Treaty Interpretation Under a Covenant Paradigm

Jared I. Mayer*

Abstract

Treaty interpretation has long drawn from the practice of contract interpretation. This is because, structurally speaking, treaties and contracts share many features. While the contract paradigm of treaty interpretation may work well for "ordinary" treaties—that is, treaties that have relatively low transaction costs for negotiating and renegotiating, whose fallout would not produce possibly disastrous consequences, and whose contents reify other, previously instantiated commitments between the parties—there is reason to doubt its efficacy with respect to "momentous" treaties. Momentous treaties are those whose transaction costs are tremendously high, fallout from which would jeopardize critical international security and prosperity goals, and that are often not supported by previous treaties securing the same or similar goals. Since the contract paradigm of interpretation largely focuses on the text of a treaty, it might be ill-suited to promote trust between the parties, which is especially important for maintaining momentous treaties. I argue that when it comes to interpreting momentous treaties, international institutions should opt for a "covenant paradigm of interpretation" over the contract paradigm of interpretation. Drawing on historical and anthropological work on the ancient Near East and Bible, I provide an account of "covenant interpretation" that calls on interpreters to focus not only on the text, but also on the parties' broader shared history and normative values. Using this paradigm, international institutions can remedy contract interpretation's trust-building deficit.

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I. INTRODUCTION

In both common and civil law jurisdictions, treaties have been interpreted and conceptualized through the framework of contracts. Such a paradigm is embodied in the 1969 Vienna Convention on the Law of Treaties (Vienna Convention).[1] That treaty, which governs treaty interpretation for future treaties, utilizes tools that originate in the realm of contract interpretation, such as the primacy of good faith in treaty fulfillment.[2] Interestingly, the Vienna Convention adopts a contract-style method for resolving treaty breaches; it absolves parties of a particular treaty obligation when another bound party breaches that obligation.[3] In both treaty interpretation and breach resolution, then, contract interpretation serves as the critical conceptual paradigm.

For many, indeed most, treaties, the contract paradigm fits well. Investment treaties, for example, are treaties for which the contract paradigm is well-suited. They have been more frequently renegotiated since their increased use beginning in the 1990s.[4] Renegotiation of these treaties comes at a relatively low cost since renegotiation aims to clarify or further specify the goals laid out in the initial treaties. It may also be that breaching these treaties will not result in any adverse effects to the breaching or non-breaching parties. This is because the parties have other agreements that essentially "copy" the breached investment treaty's terms, thus leaving the investment arrangement between the parties intact.

Focusing on these features highlights the fact that some treaties are different in kind than the investment treaties just mentioned. These are what I coin as *momentous* treaties. Unlike ordinary treaties, momentous treaties feature tremendously high transaction costs when it comes to negotiation and renegotiation. This can be due to the treaty being politically charged within a party's domestic politics or, more broadly, the fact that fallout from the treaty can lead to dire consequences and thus the treaty is tremendously risky. Because negotiation is so costly, momentous treaties will seldom stand upon previous, underlying agreements that can support the treaty in the event of a breach. Nuclear

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1 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

2 *See generally* MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 47(2009) (highlighting the historical relationship between treaties and contracts).

3 Vienna Convention, *supra* note 1, at art. 60. It is important to note that Article 60 allows parties to abrogate their responsibilities only upon unanimous consent of all of the non-breaching parties involved. Article 60, however, allows parties who are uniquely, adversely affected by the initial breach to subsequently breach the treaty; it grants the same privilege to all parties if the breach were to "radically change[ ] the position of every party" to the treaty. *Id.* at art. 60(2)(b)–(c).

4 Kathryn Gordon & Joachim Pohl, *Investment Treaties over Time – Treaty Practice and Interpretation in a Changing World*, *in* OECD WORKING PAPERS ON INTERNATIONAL DEVELOPMENT (2015). Available online at http://perma.cc/4PVV-4MSR.

non-proliferation treaties largely feature these dynamics and will therefore be my central example of momentous treaties.

Fallout from such a breach is partly driven precisely by the Vienna Convention's contractual paradigm. As I argue, the Vienna Convention's Article 60, in following the "breach of contract" paradigm, allows parties to escape from their treaty commitments' grasp, irrespective of whether the breached commitment is ordinary or momentous. This, in turn, might lead to fallout from the treaty that entirely negates the treaty's purpose, leading to dire consequences. In the nuclear non-proliferation context, for example, one nation's breach of the treaty can lead other signatory nations to breach the treaty as well.[5] To ensure that parties will perform their obligations, momentous treaties might place a premium on building trust between the parties that is simply not necessary with ordinary treaties.

The Vienna Convention's fidelity to the contractual paradigm of treaty interpretation further exacerbates the unique issues that may arise for momentous treaties. While a treaty is to be interpreted broadly with an eye towards the goal for which it was established,[6] treaty interpretation fundamentally rests upon the treaty's text with the understanding that the text is the "authentic expression of the intentions of the parties."[7] This may work well with an ordinary treaty, whose transaction costs for renegotiation are relatively low and whose provisions are secured by other, overlapping agreements. Yet because a momentous treaty has high transaction costs for renegotiation and does not have overlapping, alternative arrangements that secure the treaty's goals, emphasizing the discrete text of the treaty may leave a momentous treaty interpretively "under-supported," as it were, rendering its provisions relatively insecure upon a party's breach.

This Comment's solution to these interpretive problems is to shift treaty interpretation from a contract paradigm to a *covenant* paradigm. "Covenant paradigm" refers to an interpretive framing that largely draws from political arrangements commonly found in the Hebrew Bible and in ancient Near-Eastern societies. I create an account of covenant interpretation focuses on three features that distinguish it from contract interpretation: the centrality of kinship, impossibility of treaty dissolution, and normative evolution and holism.

The first two features refer to covenants' dynamic temporal character. "Centrality of kinship" draws on a legal-fictional conception of "blood relations"

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5 *See, for example*, Parisa Hafezi, *Iran Further Breaches Nuclear Deal, Says It Can Exceed 20% Enrichment*, REUTERS, (Sept. 7, 2019), http://perma.cc/6XZG-D4VY (highlighting how the U.S.'s breach of the Joint Comprehensive Plan of Action (JCPOA) enticed Iran to breach the JCPOA and enrich its uranium to be used for nuclear weapons).

6 Vienna Convention, *supra* note 1, at art. 31(1)–(2).

7 I.M. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 71 (1973).

between covenantal partners to indicate that the parties are obligated to see themselves as intertwined with one another in the treaty's joint venture.[8] Thus, it focuses on the parties' shared history, with an emphasis on how and why the parties came together to form the treaty at hand. A corollary to this point is "impossibility of treaty dissolution." Since the foundation of the covenant is the "blood relation," as it were, between the parties, there cannot be a "sunset clause" or other stipulation that a covenant will end. Similarly, the parties cannot breach a covenant and thereby render it non-binding for the other parties, unless that breach fundamentally challenges the "blood relation" between the parties.

The third feature of covenant interpretation refers to their distinctly dynamic *normative* character. Unlike contracts, which must be tethered to the particular obligations stipulated by the parties at the time of contracting, covenants can extend over time to create new obligations for the parties.[9] All of those obligations, in turn, reinforce each other. The covenant's text merely serves as a springboard for synthesizing a variety of sources, including the parties' shared history and normative values, that hang together holistically. Given momentous treaties' high transaction costs for renegotiation, using interpretive methods that reach beyond the text might be helpful in preserving the scheme that the treaty was meant to create. This means looking towards not only the treaty's purpose, but also to the parties' shared history and values to help regenerate trust between them. To illustrate these points, I review *Marshall Islands v. United Kingdom*,[10] an opinion issued by the International Court of Justice (ICJ), showing how a covenant paradigm would contrast with the Court's approach. Idiosyncratic as the covenant paradigm may be, I also argue that this approach is not far off from the ICJ's approach in its peculiar majority advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*.[11] In using covenant interpretation and the tools that it provides, institutions can help create a web of commitments that support the momentous treaty's goals. In so doing, institutions can remedy the unique shortcomings that the contract paradigm of interpretation has for interpreting momentous treaties.

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8 *See* FRANK MOORE CROSS, FROM EPIC TO CANON: HISTORY AND LITERATURE IN ANCIENT ISRAEL 3–4 (1998).

9 As this Comment shows, the evolution of the parties' obligations cannot be accommodated by the Vienna Convention's use of "course of performance" in treaty interpretation. *See* Vienna Convention, *supra* note 1, at art. 31(3).

10 Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Judgment, 2016 I.C.J. 833 (Oct. 5).

11 *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (Jul. 8).

II. TREATY AS CONTRACT

To establish the strong connection between treaty and contract interpretation, I will first show the historical and contemporary conceptual relationship between treaties and contracts. It will do so by highlighting the parallels between how contracts and treaties are interpreted, as well as how contracts and treaties may be suspended and terminated. Drawing this conceptual parallel between treaties and contracts is by no means novel.[12] Grotius plainly referred to treaties as "a [s]ort of [c]ontract"; that is, treaties must be conceptualized under a contract paradigm.[13] In the U.S., this conceptual relationship between contracts and treaties has been enshrined in law: "[a] treaty is in the nature of a contract between two nations, not a legislative act."[14] Recent scholars, too, have defended this conceptual parallel. As Russell Hardin of New York University has noted, "[t]reaties are roughly analogous to contract and mutual promises. Like contracts, they are formal; like promises, they are backed by no higher authority. We enter into promises, contracts, and treaties because each party expects to gain as a result."[15] Given these features, some scholars have concluded that treaty-making is a form of private ordering between nations that can be used to resolve collective action problems, such as prisoners' dilemmas.[16]

A. Interpretation

The relationship between contracts and treaties extends to the realm of interpretation.[17] Treaty interpretation, as performed today, has largely utilized concepts and idioms from both common and civil law contracts jurisprudence, beginning with the normative goals of treaty interpretation.[18] International law

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12 A treaty, under the Vienna Convention, is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." *See* Vienna Convention, *supra* note 1, at art. 2.1(a).

13 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 820 (Richard Tuck, ed., John Morrice, et al., trans., 2005) (1625).

14 Foster v. Neilson, 27 U.S. 253, 314 (1829).

15 Russell Hardin, *Contracts, Promises and Arms Control*, 40 BULL. OF THE ATOMIC SCIENTISTS 14 (Oct. 1984).

16 *See, for example*, Bryan H. Druzin, *Opening the Machinery of Private Order: Public International Law as a Form of Private Ordering*, 58 ST. LOUIS U. L. J. 423, 450–54 (2014).

17 For a succinct account of the historical relationship between contract and treaty interpretations, *see* ERIK BJORGE, THE EVOLUTIONARY INTERPRETATION OF TREATIES 99–105 (2014).

18 This Comment focuses on English, French, German, and American doctrines in contract law. This is because these jurisdictions represent the key doctrinal differences between the common and civil law traditions. Indeed, these traditions are so influential worldwide that "one need not go outside . . . . some well-known—albeit ill-defined—contrasts between Anglo-American (common

scholars have long debated the methods that international institutions should adopt when interpreting treaties. These methodological debates, in turn, point to what these scholars take to the be normative goals of treaty interpretation. As Sir Humphrey Waldock has noted, scholars

> differ to some extent in their basic approach to the interpretation of treaties according to the relative weight which they give to—
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> *(a)* the text of the treaty as the authentic expression of the intention of the parties;
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> (*b*) the intentions of the parties as a subjective element distinct from the text; and
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> (*c*) the declared or apparent objects or purposes of the treaty.[19]

These debates are mirrored in the context of European contract law.[20] The French system on the one hand, and the English and German systems on the other hand, depart from one another in whether the aim of contract interpretation is to secure the parties' common intention (per the French system) or rather to impute a meaning to the contract that a reasonable person would impute (per the English and German systems).[21] Moreover, some English courts are inclined to take a "purposivist" approach when a commercial contract's terms would fly in the face of ordinary business sense.[22]

Article 31 of the Vienna Convention attempts to provide a solution to these methodological debates. Article 31.1 calls on courts to interpret treaties "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[23] On its face, Article 31.1 marks the treaty's text as the departure point for any interpretive inquiry. This is further confirmed by the *Commentary to the Draft Articles*, which champions the text and eschews discovering any intent independent of the text:

> the text must be presumed to be the authentic expression of the intention of the parties; and that, in consequence, the starting point of interpretation is

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law) and Continental (civil-law) systems of procedure." MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 10 (1991).

19 Rep. of the Int'l Law Comm'n on the Work of its Eighteenth Session, U.N. Doc. A/CN.4/191 at 218 (1966); *see also* SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES, 70–73 (1973) [hereinafter Rep. of the Int'l Law Comm'n] (discussing the methodological debates on the question of treaty interpretation. *But see* VILLIGER, *supra* note 2, at 421–22 (identifying *five* approaches to treaty interpretation).

20 *See* Stefan Vogenauer, *Interpretation of Contracts: Concluding Comparative Observations*, *in* CONTRACT TERMS 123, 130–35 (Andrew Burrows & Edwin Peel, eds. 2007).

21 *Id.* at 127–29.

22 *See* Antaios Compania Naviera S.A. v. Salen Rederierna AB, [1985] AC 191 (HL), at 201 (U.K.) (per Lord Diplock).

23 Vienna Convention, *supra* note 1.

> the elucidation of the meaning of the text, not an investigation ab initio into the intentions of the parties.[24]

Article 31.2 clarifies that a treaty's context is constituted by the treaty's preamble and related agreements that all of the present parties have accepted.[25] Beyond the context, Article 31.3 mandates that courts take into account the parties' subsequent agreements, subsequent implementation of the present treaty, and any other international law provisions that apply to the parties.[26] These provisions help navigate the adjudicating body between "a strictly textual approach which would naturally give the terms of a treaty their original significance, and a purely teleological approach which would allow for the effect of an evolution of the law on the interpretation of legal terms."[27] Textualism with a tinge of teleology, therefore, marks treaty interpretation's fundamental structure.

What, then, of intentions? Those are relegated to "supplementary means of interpretation," which under Article 32, may be used "in order to confirm the meaning resulting from the application of article 31," or when the interpretation stemming from Article 31 methods results in a an absurd, unreasonable, ambiguous, or obscure interpretation.[28] As the commentary to the Draft Articles notes, listing intentions as "supplementary" affirms the fact that Article 32 "does not provide for alternative, autonomous, means of interpretation but only for means to aid an interpretation governed by the principles contained" in Article 31.[29] While treaty interpretation under the Vienna Convention primarily adopts textual and teleological methods, it also leaves room for the parties intentions to factor into the interpretive analysis when ambiguities arise.[30]

Contract interpretation follows a similar structure. In both German and English contract interpretation, the text of a contract is primary.[31] In a manner similar to Article 32, where the text leaves ambiguity in the interpretation, courts

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24 UN General Assembly, *Draft Articles on the Law of Treaties with Commentaries*, 1966 Y.B. INT'L L. COMM'N 187, 220 [hereinafter *Draft Articles*].

25 Vienna Convention, *supra* note 1.

26 *Id.*

27 Francis G. Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference*, 18 INT'L & COMP. L.Q. 318, 331 (1969); *see also* SINCLAIR, *supra* note 7, at 75–76 (noting that contract interpretation is primarily to be characterized as textual and teleological).

28 Vienna Convention, *supra* note 1.

29 *Draft Articles*, *supra* note 24, at 223.

30 *C.f.* Peter McRae, *The Search for Meaning: Continuing Problems with the Interpretation of Treaties*, 33 VICTORIA U. WELLINGTON L. REV. 209 (2002) (discussing which methods of interpretation the ICJ has adopted with regards to treaties).

31 Vogenauer, *supra* note 20, at 134.

are inclined to look to the parties' intent independently of the contract's text.[32] "Modern" English contracts jurisprudence slightly departs from this standard, to be sure, as the emphasis on the text's objectivity is softened by the English courts interpreting contracts to accord with "common sense" or, in commercial settings, "business commonsense."[33] In the American context, courts are also exhorted to read the contract "objectively," giving great weight to the text when interpreting a contract.[34] Nonetheless, courts should also give "great weight" to the parties' "principal purpose" in forming the contract if that purpose is discernable.[35] What is more, courts should interpret the contract according to how the parties altered their contractual agreement (perhaps far more widely than is allowed under the Vienna Convention) via a change in the course of performance of the contract.[36] Despite differences between these jurisdictions' contract jurisprudences, the conceptual framework used to craft Articles 31 and 32 of the Vienna Convention stems, primarily, from a contract paradigm.

The doctrinal importance of good faith, a hallmark of contract interpretation across both common and civil law regimes, also shines through in the Vienna Convention. Article 26 of the Vienna Convention provides, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[37] This principle, known as *pacta sunt servanda*, "is the fundamental principle of the law of treaties."[38] This prohibits a party from avoiding a treaty obligation "by a merely literal application of the [treaty's] clauses."[39] Indeed, this principle fuels Article 31's requirement that treaties be interpreted in good faith.[40] Contract law across common and civil law systems reflects a premium placed on good faith, as well. Indeed, *pacta sunt servanda* has been part and parcel of civil contract law since its "founding."[41] This is reflected in contemporary civil contract law, such as in

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32 *Id.* at 132–34. In this respect, French contract interpretation remains the outlier, as it focuses more squarely upon the parties' joint will. *Id.*

33 *Id.* at 40.

34 *See* RESTATEMENT (SECOND) OF CONTRACTS, §§ 33(1), 202(3), 203(a), 204, 222 (Am. Law Inst. 1981).

35 *Id.* at § 202(1).

36 *See id.* at § 223; *see also* 5 CORBIN ON CONTRACTS § 24.16 (2019).

37 Vienna Convention, *supra* note 1.

38 Rep. of the Int'l Law Comm'n, *supra* note 19, at 211.

39 *Id.*

40 *See* Vienna Convention, *supra* note 1; *see also Report of the International Law Commission*, *supra* note 19, at 221.

41 *See* SAMUEL VON PUFENDORF, THE WHOLE DUTY OF MAN ACCORDING TO THE LAW OF NATURE 109 (Ian Hunter & David Saunders, eds., Andrew Tooke, trans., 2003) (1673) ("[I]t is an obligation of the *Law of Nature*, that *every Man keep his Word*, or fulfill his Promises and make good his Contracts.") (emphases in original). For a fascinating discussion of this maxim's development

§ 242 of the German *Bürgerliches Gesetzbuch*, which provides a cause of action for subpar performance even if that performance falls within the technical letter of the parties' contract.[42] American contract law, under the influence of Professor Karl Llewellyn, has adopted a version of the German doctrine of good faith.[43] Uniform Commercial Code § 1-304,[44] as well as Restatement (Second) of Contracts § 205,[45] reflects similar requirements that the parties fulfill their contractual obligations in good faith. Though English contract law has been resistant to the broad notion of good faith, recent developments in the field of "unfairness" have catalyzed developments in English contract law that mimic the doctrine of good faith.[46] The doctrine of good faith, then, is yet another conceptual bridge between contract and treaty law.

B. Suspension and Termination

The Vienna Convention draws an important distinction between when treaties may be terminated and when they may be suspended.[47] Termination "[r]eleases the parties from any obligation further to perform the treaty";[48] suspension, by contrast, releases the parties from their treaty obligations with each other for some period of time.[49] Unlike termination of a treaty, however,

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throughout the civil law tradition, *see* Richard Hyland, *Pacta Sunt Servanda: A Meditation*, 34 VA. J. INT'L L. 405 (1994).

42 *See* Werner F. Ebke & Bettina M. Steinhauer, *The Doctrine of Good Faith in German Contract Law*, *in* GOOD FAITH AND FAULT IN CONTRACT LAW 171, 172–75 (Jack Beatson & Daniel Friedman, eds. 1997).

43 *See* E. Allan Farnsworth, *Good Faith in Contract Performance*, *in* GOOD FAITH AND FAULT IN CONTRACT LAW 153, 154–56, *supra* note 42.

44 U.C.C. § 1-304 (AM. LAW INST. & UNIF. LAW COMM'N 1977).

45 RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 34, at § 205.

46 *See* Jack Beatson & Daniel Friedman, *Introduction: From 'Classical' to Modern Contract Law*, *in* GOOD FAITH AND FAULT IN CONTRACT LAW 3, 14–17, *supra* note 42; *see also* Susan Bright, *Unfairness and the Consumer Contract Regulations*, *in* CONTRACT TERMS 173, 180–84, *supra* note 20.

47 Vienna Convention, *supra* note 1. *See also* Laurence R. Helfer, *Exiting Treaties*, 91 V.A. L. REV. 1579, 1613–29 (2005) (discussing the important differences between breach of treaty and exit/termination of treaty).

48 Vienna Convention, *supra* note 1, at art. 70. To be sure, the Vienna Convention provides limitations on when a party may initially withdraw from a treaty, that is, terminate a treaty for itself not in response to another party's withdrawal. Under those limitations, a party may only terminate a treaty if the parties intended to afford each other the possibility of terminating the treaty or if the right to withdraw from the treaty is implicit in the treaty's nature. *See id.* at art. 56. These limitations, however, apply only when the treaty does not itself address the possibility of withdrawal from the treaty. Given that parties need to simply address withdrawal within the treaty in order to overcome Article 56's analysis, Article 56 serves as little restraint on the parties' abilities to withdraw from their treaty.

49 *Id.* at art. 72.

suspension requires parties to "refrain from acts tending to obstruct the resumption of the operation of the treaty."[50]

Terminating or suspending a treaty begins when a party materially breaches the treaty. In other words, the party openly repudiates the contract in a way that is not sanctioned by the Vienna Convention or violates a provision of the treaty "essential to the accomplishment of the object or purpose of the treaty."[51] If the treaty is bilateral, then upon breach, the party not in breach may disregard the treaty.[52] To this extent, the Vienna Convention largely mirrors the conceptual tools used to understand breach of contract.

With multilateral treaties, the Vienna Convention provides numerous avenues for discerning whether and to what extent a treaty may be disregarded by the parties not in breach. A treaty will terminate or be suspended if all other parties not in breach agree to terminate or suspend it, respectively.[53] Article 60.2 provides two alternative avenues to suspending, but not terminating, a treaty. A treaty may be suspended with respect to one or more of the parties if those parties are "specifically affected by the breach"[54] or if the breach "radically changes the position of every party with respect to the further performance of its obligations under the treaty."[55] To be sure, a party claiming that its treaty obligation is nullified due to a material breach must follow the notification and adjudication procedures provided in Articles 65 through 68.[56] Notwithstanding these quite important procedures,[57] treaty breaches are conceptualized in ways that are almost identical to how breaches of contract are conceptualized.

The themes of materiality, conditional performance, and the distinction between termination and suspension are longstanding parts of both common and civil law regimes. Both common and civil law regimes allow termination of a contract upon breach only if that breach is "material."[58] Though the terminology

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50 *Id.* at art. 72.2.

51 *Id.* at art. 60.3.

52 *Id.* at art. 60.1.

53 *Id.* at art. 60.2(a).

54 *Id.* at art. 60.2(b).

55 *Id.* at art. 60.2(c).

56 *Id.* at 65–68.

57 For a discussion of the procedures that follow a party's (questionable) breach of a treaty, *see* Section III.C.

58 *See* G.H. TREITEL, REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ACCOUNT 350–52 (1988). To be sure, not all jurisdictions use the term "material" to describe the kind of breach necessary to render the contract unenforceable. Despite the variation in terms—ranging from "essential" to "deprive [the non-breaching party] of substantially the whole benefit" to "important ground of termination"—both common and civil law traditions fundamentally agree that

across regimes varies widely, each party's contractual obligations are, broadly speaking, conditional upon the other party's performance.[59] Thus, a breach of one of those "material" conditions may lead to one of two results. The first, and more moderate, effect of a material breach is canonized in the civil law tradition under the maxim *exceptio non adimpleti contractus*.[60] This principle does not allow the non-breaching party to terminate the contract, but rather "*for the time being* to refuse to perform his part."[61] The non-breaching party is excused from its contractual performance until and unless the party in breach performs adequately or offers to do so, or if the party in breach defaults, in which case the non-breaching party may terminate the contract.[62] Similarly, in common law jurisdictions, the breaching party's ability to possibly "cure" its defective performance, coupled with the fact that the non-breaching party may only suspend its performance while the breaching party is given time to cure the defect, suggests a common law corollary to the *exceptio*.[63] Thus, the *exceptio* and suspension, and contractual and treaty termination, are each other's equivalents in contract and treaty enforcement, respectively.[64]

III. MOMENTOUS TREATIES AND CHALLENGING THE CONTRACT PARADIGM

As outlined above, treaties borrow from contract law's conceptual toolbox in debates over interpretation, methods of interpretation, and enforcement of terms. This is why I refer to treaty interpretation as adopting or utilizing a "contract paradigm." But it is at this point that I turn to the questions of when and to what extent this paradigm is most useful and, conversely, where it deteriorates in the face of unique challenges that arise on the international stage. This Section argues that while the contract paradigm of treaty interpretation works

termination of contractual duties occurs only when the party in breach breaches the contract in a uniquely severe way. *Id.* at 350–51.

59 *Id.* at 259–61.

60 *Id.* at 248.

61 *Id.* at 310 (emphasis in original).

62 *Id.* at 310–11.

63 *Id.* at 313.

64 As an aside, it is important to note that there is nothing in principle that renders treaties uniquely susceptible to having multiple parties. Contracts, too, may have arrangements whereby there are multiple promisors and promisees. *See, for example*, RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 34, at § 9, cmt. c (illustrating the conceptual and practical possibility of having a multilateral contract).

well when it comes to ordinary treaties, it falters when applied to momentous treaties.[65]

A. Ordinary Treaties

It is first important to identify ordinary treaties' key properties. One of those properties is relatively low transaction costs for renegotiating those treaties over time. Instead of starting anew when one or more parties wish to alter their previous agreement, parties may simply amend the treaty according to the treaty's own terms. Under the Vienna Convention, parties, by and large, may renegotiate a treaty according to the parties' own terms.[66] Recent data on drafting bilateral investment treaties has shown that parties frequently renegotiate low-transaction-cost treaties. During the early to mid-1990s—immediately after the fall of the Soviet Union—there was a dramatic rise in the number of these treaties negotiated between nations.[67] While the absolute number of new bilateral investment treaties has dramatically dropped since that time, and while the absolute number of renegotiated bilateral investment treaties remains relatively low, "the proportion of replacements in the overall treaty production has tended to increase since the early 2000s."[68] This data supports the hypothesis that renegotiating an already existing treaty has lower transaction costs relative to negotiating an entirely new treaty. Moreover, given the frequency with which these bilateral investment treaties are renegotiated—and given that they are often renegotiated to provide further details on "fair and equitable treatment" and "full protection and security" between the parties[69]—the evidence suggests that the marginal benefits of these renegotiations outweigh the marginal costs of renegotiation. Thus, an ordinary treaty, such as a bilateral investment treaty, will have relatively low transaction costs for renegotiation of its terms.

Another important feature of ordinary treaties is that they often reiterate and therefore support agreements securing the same or similar goals that are already in play. This may be because by the time ordinary treaties are ratified by the parties, other agreements, treaties, and shared interests have already created a web of

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65 It is important to note here that by ordinary, I do not mean to suggest that these treaties are somehow unimportant or negligible. Indeed, investment treaties are an incredibly important part of settling investors' expectations and allocating investment risks in a dynamic global economy. *See* Gordon & Pohl, *supra* note 4, at 9. The features that I identify as being part of ordinary treaties, as we shall see, speak more to their structural features, not to the goals that they aim to achieve.

66 Vienna Convention, *supra* note 1, at art. 39.

67 Gordon & Pohl, *supra* note 4, at 36.

68 *Id.*

69 *Id.* at 37.

similar commitments.[70] Thus, if one or more of the parties withdraws from the treaty, those parties may reasonably rely upon the web of similar commitments to serve as a "safety net" for their interests.[71] Investment treaties once again serve as an illustrative example. Investment treaties between nations generally stipulate, among other things, that nations will treat investors from the other nations fairly and equitably. The Investor State Dispute Settlement (ISDS) is a treaty provision that parties may insert into their investment treaties that allows private parties to sue nations when those parties believe that those nations have treated them unfairly.[72] Since private parties—which are, in nearly all cases, multinational corporations—have presences in many countries, they can reap the benefits of each country's ISDS agreements; many of the agreements include arbitration provisions that entitle an aggrieved party to bring a claim before numerous adjudicatory bodies.[73] Thus, a nation's withdrawal from one investment treaty will not substantially reduce foreign investment in that nation.[74]

The previous point highlights the ways in which *breach* of ordinary treaties has relatively low costs for the breaching party. This can be the case irrespective of the treaty's goals. If breaching the treaty will not result in a great military, economic, or natural calamity, yet parties find the treaty to be costly, then holding everything else constant, parties will be loath to adhere to the treaty simply for adherence's sake.[75] This is likely to work alongside other previously discussed elements: low costs for breaching an ordinary treaty might be bolstered because of myriad opportunities to renegotiate, and the existence of a web of other commitments might support the fallout from any breach of a treaty. Because of their low costs and other characteristics, ordinary treaties might therefore be subject to frequent breaching.

This discussion has assumed a bilateral treaty as the operating model. Could the same analysis apply to ordinary multilateral treaties? There is good reason to believe it will. Multilateral treaties, in principle, have the same key features as

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70 *See* Oran R. Young, *Institutional Linkages in International Society: Polar Perspectives*, 2 GLOBAL GOVERNANCE 1, 6-7 (1996); *see also* G. Kristen Rosendal, *Impacts of Overlapping International Regimes: The Case of Biodiversity*, 7 GLOBAL GOVERNANCE 95, 96–98 (2001).

71 *See* Brett Ashley Leeds & Burcu Savun, *Terminating Alliances: Why Do States Abrogate Agreements?*, 69 J. POL. 1118, 1119–20 (2007) (showing the many ways in which a treaty may conclude, including by mutual recognition that the parties have achieved their goals).

72 *See* Clint Peinhardt & Rachel L. Wellhausen, *Withdrawing from Investment Treaties but Protecting Investment*, 7 GLOBAL POL'Y 571 (2016).

73 *Id.* at 572.

74 *Id.*

75 *See, for example*, Anglo-Norwegian Fisheries, (U.K. v. Nor.), Order, 1951 I.C.J. 117 (Jan. 10) (resolving dispute between the U.K. and Norway regarding fishing and territorial rights off the coast of Norway).

ordinary treaties: low costs for breaching and/or suspending performance, largely motivated by the fact that there are overlapping agreements that the multilateral agreement reifies and, further, that the possibility of renegotiation remains.[76] To be sure, multilateral treaties, given that they unify multiple parties under one scheme, might, in principle, make exiting from them more difficult than exiting from bilateral treaties.[77] Multilateral treaties, however, often times simply "set[ ] up . . . conventional bond[s] between each of the parties and each of the other parties, so that breach of a particular provision by one state . . . affects only one other state."[78] Thus, given that multilateral treaties may, in some sense, be a subset of bilateral agreements between parties, the earlier analysis for bilateral treaties seems applicable to multilateral treaties as well.

B. Momentous Treaties

Momentous treaties stand in stark contrast with ordinary treaties. The term "momentous" is borrowed from, and inspired by, William James in his discussion of the pragmatics of decision-making and belief acquisition:

> If I . . . proposed to you to join my North Pole expedition, your option would be momentous; for this would probably be your only similar opportunity, and your choice now would either exclude you from the North Pole sort of immortality altogether or put at least the chance of it into your hands. He who refuses to embrace a unique opportunity loses the prize as surely as if he tried and failed.[79]

One essential element of momentous treaties that this passage highlights is the rarity of opportunities to create these kinds of treaties. This might be the case for a number of reasons, one being that the parties to a particular momentous treaty stand to suffer significantly if the treaty breaks down, or another being that the treaty is politically controversial within a state party's domestic politics. Be that as it may, what partly distinguishes momentous from ordinary treaties is the sheer risk of, and thus lack of opportunities that parties have to negotiate and ratify, momentous treaties.

What is more, it should not be surprising that momentous treaties fail to reaffirm other, earlier agreements that protect the parties' interests. If a momentous treaty is momentous precisely because of its inherent risks, one

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76 *See* Vienna Convention, *supra* note 1, at art. 40 (outlining the distinct procedures for amending multilateral treaties between all parties and for amending agreements between only specific parties to the treaty, respectively).

77 Indeed, as Helfer concludes from his compilation of treaty withdrawal data, "states quit multilateral treaties with a fair degree of regularity." Helfer, *supra* note 47, at 1608.

78 Christian Dominicé, *The International Responsibility of States for Breach of Multilateral Obligations*, 10 EUR. J. INT'L. L. 353, 354 (1999).

79 William James, *The Will to Believe*, *in* THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY 1, 4 (Longmans, Green, & Co. 1912) (1896).

should not expect to find layers of similar agreements in force between the parties. This has sobering consequences for momentous treaty fallout. With ordinary treaties, like foreign investment treaties, parties could expect to retain foreign investment within their nations because foreign investors can rely upon a multitude of overlapping agreements securing their rights as investors, even if the host nation breached one foreign investment treaty. With momentous treaties, however, there is little reason to believe that a network of overlapping agreements, which cement the contentious, indeed volatile, provisions of the momentous treaty, exists. In the fallout from the momentous treaty, then, there will be no web of earlier, alternative commitments on which the parties may land.

Fallout from such treaties may also prove to be uniquely dire, either in the short or long term, relative to the fallout from their ordinary counterparts. Take, for example, the Nuclear Non-Proliferation Treaty (NPT).[80] Fallout from this treaty may foreseeably result in the stockpiling and/or readying of nuclear weapons, at the very least.[81] Further, fallout from the NPT may highlight the fact that trust between the parties to the treaty—or at least the trust between the breaching party and at least one of the other parties to the treaty—has been made untenable, rendering a nuclear-contained peace unachievable.[82] As a result, both parties to the treaty, and indeed the entire world, will be subjected to a greater risk of nuclear war.

This is the case regardless of whether the treaty is bilateral or multilateral. The relationship between a party's breach of a bilateral treaty and the non-breaching party's obligations with respect to that treaty is fairly simple. In such a case, the non-breaching party is entitled to terminate or suspend the treaty.[83] With multilateral treaties, the picture becomes more complicated. Recall how a treaty may be suspended with respect to one or more of the parties to the treaty, under Article 60.2(b), if those parties are "specifically affected by the breach,"[84] or, under Article 60.2(c), if the breach "radically changes the position of every party to with respect to the further performance of its obligations under the treaty."[85] Indeed, Article 60.2(c) was crafted "with so-called integral treaties in mind, *e.g.*, on

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80 *See* Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 729 U.N.T.S. 161.

81 *See* Leonard S. Spector, *Slowing Proliferation: Why Legal Tools Matter*, 34 VT. L. REV. 619, 624 (2010) ("If [a country] were to suddenly pull out of the NPT and tell the IAEA [International Atomic Energy Agency] to go home and if it had prepared non-nuclear components for nuclear weapons in advance, it could produce nuclear arms in a matter of weeks, under some scenarios.").

82 *See* Jan Ruzicka & Vincent Keating, *Going Global: Trust Research and International Relations*, 5 J. TR. RES. 1, 4 (2015).

83 Vienna Convention, *supra* note 1, at art. 60.1.

84 *Id.* at art. 60.2(b).

85 *Id.* at art. 60.2(c).

disarmament, where a State could not suspend the treaty in relation to one party without violating its obligations toward the others."[86] Article 60.2(b) is created in the same spirit, but with the recognition that a particular party to a multilateral treaty may have a unique interest in a specific party's enforcement of the treaty and thus a unique right to suspend performance upon that specific party's breach.[87] In either case, one party's suspension of a treaty may cause the other parties to suspend their performance as well. This situation occurred in 2007, when Russia announced that it would suspend its performance of the Treaty on Conventional Armed Forces in Europe (CFE). After unsuccessfully attempting to force Russia's performance under the treaty, the U.S. and other NATO members, who were parties to CFE, announced that they would also suspend their performance.[88] This rendered the military stability in Europe that the CFE established uncertain, undercutting the primary purpose of the treaty.[89]

C. Challenging the Contract Paradigm

These features of momentous treaties highlight the ways in which *trust* between nations will need to play a significant role in securing momentous treaties' objectives between parties.[90] Recall that momentous treaties are rare, unilateral (in that they do not reify other earlier commitments), and tremendously important. Given the fundamental premise of international relations—that the world lacks a consistent and powerful mode of coercive enforcement for international agreements—it seems implausible to think that coercive powers alone will ensure compliance with momentous treaties.[91] After all, the cost of coercively enforcing

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86 VILLIGER, *supra* note 2, at 745.

87 *Id.*

88 *See* Mika Hayashi, *Suspension of Certain Obligations of the CFE Treaty by NATO Allies: Examination of the Response to the 2007 Unilateral Treaty Suspension by Russia*, 18 J. CONFLICT & SEC. L. 131, 133–34 (2013).

89 An important point to note is that the severity of these kinds of breaches are manifest in externalities as well. Take the NPT, for example. Breach of that treaty will likely result in another party "suspending" performance of the treaty in order to create or otherwise militarily prepare a nuclear stockpile. This exposes *all nations* to the effects of a catastrophic nuclear war, whose effects simply cannot be contained. Even so-called "limited" nuclear wars can have ghastly, catastrophic consequences for both combatant nations and peaceful ones. *See* Joseph Cirincione, *The Continuing Threat of Nuclear War*, *in* GLOBAL CATASTROPHIC RISKS 381, 386–88, 390–92 (Nick Bostrom & Milan M. Cirkovic, eds. 2008).

90 *See* Jan Ruzicka & Nicholas J. Wheeler, *The Puzzle of Trusting Relationships in the Nuclear Non-Proliferation Treaty*, 86 INT'L. AFF. 69, 70 (2010) (claiming that the NPT fundamentally establishes a set of "trusting" relationships between the parties). The scholarship on trust has debated what exactly is meant by trust in international relations. *See* Torsten Michel, *Time to Get Emotional: Phronetic Reflections on the Concept of Trust in International Relations*, 19 EUR. J. INT'L. REL. 869, 871–74 (2012).

91 *See* Druzin, *supra* note 16, at 455 ("Sanctioning authority is seldom granted by treaties and rarely used even where it is granted.").

such a treaty may well outweigh any possible benefit that would arise from this coercive exercise.[92] In addition, momentous treaties' unilateral character suggests that fallout from momentous treaties will not be supported by underlying agreements that secure the same policy objectives. If this is so, and if momentous treaties have structural features that render them both uniquely important and fragile, then trust between parties may be necessary to ensure as much compliance with momentous treaties as possible.[93] Trust is understood as the creation of overlapping norms and practices such that minimal risk-hedging is required.[94] This kind of trust may arise in the international arena over time when there are repeated signals that each party is consistently performing their treaty obligations.[95] While trust may be severely undermined by a nation's breach of a momentous treaty, it still behooves us to recognize the ex ante value of identifying norms, policies, and institutions that can play critical roles in creating and promoting trust between nations.

The contract paradigm for treaty interpretation may be insufficient for performing this ex ante trust-promoting function for momentous treaties. The key drawback to the contract paradigm of treaty interpretation is the fact that this interpretive exercise will be largely cabined to the particular meaning of the treaty's text. Of course, the Vienna Convention explicitly eschewed a form of hyper-textualism, instead opting for a blended approach that privileges the text and purpose of the treaty, with reference to the parties' intent as needed to resolve ambiguities.[96] Yet parties' obligations, including what constitutes a "material breach" of those obligations and when such obligations may be suspended by non-breaching parties, are established largely in reference to some conception of the meaning of a treaty's text.[97]

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92 It should be noted that even economic sanctions have a questionable efficacy in curbing rogue parties, oftentimes instead placing huge burdens on those parties' vulnerable, and innocent civilian populations. *See* Jana Ilieva, Aleksandar Dashtevski, & Filip Kokotovic, *Economic Sanctions in International Law*, 9 UMTS J. ECON. 201, 206–07 (2018).

93 *See* Druzin, *supra* note 16, at 455.

94 S*ee* Vincent Charles Keating & Jan Ruzicka, *Trusting Relationships in International Politics: No Need to Hedge*, 40 REV. INT'L. STUD. 753, 761–62 (2014) (correlating a lack of "hedging" with genuine trust between nations); *see also* Michel, *supra* note 90, at 884.

95 *See* Druzin, *supra* note 16, at 437, 442–43.

96 *See* Section II.A.

97 Article 31.3(b) admittedly allows a court to take "into account together with the context . . . Any subsequent agreement between the parties . . . [or] Any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation." Vienna Convention, *supra* note 1. These sources of interpretation are all "objective evidence of the understanding of the parties as to the meaning of the treaty." *Report of the International Law Commission*, *supra* note 19, at 221. Yet as the Report notes, courts have often resorted to such materials only when the text was ambiguous. *Id.* The meaning of the text, then, still reigns supreme in the analysis.

Under the contract paradigm of interpretation, to be sure, international institutions may not always be wed to the *present* meaning of a term. Those institutions may decide that "the parties' intent upon the conclusion of the treaty was . . . to give the terms used—or some of them—a meaning or content capable of *evolving*, not one fixed once and for all."[98] This method of interpretation, however, is significantly limited by treaty interpretation's contract-grounded premises. Scholars have noted the tremendous difficulty in reconciling treaty interpretation's contractual nature with evolutionary interpretation, for evolutionary interpretation will naturally weaken the certainty and consensual basis upon which treaties *qua* contracts are made.[99] To limit this negative outcome, proponents of evolutionary interpretation insist that "evolutionary interpretation . . . must ultimately refer back to the consent of the parties themselves and to their common intention."[100] Skeptics, however, highlight the remaining tension between the interpretive demands of Article 31 of the Vienna Convention and the expansive methodology embodied in evolutionary interpretation.[101] Even the parties' most abstract obligation—*pacta sunt servanda*—directs parties to perform *their stipulated obligations* in good faith. While this maxim calls upon parties to perform their treaties not just to accord with the text of those treaties, it still fundamentally rests on the assumption that the text is what shall govern over the parties. The contract paradigm, then, renders evolutionary interpretation unsatisfying: it cannot concurrently provide the certainty that the contract paradigm requires *and* the normative expansion that made evolutionary interpretation initially tempting.

At bottom, it is ironically the commitment to the treaty's text that jeopardizes momentous treaties. In order to promote trust between the parties, it may behoove institutions to relax their central commitment to the text and instead broaden their analysis to draw upon other sources that may help the feuding parties repair and build trust. Curing momentous treaties' insufficiencies and promoting trust, then, requires rethinking the contract paradigm to which treaty interpretation has bound itself.

IV. THE HISTORICAL ACCOUNT OF COVENANTS

As discussed, it is pertinent to challenge the contract paradigm of treaty interpretation in order to promote trust between parties to momentous treaties.

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98 Dispute regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. 213, 242 ¶ 64 (July 13) (emphasis added).

99 *See, for example*, Catherine Brölmann, *Limits of the Treaty Paradigm*, *in* INTERROGATING THE TREATY: ESSAYS IN THE CONTEMPORARY LAW OF TREATIES 29, 34–36 (Matthew Craven & Malgosia Fitzmaurice, eds., 2005).

100 BJORGE, *supra* note 17, at 120.

101 *See, for example*, RICHARD K. GARDINER, TREATY INTERPRETATION 470, 473–74 (2d ed. 2015).

Doing so requires exploring interpretive paradigms that sharply depart from the contract paradigm. As I shall argue in this Section, the *covenant paradigm* found in both ancient Near Eastern societies and the Bible, modified to fit the international legal context, is a promising candidate to replace the contract paradigm of momentous treaty interpretation.

Before fully examining the account of "covenant" adopted by this Comment, it is important to identify the senses of covenant that I will not discuss. The first sense of covenant that is not explored in this Comment is one that is similar to an ordinary contract or treaty between two or more parties. Like any ordinary contract, this first sense of covenant "represents an agreement between two parties in which there is parity. Both sides enter the treaty voluntarily, resulting in a partnership relationship."[102] Given the structural similarity between these covenants and modern contracts and treaties, there is little reason to believe that this conception of covenant will provide a sufficiently meaningful contrast with contemporary contracts.

Scholars have also identified a second sense of covenant within the Hebrew Bible.[103] All of these scholars agree that covenants of this second kind are instantiated in particular, dramatic episodes, such as the creation of the covenant with Noah[104] and the creation of the covenant with the Israelites at Sinai.[105] They disagree, however, as to how to conceptualize the covenants that Noah and the Israelites made in their respective agreements. Some scholars have compared these covenants with "*suzerainty* treaties."[106] These covenants, in sharp contrast to the contract-like covenants discussed above, were premised upon the covenant being made between a "vassal" and "king," "where the vassal is obligated to obey the commands stipulated by the king."[107] The purpose of this kind of covenant, its proponents claim, was to "establish a firm," but unilateral, "relationship of mutual support between the two parties," whereby "the emphasis" was placed upon "the vassal's obligation to *trust* in the benevolence of the sovereign."[108] Thus, on this understanding, one party's domination over the other and the unilateral

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102 Irvin A. Busenitz, *Introduction to the Biblical Covenants: The Noahic Covenant and The Priestly Covenant*, 10 THE MASTER'S SEMINARY J. 173, 175 (1999).

103 *See generally* Scott Hahn, *Covenant in the Old and New Testaments*, 3 CURRENTS IN BIBLICAL RES. 263, 264–70 (2005) (surveying critical contributions to the literature analyzing Israelite covenants).

104 *See Genesis* 9:1–11 (JPS, trans.).

105 *See, for example*, *Exodus* 17:7.

106 *See* George E. Mendenhall, *Covenant Forms in Israelite Tradition*, 27 THE BIBLICAL ARCHEOLOGIST 50, 55–56 (1954) (emphasis in original); *see also* Busenitz, *supra* note 102, at 176.

107 Mendenhall, *supra* note 106, at 55; Busenitz, *supra* note 102, at 176.

108 Mendenhall, *supra* note 106, at 56 (emphasis in original).

obligations provided by the suzerainty covenant distinguish it from the contract-like account of covenant.

Rejecting this proposal, other scholars—and this Comment—emphasize the importance and analytical priority of *kinship* in distinguishing the second sense of covenant from the first. As Hebrew Bible scholar Frank Moore Cross describes:

> The social organization of West Semitic tribal groups was grounded in kinship. Kinship relations defined the rights and obligations, the duties, status, and privileges of tribal members, and kinship terminology provided the only language for expressing legal, political, and religious institutions.[109]

Originally, the concept of kinship was deeply tethered to blood relations between family members.[110] This way of framing the kinship relationship allowed the concept to adopt an array of obligations that were incumbent upon kinsmen. Such obligations included securing the welfare and physical protection of one's kin, though these important obligations are by no means distinct to kinship as a method of constituting political society.[111] Kinship's unique contribution to these obligations was that it "thickened" these obligations using a variety of emotively charged concepts.[112] For example, love (*ahaba)* "is kinship language, the bond that holds together those in intimate relationships, the relationships of family and kindred."[113] Loyalty (*hesed*), too, is a fundamental way in which kinsmen are to interact with each other.[114] It is on this unique basis that the Biblical conception of covenant rests.

Over time, kinship was reshaped and reformed in order to accommodate a more complex and dynamic political society. As families began coordinating and living together in political society, blood relationship alone could no longer provide the grounds for kinship needed to ensure a cohesive society. Thus, early societies crafted "legal mechanisms or devices—we might even say legal fictions—" to overcome the lack of blood ties and extend the kinship relationship.[115] Covenant was invented to bridge the gap between two, nonblood-related persons or tribes. With a deity as their witness, two parties would "unite their blood," as it were, to extend "the duties and privileges of kinship" to each

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109 CROSS, *supra* note 8, at 3.

110 *Id.* at 3–4.

111 *Id.* at 4.

112 "Thickened," in this context, refers to Bernard Williams' distinction between "thick" and "thin" concepts. For the classical discussion of this distinction, see BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 129, 152 (1985).

113 CROSS, *supra* note 8, at 5.

114 *Id.*

115 *Id.* at 7.

other.[116] This innovation allowed the kinship conception of political relations to extend onto the international scene. Covenants between nations outlined obligations between nations in "thick" terms that were part and parcel of the kinship model. Relationships between nations were characterized as "loving" and the member nations were subscribers to "a treaty of brotherhood."[117] The language of covenant, then, "is taken from the language of kinship," and to understand covenant requires us to appreciate and understand kinship.[118]

One example of this kind of kinship-infused covenant can be found in the treaty that was made between the Kingdom of Israel and the Kingdom of Tyre. To celebrate and thank God for granting him a peaceful and prosperous kingdom, King Solomon of Israel declares that he will build "a house for the name of the Lord."[119] Hiram, a "lover" of Solomon's father David,[120] creates a covenant with Solomon to provide lumber for the construction.[121] This treaty is characterized as a "covenant of brotherhood" between Solomon and Hiram, showing their strong commitment to one another.[122]

Additionally, covenants, as distinguished from contracts, are almost always interminable. Indeed, David Novak takes this property to be one of the essential features that distinguishes a covenant from a contract.[123] Aside from Novak's stipulation, however, scholarly works on this point are few and far between, since theologians, "for the most part, have always assumed" covenants' interminability.[124] Today, scholars hotly debate the extent to which covenants are terminable or interminable, with particular attention being paid to the Davidic covenant.[125] Despite this scholarly debate, breach of covenant throughout the Bible consistently results in reckoning and punishment, to be sure, but not a dissolution of the covenantal relationship. This accords with the kinship account of covenants. Since a covenant, on the kinship account, is grounded in a legal fiction that creates a "blood relation" between parties, that "blood relation"

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116 *Id.* at 8.

117 *Id.* at 10 (citing 1 *Kings* 5:14–26).

118 *Id.* at 11.

119 1 *Kings* 5:19.

120 1 *Kings* 5:15.

121 1 K*ings* 5:24–26.

122 *Amos* 1:9.

123 DAVID NOVAK, THE JEWISH SOCIAL CONTRACT: AN ESSAY IN POLITICAL THEOLOGY 35 (2005).

124 David W. Jones & John K. Tarwater, *Are Biblical Covenants Dissoluble? Toward a Theory of Marriage*, 47 S.W. J. THEOLOGY 1, 5 (2004). Part of the debate stems from the Hebrew word that is used when the Bible discusses possible instances of covenant termination (*hafreh*). It can be understood to refer to either a breach of a covenant's terms or a termination of the covenant. *Id.* at 9.

125 *See* Hahn, *supra* note 103, at 276–77; *see also* Jones & Tarwater, *supra* note 124, at 8–9.

cannot be negated by a simple violation of one's duties to one's kin. Nor can it be negated by the parties' mutual assent that the covenant be negated; that is, under a covenant, parties are not entitled to mutually agree to exit the covenant. The only exception to this is when one acts in such a way as to compromise or negate one's identity as a "blood relative" of one's kin. This is seen throughout the Bible. Though the Israelites have breached their covenant with God, God consistently remembers and honors his covenant with the Israelites.[126] Yet God also provides specific commandments relating to covenantal identity; violating these commands will result in being "cut off" (*kareth*) from the rest of the Israelites.[127] So while covenants include the concept of breach in the sense that it is physically possible to violate the terms of the covenant, covenants cannot be terminated except when one or more parties act so as to "cut off" the kinship between them.

Covenants' interminability (with one exception, as noted earlier) hints at another feature: their ability to normatively evolve over time. This means that the parties may be required to perform new functions due to the covenant that they previously ratified. Once again, covenants' foundation in kinship proves to be the reason for this feature. Covenants create an artificial kinship relationship between the parties, and it is this relationship that primarily constitutes the core of the covenant. Indeed, the bonds of love and loyalty provide the grounds for more concrete duties, such as protecting one's kin and ensuring that one's kind received material welfare during times of hardship. It is therefore this bond of kinship that allow parties to reify and build upon their previous commitments.

Reification of a covenant, for example, can be found in the Book of Nehemiah. After the Israelites return from exile in Babylon, Ezra and Nehemiah rally them to rebuild the lost Israelite society based upon God's commandments.[128] After the basic infrastructure of the Temple in Jerusalem is completed, Ezra reads the Torah aloud to the gathered people.[129] The people, recognizing that their sins have caused their earlier demise and exile to Babylon, recall God's covenants with their ancestors and assert that God had not

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126 *See, for example*, *Jeremiah* 31:35–36

> Thus said the Lord, who established the sun for light by day, the laws of the moon and stars for light by night, who stirs up the sea into roaring waves, whose name is the Lord of Hosts: If these laws should ever be annulled by Me—declares the Lord—only then would the offspring of Israel cease to be a nation before Me for all time.

See also Jones & Tarwater, *supra* note 124, at 10.

127 Examples of such commandments include (for a man) failing to be circumcised, *see Genesis* 17:14, and eating leavened foods over Passover, *see Exodus* 12:15,19. *See also* Mishna, *Kerithoth* 1:1 (providing a complete list of sins that, according to the Jewish tradition, incur the penalty of being "cut off" from the covenant between God and the Jewish people).

128 *Nehemiah* 2:5, 16–18.

129 *Nehemiah* 8:2–5.

terminated those covenants even when their ancestors had sinned.[130] In an effort to mend their ways, the people reaffirm the previous covenant they had with God, promising to keep his laws and commandments.[131]

Building upon a previous covenant can also come in the form of creating a new covenant between the same parties. This is most explicitly promised in the Book of Jeremiah. In an eschatological vision, Jeremiah prophesizes that after the Israelites have suffered in the exile, God will redeem them and return them to the Land of Israel.[132] During that time, God will make a new covenant with the "House of Israel and the House of Judah:"[133] God will put his "Teaching into their innermost being and inscribe it upon their hearts,"[134] all of the Israelites will observe his commandments and follow the covenant, and God will forgive their sins.[135] These passages, combined with later passages affirming God's continuation of the previous covenant with the Israelites, suggest that this *new* covenant will simply build upon the old covenant's foundations.[136] Drawing upon and extending the previous covenant, God will create a new covenant with the Israelites that includes new obligations on the part of the Israelites. In this way, covenants can have a kind of normative extension, as it were, by drawing upon the basic principles and history of an earlier covenant and using those materials to create new obligations for the parties.[137]

Before proceeding further, it is important to take stock of this particular account of covenants. First, covenants are founded in the conceptual framework of kinship, whereby (originally) blood relations served to bind family members together through a nexus of obligations and attitudes towards each other. These obligations and attitudes include, respectively, duties to protect and support, as well as love and be loyal to, one's kin. Second, breach of the covenant, in contrast with contracts, will not terminate the covenant, except if the breach was such that it fundamentally challenged the kinship between the covenantal parties. Lastly, covenants can be normatively extended insofar as they can be reified by the parties

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130 *Nehemiah* 9:6–31.

131 *Nehemiah* 10:1, 30; *see also* NOVAK, *supra* note 123, at 77–78 (explaining the dynamic between the old and renewed covenants).

132 *Jeremiah* 31:10–14.

133 *Jeremiah* 31:31.

134 *Jeremiah* 31:33.

135 *Jeremiah* 31:34.

136 *See* Kaufmann Kohler, *New Testament*, 9 THE JEWISH ENCYCLOPEDIA 246, 246 (Isidore Singer, et. al., eds. 1905).

137 Thus, the term "new" covenant, under these contexts, would be something of a misnomer. Since these covenants, in a sense, derive their normative force in large part from the previous covenant, to a large extent they are not "new." Nonetheless, given that they are building upon the previous covenant—in contrast with merely *renewing* the covenant—these covenants are "new" in the sense that they have new content and obligations to which the parties must adhere.

later in time and new commitments can be added to a covenant based on the old covenant's normative values and history. Thus, thick obligations and attitudes, relative inability to be dissolved by breach, and normative evolution distinguish covenants from contracts.

V. TREATY INTERPRETATION AS COVENANT INTERPRETATION

We can now move from the abstract account of covenants to how covenant interpretation can be implemented to remedy contract interpretation's shortcomings with respect to momentous treaties. Recall how momentous treaties are unique insofar as they have high transaction costs to negotiate and renegotiate. Since they are difficult to secure in the first instance, they tend not to reify earlier commitments that secure the same ends. Fallout from these treaties, in addition, places a great deal of risk upon the parties and can lead to dire consequences for the parties. Furthermore, the Vienna Convention's current scheme allows for the termination or suspension of momentous treaties under certain circumstances. This can unravel the progress that nations made while they were still complying with the treaty. This scheme, and the insistence on focusing on the treaty's text to discern its precise meaning—in other words, on interpreting treaties like contracts—de-emphasizes that which might be most important with momentous treaties yet might also be scarce: trust between the parties to the treaty.

International institutions, such as the ICJ, can instead conceptualize momentous treaties as covenants to help remedy these shortcomings. Those institutions should work tirelessly to ensure that a material breach of a treaty does not result in a termination of the treaty. Under Article 65 of the Vienna Convention, parties must announce the grounds for which they wish to terminate or suspend performance of a treaty.[138] In theory, if a party makes that announcement and does not receive any objection from any other party, then the announcing party may do as it announced.[139] Given momentous treaties' unique properties, however, this is unlikely to happen. If a party to a momentous treaty objects to the termination or suspension of the treaty, then under Article 66,[140] the parties must adjudicate their dispute under Article 33 of the U.N. Charter.[141] To be sure, Article 65 allows a party to follow its plan of terminating or suspending a treaty irrespective of any other party's response to that plan when there is "special urgency."[142] A covenant-centered interpretation of this provision would interpret

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138 Vienna Convention, *supra* note 1.

139 *Id.*

140 *Id.* at 348.

141 U.N. Charter, art. 33 (mandating that the parties to a grave dispute resolve their conflict via negotiation, arbitration, or litigation, and empowering the Security Council to require such proceedings for the parties).

142 Vienna Convention, *supra* note 1.

"special urgency" to limit it only to cases in which parties firmly believe that they are in an existential crisis. Otherwise, parties would be required to resolve their disputes—indeed, perhaps renew or amend their covenants—before an international institution. In utilizing the Vienna Convention's termination-averse structure, international institutions can help ensure that momentous treaties remain perpetual in character.

The parties' shared values should also play a critical role in how international institutions adjudicate their disputes. Instead of focusing solely on interpreting the treaty in order to discern its meaning as embodying the parties' intent (however that is determined), these institutions can focus on discerning that meaning as well as, and in the light of, the parties' history and shared normative values. These values can be drawn from the original covenant to which every nation has assented: the U.N. Charter. Article 1 of the Charter spells out the core normative values on which international relations are to rest: promotion and maintenance of international peace, the development of friendly relations among nations with a premium on equal rights of peoples, and achieving international cooperation in solving global problems.[143] As shared values that govern the particular parties' treaty, these values can importantly serve as the tools with which international institutions may normatively extend the parties' obligations.[144]

These values allow international institutions to afford the parties an opportunity to reify their covenant or significantly add to it. An international institution would begin with the text of the treaty and the context in which the dispute arose. Using these materials, the institution would be able to take into account the covenant's meaning, as well as the values that the parties share (as listed above). The institution would then attempt to provide a solution that is amenable to the parties and best coheres the covenant's meaning, the normative principles, and the history (whether good or bad) between the parties.[145]

With an eye towards the future, these institutions must frame treaty relations as kinship relations. This can be done by reimagining the duty of good faith to encompass both historical as well as normative components. Though institutions cannot plausibly refer to the "blood" that is shared between the two parties, focusing on kinship relations would call upon institutions to review the history of the relationship between the two parties, even outside of the context of the

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143 U.N. Charter, art. 1.

144 This is to say nothing about the existence of norms of international law. Such binding norms should certainly play a role in the analysis if applicable, but my argument here presupposes that no such norms will be applicable. *C.f.* Vienna Convention, *supra* note 1, at art. 53 (rendering a treaty void if, at the time of its "conclusion," it conflicts with a "peremptory norm of general international law").

145 To this extent, the account of interpretation presented here strongly resembles Ronald Dworkin's account of "constructive interpretation." *See* RONALD M. DWORKIN, LAW'S EMPIRE 225–66 (1986).

(fraught) treaty. Showing bonds of solidarity between the two nations would encourage these parties—and from an ex ante perspective, future parties who will be crafting treaties—to strengthen diplomatic bonds and ties between them. Thus, by engaging in a holistic project of weaving together the treaty's text, the history between the parties, their normative principles, *and* the sense of kinship that must arise between them for ratifying a momentous treaty, an international institution may attempt to interpret a momentous treaty not as a contract, but rather as a covenant.[146] While the parties might not comply entirely with the institution's ruling, the expressive power of the opinion may well serve to help shift norms for future treaty-making parties.[147]

The ICJ's decision in *Marshall Islands v. United Kingdom* provides a good example of how covenant interpretation can be used to adjudicate real-world disputes.[148] In that case, the Marshall Islands claimed that the U.K. was failing "to fulfil obligations concerning negotiations relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament" under the NPT.[149] The U.K. objected, claiming that there was an absence of a dispute between itself and the Marshall Islands. The U.K.'s main claim was that the Marshall Islands did not inform the U.K. of its dispute and that the two states did not have a precise disagreement about a shared issue of international law.[150] The Marshall Islands countered that its position regarding nuclear proliferation was inexorably opposed to the U.K.'s position on the issue, as derived from the U.K.'s pleadings in the case and other policy positions.[151] According to the Marshall Islands, the U.K. shirking its responsibilities under the NPT—responsibilities that the Marshall

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146 Interestingly, Druzin contends that specific treaty obligations are necessary for encouraging parties to create bonds of trust between them, for specificity "clarifies who is actually playing the game." *See* Druzin, *supra* note 16, at 442. This Comment's account allows for this kind of specificity. Indeed, institutions are to impose these kinds of specific requirements on the parties in resolving disputes between them. Where this Comment's account differs from Druzin's account is the sources that may be used to further cement bonds of trust between the parties. While Druzin seemingly wants to focus solely on the parties' trust building via the words of their treaty, this Comment's account wants to expand the sources from which the parties' trust may grow to include the parties' history and shared normative principles.

147 *See, for example*, Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PENN. L. REV. 2021, 2029–33 (1996) (advocating for the virtues of the expressive powers of law in solving coordination problems).

148 Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Judgment, 2016 I.C.J. 833 (Oct. 15).

149 *Id.* at 845, ¶ 22.

150 *Id.* at 846-47, ¶¶ 27–28.

151 *Id.* at ¶¶ 33, 35.

Islands insisted the U.K. was obligated to take seriously—constituted a dispute eligible for adjudication by the ICJ.[152]

The ICJ, however, concluded otherwise, finding that the Marshall Islands failed to demonstrate the existence of a dispute between itself and the U.K.[153] This was a surprising conclusion to reach, given the ICJ's quite liberal pleading requirements. The parties need not have directly addressed each other about the issue in question prior to the dispute.[154] Rather, the parties may present evidence that even implicitly demonstrates that they "hold clearly opposite positions" on the issue at hand.[155] While the pleadings may serve as evidence of, or further ratify, the existence of a dispute between the parties, the proceedings alone cannot "enable the Court to find that the condition of the existence of a dispute has been fulfilled in the same proceedings."[156]

The Court nonetheless dismissed the case on the grounds that there was no dispute between the parties. To be sure, the Court noted that the Marshall Islands have suffered longstanding harms due to nuclear arms testing in its vicinity from 1946 to 1958;[157] however, this history alone could not suggest the existence of a dispute between the Marshall Islands and the U.K.[158] Though the Marshall Islands made statements indicting nuclear powers for failing to negotiate global nuclear disarmament, the Court found that those statements failed to "articulate[ ] an alleged breach by the [U.K.] . . . of the NPT."[159] The Court similarly dismissed the Marshall Islands' other evidence—the U.K.'s voting record on nuclear disarmament—urging caution when inferring policy disagreements from a state's vote on a resolution.[160] The Marshall Islands' evidence that the U.K. was deaf towards diplomatic overtures to work towards nuclear disarmament was equally dismissed. Since the Marshall Islands' statements regarding nuclear disarmament could not give the U.K. notice of the disagreement between itself and the Marshall Islands, the Court concluded that the U.K.'s refusal to participate in nuclear disarmament negotiations could not ground the existence of a dispute between the two states.[161] Absent such a dispute, then, the Court deemed itself to be without jurisdiction and therefore dismissed the case.[162]

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152 *Id.* at 848, ¶ 35.

153 *Id.* at 856–57, ¶ 59.

154 *Id.* at 849, ¶ 38.

155 *Id.* at 849–50, ¶¶ 38–41.

156 *Id.* at 851, ¶ 42.

157 *Id.* at 843, ¶ 16.

158 *Id.* at 851–52, ¶ 44.

159 *Id.* at 854, ¶ 51.

160 *Id.* at 855, ¶¶ 55–56.

161 *Id.* at 855–56, ¶ 57.

162 *Id.* at 856–57, ¶ 59.

Central to the Court's analysis—and central to the Court's failure to appreciate the Marshall Islands' position—was its contract paradigm of treaty interpretation. Motivating the Court's discussion of civil procedure was the NPT and its requirement that nations of the world come together to negotiate nuclear disarmament. That requirement, however, was seemingly interpreted to be a contractual requirement, one that required at least one of the parties to formally allege that one of the other parties breached the treaty. Absent such formalities, however, the Court felt that the proper channels through which a breach of treaty *qua* contract claim could be made were not utilized. Thus, under the contract paradigm of interpretation, the Court dismissed the case.

A different conclusion would be reached by using the covenant paradigm of interpretation. As we have already seen, the NPT is a paradigmatic momentous treaty to which it would be appropriate to apply the covenant paradigm of interpretation.[163] Recall how covenant interpretation presents essentially three main features: thick obligations and attitudes that establish a kinship relationship between the parties, relative inability to be dissolved by breach, and the covenant's normative evolution. Neither the U.K. nor the Marshall Islands claimed that the NPT dissolved due to a party's breach. Indeed, the difficulty of this case in part lies in the fact that it was an open question as to whether one party failed to comply with the NPT to such a degree that there was a sufficient "dispute" for the ICJ to adjudicate.

The parties' history, however, is illuminating for this case. Having been exposed to the effects from nuclear weapons testing from 1946–1959, the Marshall Islands knew firsthand the toxic effects that such weapons would have for generations to come.[164] Indeed, the Court recognized that the Marshall Islands, "by virtue of the suffering which its people endured as a result of it being used as a site for extensive nuclear testing programs, has special reasons for concern about nuclear disarmament."[165] To be sure, the U.K. never tested its nuclear weapons in the Marshall Islands.[166] Yet the U.K. benefitted from the testing and arms development that arose out of those tests.[167] Recognition of the negative externalities that would inevitably result from the use of nuclear weapons,

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163 *See supra* notes 79–89 and accompanying text.

164 *See* Marsh. Is. v. U.K., 2016 I.C.J. at 843, ¶ 16.

165 *Id.* at 851, ¶ 44.

166 *See id.* at 843, ¶ 16.

167 As the Court notes, the U.S. tested nuclear weapons near the Marshall Islands. *See id.* Immediately after the period in which the U.S. stopped testing nuclear weapons near the Marshall Islands, it entered into a treaty with the U.K. to exchange information relating to nuclear weapons. *See* Atomic Energy: Cooperation for Mutual Defense Purposes, U.S.-U.K., art. II, July 3, 1958, 9 U.S.T. 1028. Thus, while the U.K. did not test nuclear weapons near the Marshall Islands, it reaped the benefits of a nation that did expose the Marshall Islands to nuclear weapons' noxious consequences.

including in testing such weapons, caused the nations of the world, including the U.K., to come together in 1968 to create the NPT and to work towards a nuclear arms-free world.[168] The fundamental, underlying reality that motivated the creation of the NPT in the first instance—the existence of nuclear and non-nuclear powers, respectively—further suggests that the harms arising from nuclear armament uniquely stemmed from nuclear-armed states.[169] The Marshall Islands, in its statements made in multilateral fora, arguably sought to press all of the nuclear-armed states, including the U.K., to live up to their obligations under the NPT.[170]

Furthermore, the normative valence and purpose of the NPT is quite clear. Article VI of the NPT calls on nations to negotiate an end to the nuclear arms race and towards nuclear disarmament.[171] Article 1.1 of the U.N. Charter is equally clear: the U.N. is directed, in part, "to take effective collective measures for the prevention and removal of threats to peace."[172] Working towards a world devoid of nuclear weapons seems to fall directly under Article 1.1's aegis. It seems all too clear, then, that the NPT speaks in favor of nations having to justify their nuclear weapons-related activities. Consequently, the burdens for mitigating those harms and the risks associated with those harms should fall on those states engaging in nuclear weapons-related activities.

Taking these two points together, a covenant paradigm of interpretation would conclude that the ICJ should reach the merits of the case at hand. Creating a trusting kinship relationship between the Marshall Islands and the U.K. requires drawing on the parties' shared history and the normative valence of the treaty that they signed. The Marshall Islands' history of devastation at the hands of nuclear weapons testing suggests that it *uniquely* has claims against nuclear powers to work towards a world without nuclear weapons. Moreover, the clear normative valence of the NPT speaks in favor of shifting the burden onto the nuclear powers to justify their retention and/or use of any nuclear weapons. While the NPT may not have explicitly allowed for the kind of petition filed by the Marshall Islands, both the Marshall Islands' history and the NPT's normative valence points to the ICJ incorporating that right into the NPT. Indeed, creating a sense that the U.K. must protect its "kin" requires the Court to allow the Marshall Islands to voice its claims, especially when, as here, the U.K.'s voting-record on nuclear disarmament and its pleadings suggest that the U.K. was not taking some of its obligations under the NPT seriously.[173] Interpreting the NPT under a covenant paradigm,

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168 *See* Marsh. Is. v. U.K., 2016 I.C.J. at 843 ¶ 18.

169 *See id.* at 843–44, ¶ 19.

170 *See id.* at 852–53, ¶ 48.

171 *See id.*; *see also* Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 80.

172 U.N. Charter, art. 1.1.

173 *See* Marsh. Is. v. U.K., 2016 I.C.J. at 848, ¶ 35.

then, would suggest creating an opportunity for the Marshall Islands to hold the U.K. to account for its possible violations of the NPT.

Although the covenant paradigm of interpretation is newly advanced in this Comment, the ICJ has at times made steps toward adopting covenant interpretation when engaging with momentous treaties. One rather imperfect example comes from the ICJ's advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*, where the Court determined that nations have the obligation to negotiate nuclear disarmament, as discussed above.[174] While the Court was not asked to interpret one treaty—it was asked to determine whether the threat or use of nuclear weapons was ever sanctioned under international law—the Court's methodology is illuminating. After surveying the international legal norms and treaties, the Court concluded that international law did not sanction the use of nuclear weapons.[175] It also held, however, that there was no settled state practice that prohibited the use of nuclear weapons when used in a defensive capacity and when a nation's existence is threatened.[176] The Court, then, recognized two conflicting realities. On the one hand, states have not used nuclear weapons since 1945; on the other hand, states have stockpiled nuclear weapons for the purpose of deterring other states' aggressive behavior. Lastly, the Court reminded the General Assembly that states were obligated, under the NPT, to actively, and in good faith, negotiate agreements that would lead to total nuclear disarmament.[177]

In one sense, the Court's admonition that states must work toward a world without nuclear weapons is entirely orthogonal to the question at hand. As Judge Shahabuddeen noted in dissent, the General Assembly did not ask the Court to address the question of whether states have an obligation to work towards nuclear disarmament under the NPT.[178] This may be because states' obligation to work towards nuclear disarmament is separate and aside from the question of whether states, currently armed with nuclear weapons, may use them under certain circumstances. The Court's holistic approach, however, recognized the covenantal nature of the NPT. While states are currently not in a position to simply abandon and destroy their nuclear weapons, the Court synthesized this sober reality with the states' obligation to work towards a more peaceful and less hostile world.

Still, the majority's opinion leaves much to be desired in the way of covenant interpretation. Ideally speaking, the majority should have consulted the history of nuclear proliferation, the history of the nations coming together to resolve to

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174 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 267 ¶ 105(2)(F) (July 8).

175 *Id.* at 266, ¶ 105(2)(A).

176 *Id.* at ¶ 105(2)(B).

177 *Id.* at 267, ¶ 105(2)(F).

178 *Id.* at 378 (Shahabuddeen, J., dissenting).

abandon their nuclear weapons under the NPT, and the normative principles contained in Article 1 of the U.N. Charter. It should have also pressed the General Assembly to see how its own practices are inconsistent with the history of the NPT and the normative principles contained in the U.N. Charter. Despite its shortcomings, the opinion provides a glimmer of what a covenantal interpretive paradigm for momentous treaties can look like.

VI. CONCLUSION

Treaty interpretation has largely found itself in the grip of a contract paradigm of interpretation. This paradigm largely centers on the primacy of the treaty's text and the meaning of that text as the locus of obligations for the parties. This paradigm has ostensibly worked well for ordinary treaties but would likely not fare well with respect to momentous treaties. Ordinary treaties have relatively low transaction costs for negotiation and renegotiation, and they also reify earlier treaty agreements that were previously ratified by the parties. Breaching ordinary treaties, then, by no means leads to disastrous consequences. In contrast, momentous treaties are rather costly to create and renegotiate and thus are relatively rare to complete. Fallout from a momentous treaty would be all the more calamitous relative to its ordinary counterparts. As such, momentous treaties need unique treatment to promote trust between the parties. This kind of treatment would require weakening the momentous treaty interpretation's marriage to the text—a key feature of the contract paradigm of interpretation. A covenant paradigm of interpretation can serve as an alternative to the contract paradigm of interpretation. The covenant paradigm of interpretation is unique insofar as it grounds interpretation in kinship relations, it renders agreements relatively interminable, and it allows agreements to be normatively extended based on the parties' shared principles and history. This covenant paradigm of interpretation is able to resolve the problems that arose when applying the contract paradigm of interpretation to momentous treaties.

Of course, the contract paradigm of interpretation is aimed not only at providing a promising account of momentous treaty interpretation, but also of legal interpretation as well. When similar dynamics arise in other contexts—perhaps in the realm of American constitutional law[179]—there is good reason to believe that covenant interpretation would be appropriate to apply there as well. Perhaps even in circumstances that are far less dire, such as with ordinary treaties, covenant interpretation can serve as a helpful challenge to the contract interpretive hegemony. I do not argue for such extensions of the covenant paradigm of interpretation and it is for future scholarship to determine whether this paradigm

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179 *See, for example*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 901 (1992) ("Our Constitution is a covenant running from the first generation of Americans to us, and then to future generations.").

would appropriately apply to those contexts. It is my hope, however, that at the very least, this Comment has shown the covenant paradigm of interpretation to be an attractive alternative to the contract paradigm of interpretation.