 83 *AJIL* (1989) 259, at 264.

¹⁵ Chayes and Chayes, *supra* note 5, at 27. See also T. Franck, *The Power of Legitimacy among Nations* (1990), at 38.

¹⁶ Andrew Hurrell argues that both weak and strong states have an interest in the maintenance of 'a law-impregnated international community'. For weak states, the 'fabric of the international legal order bolsters their very ability to maintain themselves as "states"'. Strong states on the other hand have a disproportionate influence in making the rules of the international order and have a stake in preserving the stability of the system from which they clearly benefit. Hurrell, *supra* note 12, at 60–61. Hurrell relies on Schachter, *supra* note 11, at 30.

parties to move toward increasing compliance with regime norms and guiding the evolution of the normative structure in the direction of the overall objectives of the regime'.¹⁷ The practice of international law 'is indicative of th[e] sense of being bound and gives specific content to the legal rules'.¹⁸ Respect for the rules of the international system is the price of membership. It generates pressure to comply with the law out of a common sense of being part of a community.¹⁹ States behave in a certain way because they see it as the 'right thing to do'. This sense of obligation is the result of socialization to the norm, and becomes embedded in legal and bureaucratic processes.

Socialization occurs through participation and interaction within the international system. Harold Koh explains the process as follows:

As governmental and non-governmental actors repeatedly interact within the transnational legal process, they generate and interpret international norms and then seek to internalize those norms domestically. . . . It is through this transnational legal process, this repeated cycle of interaction, interpretation and internalization, that international law acquires its 'stickiness', that nation-states acquire their identity and that nations come to 'obey' international law out of perceived self-interest.²⁰

Law becomes embedded in bureaucratic and political processes, and compliance becomes a matter of habit or bureaucratic routine. And because this internalization of the law occurs in all states that participate in a regime, a multinational network emerges that operates roughly in harmony. This network shares a body of knowledge and at least some expectations, beliefs and understandings that have arisen through interaction in the creation and implementation of the law. Because they have become embedded in their respective systems, they operate more or less in parallel as an institutional check on less cooperative forces within each state. And these networks include not only national officials but also international civil servants who are often at

¹⁷ Chayes and Chayes, *supra* note 5, at 228. For a discussion of this point see Keohane, *supra* note 5, at 487. More fundamentally, Kratochwil questions the causal connection between norms and behaviour that instrumental accounts try to make. In answering the question 'how do norms matter?', he states that the causal connection is not necessarily one of mechanics. Instead, 'a connection is established if we think along the lines of 'building a bridge' which allows us to get from 'here' to 'there'. This is what we do when we provide an account in terms of purposes or goals, or when we cite the relevant rule that provides the missing element, showing us the reasons which motivated us to act in a certain way. No 'mechanism', no hammer hitting a lever, no springs, no billiard balls are involved here. . . . We reconstruct a situation, view it from the perspective of the actor, and impute purposes and values based on the evidence provided by the actor himself (although not necessarily limited to his own testimony). This, in turn, provides us with an intelligible account of the reasons for acting . . .'. Kratochwil, 'How do Norms Matter', in Byers, *supra* note 3, at 66.

¹⁸ Hurrell, *supra* note 12, at 64.

¹⁹ 'Nations, or those who govern them, recognize that the obligation to comply is owed by them to the community of states as the reciprocal of that community's validation of their nation's statehood'. Franck, *supra* note 15, at 196. Or, as he puts it later: 'A state's membership of the community of nations . . . endows it with the legitimate capacity to enter into treaties as well as imposing on it the legitimate obligation to carry them out faithfully'. Franck, *supra* note 5, at 42.

²⁰ Koh, *supra* note 5, at 2651 and 2655. For related analyses of the internalization of norms, see Wendt, *supra* note 3; Hurd, 'Legitimacy and Authority in International Politics', 53 *International Organizations* (1999) 379; and Finnemore and Sikkink, 'International Norm Dynamics and Political Change', 52 *International Organizations* (1998) 887.

the heart of bureaucratic alliances, serving as focal points for interaction between domestic components of the networks. Indeed, international secretariats can be ‘incubators’ of coalitions, actively seeking to create transnational bureaucratic networks to support the organizations’ objectives.²¹ To the extent that these objectives are concretized in law, the networks are coalitions in support of compliance with the law.

B *The Concept of an Interpretive Community*

To claim that law is a distinctive form of discourse implies that good arguments can be distinguished from bad. Legal practice, as Ronald Dworkin and others have argued persuasively, is fundamentally an exercise in interpretation.²² In a domestic legal system, courts are the primary interpreters. In the decentralized international legal system, much law is interpreted not by an impartial arbiter but by domestic officials who are institutionally and politically predisposed to interpretations that favour their government or state. That does not mean, however, that invoking the law merely provides a rhetorical gloss on decisions taken for other reasons. Legal arguments about the meaning of a text do matter. Not only can good arguments be distinguished from bad, but the need to justify and explain affects the way states behave.

In seeking to make that case in the context of bilateral treaties, I invoked the notion of an interpretive community.²³ The concept was developed by Stanley Fish, a literary theorist, who claims it has explanatory power both in his field and in the field of legal

²¹ Chayes and Chayes, *supra* note 5, at 280. Citing with approval Keohane and Nye’s seminal work, ‘Transgovernmental relations and international organizations’, 27 *World Politics* (1974) 51. The implication is that international secretariats have a degree of independent power. For an extended argument on why they have such power and how it is used see Barnett and Finnemore, ‘The Politics, Power and Pathologies of International Organizations’, 53 *International Organization* (Autumn 1999) 699. On transnational governmental networks generally, see Slaughter, ‘Government Networks: The Heart of the Liberal Democratic Order’, in G. Fox and B. Roth (eds), *Democratic Governance and International Law* (2000) 199.

²² Dworkin, ‘Law as Interpretation’, 60 *Texas Law Review* (1982) 527, at 527. See also C. Sunstein, *Legal Reasoning and Political Conflict* (1996), at 167 (‘interpretation is a pervasive part of legal thinking’); Kratochwil, *supra* note 17, at 42; Fallon Jr., ‘Reflections on Dworkin and the Two Faces of Law’, 67 *Notre Dame Law Review* (1992) 553. For a critique of the view that law is fundamentally an interpretive practice, see Patterson, ‘The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory’, 72 *Texas Law Review* (1993) 1.

²³ The following discussion of interpretive communities is drawn in part from Johnstone, *supra* note 5. In that article, I applied the concept mainly to the debate over the reinterpretation of the Anti-Ballistic Missile Treaty seeking to demonstrate how an interpretive community was instrumental in causing the Reagan administration to back away from the reinterpretation. Perhaps having learned the lesson of the reinterpretation saga, the current Bush Administration, in advancing its proposed missile defence system, made it clear that it would renegotiate or withdraw from the ABM Treaty rather than advance an interpretation that would permit it to proceed. In revealing remarks to the press in Washington on 13 July 2001 Secretary of Defense Donald Rumsfeld said: ‘I think the United States of America ought not to be running around being seen as breaking treaties and violating treaty provisions and being legitimately or illegitimately accused of doing that. . . . It’s not what’s good for our country, which is why the president has said, starting in his campaign and practically every month since that we’ve got to move beyond the ABM Treaty. If you get to the point where we need to go beyond the treaty and we haven’t been able to negotiate something, obviously there’s a provision we can withdraw in six months, and that’s what

interpretation. Designed to avoid the pitfalls of both pure objectivity (meaning resides in the text) and pure subjectivity (meaning resides in the reader), it is best understood as a way of speaking about the power of institutional settings, within which assumptions and beliefs become matters of common sense.²⁴ Fish explains the concept as follows:

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 the 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 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 understandings and stipulations of relevance and irrelevance were the content of the consciousness of the 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.²⁵

The interpretive community constrains interpretation by providing the assumptions and categories of understanding that are embedded in the relevant practice or enterprise. All professional interpreters, Fish argues, 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.²⁶ 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. Texts do not have properties before they are encountered in situations; the meanings they have are

you’d have to do’. Tyler, ‘Contradictory US Words on ABM Issue Puzzle Russia’, *New York Times*, 14 July 2001. In other words, rather than putting forward an interpretation of the treaty likely to be branded as wrong, the Bush Administration chose to withdraw from it, the legality of which no one can question even if the policy may not be wise.

²⁴ These assumptions and beliefs are, for the community associated with the particular institutional setting, ‘facts’, which are not immutable but provide objectivity within a community of interpretation where they need not be questioned. Abraham, ‘Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair’ in S. Levinson and S. Mailloux (eds), *Interpreting Law and Literature: A Hermeneutic Reader* (1988) 115, 122–124.

²⁵ Fish, *Doing What Comes Naturally*, *supra* note 5, at 141–142.

²⁶ Cass Sunstein makes the same point: ‘Knowledge of the law consists in large part of prevailing interpretive practices within the legal community. In any field interpretive practices should be chosen because of the setting in which interpretation occurs. . . . Interpretive practices are a function of the role in which interpreters find themselves.’ Sunstein, *supra* note 22, at 33 and 169.

always a function of the circumstances in which they are encountered.²⁷ Thus interpretation is constrained not by the language of the text, or its context, but by the 'cultural assumptions within which both texts and contexts take shape for situated agents'.²⁸ 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. 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.²⁹ Disputes over meaning are resolvable through the 'conventions of description, argument, judgment and persuasion as they operate in this or that profession or discipline or community'.³⁰ 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.

Fish's theory of interpretation has much in common with Ronald Dworkin's theory of law, although they have critiqued each other's views.³¹ Dworkin puts interpretation at the centre of his theory and, like Fish, seeks a middle ground between pure objectivity and pure subjectivity. He too stresses that interpretation is enterprise-

²⁷ Fish, *Fish v. Fiss*, 36 *Stan. L.Rev.* (1984) 1325, at 1335. Stanley Fish and Owen Fiss engaged in a sustained debate over the way in which interpretation is constrained in domestic legal systems. Fiss, borrowing the idea of interpretive communities from Fish, posited a concept of 'bounded objectivity' and argued that judges are constrained by 'disciplining rules' to which they are committed by virtue of the office they occupy. Fiss, 'Objectivity and Interpretation', 34 *Stanford Law Review* (1982) 739. Fish responded that appeals to the authority of the judicial office do not help because the disciplining rules to which judges are presumably committed are in need of interpretation themselves. The constraints on interpretation are not external, but rather are embedded in the practice or enterprise of judicial interpretation itself. Fish, *supra* note 25, at 141–142.

²⁸ Fish, *supra* note 25, at 300.

²⁹ Fish, *supra* note 27, at 1343.

³⁰ Fish, *supra* note 25, at 116. 'Interpreters are constrained by their tacit awareness of what is possible and not possible to do, what is and is not a reasonable thing to say, what will and will not be heard as evidence, in a given enterprise; and it is within those same constraints that they see and bring others to see the shape of the documents to whose interpretation they are committed.' Fish, 'Working on the Chain Gang: Interpretation in Law and Literature', 60 *Texas Law Review* (1982) 551, at 562.

³¹ In a nutshell, Dworkin argues that the constraints imposed by the practices of the professional literary community are so weak that interpretation is rendered wholly subjective by Fish's theory. Fish on the other hand finds Dworkin's account of interpretation to be generally attractive, but accuses him of falling away from his own best insights about the fallacies of pure objectivity by assuming that existing law in the form of a chain of decisions has at some level the status of 'brute fact' and is not the product of interpretation. See Dworkin, *supra* note 22; Fish, *supra* note 30; Dworkin, 'My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk about Objectivity Any More', in W. J. T. Mitchell (ed.), *The Politics of Interpretation* (1983) 287; Fish, 'Wrong Again', 62 *Texas Law Review* (1983) 299; and R. Dworkin, *Law's Empire* (1986), at 77 and 425, n. 23. An article that compares and criticizes both theories

specific and claims that constraints are inherent in the enterprise.³² He describes law as an ‘argumentative attitude’³³ and, in the simplest formulation of his thesis, states that ‘constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong’.³⁴ In short, the goal of interpretation is to make a text the best it can be.

Dworkin divides interpretation into three stages in which different degrees of consensus are needed if the interpretive attitude is to flourish.³⁵ In the first, ‘pre-interpretive’ stage, there must be a great degree of consensus within an interpretive community about the rules and standards taken to provide the tentative content of the practice.³⁶ To illustrate the point, Dworkin states about the concept of justice: ‘the thesis that abstract art is unjust is not even unattractive, it is incomprehensible as a theory about justice because no competent pre-interpretive account of that practice of justice embraces the criticism and evaluation of art’.³⁷ At the second, interpretive stage, interpreters share some convictions about the standard features of the practice and why it is worth pursuing; if one advances justifications or interpretations that go beyond the accepted boundaries of a practice, one is marked ‘as outside the community of useful or at least ordinary discourse about the institution’. At the third, post-interpretive stage, the interpreter needs more substantive conviction

is Patterson, ‘The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory’, 72 *Texas Law Review* (1993) 1. For Fish’s response to Patterson, see ‘How Come You Do Me Like You Do? A Response to Dennis Patterson’, 72 *Texas Law Review* (1993) 57. Patterson’s counter-reply is ‘You Made Me Do It: My Reply to Stanley Fish’, 72 *Texas Law Review* (1993) 67.

³² ‘The history of shape of a practice or object constrains the available interpretations of it.’ Dworkin, *supra* note 31, at 52. ‘Participants in a practice: share a vocabulary, must understand the world in similar ways and have interests and convictions sufficiently similar to recognize the sense in each other’s claims, to treat them as claims rather than just noises. That means not just using the same dictionary but sharing what Wittgenstein called a form of life sufficiently concrete so that the one can recognize the sense and purpose in what the other says and does’. *Ibid.*, at 63.

³³ ‘Law’s empire is defined by attitude, not territory or power or process. . . . It is an interpretive, self-reflective attitude addressed to politics in the broadest sense. . . . Law’s attitude is constructive: it aims, in the interpretive spirit to lay principle over practice, to show the best route to a better future, keeping the right faith with the past. It is, finally, a fraternal attitude, an expression of how we are united in community though divided in project, interest and conviction.’ Dworkin, *supra* note 31, at 413.

³⁴ *Ibid.*, at 52.

³⁵ The following account is from *ibid.*, at 65–68.

³⁶ ‘Law cannot flourish as an interpretive enterprise in any community unless there is enough initial agreement about what practices are legal practices so that lawyers argue about the best interpretation of roughly the same data. . . . I do not mean that all lawyers everywhere and always must agree on exactly which practices should count as practices of law, but only that lawyers of any culture where the interpretive attitude succeeds must largely agree at any one time. We all enter history of an interpretive practice at a particular point; the necessary pre-interpretive agreement is in that way contingent and local’. *Ibid.*, at 90–91. Note that Dworkin states explicitly that some interpretation is necessary even at the pre-interpretive stage. But because the degree of consensus is so great, the classifications it yields are treated as given in day-to-day reflection and argument. *Ibid.*, at 66. Stephen Guest argues that Stanley Fish’s criticism of Dworkin is misplaced because he misunderstands him on this point. Stephen Guest, *Ronald Dworkin, Jurists: Profiles in Legal Theory* (2nd ed., 1997), at 40–41.

³⁷ Dworkin, *supra* note 31, at 75.

tions about what kinds of justifications really would show the practice in the best light.³⁸ According to Dworkin, what matters at the post-interpretive stage, is not so much the conventions of an interpretive community but rather the coherent set of principles that reside in the ‘political structure and legal doctrine of the community’ as a whole.³⁹ Hard cases arise when the threshold test of fit (at the second stage) does not discriminate between two or more competing interpretations. To decide which of those interpretations is ‘right’ (in Dworkin’s theory, there is only one right answer), his ideal judge Hercules must ask ‘which shows the community’s structure and institutions and decisions – its public standards as a whole – in a better light from the standpoint of political morality’.⁴⁰

Thus Dworkin and Fish share the view that law is an interpretive practice and that all interpretation is enterprise-specific, in the sense that different standards and techniques of interpretation apply in different enterprises. They also agree that legal interpretation is constrained in some way (it is not purely subjective or discretionary), but they disagree about the source of the constraint. Fish sees interpretation as an intersubjective enterprise, whereas Dworkin’s Hercules is engaged in a more private exercise – a ‘conversation with himself, as joint author and critic’.⁴¹ Moreover, Dworkin believes that Hercules can and should appeal to something external to the law – moral and political philosophy – to decide what puts it in its best light. Cass Sunstein is troubled by this feature of Dworkin’s theory. He argues that lawyers’ inquiry into what is the best interpretation of the law draws from principles already internal to the legal culture. It centres not on political philosophy but on ‘what positions now within the legal culture can be supplied by good arguments’.⁴² Kratochwil makes the more pointed critique that attempting to show there are single right answers even in hard cases is virtually impossible, presumably because in a pluralist environment values are deeply contested.⁴³ Fish insists that his account of interpretation cannot be faulted on the grounds that it is a private affair — he claims it is anything but a ‘conversation with oneself’⁴⁴ — but his notion of a professional

³⁸ *Ibid.*, at 68.

³⁹ *Ibid.*, at 255.

⁴⁰ *Ibid.*, at 256.

⁴¹ This is Dworkin’s metaphor for interpretation. Dworkin, *supra* note 31, at 58.

⁴² C. Sunstein, *The Partial Constitution* (1993), at 113. In this respect, Sunstein’s position is closer to that of Stanley Fish although he also criticizes the latter’s approach on the grounds that it amounts essentially to a rejection of the idea that interpretive disputes can be settled through reason or argument (at 114).

⁴³ Kratochwil, *supra* note 17, at 42. See also Howse, *supra* note 5, at 41. Although this critique of the one right answer thesis would seem to carry particular weight in the international legal order, Thomas Franck finds much in Dworkin’s theory of law as integrity that is useful for his own analysis of fairness discourse in international law and institutions. See Franck, *supra* note 5, at 26–46.

⁴⁴ In responding to Patterson, Fish strongly and persuasively counters the charge that his theory does not give due account to the role of intersubjectivity in the constitution of meaning: ‘but that’s all I do; that’s what interpretive communities are all about’. Fish, *supra* note 31, at 60.

community of interpreters has been criticized for being too insular, too sealed, too little open to critical reflection and influences from outside the community.⁴⁵

Jurgen Habermas has considered this problem⁴⁶ and, building on his theory of communicative action, emphasizes the importance of argumentation to legal interpretation. Normative judgments, he argues, are made not by logical inference or conclusive evidence but ‘discursively . . . by way of a justification that is carried out with arguments’.⁴⁷ From this perspective, legal discourse is interactive and the political ideal is ‘an open society of interpreters’.⁴⁸ Habermas does not address himself to the international field, but it seems that in the international legal system something approximating an open society of interpreters may actually exist. There are institutions whose legal opinions carry special weight, such as the International Court of Justice, but because the system is non-hierarchical, no single institution has ultimate interpretative authority. The influence of court judgments and advisory opinions, decisions of intergovernmental bodies, statements of governmental officials, scholarly expositions and the views of the many other participants in the international legal process depend as much on their persuasive power as institutional authority.⁴⁹

Legal scholars have long argued that, in any interpretive dispute, the range of

⁴⁵ Goldsmith, ‘Is there Any Backbone in This Fish? Interpretive Communities, Social Criticism and Transgressive Legal Practice’, 23 *Law and Social Inquiry* (1998) 373. See also Patterson, *supra* note 31. Fish does offer an account of how members of an interpretive community may change their mind or views (Fish, *supra* note 25, at 146), but some of his explanations of the internal constraints on interpretation seem to suggest that it is intellectually impossible for an interpreter to diverge from the conventions of his or her community. For example, he says that the interpreter is ‘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 thought’. Fish, *supra* note 27, at 1333.

⁴⁶ Habermas questions whether Dworkin’s ‘monological’ or single author model of judge Hercules, distinguished by her privileged access to the truth, should be held up as a political ideal. J. Habermas, *Between Facts and Norms* (1996) 223. He cites approvingly Frank Michaelman’s complaint that Hercules is a loner: ‘What is lacking is dialogue. . . . His narrative constructions are monologous. He converses with no one except through books. He has no encounters. He meets no otherness. Nothing shakes him up. No interlocutor violates the inevitable insularity of his experience and outlook.’ Michaelman, ‘The Supreme Court 1985 Term – Foreword: Traces of Self-Government’, 100 *Harvard Law Review* (1986) 4, at 76.

⁴⁷ Habermas, *supra* note 46, at 226. Substantial reasons cannot ‘compel’ an end to normative argument. The discourse, rather, is an unending process of argumentation striving toward a limit’ which is only reached provisionally when an uncoerced agreement on the acceptability of the disputed claim emerges (at 227). ‘The practice of argumentation is characterized by the intention of winning the assent of a universal audience to a problematic proposition in a non-coercive but regulated contest for the better arguments based on the best information and reasons. . . . Whether norms and values could find the rationally motivated assent of all those affected can be judged only from the intersubjectively enlarged perspective of the first-person plural’ (at 228).

⁴⁸ *Ibid.*, at 223.

⁴⁹ Thomas Franck argues that the weight of even a court judgment in a domestic legal system comes down to persuasive power: ‘The power of the court to do justice depends on the persuasiveness of the judge’s discourse, persuasive in the sense that it reflects not their own but society’s value preferences’. Franck, *supra* note 5, at 34.

possible legal arguments that can be deployed is not infinite.⁵⁰ Even a deconstructionist like Martti Koskenniemi notes that legal arguments form patterns and that there is a limited set of arguments that can acceptably be invoked to justify a solution.⁵¹ He adds that the arguments are inherently contradictory, but as Stephen Toope points out, these opposites or antimonies do not render discourse meaningless, but rather help to shape and construct the discourse.⁵² Similarly, Kratochwil argues that radical rule scepticism dissolves

as soon as we leave the atomistic world of the single speaker and take more seriously the notion that language is an intersubjective practice. As a practice, a rule not only tells me how to proceed in a situation that I might never have faced before, it is also governed by certain conventions of the community of which I am a part. To this extent, my interpretation of a rule as well as my uses of words are monitored and reinforced by a group of competent speakers. Thus, while there are likely to be disagreements about the proper use of a term or the interpretation of a rule, purely idiosyncratic uses are excluded even if the use of the concepts remain contestable and contested.⁵³

Intersubjectivity, as that term is used by Kratochwil and others, does not connote simple agreement, but rather is about engaging in a collectively meaningful activity, an activity collectively understood. Gerald Postema's description of friendship as a social practice helps illustrate the point:

The history of the friendship is a common history and the complex meaning of the relationship is collectively constructed [by the friends] over the course of the 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, 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.⁵⁴

Legal discourse, similarly, is not simply the search for a negotiated agreement on the meaning and application of legal terms. Nor is it the search for some legal truth 'out there', waiting to be discovered. It is a practice that operates on the basis of common understandings and shared beliefs about the relationship governed by the rules in question. Thus interpretation of international law is the search for an intersubjective understanding of the norm at issue: the interpretive task is to ascertain what the law means to the parties to a treaty or subjects of the law

⁵⁰ Chayes and Chayes, *supra* note 5, at 119. Schachter, *supra* note 11, at 46; Alvarez, *supra* note 5, at 134, 136. Sunstein makes the same point about domestic legal interpretation. Sunstein, *supra* note 22, at 13.

⁵¹ M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989), at 48. See also *Idem*, 'The Place of Law in Collective Security', 17 *Michigan Journal of International Law* (1996) 455, at 478; *Idem*, 'The Politics of International Law', 1 *EJIL* (1990) 4.

⁵² Toope, *Emerging Patterns of Global Governance*, in Byers, *supra* note 3, at 98. Similarly, Franck states 'what matters is how the tension [between opposing notions] is managed discursively through what Koskenniemi calls the "social conception" of the legal system'. Franck, *supra* note 5, at 23.

⁵³ Kratochwil, *supra* note 17, at 52.

⁵⁴ Postema, "'Protestant' Interpretation and Social Practices', 6 *Law and Philosophy* (1987) 283, at 309–310.

collectively rather than to any one of them individually. It is an interactive process, the parameters of which are set by an interpretive community. The members of this community are engaged in a form of practice, whose general purpose they agree on. That level of agreement is sufficient to make rational discourse among them possible and for them collectively to be able to distinguish good legal arguments from bad.

C The Composition of an Interpretive Community

What is the composition of the interpretive community associated with the practice of international law? The concept is meant to describe the nature of interpretation and not an actual collection of people, with identification cards. However, it is useful to consider who might actually belong to this community to appreciate that the concept is not a mere abstraction. It is easiest to imagine a community composed of two concentric circles. The inner circle consists of all individuals directly or indirectly responsible for the formulation, negotiation, conclusion, implementation and application of a particular legal norm. It is surrounded by an outer circle of lawyers and other experts engaged in professional activities associated with the practice or issue area regulated by the norm. The line between the inner and outer circle is blurred. Thus, for example, in the Kosovo case, representatives of governments who were not on the Security Council but who participated in the debate and had been involved in Council debates on humanitarian intervention in the past (like India) or had a special stake in the outcome (like Bosnia), are in both the inner and outer circle.

The inner circle (or what I call elsewhere the narrow interpretive community) results from the process of bringing rules into existence and participating in their implementation and application. It generates a network of government and intergovernmental officials who share a set of assumptions, expectations and a body of consensual knowledge based on what they have learned about each other. This consensual knowledge yields, in Fish's terms, 'assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance' that enables them to interpret a text in common.

The outer circle (or broader community) is composed of an amorphous group of all those regarded as possessing expertise in international law and/or special knowledge in the relevant field. It is analogous to what Oscar Schachter has called the invisible college of international lawyers – a group of professionals dispersed throughout the world who are dedicated to a common intellectual enterprise and engage in a continuous process of communication and collaboration.⁵⁵ The concept is like but not identical to an epistemic community,⁵⁶ the main difference being that an interpretive community offers not only knowledge and policy advice but more importantly passes judgment. Its job, so to speak, is to decide which interpretation of a treaty or other law is best.

More specifically, the outer circle is composed of judges, government officials, international civil servants, lawyers, scholars and non-governmental experts who

⁵⁵ Schachter, *supra* note 5, at 217.

⁵⁶ Haas, *supra* note 5.

participate in some way in the particular field of international law or practice in which the interpretive dispute arises. Their competency or expertise comes from training and immersion in international law. As participants in a field of practice, they have come to understand its purpose and conventions, learned not merely as a set of abstract rules but through the acquisition of know-how, a mastering of discipline or technique.⁵⁷ Their values may vary with the political and cultural community from which they hail, but the members of the legal interpretive community share a perspective and way of understanding the world acquired through their immersion in the law and interaction with one another.

A legal adviser, either to a government or international organization, is an important member of the community. His job is to serve a client, but performing that job well requires him not only to design legal strategies and defend claims but also to provide legal opinions based on his best judgment of what the law is. In this capacity he acts much like a judge, though without the power to issue authoritative interpretations by virtue of the office alone. As Schachter argues, a creative lawyer can invoke arguments that suit his client's ends, 'but he is able to do this successfully only to the extent that his positions are acceptable (at least acquiesced in) by other states concerned. . . . A legal adviser . . . will be expected to express an opinion or give a ruling that will meet the test of legal credibility.'⁵⁸ The opinion of a legal adviser to a government is a gauge of what the judgment of the interpretive community is likely to be on a particular course of action. The opinion of a legal adviser to an international organization is that plus an element of community judgment itself. An international legal adviser rarely if ever has the final say, but the weight of such opinions can be considerable.

To summarize, an interpretive community loosely composed of two concentric circles of professionals associated with a field of legal practice sets the parameters of discourse within that practice and affects how the law is interpreted and applied. It is in a sense the arbiter of what constitutes a good legal claim; it represents the institutional mechanism closest to an impartial arbiter that most international disputes provide. Its influence derives from its ability to issue credible legal judgments. It wields that influence directly by evaluating particular interpretations and applications of the law, and indirectly in the way states measure their own interpretations against anticipated judgment of the community. The extent of influence will depend on how unified the interpretive community is, which will vary with the setting. I turn now to a particular field of practice, the enterprise of Security Council decision-making, in order to consider whether an interpretive community operates there and if so whether it has any influence on deliberations in and around the Council.

⁵⁷ Postema, *supra* note 54, at 304.

⁵⁸ Schachter, *supra* note 11, at 42, 46 and 50.

3 The Security Council as Forum for Justificatory Discourse

International legal discourse takes place in various ways and settings, but it is most intense in international organizations.⁵⁹ When the relevant law is UN Charter articles on peace and security, the Security Council is the central arena. A political body, the Council does not employ judicial criteria when it makes decisions, but it is subject to the limitations of the Charter and sometimes acts in a quasi-judicial mode.⁶⁰ It made determinations of law when it declared Iraq's annexation of Kuwait to be null and void and held it liable for direct losses caused by the invasion.⁶¹ It elaborated the content of Charter provisions on international peace and security by declaring the proliferation of weapons of mass destruction, as well as economic, social, humanitarian and ecological sources of instability, to be threats to peace.⁶² Most importantly for the purposes of this analysis, every operational decision it makes is an implicit interpretation of the Charter and other relevant law – some with potentially far-reaching legal consequences.⁶³ The establishment of criminal tribunals for former Yugoslavia and Rwanda are dramatic examples. More generally, much Council practice in the areas of peacekeeping, peace-building and peace enforcement gives content to the norms and, on occasion, pushes the boundaries of what is deemed legally acceptable. Either through a rational application of lessons learned or the

⁵⁹ International organizations are 'focused and intensified arenas for public justification'. Chayes and Chayes, *supra* note 5, at 125.

⁶⁰ Schachter, 'The United Nations Legal Order: An Overview', in C. Joyner (ed.), *The United Nations and International Law* (1997) 12.

⁶¹ In Resolution 687, the Security Council made a number of other 'quasi-judicial' determinations, including its findings about the border between Iraq and Kuwait and on Iraq's weapons of mass destruction. That the Council was aware of the unusual action it was taking is revealed by the careful wording of the resolution. It did not, for example, purport to impose a border between Iraq and Kuwait but rather order demarcation of a pre-existing border. The US was careful to make this distinction in explaining its vote, and Ecuador abstained precisely because it feared the Council was opening the door to establishing unsettled borders elsewhere, such as between Ecuador and Peru. Similarly, it did not declare Iraq to be in violation of the Nuclear Non-Proliferation Treaty, but rather referred to 'reports in the hands of Member States' about Iraq's attempts to acquire nuclear material. In other words, the Council went to considerable rhetorical lengths to avoid the impression that it was making legal determinations. For a fuller analysis of the legal implications of Resolution 687, see I. Johnstone, *Aftermath of the Gulf War* (1994); Franck, *supra* note 5, at 232–233; Schachter, 'UN Law in the Gulf Conflict', 81 *AJIL* (1991) 452, at 456–457; and R. Higgins, *Problems and Process: International Law and How We Use It* (1994) at 183–185.

⁶² Declaration of the Security Council, UN Doc. S/23500, 31 January 1992. Even more far-reaching, in January 2000, the Security Council held a meeting on the impact of AIDS on peace and security in Africa and worldwide, signalling that the pandemic should be viewed as a non-military threat to security. See Letter dated 31 January 2000 from the President to the Security Council addressed to the President of the General Assembly, UN Doc. S/2000/75, 31 January 2000. See also, UN Doc. S/RES/1308 (2000), 17 July 2000, on AIDS and peacekeeping.

⁶³ Schachter, *supra* note 60, at 9. See also Higgins, *supra* note 61 (1994), at 28; Franck, *supra* note 5, Chapter 7; Caron, 'The Legitimacy of the Collective Authority of the Security Council', 87 *AJIL* (1993) 552; Abbot, *supra* note 6, at 417. Michael Byers suggests that more scholarly attention should be devoted to the role of the Security Council in the development of customary law, given the increased level of Council activity in recent years, M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999) 42.

inertial impact of precedent, what seems to work in one case will often be tried in the next. In this way, demonstrably successful activities (or at least those that do not manifestly fail) tend to reinforce inchoate norms.⁶⁴

A *Communicative Action and Strategic Argumentation*

Thus discourse about the meaning and implementation of legal norms does take place in the Council. Legal arguments are often made and presumably they serve a purpose. To understand what purpose they serve, recent applications of Habermas' theory of communicative action to world politics and diplomacy are instructive. In one such application, Thomas Risse claims that arguing is a form of social action that has an impact on the conduct of world politics.⁶⁵ The theory of communicative action holds that there are at least three kinds of communicative behaviour: bargaining based on fixed preferences; strategic argumentation, in which arguments are used to justify positions and persuade others to change their minds; and 'true reasoning', in which actors seek a reasoned consensus on the basis of shared understandings, where each actor not only tries to persuade but is also prepared to be persuaded.⁶⁶ The last is Habermas' ideal of communicative action. Central to the theory is the notion of an 'ideal speech situation', within which discourse is based on openness, equality and the absence of coercion.⁶⁷ The goal is mutual understanding, unaffected by power relationships or any other factors extraneous to 'the power of the better argument'.

Distinguishing true reasoning or sincere communication from strategic argumentation in world politics is a challenge.⁶⁸ How does one know when, if ever, diplomacy is oriented towards mutual understanding? And more to the point, is it possible to conceive of any diplomatic interaction unaffected by power relationships? Fortunately, it is not necessary to make that distinction in order to support the case that legal argumentation does matter in a setting like the Security Council. Echoing Schachter's point that in order to be persuasive, governments are impelled to justify

⁶⁴ For a more detailed discussion of this point, see Johnstone, 'UN Peacebuilding: Consent, Coercion and the Crisis of State Failure', in Canadian Council on International Law, *From Territorial Integrity to Human Security*, 28th Annual Conference (1999) 186.

⁶⁵ Risse, *supra* note 4, at 4–5. See also Muller, *supra* note 4, at 160; Lose, *supra* note 4, at 179.

⁶⁶ *Ibid.*, at 7–9.

⁶⁷ Habermas does not argue that the ideal speech situation must exist for communicative action to occur, but rather that it is embedded in the very nature of the discourse. 'Insofar as participants understand themselves to be engaged in a cooperative search for common ground solely on the basis of good reasons, then they must – as a condition of the intelligibility of their activity – assume that the conditions of the ideal speech situation are satisfied'. Lose, *supra* note 4, at 184. In other words, as Willem Van Reijen puts it, 'if we had to assume that most people generally lie and that everybody always behaves in a cynical way, then language would lose its mission and understanding would be impossible'. Van Reijen, 'The Erosion of Western Culture: Habermas' Magum Opus', in D. Horster, *Habermas: An Introduction* (1992) 59, at 64.

⁶⁸ I would like to thank Michael Barnett for pointing out that Habermas' distinction between strategic and sincere communication is fine analytically but may not hold up in practice; there are elements of strategic language even in the most sincere utterances. For an argument that Habermas does not adequately defend the distinction between true and strategic communicative action, see Johnson, 'Arguing for Deliberation: Some Skeptical Considerations', in J. Elster (ed.), *Deliberative Democracy* (1998) 161, at 173.

their position on grounds other than self-interest, John Elster asserts that in public settings impartial arguments and appeals to collective interest fare better than self-serving arguments.⁶⁹ He offers five possible reasons as to why this is the case, none of which turn on speakers actually being impartial, only appearing to be so.⁷⁰ That impartial arguments are used for strategic reasons does not mean they have no independent efficacy in public settings. Elster refers to the ‘civilizing force of hypocrisy’: even if impartial arguments are used hypocritically, they often lead to concessions to the general interest and more equitable outcomes from the debate.⁷¹ This is because the argument or justification cannot correspond perfectly with self-interest or it will appear partial and therefore be greeted with suspicion. Nor can the speaker change her position once it ceases to serve her interest because that will be seen as opportunistic.⁷²

Any argument, therefore – even one made hypocritically – is more likely to succeed if pure self-interest is diluted. Impartial arguments cannot be dismissed as *ex post* rationalizations.⁷³ Having to pay lip service to the collective interest and shared principles does not turn states into paragons of virtue, but it does force them to moderate the rhetorical positions they take. This in turn can lead to what Risse calls ‘argumentative self-entrapment’.⁷⁴ Once governments accept a legal norm rhetorically, they begin to argue over its interpretation and its application to the particular case at hand, rather than the validity of the law itself. This creates a ‘discursive opening’ for their critics – ‘if you say you accept human rights, then why do you systematically violate them?’ – which eventually induces governments to match words with deeds.⁷⁵ The deeds may either be tactical concessions in order to give their claims the ring of plausibility, or they may reflect major policy choices. David Rieff’s

⁶⁹ Elster, ‘The Strategic Uses of Argument’, in K. Arrow, *et al.* (eds), *Barriers to Conflict Resolution* 236 (1995). See also the chapters by Elster, ‘Introduction’, ‘Deliberation and Constitution-Making’, and Fearon, ‘Deliberation as Discussion’ in Elster, *supra* note 68. According to Ambassador Danilo Turk, Permanent Representative of Slovenia to the United Nations, who was a member of the Security Council during the Kosovo debates, arguments based on national interest are often couched in quasi-judicial terms because the legitimizing role of the Council is valued. Interview with the author, 21 August 2001.

⁷⁰ The five reasons are: if others believe one is arguing from principle, they may be more willing to back down; public-regarding language can be used as a subterfuge for a deal among special interests; impartial arguments may actually persuade others; there is a social norm against taking positions that cannot be justified in terms of benefits to the collectivity; and arguments based on principle rather than bargaining power may help an opponent save face. Elster, ‘Strategic Uses’, *supra* note 69, at 246–247. See also, Elster ‘Deliberation’, *supra* note 69, at 101.

⁷¹ Elster, ‘Strategic Uses’, *supra* note 69, at 249. See also Gambetta, ‘Claro!: An Essay on Discursive Machismo’, in Elster, *supra* note 68, at 19, 23.

⁷² Cf. Goldsmith and Posner, ‘Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective’, University of Chicago John M. Olin Law and Economics Working Paper No. 108 (2d series) at 3, www.law.uchicago.edu/Publications/Working/index.html, who argue that, when interests change rapidly, so do the rationalizations.

⁷³ Elster, ‘Deliberation’, *supra* note 69, at 104.

⁷⁴ Risse, *supra* note 4, at 32.

⁷⁵ *Ibid.*, at 32–33. See also Louis Henkin: ‘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’. Henkin, *supra* note 13, at 45.

comment on the intervention in Kosovo is suggestive: ‘hoist on the petard’ of their professed commitment to human rights, Western states could not easily avoid acting.⁷⁶ The point holds even more true for East Timor: ignoring the violence aimed at overturning the UN-sponsored vote on independence there would have been extremely awkward in the aftermath of Kosovo, even if calculations of short-term national interest might have counselled caution.

Thus whether driven by the ‘civilizing’ force of strategic argumentation or the logic of true reasoning and mutual persuasion, arguments based on norms can have an independent impact on behaviour. According to the first logic, impartial arguments advance interests because both the speaker and target of the argument see instrumental benefits from preserving a reputation for norm-guided behaviour. According to the second logic, the argumentative process works because both actors are genuinely open to persuasion and are prepared to change their conceptions of interest. Either way, the outcome of discourse can change the environment that the actors inhabit. It affects the normative climate in which strategic arguments are deployed, and it may change the very beliefs and identities of the actors.⁷⁷ In a setting like the Security Council, it may be impossible to know whether the legal arguments in a given case are strategic or sincere (if any are!), but it is not necessary to make that distinction to support the case that arguments do matter.

B Pre-conditions for Effective Discourse

Habermas identifies several preconditions for effective communicative action, two of which are particularly relevant to Security Council deliberations: first, the actors must inhabit a ‘common lifeworld’; and second, they must recognize each other as equal participants in the discourse, have equal access to it, and the discourse must be open and public in nature.⁷⁸ These rather abstract principles raise a host of questions about the real world of Security Council decision-making, which I shall address in turn. I am not seeking to demonstrate that the Council approximates an ‘ideal speech situation’ – clearly it is anything but – but rather to use the analytical framework suggested by the theory as a way of exploring whether the minimal conditions necessary for some discourse based on law exists.

A common lifeworld consists of shared experiences and assumptions; ‘a supply of collective interpretations [actors have] of the world and of themselves, as provided by

⁷⁶ Rieff, ‘A New Age of Liberal Imperialism’, *World Policy Journal* (Summer 1999) 1, at 7.

⁷⁷ This is why, in Risse’s view, the theory of communicative action helps clarify the mutual constitutiveness of agent and social structure that social constructivism emphasizes: ‘Agents are not simply the puppets of social structure, since they can actively challenge the validity claims inherent in any communicative action. At the same time, they are social agents that produce and reproduce the intersubjective structures of meanings through their communicative practices’. Risse, *supra* note 4, at 10. Similarly, Kratochwil asserts: ‘Actors are not only programmed by rules and norms, but they reproduce and change by their practice the normative structures by which they are able to act, share meanings, communicate intentions, criticize claims and justify choices. Thus one of the most important sources of change, neglected in the present regime literature, is the practice of the actors themselves and its concomitant process of interstitial law-making in the international arena.’ Kratochwil, *supra* note 3, at 61.

⁷⁸ See Muller *supra* note 4, at 162; Risse, *supra* note 4, at 10–11.

language, a common history or culture.⁷⁹ It includes a common body of norms and rules perceived as legitimate, and provides actors with a ‘repertoire of collective understandings to which they can refer when making truth claims’.⁸⁰ Risse notes that the degree to which a common lifeworld exists in international relations varies considerably between regions and issue areas. He believes that pluralistic security communities based on a collective identity and shared values and norms, as well as heavily regulated regimes like human rights and trade, might constitute a common lifeworld.⁸¹

The Security Council is different, as Risse himself emphasizes. It is designed to be as heterogeneous as possible, with balanced representation from each geographical region, and with 10 of its 15 members rotating every two years. The issue-area it encompasses – peace and security – is broad and getting broader. It would seem to be rather far-fetched to suggest that a shared culture and common values inform deliberations in the Security Council, but so demanding a condition is not necessary for reasoned discourse to occur. In any communicative enterprise, the participants tend to operate according to a set of conventions, practices and shared understandings. The more deeply rooted the shared ideas and values, the more profound the discourse is likely to be, but that does not mean reason and persuasion are inconsequential when such deep roots are lacking. All that is necessary is a sense of being in a relationship of some duration, from which common meanings and expectations have emerged, and of being engaged in an enterprise the general purpose of which all understand in roughly the same way. As Toope points out, the social constructivist analysis of international relations does not assume the current existence, or even the ultimate creation, of a shared philosophical framework underlying the interaction of states in the international arena. ‘The assertion is more careful, that some “common meanings” may emerge through the interaction of various actors (including States) in bilateral and multilateral fora; these intersubjective meanings in turn allow for the evolution of legal rules.’⁸² The emphasis is on meanings and understandings, not values or political theory.

Because there is a normative framework that structures Security Council debates,

⁷⁹ Risse, *supra* note 4, at 10–11 (citing J. Habermas, *Theory of Communicative Action*, vol. 2, (1981), at 209).
⁸⁰ *Ibid.*, at 11. See also Muller, *supra* note 4, at 162.

⁸¹ For an excellent recent volume of studies on security communities, see E. Adler and M. Barnett (eds), *Security Communities* (1998).

⁸² Toope, *supra* note 52, at 95. He adds that ‘The common meanings which arise in regimes do not depend on one overarching philosophical goal such as the triumph of liberalism, but upon an incremental growth of shared perceptions fostered by participation in processes of norm evolution which are deemed to be fair and open’ (at 98). See also, M. Finnemore, *National Interests and International Society* (1996). Lars Lose makes the same point about the understanding of social integration that follows from the theory of communicative action. It does not rely on ‘pregiven common values, but is embedded in the dialectical relationship between agents and the structures of the lifeworld as mediated by communicative interaction. What is interesting about this concept of social integration is that it conceptualizes social integration in a modern pluralistic world where a multitude of different lifeworlds exist’. Lose, *supra* note 4, at 186–187, following Warnke, ‘Communicative Rationality and Cultural Values’, in S. K. White (ed.), *The Cambridge Companion to Habermas* (1996).

not any arguments will do – some arguments are more acceptable, more credible, than others.⁸³ This normative framework is embodied in the UN Charter and Charter-based law relating to peace and security. Through interpretation, explicit or implicit, that normative framework has been supplemented by decisions and opinions of the International Court of Justice, ‘soft law’ in the form of General Assembly resolutions, decisions of other intergovernmental bodies such as the Human Rights Commission, and the Security Council’s own determinations and operational decisions. Even during the Cold War it was possible to identify the goals of the international community as set forth in the UN Charter, even if it was difficult to move from those broad goals to specific decisions in intergovernmental bodies.⁸⁴ There are standard forms of argument used to appraise and ultimately accept or reject competing claims, a legal discourse that is fundamentally about the limitations imposed by the Charter and the relative weight to be assigned to the overarching purposes of the Charter in a given case.

As argued above, the Security Council is subject to legal limitations imposed by the Charter, meaning that if it acts in a manner that violates the Charter’s principles and purposes, it will be subject to criticism.⁸⁵ Who judges whether it has exceeded those limits? At the San Francisco conference, the founders agreed that each organ of the UN should interpret those aspects of the Charter that fall within its competence, including the jurisdictional issue of the extent of its own competence. The International Court of Justice in the *Namibia* and *Lockerbie* cases cast some doubt on this absolute right of ‘auto-interpretation’, but fell well short of articulating a doctrine of judicial review.⁸⁶ This does not mean, however, that Council interpretations of its powers should be treated as conclusive simply because they were issued by the Council. José Alvarez argues that the ICJ has engaged and will continue to engage in variegated forms of ‘review’, short of a finding that the Council has exceeded its

⁸³ David Angell, a former Canadian diplomat at the UN, insists that some Ambassadors are more effective than others precisely because they are more persuasive. He identifies Canada’s former Permanent Representative, Robert Fowler, and the Permanent Representative of the United Kingdom, Sir Jeremy Greenstock, as good examples. The source of their persuasiveness is the ability to make arguments and draft language that captures the collective interest without compromising the national self-interest of their countries. Angell points to Ambassador Greenstock’s instrumental role in drafting the declaration adopted by the Security Council on the occasion of the Millennium Summit as an example. Interview with the author, 21 June 2001.

⁸⁴ Schachter, *supra* note 11, at 51. Among the goals, Schachter lists peace, security, national independence, economic well-being, self-determination and human dignity.

⁸⁵ Article 24(2), Charter of the United Nations.

⁸⁶ For contrasting views on the merits of the ICJ *Lockerbie* decision, both of which see the Court as having left open the possibility of judicial review, see Franck, ‘The Powers of Appreciation: Who is the Ultimate Guardian of UN Legality?’, 86 *AJIL* (1992) 519; Reisman, ‘The Constitutional Crisis in the United Nations’, 87 *American Journal of International Law* (1993) 83. See also, Gowland-Debbas, ‘The Relationship between the International Court of Justice and the Security Council in Light of the *Lockerbie* Case’, 88 *AJIL* (1994) 643. Alvarez, ‘Judging the Security Council’, 90 *AJIL* (1996) 1 (for other works on the question of judicial review by the ICJ, see the long list cited by Alvarez at note 4 of his article).

competence.⁸⁷ He characterizes the opinions of some of the judges in the *Lockerbie* case as ‘warnings’ to the Council ‘to exercise care in undertaking similar action in the future’; they were ‘cueing the Council to internalize the limits suggested and impose restraints on itself that would prevent violations of the law’.⁸⁸ Nor, Alvarez argues, should the Court be seen as the only legitimator or delegitimator of Council action. The General Assembly, the Human Rights Commission, and the International Criminal Tribunals, for example, all comment on Council action directly or indirectly.⁸⁹ Arbitral proceedings and even national courts pass judgment. And the Secretary-General may have a role, depending on how he interprets his own powers.

The end of the Cold War has heralded some convergence of values, or at least wider concordance on the rules of coexistence and cooperation, in a pluralistic international environment. Arguably, a minimal sense of international community is emerging, which is likely to enhance the prospects of cooperation based on law.⁹⁰ Franck argues that a sense of global community is a precondition for global fairness discourse – which he describes as ‘the reasoned pursuit of . . . John Rawls’ “idea of an overlapping consensus” – and he questions Rawls’ reluctance to extend his maximin difference principle to international relations.⁹¹ Franck asserts that a sufficient global sense of community currently exists to support at least reasoned discourse about the redistributive implications of the principle.

Even if one is sceptical about the emergence of a global community, one need not look far beyond the development of human rights law to make a plausible argument that the normative climate has evolved since the founding of the United Nations. In 1945, international peace and security was conceived largely in terms of the military threat states posed to each other. But the UN Charter contains the seeds of a broader conception of security, that of human security. The seed has sprouted in the form of a web of international human rights instruments, starting with the Universal

⁸⁷ Alvarez elaborates the notion of ‘an expressive mode of review’, in the form of an ongoing dialogue between the Court and the Council, and describes the ICJ as an organ capable of producing a ‘self-reflective and self-corrective body of identifiably legal discourse that will bind its audience together in a common language and common set of practices’. *Ibid.*, at 33.

⁸⁸ *Ibid.*, at 30.

⁸⁹ *Ibid.*, at 10–12. The International Criminal Tribunal for the former Yugoslavia, in one of its first opinions, ruled that the Security Council’s powers, ‘while not unlimited’, encompassed the creation of a judicial tribunal under Article 41 of the Charter (emphasis added). Thus by passing favourable judgment on the legality of the Council’s action, the Tribunal implied that it was not beyond its own competence to pass unfavourable judgment. *Prosecutor v. Tadic*, Case IT-94-1-AR 72, paras 18–22 (2 Oct. 1995).

⁹⁰ This is the thrust of the report by the Commission on Global Governance, *Our Global Neighborhood* (1995). For an interesting analysis of that and similar reports, see Barnett, ‘Bringing in the New World Order: Liberalism, Legitimacy and the United Nations’, 49 *World Politics* (1997) 526.

⁹¹ Franck, *supra* note 5, at 10–19. Franck states that fairness discourse must take place within a community that shares an irreducible core of beliefs as to what the search for fairness entails. He defines the discourse as ‘the process by which the law, and those who make law, seek to integrate [legitimacy and distributive justice], recognizing the tension between the community’s desire for both order (legitimacy) and change (justice), as well as the tensions between differing notions of what constitutes good order and good change in concrete instances’ (at 25–26). See also Franck, ‘Legitimacy in the International System’, 82 *AJIL* (1988) 705, at 759, in which he refers approvingly to Dworkin’s conception of a ‘community of principle’.

Declaration of Human Rights and the Genocide Convention of 1948, through the four Geneva Conventions and their Protocols on humanitarian law and the two International Covenants on human rights. The post-Cold War era has seen the Vienna Conference on Human Rights of 1993, the establishment of international criminal tribunals for former Yugoslavia and Rwanda (and mixed national-international tribunals in East Timor and Sierra Leone), to the newly established International Criminal Court. These were accompanied by important regional developments, including the Helsinki Final Act (1975) in Europe, the Santiago Commitment to Democracy and the Renewal of the Inter-American system (1991) and the Inter-American Democratic Charter (2001), as well as the commitments to democracy adopted by Mercosur and other sub-regional groups in Latin America, and the OAU decision of 1998 not to allow governments who come to power through unconstitutional means to participate in its Summit-level meetings, reaffirmed in the Charter of the African Union (2001).⁹² Finally, in the drama occasioned by the end of the second millennium, 189 heads of state and government announced in the Millennium Declaration their common commitment to six values: freedom, equality, solidarity, tolerance, respect for nature, and shared responsibility.

To these legislative and declaratory developments can be added the pattern of practice in the Security Council since 1991, particularly in the area of humanitarian intervention. The five Permanent Members of the Security Council have been dealing with each other on an almost daily basis for the last 10 years, in effect debating the shape of the post-Cold war world in the context of particular crises and on occasion thematic issues (such as the protection of civilians in armed conflict). From northern Iraq, through Bosnia, Somalia, Liberia, Haiti, Rwanda, Sierra Leone, Kosovo, East Timor and Afghanistan, collectively they have found a way of authorizing – or endorsing after the fact – operations that would have been unthinkable during the Cold War. Meanwhile, multidimensional peacekeeping and peace-building operations established by the Security Council have involved the UN in demilitarization, the promotion of law and order, human rights and administration of justice, good governance and democratic development, civil administration and economic reconstruction – all matters that go to the heart of sovereignty. That governments and other parties to the internal conflicts where these missions were deployed invited such involvement is telling. Precisely because they are consent-based, such peace-building

⁹² John Ikenberry sees in these and other developments the emergence of a 'single world standard . . . that acknowledges rights that people are expected to enjoy and that states and the international community are expected to observe and protect'. Ikenberry, 'The Costs of Victory: American Power and the Use of Force in the Contemporary Order' in A. Schnabel and R. Thakur (eds), *Kosovo and the Challenge of Humanitarian Intervention* (2000) 85, at 90–91. Underpinning all of these normative developments is a belief in the value of multilateralism, defined by John Ruggie as an institutional form that coordinates relations among three or more states on the basis of generalized principles of conduct. Ruggie, 'Multilateralism at Century's End', in *Constructing the World Polity* (1998) 102, at 109.

‘interventions’ are indicative of how far states have come in accepting the notion of external involvement in internal affairs for the sake of peace.⁹³

Only 11 vetos have been cast since 1990 and, other than on the Arab–Israeli conflict, these have had more to do with unrelated political issues (such as China’s relations with Taiwan, Russia’s displeasure with the financing arrangements for the Cyprus operation, and the US’ unhappiness with former Secretary-General Boutros-Ghali), than principled differences over the merits of a particular action. At least until the breakdown in the Council over Iraq in early 2003, the response to the events of September 11 reinforce this image of convergence among the P5. Resolutions strongly condemning the attacks and endorsing the US position that a military response in self-defence was justified (Article 51), were capped by an unprecedented resolution that amounts to sweeping legislation outlawing a long list of activities relating to terrorism.⁹⁴ US and Russia became much closer in the Council and it was not hard to bring China (as well as France and the UK) along. In a sense, the P5 have become an exclusive club with a shared history and set of experiences. They have learned about each other from working together and have developed shared understandings.⁹⁵ The Iraq crisis represents a significant setback in Council unity, but that does not take away from the impressive level of Council activity since the end of the Cold War has had an impact on how the P5 view their rights and responsibilities in the field of peace and security. Paraphrasing Rawls and Habermas, practice within the Council has contributed to ‘overlapping lifeworlds’, if not a common lifeworld, among its members.

Thus at the time of the Kosovo crisis the climate in and around the Council had evolved to the point where it was not nonsensical to talk about discourse on the basis of norms. The normative framework was not sufficient to yield a single ‘right answer’ in Dworkin’s sense, but it was enough to distinguish good arguments from bad. Moreover the process of normative evolution may be self-reinforcing. Shared understandings make the discourse possible and in turn the practice that results from that discourse generates intersubjective meanings that affect the normative climate in

⁹³ I. Johnstone, *The UN’s Role in Transitions from War to Peace: Sovereignty, Consent and the Evolving Normative Climate*, Norwegian Institute for Defence Studies, IFS Info 1/1999.

⁹⁴ UN Doc. S/RES/1368 (2001), 12 September 2001 and UN Doc. S/RES/1373 (2001), 28 September 2001. The latter follows on a series of resolutions preceding September 11 that declared terrorism a threat to international peace and security, but Resolution 1373 goes much further, the likes of which the Security Council has never adopted before. Many of the proscribed activities are covered by one or another convention relating to terrorism, but Resolution 1373 makes the prohibitions binding on *all* states.

⁹⁵ The progress has not been linear and there is no guarantee it will continue, as recent US positions on the International Criminal Court, Kyoto Protocol, Biological Weapons Convention and ABM Treaty indicate. P5 harmony could easily break down if the Bush Administration pushes for action against Iraq in the name of countering terrorism.

which the Council operates. Language is the glue that holds the 'overlapping lifeworlds' together; in international society, that language is the language of law.⁹⁶

Habermas' second precondition for communicative action, equal status in and access to the discourse, means that 'relationships of power, force and coercion are assumed absent when argumentative consensus is sought'.⁹⁷ Relationships of power and coercion are certainly present in the Security Council, but there are features of the deliberations that suggest raw material power is not the only thing that matters. In particular, the formal equality of the 15 members and the glare of publicity to which their actions – and more to the point justifications for those actions – are exposed, have an impact on how decisions are taken. Five members of the Security Council have permanent status and veto power, while the other 10 do not. But every member of the Council is formally equal in the sense that sovereign equality is a basic principle of the Charter, and each has one vote. The Presidency rotates among all members on a monthly basis, and all have the right to put a matter on the Council's agenda. Most tellingly, this formal equality is reinforced by Article 24 of the Charter, which stipulates that the Security Council acts on behalf of the entire UN membership. Thus formally the arguments of even the smallest members are entitled to equal consideration and, at least notionally, all members are expected to speak and vote in the collective interest.⁹⁸ This goes in a small way towards levelling the power disparity between the P5 and the non-permanent 10. Since the latter unlike the former are elected by the membership as a whole, they can claim with some justification that they more than the P5 speak for the other 176 UN Member States.

Beyond that, the Council is not entirely closed to participation by other states and even non-state actors. Non-members are allowed to speak but not vote in public meetings and often do on matters of special concern to them (for example if they are parties to the conflict under discussion, or neighbours, or potential troop contributors to a peace operation). They do not participate in informal consultations, the most common form of meeting in the 1990s, where most of the real business of the Council is done. But in the early 1990s the practice of 'Arria formula' gatherings began, named after the Venezuelan Ambassador to the UN who presided over the first such meeting. These are held in private away from the Council chambers, with no official

⁹⁶ Lars Lose, drawing on the English School associated with Hedley Bull, Martin Wight, Adam Watson and others, says this about the language of diplomacy. Lose, *supra* note 4, at 198. I would argue that the language of law, a more highly developed and structured form of rhetoric, fits better. Of course, international society like national societies can have more than one language and still be a society.

⁹⁷ Risse, *supra* note 4, at 10–11.

⁹⁸ The expectation to speak in the collective interest is not merely notional. The rhetoric used in the Security Council implicitly and sometimes explicitly acknowledges Article 24. Thus the sort of argument made by the representative of Zimbabwe when sanctions were imposed on Libya is not unusual: 'this 15 member Council acts on behalf of the 175 States Members of the UN. This means that 160 states have placed their security, and possibly their survival in the hands of the 15. This is a solemn and heavy responsibility. . . . It is therefore of crucial importance that every decision taken by the Council be able to withstand the careful scrutiny of the 160 Member States on whose behalf the Council is expected to act. This is only possible if the Council insists on being guided in its decisions and actions by the Charter and other international conventions.' Security Council meeting, 31 March 1992.

records or Secretariat presence. Their purpose is to give Council members a chance to hear from visiting dignitaries of non-members or representatives of non-state parties to a dispute in an informal and confidential setting.

The Council has responded to demands for wider participation in other ways.⁹⁹ The Council President as well as Secretariat representatives meet with troop contributors to peace operations regularly. The President sometimes briefs non-members after informal consultations. More often than in the recent past open debates are held before the day of a vote to give others a chance to weigh in on an issue and to gain insight into what members of the Council are thinking. The civilian and military heads of peacekeeping missions, as well as the heads of relevant UN agencies such as the High Commissioner for Refugees, are often invited to the Council. The President meets with the President of the International Committee of the Red Cross periodically, a non-governmental organization with semi-official status by virtue of its mandate from the Geneva Conventions. And the Security Council has recently invited other non-governmental organizations to Arria formula meetings.¹⁰⁰ Moreover, the relative ease of access NGOs have to the Secretariat and diplomats (of some countries) stationed at UN headquarters means that the more active and credible NGOs have little trouble making their voices heard.¹⁰¹ In sum, the Security Council is not a sealed chamber, deaf to voices and immune to pressure from beyond its walls.

Finally, despite the fact that Council debates usually occur in informal consultations, they are not entirely private or confidential. The outcomes of many Security Council debates – the resolutions and statements adopted or defeated – are very public and are usually accompanied by explanations of votes. Although it is widely understood that the efficient functioning of the Council requires that it conduct much of its work out of the public eye, there has been a backlash against this more restrictive style of consultation. By holding more open meetings, members of the Council are compelled to explain their positions publicly. And because arguments based on self-interest are less persuasive in public, the language of reason is more likely to be used. At a minimum, ‘the civilizing force of hypocrisy’ comes into play and, even if the

⁹⁹ A useful summary of recent innovations in Security Council practice is Friedrich Soltau, ‘The Right to Participate in the Debates of the Security Council’, October 2000, American Society of International Law, www.asil.org. See also UN Doc. S/RES/1353, 13 June 2001 and UN Doc. S/1999/1291, 30 Dec. 1999, as well as the documents referred to in both. For a great many other proposals that have been made on Security Council procedures, see the Report of the Open-Ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Council, especially Annex IX and XII, UN Doc. A/54/47, 25 July 2000.

¹⁰⁰ For example, Human Rights Watch recently briefed members of the Council on the situation in Angola. Human Rights Watch press release, 5 March 2002, www.hrw.org/press/2002/angola030502.htm.

¹⁰¹ For influential analyses of the powerful new role NGOs play in international affairs, see Matthews, ‘Power Shift’, 76(1) *Foreign Affairs* (1997) 50; M. Keck and K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (1998); Finnemore and Sikkink, *supra* note 20. Anne-Marie Slaughter cautions that the ‘power shift’ to NGOs should not be overstated; that the real shift taking place is to transgovernmental networks of courts, regulatory agencies, executives and legislatures. Slaughter, ‘The Real New World Order’, 76(5) *Foreign Affairs* (1997) 183.

final outcome is the result of bargaining rather than reasoned discourse, any deals struck must be capable of withstanding the glare of publicity.¹⁰²

The key point for this article is that the impact of the broader, outer circle of the interpretive community can only be felt if the debates are public. For the community to pass judgment, it must have a chance to hear the arguments and justifications. Most of the effort at persuasion (as opposed to after-the-fact justification) takes place in private where one would suppose legal arguments count for less. But the effort at persuasion is influenced by the subsequent need to justify. If a Council member says in an informal meeting, 'we will push this to a vote and you will be required to explain your position in public', then it might cause other members to think twice if they have doubts about whether their position and explanation will pass muster with the outside world. In this way, debates in private are animated by arguments that will be used later to justify positions in public. And in fact informal consultations of the Security Council are not treated by participants as completely private. With 15 representatives, plus aides and Secretariat staff present, rarely is a word uttered that the speaker would not want to be known publicly. Since there are no official records of the meeting, the utterances can always be denied – a not insignificant point in the murky world of multilateral diplomacy – but the glare of publicity does find its way into even informal consultations of the Security Council, if only through the cracks in the chamber windows.

These concessions to demands for greater access to and openness in the Security Council reflect an implicit understanding that for credible deliberation to take place among states of vastly different size and capabilities, some preconditions must be met. That the concessions themselves may be designed to relieve pressure for expansion of the Council does not lessen the force of the argument.¹⁰³ One can easily imagine other steps that could enhance the process of justificatory discourse within the Council. Demanding written justification for the exercise of a veto, for example, would force the vetoing state to be explicit about its reasons which, in accordance with Article 24 of the Charter, should be based on the interests of the UN membership as a whole. This in turn would give the interpretive community better opportunity to assess and judge the claim. Ultimately, it could make it more difficult for permanent members to cast a veto, forcing them to exercise the prerogative more responsibly.¹⁰⁴ Allowing more opportunity for the voice of civil society to be heard would have a similar impact.

¹⁰² Elster, 'Deliberation', *supra* note 69, at 111 and 117.

¹⁰³ Council expansion is clearly needed, but this discussion of justificatory discourse suggests a note of caution. A larger Council could be less cohesive and reasoned discourse might become more difficult. As a thin normative consensus emerges, discourse based on shared understandings and intersubjective meanings, if not values, is possible. Conceivably a dramatic expansion of the Council would jeopardize that minimal consensus. Debates would be more open and inclusive, but could lose their discursive bite. On the democratic deficit and other governance-based criticisms of international organizations, see for example Woods, 'Governance in International Organizations', 5 *Global Governance* (Jan-March 1999) 39; J. Nye (ed.), *Governance in a Globalizing World* (2000); 'Bringing Down the Global Democratic Deficit', *ASIL Proceedings*, 6 April 2001.

¹⁰⁴ The Foreign Minister of Germany made such a proposal, without specifying that the justification should be in writing. See UN Doc. A/54/47, 25 July 2000, Annex VII.

Speaking in Security Council meetings or observing informal consultations is out of the question, but in cases where a particular NGO has special knowledge or insight (based, for example, on its presence in the field), it could be invited to participate in Arria formula meetings¹⁰⁵ or troop contributor consultations.

Thus in the enterprise of Security Council decision-making, there is some evidence of a normative and procedural framework that makes legal discourse both possible and potentially meaningful. In the next section, I test that claim by analysing the debates in and around the Security Council over NATO's intervention in Kosovo in March 1999.

4 The Kosovo Intervention

While it is not possible to provide a full account of the Kosovo crisis here,¹⁰⁶ a brief review of the facts and legal issues is necessary to put my analysis in context. The roots of the conflict in Kosovo may date back centuries, but a more proximate cause was the 1989 decision of President Milosevic to remove Kosovo's status as an autonomous region of Serbia.¹⁰⁷ Ethnic Albanian leaders declared independence in 1990 and unrest continued throughout the decade. Matters took a turn for the worse in early 1998, at which point the Security Council got involved in earnest by imposing an arms embargo (Resolution 1160). The situation nevertheless deteriorated throughout the year, prompting a diplomatic effort by Richard Holbrooke that resulted in two agreements with the FRY, one providing for the deployment of an OSCE verification mission and the other for NATO overflights. This diplomatic success came on the heels of a threat of force by NATO in the form of activation orders for a phased air campaign issued by the North Atlantic Council on 13 October 1998. The OSCE and NATO verification missions were endorsed by the UN Security Council in Resolution 1203, but wrangling in the Council resulted in the following watered down language on the use of force: 'in the event of an emergency, action may be needed to ensure the safety, and freedom of movement' of the verifiers.

The deployment of the missions proved not to be enough to quell the violence. The Serb campaign of repression, culminating in a bloody massacre of 45 ethnic Albanians in the village of Racak on 15 January, was met with intensified resistance on the part of the Kosovo Liberation Army (KLA). In an attempt to repeat the success of the Dayton Agreement for Bosnia, the parties were pressured into talks in Rambouillet and then Paris under the co-chairmanship of the British and French. A last ditch effort by US Secretary of State Albright induced the Albanian side (represented by the KLA, the more moderate government of Ibrahim Rugova and

¹⁰⁵ Ambassador Somavia had made the proposal earlier in February 1997, but it has been acted on only rarely. S. Bailey and S. Daws, *The Procedure of the UN Security Council* (3rd ed., 1998) 75.

¹⁰⁶ For insightful histories of Kosovo, see N. Malcolm, *Kosovo: A Short History* (1998) and T. Judah, *Kosovo: War and Revenge* (2000). For a thorough compilation of international documents as well as analysis of the events leading to the intervention, see M. Weller, *The Crisis in Kosovo 1989–1999: International Documents and Analysis*, vol. 1 (1999).

¹⁰⁷ S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (1999) 207.

others) to sign the accord. Despite the threat of NATO airstrikes, the Yugoslav delegation refused. On 24 March, NATO launched the promised airstrikes without further Security Council authorization. A draft resolution condemning what the FRY called 'NATO aggression' was introduced by Russia two days later but lost by a vote of 12–3 (only Russia, China and Namibia voted for it). The NATO campaign ended on 9 June with the agreement of the FRY authorities to withdraw from Kosovo and accept the deployment of the NATO-led Kosovo Force (KFOR) and the United Nations Mission in Kosovo (UNMIK), whose mandates were set out in Security Council Resolution 1244.

A *The Legal Arguments*

Various possible legal justifications for the use of force can be posited.¹⁰⁸ First, it might be argued that the NATO action did not violate Article 2(4) of the Charter, because it was not directed against the territorial integrity or political independence of the FRY, and is consistent with the 'purposes and principles' of the Charter. A second possible justification is collective self-defence, which would require asserting that the threat to European countries posed by a possible spillover of the Kosovo conflict amounted to an 'armed attack' within the meaning of Article 51 of the Charter. Third, the claim was made that existing Security Council resolutions and statements (especially Resolutions 1160 of 31 March 1998, 1199 of 23 September 1998, and 1203 of 24 October 1998, plus the Presidential Statement of 29 January 1999) provided the requisite authority for NATO. These documents made demands on the Serbs under Chapter VII of the Charter and threatened 'further action'; failure to comply with those demands, it was argued, lawfully triggered the action. Fourth, an argument could be made that a customary law right of humanitarian intervention exists, based on state practice during the Cold War years (including interventions by India in East Pakistan, Vietnam in Cambodia and Tanzania in Uganda), more recent Security Council practice, and

¹⁰⁸ Some of the arguments outlined in the text were actually put forward by NATO members, others were not. For scholarly comment on the legality of the intervention, see generally, Roberts, 'NATO's Humanitarian War', 41 (No. 3) *Survival* (Autumn 1999) 102; Chesterman, *supra* note 107, at 206–219; Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *EJIL* (1999) 1; Cassese, 'Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', 10 *EJIL* (1999) 23; Mertus, 'Sovereignty and Humanitarian Intervention After Kosovo', in Canadian Council of International Law, *From Territorial Sovereignty to Human Security* (1999) 198; 'Editorial Comments: NATO's Kosovo Intervention', by Louis Henkin, Ruth Wedgewood, Jonathan Charney, Christine Chinkin, Richard Falk, Thomas Franck and W. Michael Reisman, 93 *AJIL* (1999) 831; White, 'The Legality of Bombing in the Name of Humanity', 5 *Journal of Conflict and Security Law* (2000) 27. Alvarez, *supra* note 5, at 125–130. Kritsiotis, 'The Kosovo Crisis and NATO's Application of Armed Force against the Federal Republic of Yugoslavia', 49 *ICLQ* (2000) 330. See also the *Fourth Report of the House of Commons Foreign Affairs Committee*, 7 June 2000, together with appendices that include written memoranda submitted by legal scholars. Some of these memoranda are reproduced in 49 *ICLQ* (2000) 876.

evolving human rights and humanitarian law norms.¹⁰⁹ Fifth, a related argument based on extreme humanitarian necessity was put forward, a version of which is reflected in the following statement of Sir Jeremy Greenstock, Permanent Representative of the United Kingdom to the United Nations: ‘as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable’.¹¹⁰ Sixth, the adoption of Resolution 1244 (combined with the failed draft resolution of 26 March 1999 and the silence of the General Assembly) could be seen as implicit, retroactive approval of the intervention.¹¹¹

Strong counter-arguments can be made for each justification and, indeed, the weight of scholarly opinion in North America and Europe seems to be that the action was a violation of the law even if morally justified. It is not my purpose to enter that debate but rather to look at how it was conducted in order to illustrate the role of interpretive communities in shaping international legal discourse, constraining interpretations of the Charter and ultimately affecting the conduct of international relations. I begin by outlining six features of the discourse and then draw a number of conclusions.

B Six Features of the Kosovo Debates

First, the *range* of legal arguments made in the Security Council is significant. In the debates of 24 March (the day the airstrikes began) and 26 March (the date of the failed resolution to condemn the bombing), every Permanent Member of the Security Council (and most others) invoked legal norms and principles. Legal arguments on both sides were pressed with varying degrees of vigour, with some speakers passing direct judgment on the legality of the intervention while others commented more generally on the legal context in which it took place. Thus, for example, the Permanent Representative of Russia made a fairly detailed legal claim in the debate on 26 March 1999:

The aggressive military action unleashed by NATO against a sovereign state without the authorization and in circumvention of the Security Council is a real threat to international peace and security and a gross violation of the UN Charter and other basic norms of international law. Key provisions of the Charter are being violated, in particular Article 2,

¹⁰⁹ The writing on humanitarian intervention is voluminous. For four recent book-length reviews, see Chesterman, *supra* note 107; F. Tesón, *Humanitarian Intervention: An Inquiry Into Law and Morality* (2nd ed., 1997); S. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (1996); and N. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (2000).

¹¹⁰ UN Doc. S/PV.3988, 24 March 1999, at 12. Another version of the argument, suggested by Louis Henkin and earlier by Oscar Schachter in a different context, is that cases of extreme humanitarian necessity excuse the turning of a ‘blind eye’ to violations of the law. Henkin, *supra* note 108, at 827. Schachter, *supra* note 11, at 126.

¹¹¹ There is no formal basis for retroactive authorization in the Charter, but there is some precedent in practice, namely the Presidential Statements welcoming ECOWAS’ interventions in Liberia and Sierra Leone after the fact. UN Doc. S/23886, Statement by the President of the Security Council, 7 May 1992 (on Liberia); UN Doc. S/PRST/1998/5, Statement by the President of the Security Council, 26 Feb. 1998 (on Sierra Leone).

paragraph 4, which requires all Members of the United Nations to refrain from the threat or use of force in their international relations, including against the territorial integrity or political independence of any State; Article 24, which entrusts the Security Council with the primary responsibility for the maintenance of international peace and security; Article 53, on the inadmissibility of any enforcement action under regional arrangements or by regional agencies without the authorization of the Security Council as well as others.¹¹²

Also arguing against the intervention on legal grounds were the representatives of China (a permanent member of the Council), as well as Yugoslavia, India, Belarus and Cuba (none of whom were Council members but spoke in the debates).¹¹³

Speaking in defence of the intervention, the UK made the most direct if not detailed legal argument:

The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. . . . Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on the grounds of overwhelming humanitarian necessity, military intervention is legally justifiable. The force now proposed is directed exclusively to averting a humanitarian catastrophe, and is the minimum judged necessary for that purpose.¹¹⁴

The Netherlands was also firm about the legality of the action, while other Council members made less explicit legal arguments in support of it based mainly on prior resolutions, including the US, Canada, France, Argentina and Slovenia.¹¹⁵ Danilo Turk, the Permanent Representative of Slovenia and a respected international lawyer set out sophisticated legal arguments in both debates, reflecting his lawyerly sensitivity to the fine line that had to be drawn in order to meet the test of plausibility. Thus in the debate on 24 March he intervened twice, the second time to clarify the law and rebut some of the arguments made earlier. On 26 March, in explaining his Government's vote against the Russian draft, he said:

The draft resolution completely fails to reflect the practice of the Security Council, which has several times, including on recent occasions, chosen to remain silent at a time of military action by a regional organization aimed at the removal of a regional threat to peace and security. It is true that each case is unique. However, the requirement of consistency in the interpretation and application of the principles and norms of the United Nations Charter demands at least some indication as to the specific justification for the approach proposed by the draft resolution in the present case.¹¹⁶

Second, the heavy weather (real and anticipated) that greeted efforts to justify the

¹¹² Ambassador Sergey Lavrov, Permanent Representative of the Russian Federation to the United Nations, 3989th meeting of the Security Council, 26 March 1999, UN Doc. S/PV.3989, at 5. See also his statement on 24 March: 3988th meeting of the Security Council, 24 March 1999, S/PV.3988, at 2.

¹¹³ See UN Doc. S/PV.3988 of 24 March 1999 and UN Doc. S/PV.3899 of 26 March 1999.

¹¹⁴ Sir Jeremy Greenstock, Permanent Representative of the United Kingdom to the United Nations, 3988th meeting of the Security Council, 24 March 1999, UN Doc. S/PV.3988, at 12. The British position is articulated more fully in a Foreign and Commonwealth Office note circulated to NATO allies in October 1998, reproduced by Roberts, *supra* note 108, at 106.

¹¹⁵ See UN Doc. S/PV.3988 and UN Doc. S/PV.3989.

¹¹⁶ Ambassador Danilo Turk, Permanent Representative of Slovenia to the United Nations, 3989th meeting of the Security Council, 26 March 1999, UN Doc. S/PV.3989, at 3.

intervention on legal grounds caused some NATO governments to refrain from pushing the strongest versions of the legal claim. This is certainly true of the US, which consistently asserted the legality of its position,¹¹⁷ but ultimately relied on a 'laundry list' of factors and a general claim of legitimacy rather than a single legal justification.¹¹⁸ The reasons are twofold: first, while the US may have been confident about its legal case, it did not believe legal arguments would persuade those who needed persuading; and second, the US was concerned about the precedent that could be set by acceptance of a customary law doctrine of humanitarian intervention.¹¹⁹ Thus in the Security Council debates of 24 and 26 March, the US representative referred to the earlier resolutions in vague terms and simply asserted that 'we believe that action by NATO is justified and necessary to stop the violence and prevent an even greater humanitarian disaster'.¹²⁰ Later, Secretary Albright said that the Kosovo situation was *sui generis* and that it was important 'not to overdraw the lessons that come out of it'.¹²¹

As noted above, some NATO allies like the UK and the Netherlands were more explicit about the legal basis for the claim, but they may not have pushed it with the same degree of vigour at the end of discussions as they had at the start.¹²² Moreover, many turned to emphasizing the exceptional nature of the intervention. Thus, for example, after an in-depth discussion of the legal issues in the German Bundestag, the German Government took the view that, while the 'state of humanitarian necessity' in Kosovo was desperate enough to justify intervention, 'the decisions of NATO must not become a precedent. As far as the Security Council monopoly on force is concerned,

¹¹⁷ Starting with the statement of Secretary of State Albright at a press conference in Brussels, 8 October 1998, cited in Chesterman *supra* note 107, at 208.

¹¹⁸ Mertus, *supra* note 108, at 109, citing her interviews with White House staff in the Clinton Administration.

¹¹⁹ As a US diplomat directly involved in making the US case at the UN said in an interview with the author, 'the possibility that a legal argument may get turned against you elsewhere causes you to shut up. It is rarely a one-shot deal and the US, perhaps more than some of its European allies, was concerned about the implications of a doctrine of humanitarian intervention. Our position was to let the European allies run with the legal arguments, and we would focus on the needs and circumstances of the situation.' Interview with the author, 16 August 2001.

¹²⁰ Ambassador Peter Burleigh, UN Doc. S/PV.3988, at 5. See also UN Doc. S/PV.3989, at 4–5. President Clinton's Address to the Nation on NATO Airstrikes on 24 March lists the earlier resolutions, humanitarian concerns, the need for regional stabilization, the impact of refugee flows and NATO's reputation as factors justifying the intervention. Weller, *supra* note 106, at 498. On that same day, the US Mission to the UN circulated a list of ten factors supporting NATO action in Kosovo without specifying the precise legal justification. 'Factors Supporting NATO Action in Kosovo'. Document on file with author.

¹²¹ U.S. Secretary of State Madeleine Albright Press Conference in Singapore, 26 July 1999, <http://secretary.state.gov/www/statements/1999/990726b.html>.

¹²² US diplomat interview with the author, 16 August 2001.

we must avoid getting on a slippery slope'.¹²³ Similar debates were conducted and similar conclusions reached in other European parliaments.¹²⁴

In sum, the opinions in NATO ranged from countries that had real doubts about the legality of the action, to those who had no such doubts but were reluctant to push the legal case either because it would not be convincing or because of the precedent it might establish, to those who neither had doubts nor were concerned about pushing the legal claim. The net result was a collective decision (or non-decision) to emphasize the legitimacy of the action without denying its legality, while putting forward a range of factors – both legal and non-legal – to justify it. As the Acting Legal Adviser to the State Department said later, the NATO justification was a 'pragmatic basis for moving forward without establishing new doctrines or precedents that might trouble individual NATO members or later haunt the alliance if misused by others'.¹²⁵

Third, the positions of non-NATO states were varied and nuanced, reflecting interesting interplay between norms, power and interests. Russia and China were deeply opposed, but not only for the obvious reason. Certainly they did not relish the prospect of 'humanitarian intervention' directed against them, but given the extreme unlikelihood of that happening in the short or medium-term, it is probable that something else was at play. Both Russian and Chinese commentators have suggested that what was most disturbing to the two governments was the notion of a norm- or value-driven intervention.¹²⁶ From a realist point of view, if the intervention in Kosovo was seen as driven purely by Western interests, presumably Russia and China would not have felt deeply threatened, as a rational actor is unlikely to calculate that Western interests would be served by intervening militarily in either country for the sake of Chechnya or Tibet. On the other hand, intervention to spread 'Western values' elsewhere would be perceived as a more insidious threat because it could shake the foundations of non-Western regimes even if coercive action is never taken against them directly.

Revealing insights from other regions can be summarized as follows:

¹²³ Statement of Foreign Minister Kinkel, 16 October 1998. Quoted in Simma, *supra* note 108, at 13. Stressing that it was not a precedent may explain the high level of support in the German Bundestag (the vote was 500–62) for what one group of commentators describe as 'the most spectacular political undertaking in the history of the Federal Republic of Germany'. Duke, Ehrhart and Karadi, 'The Major European Allies: France, Germany and the United Kingdom', in Schnabel and Thakur, *supra* note 92, 128, 132.

¹²⁴ See positions of Portugal and Belgium in 'Kosovo and the Case of the (Not So) Free Riders: Portugal, Spain, Belgium and Canada', in Schnabel and Thakur, *supra* note 92, at 187 and 191.

¹²⁵ Matheson, 'Justification for the NATO Air Campaign in Kosovo', Proceedings of the 94th Annual Conference of the American Society of International Law, 301, at 301.

¹²⁶ See Baranovsky, 'Humanitarian Intervention: Russian Perspectives', in *Intervention, Sovereignty and International Security* (Pugwash Study Group Occasional Papers, vol. 2, no. 1, 2001) 12, at 17–18; Yunling, 'China: Whither the World Order after Kosovo?', in Schnabel and Thakur, *supra* note 92, at 121. See also Bell, 'Force Diplomacy and Norms', in Schnabel and Thakur, *supra* note 92 at 460. In Russia, the Kosovo crisis had a profound impact on the broader domestic struggle between democrats and hardliners, strengthening the hand of the latter and ironically the NATO intervention was perceived by many as an assault on 'democratic values' – on Russia's democracy, not Milosevic. Baranovsky, 'Russia: Reassessing national interests' in Schnabel and Thakur, *supra* note 92, at 108.

- Bosnia and Albania, though supportive of the intervention, did not state explicitly that it was legal in their comments in the Security Council (as non-members).¹²⁷ Moreover, the Islamic world was *not* unambiguously supportive of NATO.¹²⁸ Among countries in the Middle East, there was sympathy for the suffering of fellow Muslims and some stated concern about human rights, but they also feared that NATO interference if unchecked would extend to their part of the world, to combat terrorism for example.¹²⁹ This ambivalence is telling. If the legal discourse were meaningless, Islamic leaders would have fewer qualms about giving in to natural (and politically beneficial) sympathy for the Kosovar Albanians by offering their wholehearted support to the intervention. They would have no reason to fear that doing so would make intervention against them any more likely unless they believed the precedent would have legal significance. I return to this point below.
- Positions among Latin American countries were a reflection of the differing attitudes towards normative developments there in recent years, as well as relations with the US.¹³⁰ A genuine region-wide commitment to democracy seemed to be emerging, as was a more flexible understanding of the norm against intervention, precipitated by efforts of the UN and OAS to bring peace and democratic rule to El Salvador, Guatemala, Nicaragua and Haiti. Balanced against these normative developments were continuing concerns about US hegemony. As regards Kosovo, Argentina (a member of the Council) and Chile were generally more supportive of the NATO intervention than Brazil (also a Council member) and Mexico. This ambivalence was reflected in a Rio Group statement that deplored the failure to obtain Security Council authorization but did not object to the NATO campaign and called for respect for human rights.¹³¹ Mexico was clearest about its disapproval of the NATO action, while one can find in the statements of Argentinian, Chilean and even Brazilian officials ‘a recognition that territorial integrity does not entirely preclude some forms of intervention’.¹³²
- South Africa condemned the NATO intervention on 25 March and as chair of the non-aligned movement joined the past and future chairs in a statement on 9 April affirming the NAM’s belief in the Security Council as the appropriate conflict

¹²⁷ Statement of Bosnia, UN Doc. S/PV.3988, 24 March 1999, at 19. Statement of Albania, UN Doc. S/PV.3988, 24 March 1999, at 18.

¹²⁸ Karawan, ‘The Muslim World: Uneasy Ambivalence’, in Schnabel and Thakur, *supra* note 92, at 215–216.

¹²⁹ *Ibid.*, at 218, citing by way of example an article in the semi-official Egyptian publication *Al-Ahram*. Karawan also quotes Ayatollah Khomeini of Iran asking ‘is any Muslim feeling safer?’ as a result of the bombing (at 219).

¹³⁰ See Serrano, ‘Latin America: The Dilemmas of Intervention’ in Schnabel and Thakur, *supra* note 92, at 223.

¹³¹ *Ibid.*, at 234.

¹³² *Ibid.*, at 236. See also statements in the Security Council debates of 24 and 26 March, and 10 June, *supra* note 112. Generally, Argentina stressed humanitarian considerations, while Brazil was more circumspect, but both voted against the Russian draft resolution of 26 March.

resolution body. Philip Nel points out that the latter statement fell short of direct condemnation because of difficulty in getting NAM consensus, but South Africa saw it as a breakthrough in trying to revitalize NAM's role as an active player on the world stage.¹³³ Nel states that South Africa's primary motivation was a conscious desire to strengthen the UN and he adds that NAM policy on Kosovo was symptomatic of a 'renewed appreciation of the tactical advantages of multilateralism'.¹³⁴

Fourth, the debates within NATO suggest that the legal discourse over Kosovo may have had an impact on the enunciation of NATO's new strategic concept. As the Washington Summit of April 1999 to celebrate NATO's 50th Anniversary approached, there were debates and differences of opinion among NATO countries over whether the alliance could intervene out-of-area (i.e. not in self-defence) *without* Security Council authorization. Before then, it had been assumed that NATO would only act in such cases in support of and under the authority of the UN.¹³⁵ The US (supported by the UK), however, was pushing for a revision of this doctrine, a position that was resisted by a number of NATO countries, including France and Germany. The US' view was reflected in a claim by Deputy Secretary of State Strobe Talbott that NATO and the UN were complementary institutions, not in a hierarchical relationship.¹³⁶ Taken literally, this flies in the face of Article 53 of the UN Charter, which states that enforcement action by regional organizations (i.e., military action in cases other than self-defence) requires authorization by the Security Council. The debate on the general principle continued through the Kosovo crisis, right up to the Washington Summit. And while all NATO countries supported the Kosovo action in the end, they were divided on the justification. As Matheson told the American Society of International Law the following year:

there was broad consensus within NATO that armed action was required to deal with the intolerable atrocities in Kosovo, but also a shared concern that the chosen justification not weaken international legal constraints on the use of force ... NATO states went through extensive discussion on this point. All agreed that NATO had to respond, yet no single factor or doctrine seemed to be entirely satisfactory to all NATO members as a justification under traditional legal standards ...¹³⁷

The Kosovo experience was sufficiently disturbing to many NATO countries that, surprisingly, the new strategic concept *reinforced* the role of the UN.¹³⁸ The implication

¹³³ Nel, 'South Africa: The Demand for Legitimate Multilateralism', in Schnabel and Thakur, *supra* note 92, at 245–246.

¹³⁴ *Ibid.*, at 251 and 256.

¹³⁵ Butler, 'NATO: From Collective Defense to Peace Enforcement', in Schnabel and Thakur, *supra* note 92, at 276.

¹³⁶ Simma, *supra* note 108, at 17. See also Chesterman, *supra* note 107, at 233.

¹³⁷ Matheson, *supra* note 125, at 301.

¹³⁸ Butler, *supra* note 135, at 282. Paragraph 31 of the Alliance's Strategic Concept reads: 'NATO recalls its offer, made in Brussels in 1994, to support on a case-by-case basis in accordance with its own procedures, peacekeeping and other operations under the authority of the UN Security Council or responsibility of the OSCE. ... In this context, NATO recalls its subsequent decisions with respect to crisis response operations in the Balkans'. NATO Press Release NAC-S(99)65, 24 April 1999.

is that discourse within the Security Council affected and was affected by parallel deliberations within NATO as part of a larger network associated with Council decision-making.

Fifth, there was a palpable sense of relief when Resolution 1244 was adopted. In a nutshell, the return to the Charter framework and uncontroverted legality was welcomed by virtually every country involved in the debate.¹³⁹ The resolution authorizing the deployment of an international civil presence (UNMIK) and security force (KFOR) in Kosovo under UN auspices was adopted by a vote of 14–0, with China abstaining. Thirty members of the UN spoke, as well as the Secretary-General, and all expressed satisfaction with the turn of events, albeit in very different terms. The representative of Russia said he was ‘pleased members of NATO have finally . . . come to understand that there is no alternative to respecting the Charter prerogatives of the Security Council as the body charged with the primary responsibility for the maintenance of international peace and security’.¹⁴⁰ China’s Ambassador reiterated his condemnation of the NATO campaign but abstained on (rather than opposed) the resolution largely because it reaffirmed the primary responsibility of the Security Council for the maintenance of international peace and security.¹⁴¹ Brazil complained about the problematic precedent that had been set by the resort to military force and expressed relief that the Council had resumed ‘its rightful role’.¹⁴² Many other delegations expressed satisfaction that the matter had returned to the Council, without referring to ‘problematic precedents’ set earlier,¹⁴³ and Slovenia, in another nuanced statement, said that with Resolution 1244 the Security Council was ‘resuming its legitimate role in the Kosovo crisis’ and could now strike an appropriate balance between ‘considerations of state sovereignty on the one hand and humanity and order on the other’.¹⁴⁴ The Netherlands voted for the resolution with a ‘sense of relief’, adding that the defeat of the 26 March resolution can only be explained by ‘a shift in the balance between sovereignty and human rights, such that it is now a generally accepted rule of international law that no sovereign state has the right to terrorize its own citizens’.¹⁴⁵ Similarly, the representative of Canada commented on the Council’s ‘effective re-engagement’ and said humanitarian and human rights

¹³⁹ As early as 14 April, the Heads of State and Government of the European Union agreed that a resolution would be adopted in the Security Council on the principles for a settlement they had agreed on. Chairman’s Summary of the Deliberations on Kosovo at the Informal Meeting of the Heads of State and Government of the EU in Brussels on 14 April 1999. Document on file with author.

¹⁴⁰ Lavrov, 4011th meeting of the Security Council, 10 June 1999, UN Doc. S/PV.4011, at 7.

¹⁴¹ UN Doc. S/PV.4011, at 9.

¹⁴² *Ibid.*, at 18. For similar views, see the statements of Mexico, Costa Rica, Belarus, and the Ukraine. *Ibid.*

¹⁴³ See statements of France, Malaysia, the United Kingdom, Argentina and Gambia. *Ibid.*

¹⁴⁴ UN Doc. S/PV.4011, at 11.

¹⁴⁵ *Ibid.*, at 13.

concerns must be given new weight in the Council's definition of security, 'a step in the direction of which was taken by resolution 1244'.¹⁴⁶

The US conspicuously did not express relief about the return to the Security Council, but later in a General Assembly debate President Clinton portrayed the Kosovo situation as a triumph for the UN, not NATO.¹⁴⁷ The US recognized that, in order to bring the air campaign to an end in a satisfactory manner, a follow-on ground presence would be required and the only politically realistic way of achieving that was by returning to the Security Council. Again, Matheson is frank about this:

As soon as NATO's military objectives were attained, the Alliance quickly moved back under the authority of the Security Council. This process was not entirely satisfying to all legal scholars, but I believe it did bring the Alliance to a position that met our common policy objectives without courting unnecessary trouble for the future.¹⁴⁸

Whatever 'future trouble' he may have been referring to,¹⁴⁹ 'the return to legality' represented by bringing the UN back into the picture was the device that allowed a semblance of international consensus to emerge following the sharply divisive period of March to June 1999 (when Russia went so far as to threaten World War III). It was the normative hook that provided both a face-saving compromise for those that opposed the intervention and a vehicle for keeping the NATO consensus intact when it was beginning to fray.

Sixth, a broader circle of actors who do not represent governments weighed in on the legal issues. First among them was the Secretary-General of the UN. He contributed to the discourse before the intervention by speaking often and eloquently about the Serb campaign against the Kosovars, never calling directly for forcible intervention but suggesting that the use of force may ultimately be necessary.¹⁵⁰ On the day the NATO bombing started, the Secretary-General issued a carefully worded statement regretting the failure of diplomacy and stating that 'there are times when

¹⁴⁶ *Ibid.*, at 14. This view was elaborated by Foreign Minister Axworthy in an article published in *NATO Review*, in which he stated that the Alliance's response to the crisis in Kosovo demonstrated how the defence of human security has become a global concern, and that the concept of human security establishes a 'new measure for judging the success or failure of national and international security policies'. *NATO Review* (Winter 1999) 8, at 9.

¹⁴⁷ General Assembly, 6th Plenary Meeting, 21 September 1999.

¹⁴⁸ Matheson, *supra* note 125, at 301.

¹⁴⁹ It might have stemmed from pressure to deploy ground forces in a more hostile environment than actually existed – given the continuing opposition of Yugoslavia, supported by Russia and China – one that was much closer to the ground invasion the US was so determined to avoid. It might also have been the risk that the doctrine of humanitarian intervention could be turned against a US ally.

¹⁵⁰ On 28 January 1999, he told the North Atlantic Council that 'the bloody wars of the last decade have left us no illusions about the difficulty of halting internal conflicts – by reason or force – particularly against the wishes of the government of a sovereign state. But nor have they left us with any illusions about the need to use force, when all other means have failed. We may be reaching that limit, once again, in the former Yugoslavia . . .'. Statement of the UN Secretary-General, UN Doc. SG/SM/6878, 28 January 1999. This and other statements were relied on by NATO Secretary-General Solana and his successor George Robertson in defending the intervention. The latter said that they provided 'the moral imperative' from which 'flowed the legal justification' for the air war. Statement made by Lord Robertson on 29 June 1999, cited by Butler, *supra* note 135, at 281.

the use of force may be legitimate in the pursuit of peace', but adding that 'under the Charter the Security Council has primary responsibility for maintaining international peace and security . . . and therefore the Council should be involved in any decision to resort to force'. After the campaign and the adoption of Resolution 1244, he put the issue of humanitarian intervention squarely on the international agenda by means of his statement at the opening of the general debate in the General Assembly (24 September 1999):

Kosovo cast in stark relief the dilemma of what has been called humanitarian intervention: on one side, the question of the legitimacy of an action taken by a regional organization without a UN mandate; on the other, the universally recognized imperative of effectively halting gross and systematic violations of human rights with grave humanitarian consequences. . . . The core challenge to the Security Council and the UN as a whole in the next century is to forge unity behind the principle that massive and systematic violations of human rights – wherever they take place – cannot be allowed to stand. . . . The choice must not be between Council unity and inaction in the face of genocide on the one hand – as in the case of Rwanda and Council division, and regional action, as in the case of Kosovo, on the other. In both cases the Member States of the UN should have been able to find common ground in upholding the principles of the Charter, and find unity in defence of our common humanity.¹⁵¹

Throughout the episode, the Secretary-General was acting on his own initiative, participating in the debate over the response to the immediate crisis, and ultimately trying to shape the more long-term debate on the whole question of humanitarian intervention.

International legal scholars also weighed in, most loudly after the fact. Opinions were varied, but leaned in the direction of illegality.¹⁵² In reviewing the scholarly comment, José Alvarez makes two particularly important points: first, that even commentators who supported the objectives of the intervention generally found NATO's action to be inconsistent with the Charter; and second, that there was a significant degree of uniformity among them about the range of tools they could use in interpreting the Charter (legal texts, directly related policy and intent-based arguments, prior institutional practice and a limited number of interpretative principles).¹⁵³ At the risk of overstating the case, one can infer from the relative weight of opinion against legality that this was the judgment the US government anticipated facing from the legal community. It is impossible to say how much this anticipated judgment may have influenced the decision not to push the claim of legality and

¹⁵¹ UN Press Release, SG/SM/136, GA/9596, 24 September 1999. His speech provoked reactions from government leaders in their own statements to the General Assembly, a distinct majority of whom came out either moderately or strongly opposed to the doctrine of humanitarian intervention. A careful reading of those statements, however, reveals that the opposition, which came mainly from the South, was not to the emerging norm per se but rather was driven by a fear that the doctrine would be applied selectively.

¹⁵² In a series of editorial comments by seven leading legal scholars (all but one American) in the *American Journal of International Law* of October 1999, only one concludes unequivocally that the intervention was lawful. 'Editorial Comment', *supra* note 108. For a summary and analysis of the various comments, see Slaughter, *supra* note 3, Chapter II.

¹⁵³ Alvarez, *supra* note 5, at 134 and 136.

instead emphasize moral and policy reasons (concerns about precedent likely weighed more heavily in that decision), but presumably the internal legal advice provided to the Clinton Administration would have been based on the same raw legal material available to the scholars. The US and other NATO governments certainly sought the advice of their legal advisers¹⁵⁴ and would thus have been conscious of the difficulty in making a case that differed substantially from the conclusions drawn by legal scholars after the fact.

C Conclusions To Be Drawn from the Discourse within the Security Council

A number of conclusions can be drawn from the Kosovo experience to support the claim that justificatory discourse within an interpretive community is not epiphenomenal. First, the variegated nature of the legal argumentation is indirect evidence of the existence of an interpretive community associated with Security Council practice. For various reasons outlined in Section 2 of this article, states feel compelled to justify their actions on the basis of law. The actions and justifications are assessed, challenged, responded to and judged in a process that includes the speeches and statements of government officials, diplomatic correspondence and interaction between governments, the decisions of the ICJ and other tribunals, as well as quasi-judicial bodies, and in public, press and academic commentary. An opinion of the ICJ carries considerable weight in this process (which is why Yugoslavia brought a case to the Court and NATO countries worked hard to mount a defence),¹⁵⁵ but it is only one among many voices. It is in anticipation of judgment by the interpretive community associated with Security Council practice that legal arguments are advanced in the Council. The impact of the interpretive community will depend in part on the degree of unity within it, as expressed through the decentralized process described above. Clearly, the international community was not unified on the norm of humanitarian intervention at the time of the Kosovo crisis, which is why arguments in the Council ranged from clear statements of legality or illegality to more tentative statements about the legal context in which the intervention took place. But the mere fact that legal arguments were advanced by all members, including the most powerful, suggests that the normative framework provided by the Charter and subsequent developments is sufficiently robust to warrant an effort to justify positions on legal grounds. And because there is an interpretive community to guard in effect that normative framework, the legal arguments were nuanced. If the law were infinitely manipulable, either legal arguments would not have been made at all or they all would have been more straightforward claims of (il)legality since there would

¹⁵⁴ A diplomat from a NATO country confirmed that a Kosovo task force within his government held daily meetings for at least three months before March 1999, in which legal considerations were 'front and center' in the discussions. He confirmed that the same was going on in other NATO capitals. Confidential interview with the author, 21 August 2001.

¹⁵⁵ *Case Concerning the Legality of the Use of Force (Yugoslavia v. Belgium)*, ICJ Reports (1999), and related cases collected in 38 ILM (1999) 950–1203. For a thoughtful analysis of the proceedings before the ICJ, see Kritsiotis, *supra* note 108.

be no need to worry about the test of credibility (who would administer that test?). The variegated nature of the arguments itself is circumstantial evidence of meaningful discourse within a functioning interpretive community.

Second, concerns about precedent are only intelligible if something like an interpretive community is at work. As noted above, many states that supported the action either refrained from claiming legality or pushed the claim with less vigour than they might otherwise have done. Some, including the US, Germany, the Islamic countries and maybe Brazil were concerned about the implications of endorsing a doctrine of humanitarian intervention. One can easily imagine that some of the Islamic countries were worried about later interventions against them (and the US about Israel), but the Kosovo 'precedent' would not make that any more likely unless one assumes some mechanism for issuing credible judgments that it really is a precedent – some basis for saying like cases are (or are not) being treated alike. Otherwise, anyone could simply claim in a subsequent dispute 'but Kosovo was different' without worrying that the claim would be put to a serious test. In a decentralized legal system, the mechanism that makes those judgments can only be the interpretive community – it is what gives the whole notion of precedent its bite.

Third, concerns about the plausibility of legal arguments – and the reputational costs associated with advancing implausible arguments – are further evidence of rational discourse within an interpretive community. Ultimately it is the interpretive community, and not just those at whom the arguments are directed, that administers the test of plausibility. The interpretive community in effect says about far-fetched claims: 'your legal position is untenable; your arguments are not only patently self-serving, they are wrong'. Government leaders and officials have an interest in avoiding that kind of judgment. In the Kosovo case, reputational concerns cut both ways. On the one hand, some states may have been reluctant to put forward implausible legal arguments knowing they would be seen as hypocritical. On the other hand, once it was clear the intervention would go forward, no NATO country wanted to publicly cast doubt on the legality of the action because all have a stake in maintaining a reputation for law-compliance. Either way, the interpretive community is the entity that extracts reputational costs.

The fourth and final conclusion to be drawn from the Kosovo experience is that, while legal discourse did not directly affect the decision to intervene, it did affect subsequent developments. NATO enunciated a new strategic concept within a few weeks of the start of the bombing campaign, which reaffirmed the role of the Security Council in authorizing interventions, and implicitly treated the Kosovo case as an exception. The debate over the legality of the action caused such unease among NATO countries that many felt it was important to highlight the exceptional nature of the event rather than set a new policy. Similarly, the felt need to return to the Security Council for a long-term solution ('whereas NATO made war, it still needed the UN to help secure the peace'¹⁵⁶) is revealing. As John Ikenberry points out, the more the US'

¹⁵⁶ Schnabel and Thakur, 'Kosovo and the Challenge of World Order', in Schnabel and Thakur, *supra* note 92, at 14.

preponderant power peeks out from behind the limitations imposed by multilateral institutions, the more that power will provoke reaction and resistance.¹⁵⁷ Legal boundaries may be pushed by norm provocateurs, but to be generally accepted internationally, those pushing the limits must work to some extent within what are regarded as the legitimate venues for discourse. US leadership was followed and, as I will elaborate below, the norm of humanitarian intervention may have received a boost (despite US concerns about the precedent), but it also provoked a reaction on the broader legal and institutional questions it raised, including among NATO allies. Returning to the UN via Resolution 1244 alleviated the morning-after regrets by diluting the threat to legal order the NATO intervention was seen as presenting. It reinforced the sense that institutions are an important check on the unilateral exercise of power in the name of collective values. For states that want to promote human rights, democracy, human security or other 'emerging norms', the Kosovo experience shows that failure to work through the accepted institutions will be resisted. Ironically, in an *ad hoc*, reactive way, Kosovo may have vindicated the role of the UN as a principal forum for seeking consensus on bitterly contested norms.¹⁵⁸

5 Conclusion

This article has argued that international law operates largely through a process of justificatory discourse within and constrained by interpretive communities. International organizations are important arenas for the discourse. The more tightly states and other international actors become bound in the web of international agreements and regimes, the more important the organizations become. And the more valued the particular institution, the more effectively it serves as a venue for persuasion based on law.¹⁵⁹ The Security Council is valued to the extent that all but a few states believe it serves a useful purpose for the maintenance of peace and security, despite deep reservations about its unrepresentative composition and unequal distribution of voting power. Because it is a valued institution, reputations count there, as does a sense of fidelity to UN Charter-based rules. Power and short-term calculations of interest count more, but the impact of these factors is mitigated by norms and discourse.

A full analysis of the recent Security Council deliberations on Iraq is beyond the scope of this article, but there is evidence of a discursive process not unlike in the Kosovo case. To begin with, the debates were unusually public, giving 'the interpretive community' ample opportunity to hear, assess and weigh in on the legal arguments put forward. The US sought to justify military action on at least two

¹⁵⁷ Ikenberry, 'The Costs of Victory' in Schnabel and Thakur, *supra* note 92, at 96.

¹⁵⁸ This point should not be overstated. Smaller NATO countries like Canada, Spain, Portugal and Belgium, as well as new entrants like Hungary, Poland and the Czech Republic, were influenced by a desire for a seat at that table, a voice in that forum, not the UN. See Haglund and Sens, 'Kosovo and the Case of the (Not-so) Free Riders: Portugal, Belgium, Canada and Spain', and Talas and Valki, 'The New Entrants: Hungary, Poland and the Czech Republic', both in Schnabel and Thakur, *supra* note 92.

¹⁵⁹ Keohane, *supra* note 5, at 500–501.

distinct legal grounds: self-defence against terrorism'; and enforcement of Security Council resolutions to rid Iraq of weapons of mass destruction. On the first, there is considerable evidence that the international community was prepared to accept the legality of military action against Al-Qaeda and the Taliban in Afghanistan, but was not prepared to stretch the argument to Iraq 17 months later. The debate was waged intensely in an around the UN in the months between September 2002 and March 2003. In the end, the 'interpretive community' was not persuaded that the links between Iraq and Al-Qaeda were sufficiently tight to justify military action as an extension of the war on terrorism. When that became obvious, the Bush Administration largely gave up trying to make the case on that basis — at least to international audiences. Thus in the letter the Permanent Representative of the US sent to the President of the Security Council setting out the legal justification for the war, there is not a word about terrorism, self-defence or the controversial doctrine of pre-emption.¹⁶⁰ The legal case is based entirely on the enforcement of existing Security Council resolutions relating to Iraq's weapons of mass destruction. The implication is that when the interpretive community rendered a clear judgment on the first claim, the US shifted to the second, somewhat more plausible legal justification.

On its face, the Kosovo case could be seen as disproving the significance of legal discourse within the Security Council. After all, the intervention occurred despite the weight of opinion against its legality. But there is much surrounding the event to suggest that this dismissive view of law is too simplistic. The way the debates themselves were conducted demonstrates that the law is not infinitely manipulable, and that invocation of the law serves a purpose and has consequences. In the end, the Kosovo case altered the terms of the debate on humanitarian intervention. This could not have happened through discussion of abstract principles, but only the rough and tumble of international practice and justificatory discourse about that practice.

When the dust finally settles, it is conceivable that a consensus about humanitarian intervention will emerge along the following lines. First, that *it is lawful with Security Council approval*. Up until now, that proposition has been controversial. Even though Council practice in the 1990s suggests that its members were prepared to countenance intervention in extreme cases of humanitarian need, some — especially Russia and China (which abstained on many of the key votes) — were unwilling to endorse that as a matter of general principle. Yet following Kosovo, there is evidence that Russia, China, India and other dissenting states are closer to seeing such action as a legitimate function — even a responsibility — of the Security Council.¹⁶¹ The second

¹⁶⁰ S/2003/351, 21 March 2003.

¹⁶¹ A Russian representative said in a UN Committee on 20 October 1999 that lessons had been learned from the crisis and Russia would be prepared to develop a legal framework for enforcement actions by the international community in the case of humanitarian emergencies in the future. GA Fourth Committee debate, 12th mtg, 20 October 1999. Cited by White, 'The Legality of Bombing', *supra* note 108, at 37. Similarly, a Chinese commentator noted that the UN had expanded and strengthened its role in interventions in internal conflicts since the end of the Cold War and concluded 'of course it should be understood that the world has changed and the rules must be adjusted to reflect the new reality and meet the new requirements. In fact, China does not reject all kinds of intervention. What China does insist is

element of an emerging consensus is that, *as a general matter*, humanitarian intervention is unlawful without Security Council authorization. Deep concerns among NATO countries, US doubts about the doctrine, reactions to the Secretary-General's speech to the General Assembly and the relief of even the staunchest advocates (the UK and the Netherlands) when the matter returned to the Security Council, provides some circumstantial evidence of this proposition. Third – and this is where evidence of a consensus is slimmest – there may be rare cases in which intervention without Council authorization will be deemed excusable. In other words, a 'blind eye' will be turned to violations in cases of extreme humanitarian need. Traces of this notion of humanitarian necessity as an excuse can be found in many of the statements on Kosovo, and it has not necessarily been rejected out of hand by the weight of official or scholarly opinion. Indeed the mere fact that the draft resolution introduced by Russia on 26 March failed by a vote of 12–3 suggests that some members of the Council were prepared to excuse the intervention, even though they were deeply troubled by the lack of explicit authorization (Brazil, Malaysia and Gabon, countries not known for automatically falling into line behind the US, come to mind). The failure of the General Assembly to condemn NATO is also indicative. It is possible that a supportive vote in the General Assembly under the Uniting for Peace resolution would have been passed by the required 2/3 majority, but was not resorted to because of the precedent it would have established. If so, then the decision not to go to the General Assembly suggests a willingness to turn a blind eye matched by an unwillingness to announce that is what is going on.

The Report of the Independent International Commission on Intervention and State Sovereignty represents an effort to crystallize the emerging consensus on humanitarian intervention. Following the mixed reaction to the Secretary-General's speech in the UN General Assembly in September 1999, the Foreign Minister of Canada Lloyd Axworthy decided to establish the Commission for the express purpose of firming up the legal basis for humanitarian intervention. The blue-ribbon panel that produced this report, like other such panels, is an institutionalized expression of the interpretive community in that the members were selected precisely because they are recognized experts and distinguished figures whose views on these matters deserve a hearing and carry weight. The thrust of the report is that sovereign states have a responsibility to protect their own citizens but when they are unable or unwilling to do so, responsibility falls on the broader community.¹⁶² It outlines a set of principles as to

that the intervention should be based on rules and authorized by the United Nations Security Council.' Yunling, *supra* note 126, at 126. Satish Nambiar, a retired Lt. General of the Indian Army (and former UN force commander) wrote, after a blistering critique of the NATO intervention, 'it would appear there is some consensus that the international community has a responsibility' to deal with human rights violations and humanitarian catastrophes and that 'there have been occasions when humanitarian intervention has been authorized by the Security Council'. Nambiar, 'India: An Uneasy Precedent', *ibid.*, at 267. See also Levgold, 'Foreword', Pugwash Study Group Occasional Papers, *supra* note 126, at 9, in which he says a 'minimum of consensus', including China and Russia, exists.

¹⁶² Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, Foreword (2001) VIII.

when and how that responsibility should be exercised, either with or without Security Council authorization.

As suggested above, there is scant evidence of an international consensus on the legitimacy of intervention without Security Council approval, but there may well be with such authorization. How might this be institutionalized? It is unlikely that the Council (or General Assembly) would adopt hard and fast criteria, but one can imagine the Council issuing a Presidential Statement listing a set of considerations (not criteria) to be taken into account in such deliberations.¹⁶³ Adapted from the International Commission on Intervention principles and other similar lists,¹⁶⁴ the considerations could include: the magnitude of the emergency (how serious the violations? how urgent the crisis?); the degree of organization (how systematic are the violations? is the leadership complicit?); the quality of evidence (is there convincing proof from a credible source?); the availability of alternatives (have measures short of the use of force been exhausted?); the attitude of the people at risk (do they want coercive intervention?); the degree of international support (has the relevant regional organization taken a position?); and prospects of success (are the interveners willing to see it through?). Devising criteria is neither realistic nor likely to be productive, but such a list of considerations might just provide enough flexibility to make agreement in the Security Council possible. The benefit would be to stimulate discourse and provide members with some rough guidelines to keep the debates within the bounds of reason. The guidelines would not provide a single ‘right answer’, nor would they do away with the influence of hard power and perceptions of national interest, both of which are essential to the effective functioning of the Council. But deliberation on these questions could enhance the power of persuasion based on law, and give ‘the better argument’ a fighting chance in Security Council decision-making.

¹⁶³ There is a precedent for this. In 1994 the Council adopted a list of considerations to be taken into account before establishing a peacekeeping mission. UN Doc. S/PRST/1994/22, 3 May 1994.

¹⁶⁴ For example, Report of the Independent International Commission on Kosovo (2001); Wheeler, *supra* note 109; Damrosch, ‘The Inevitability of Selective Response’, in Schnabel and Thakur, *supra* note 92.