

# Washington University Global Studies Law Review

---

VOLUME 10

NUMBER 4

2011

---

## **REPUTATIONAL COSTS BEYOND TREATY EXCLUSION: INTERNATIONAL LAW VIOLATIONS AS SECURITY THREAT FOCAL POINTS**

**ANDREW C. BLANDFORD\***

*Given the rarity of direct sanctions for violations of international law, the rationality of compliance often hinges on a vague estimation of “reputational costs.” Rationalist international law scholars currently calculate noncompliance reputational costs as the price a state pays when excluded from future treaties due to its reputation as an unreliable treaty partner. From such limited reputational costs, it might follow that international law is powerless in the high stakes arena of international security. This Article, however, proposes a new form of noncompliance reputational costs. Following World War II, states signaled restraint by binding themselves to international security institutions. But violations of security-related commitments signal a threatening lack of restraint and have historically led to strategic reputational costs: (1) adverse alliance formation, (2) rivals’ increased armament, and (3) the denial of informal cooperation. In short, noncompliance reputational costs are not always limited to foregone treaty opportunities, but also include costs incurred when states balance against the violator in reaction to what this Article*

---

\* Andrew C. Blandford graduated *magna cum laude* from Harvard Law School in 2010, where he was a Senior Editor on the *Harvard International Law Journal*. He also holds a Master in Public Policy, with a focus on international relations, from the Harvard Kennedy School. He recently clerked for the Honorable Nanette K. Laughrey of the Western District of Missouri, during which time he was an Adjunct Professor of Law at the University of Missouri at Kansas City Law School. For their helpful comments, the author would like to thank Professors Rachel Brewster, Mark H. Moore, David K. Robinson, and Stephen M. Walt, as well as Jocelyn Chong, Neil Gormley, Claire Houston, and the participants in Harvard’s 2010 Law and Policy Seminar. Eileen Boyle and the *Global Studies Law Review* staff at Washington University in St. Louis School of Law provided excellent editorial support.

*terms “security threat focal points.” The reputational costs of violating international law are greater than previously estimated, strengthening the argument for rational compliance.*

TABLE OF CONTENTS

I. INTRODUCTION ..... 671

II. BACKGROUND: THE RECENT DEVELOPMENT OF REPUTATION IN INTERNATIONAL LAW SCHOLARSHIP ..... 674

III. SECURITY THREAT FOCAL POINT THEORY ..... 680

    A. *Security Threat and Strategic Balancing in International Relations Versus International Law Theory*..... 680

    B. *Focal Points in Game Theory and International Law Theory* ..... 686

    C. *Security Threat Focal Point Theory Summarized* ..... 690

IV. HISTORICAL EXAMPLES OF STRATEGIC REPUTATIONAL COSTS ..... 691

    A. *Multipolarity: Early Twentieth-Century Europe*..... 691

        1. *World War I: Before Bright Lines* ..... 692

        2. *World War II: “The Lesson of Munich”* ..... 693

    B. *Bipolarity: Cold War Threat Perception and International Law*..... 698

        1. *Alliance Formation*..... 698

            a. *Cold War Balancing Against Security Threat* ..... 698

            b. *Cold War Noncompliance and Threat Perception* .. 700

        2. *U.S.-Soviet Arms Control* ..... 711

    C. *The Unipolar Moment* ..... 714

    D. *Return to Multipolarity*..... 717

        1. *Coordinating Against Dispersed Threats* ..... 717

        2. *Sticky Institutions and the Chinese Model of Threat Minimization*..... 720

V. CONCLUSION: A GROWING ROLE FOR SECURITY THREAT FOCAL POINTS ..... 724

## I. INTRODUCTION

This Article connects two concepts—“security threat,” from international relations, and “focal points,” from game theory—to better address a fundamental international law question: *When will it be rational for a state to comply with international law?* In contrast to traditional international law theories that locate a “compliance pull” within the state itself,<sup>1</sup> the rationalist approach assumes that the state is a unitary actor pursuing its own self-interest, with no innate preference for complying with international law.<sup>2</sup>

Because direct sanctions for violations of international law are uncommon, the rationality of compliance often hinges on a vague estimation of “reputational costs.”<sup>3</sup> Most international law scholars agree that fairly high levels of compliance can be achieved due to states’ concerns with their reputations.<sup>4</sup> However, rationalist theory currently offers a somewhat unconvincing account of why noncompliance reputational costs should be significant: “the state with a poor reputation is either excluded from deals or it is charged a high price of admission . . . .”<sup>5</sup> In other words, rationalist international law scholars generally limit their calculation of noncompliance reputational costs to the violator’s loss of bargaining power, or total exclusion, when future treaties are negotiated. Therefore, rationalists argue that although international economic law (“IEL”) can prevent protectionism, in the realm of international security law (“ISL”)—i.e., “the laws of war, territorial limits, arms agreements, and

---

1. See, e.g., Abram & Antonia Handler Chayes, *On Compliance*, 47 INT’L ORG. 175, 179 (1993) (arguing that bureaucracies operate with a presumption in favor of compliance); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT’L L. 705, 706 (1988) (“[C]ompliance is secured . . . by perception of a rule as legitimate by those to whom it is addressed . . . .”); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2603 (1997) (describing a “process of interaction, interpretation, and internalization of international norms”). Koh explains that rationalist and normative theories “can be used together as complementary conceptual lenses,” *id.* at 2651, and that rationalist theory “works best in such global issue areas as trade and arms control law, where nation-states remain the primary players,” *id.* at 2649.

2. ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 17 (2008) (“[I]nterests are a function of state preferences, which are assumed to be exogenous and fixed. States do not concern themselves with the welfare of other states but instead seek to maximize their own gains or payoffs.”).

3. See Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1856 (2002).

4. Rachel Brewster, *Unpacking the State’s Reputation*, 50 HARV. INT’L L.J. 231, 231 (2009).

5. *Id.* at 245. See also Guzman, *supra* note 3, at 1847 (“[C]ountries will only enter into agreements with countries that have a good reputation . . . .”).

so on”—the stakes are too high for such modest reputational costs to induce compliance.<sup>6</sup>

In the international relations field, meanwhile, “reputation” is broadly defined as “a judgment about an actor’s past behavior that is used to predict future behavior.”<sup>7</sup> Contemporary international relations theorists also explain that perceptions of security threat play a key role in shaping states’ strategic behavior.<sup>8</sup>

This Article contends that reputational costs also arise when judgments that a state has violated international law lead to predictions of future security threat, as opposed to mere unreliability with respect to future treaty obligations. Given the information asymmetries in world politics, violations of ISL become what this Article terms “security threat focal points,” spotlighting the violator’s unpredictability and lack of restraint. Even while direct sanctions for noncompliance remain rare, violations of ISL can provoke other states to react strategically against the violator, often in concert.<sup>9</sup> As explored below, violations of security-related commitments have historically led to strategic reputational costs: (1) adverse alliance formation, (2) rivals’ increased armament, and (3) the denial of informal cooperation.<sup>10</sup> When such strategic reputational costs

6. Guzman, *supra* note 3, at 1825.

7. Gregory D. Miller, *Hypotheses on Reputation: Alliance Choices and the Shadow of the Past*, 12 SEC. STUD. 40, 42 (2003); *see also* Brewster, *supra* note 4, at 235 n.4 (reviewing similar international relations definitions of reputation). Political scientists also recognize that “states maintain multiple reputations.” George Downs & Michael Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95, S95 (2002); *see also* GUZMAN, *supra* note 2, at 72 (distinguishing between reputation in international law and “[m]uch of the existing [international relations] writing on reputation address[ing] a state’s reputation in the security arena,” primarily related to deterrence theory (citations omitted)).

8. *See, e.g.*, Stephen M. Walt, *Alliance Formation and the Balance of World Power*, 9 INT’L SEC. 3, 33 (1985) (“[S]tates form alliances to balance against threats rather than bandwagon with them.”); Joseph S. Nye, Jr., *Limits of American Power*, 117 POL. SCI. Q. 545, 559 (2003) (applying “soft power” theory to explain when states will unite to balance against threats).

9. It is important to distinguish rationalist international law scholars’ narrow definition of “direct sanctions” from broader strategic responses to noncompliance. The field’s leading reputation scholar offers two examples of direct sanctions: (1) direct “retaliatory measures” against the violator (such as trade sanctions), and (2) treaty withdrawal. Guzman, *supra* note 3, at 1866. Elsewhere, Guzman defines “retaliation” as “explicit and costly punishments imposed by an aggrieved party against a violator,” GUZMAN, *supra* note 2, at 46, and distinguishes “reciprocity”—i.e., the expectation that “[a] violation by one side would likely provoke a violation by the other side.” *Id.* at 32. In contrast, the broad term “strategy,” as used in game theory, “is intended to focus on the interdependence of the adversaries’ decisions and on their expectations about each other’s behavior.” THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 3 n.1 (2d ed. 1980).

10. Distinguishable from formal treaty cooperation, examples of informal cooperation include collaborative voting at the United Nations (“UN”), ad hoc military contributions of troops, bases, or overflight rights, and the adoption of voluntary economic measures.

arise, jeopardizing the violator's security interests, treaty exclusion costs will normally pale in comparison.

Consistent with rationalist assumptions, the claim here is not that international law takes on such normative significance that states are hypersensitive to illegality *per se*. Rather, when a state fails to perform the security-related commitments that it has put in writing for the world to see, others take notice and often react strategically. When commitments to ISL are perceived as credible, states are more open to welfare-maximizing cooperation and less concerned with relative power.<sup>11</sup> But when the credibility of those commitments is undermined, states tend to balance against the threatening defector.

Nor does this Article claim that ISL violations are the only source of security threat focal points in international relations. The underlying armament or use of force, for example, will also signal a certain degree of threat. Yet this Article contends that the violation (1) shines a spotlight on the threat of the underlying action, (2) creates the threatening perception that the state does not intend to be bound by the restraints to which it previously committed, and (3) facilitates international coordination in identifying and responding to the threat. When a state arms itself or uses force consistently with its international obligations, it operates within a policy space previously designated as acceptable, or at least not prohibited. But when a state arms itself or uses force inconsistently with its international obligations, it steps across a line demarcating threatening behavior, raising a red flag to other states. In a world of asymmetric information regarding states' strategic intentions, it is the ISL violation that can make the difference between a less threatening permissible security operation, on the one hand, and a provocative defection from the international order, on the other.

In short, noncompliance reputational costs are not always limited to foregone treaty opportunities but also include costs incurred when states balance against the violator in reaction to the security threat focal point. Therefore, the reputational costs of violating ISL are greater than previously estimated, strengthening the argument for rational compliance.

---

11. See G. John Ikenberry, *Institutions, Strategic Restraint, and the Persistence of American Postwar Order*, 23 INT'L SEC. 43, 44 (1999) ("It was the exercise of strategic restraint—made good by an open polity and binding institutions—more than the direct and instrumental exercise of hegemonic domination that ensured a cooperative and stable postwar order."); see also JOSEPH S. NYE, JR., *UNDERSTANDING INTERNATIONAL CONFLICTS* 208 (5th ed. 2005) (illustrating a spectrum between relations where security is the dominant goal and relations where welfare is the dominant goal).

This Article explores these noncompliance reputational costs that go beyond foregone treaty opportunities, imperiling the violator's security. Part II reviews the rationalist international law literature on reputation, focusing on Andrew Guzman's theory of direct and reputational sanctions, as well as responding critiques. Part III develops the security threat focal point theory previewed above, importing key concepts from international relations and game theory. Part IV applies this theory to historical case studies, finding that, for example: the correct "lesson of Munich" was not the need to respond to minor threats with unilateral war, but the rationality of coordinating for defense around violations of ISL; Soviet violations of the Allies' wartime agreements helped to cement a new alliance system favorable to the United States at the outset of the Cold War; and the Chinese model of maximizing relative power while minimizing relative threat reveals the stickiness of international institutions. Part V concludes by suggesting a more critical role for security threat focal points in today's multipolar world of dispersed threats.

## II. BACKGROUND: THE RECENT DEVELOPMENT OF REPUTATION IN INTERNATIONAL LAW SCHOLARSHIP

In 1960, game theorist Thomas Schelling wrote: "A potent means of commitment, and sometimes the only means, is the pledge of one's reputation."<sup>12</sup> By 1984, international relations scholar Robert Keohane explained: "Regimes rely not only on decentralized enforcement through retaliation but on governments' desires to maintain their reputations."<sup>13</sup> Soon thereafter, reputation had become "the linchpin of the dominant neoliberal institutionalist theory of decentralized cooperation."<sup>14</sup>

In international law scholarship, however, compliance theory traditionally focused on the normative power of law, rather than its instrumental role in facilitating cooperation between states. In 2002, Andrew Guzman claimed to be the first international law scholar to formally and fully study the reputational costs of noncompliance.<sup>15</sup> Guzman theorizes that because the application of direct sanctions imposes costs on sanctioning and sanctioned states alike, all states have an incentive to "free ride," relying on others to sanction the violator.<sup>16</sup> Given

---

12. SCHELLING, *supra* note 9, at 29.

13. ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 108 (1984).

14. Downs & Jones, *supra* note 7, at S95.

15. Guzman, *supra* note 3, at 1845 n.85.

16. *Id.* at 1869.

the resulting lack of direct sanctions to enforce international law, the state offers its reputation for compliance as a form of collateral.<sup>17</sup>

To illustrate how a sufficiently high reputational cost will lead rational states to comply, Guzman presents a parsimonious model based on the assumption that “countries will only enter into agreements with countries that have a good reputation.”<sup>18</sup> In other words, the reputational cost of violating international law is based on the harm to the state’s future bargaining power: “[F]ailure to live up to one’s commitments harms one’s reputation and makes future commitments less credible. As a result, potential partners are less willing to offer concessions in exchange for a promised course of action.”<sup>19</sup> Guzman’s conservative methodology provides the foundation for his strong argument establishing the key role of reputational costs in compliance theory. However, his focus on reputational costs associated with future treaty negotiations, to the general exclusion of strategic reputational costs, leads him to underestimate the importance of international law in the security context. Guzman concludes that “many of the topics that receive the most attention in international law—the laws of war, territorial limits, arms agreements, and so on—are unlikely to be affected by international law.”<sup>20</sup>

Subsequent discussions of reputation in the international law literature have sought to further limit the estimation of noncompliance reputational costs. In 2005, rational choice theorists and international law skeptics Jack Goldsmith and Eric Posner acknowledged that reputation was one possible explanation for compliance: “States refrain from violating treaties (when they do) for the same basic reason that they refrain from violating non-legal agreements: because they fear retaliation from other states or some kind of reputational loss, or because they fear a failure of coordination.”<sup>21</sup> Yet Goldsmith and Posner cite various reasons why “reputational arguments must be made with care”: (1) states have multiple reputations in different areas of international law, (2) treaties are sometimes rendered obsolete by changing circumstances, and (3) to maximize coercive power, states might actively seek to develop reputations that are in conflict with a reputation for compliance with international law.<sup>22</sup>

---

17. *Id.* at 1849–50.

18. *Id.* at 1847.

19. *Id.* at 1849–50 (citations omitted).

20. *Id.* at 1825.

21. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 90 (2005).

22. *Id.* at 102; see Andrew T. Guzman, *The Limits of International Law: Reputation and International Law*, 34 GA. J. INT’L & COMP. L. 379, 381 (2006) (reviewing GOLDSMITH & POSNER, *supra* note 21).

The first of these observations is consistent with a strong reputational incentive to comply because a state will seek to protect its distinct reputations within specific areas of international law.<sup>23</sup> Goldsmith and Posner's second reservation, regarding obsolete treaties, can merely involve situations in which neither party cares about compliance with a dead letter.<sup>24</sup> Nonetheless, as will be further discussed, Goldsmith and Posner are right to question the strength of reputational costs where international institutions have been undermined: when ISL violations come to be considered poor proxies for threat, states find it more difficult to coordinate for security.<sup>25</sup> Finally, with respect to Goldsmith and Posner's third concern, international relations scholars have shown that while states sometimes react to threats with "bandwagoning" strategies favorable to the coercive state, historically they more often balance against coercive power—thus producing the strategic reputational costs explored in this Article.<sup>26</sup>

Most recently, in 2009, Professor Brewster suggested that reputational costs are lower than often assumed because (1) new governments can repair a state's damaged reputation, and (2) other states understand that the reasons behind noncompliance in one issue area are irrelevant to compliance decisions in other areas.<sup>27</sup> First, Brewster asks, "Whose reputation?" Drawing on Michael Tomz's work on reputations for sovereign debt repayment, Brewster argues that a single government can often alter a state's reputation.<sup>28</sup> Brewster points out that individual governments decide whether to comply with international obligations, bearing only some of the state's past and future noncompliance reputational costs.

Guzman, on the other hand, argues that the "ability of a new regime to avoid the reputational stigma of past state-sponsored actions will depend a great deal on the particular circumstances of the case."<sup>29</sup> In the security context, for many of the states perceived by the West as the most threatening—e.g., China, Iran, North Korea, and Russia—the true

23. Guzman, *supra* note 22, at 382.

24. *Id.*

25. See *infra* Part IV.A.2 (discussing World War II and the obsolescence of the Treaty of Versailles).

26. See Walt, *supra* note 8, at 15 ("[B]alance of power theorists from [Leopold von] Ranke forward have persistently and persuasively shown that states facing an external threat overwhelmingly prefer to balance against the threat rather than bandwagon with it.").

27. Brewster, *supra* note 4, at 232–33.

28. *Id.* at 259 (citing MICHAEL TOMZ, REPUTATION AND INTERNATIONAL COOPERATION: SOVEREIGN DEBT ACROSS THREE CENTURIES 18–28 (2007)).

29. Guzman, *supra* note 3, at 1865.



decision-makers have remained essentially the same over a considerable period of time. More importantly, domestic politics are often complex and unpredictable, especially from a foreign perspective.<sup>30</sup> Given that no state can directly observe foreign governments' preferences for respecting international commitments, Goldsmith and Posner have shown that reputation functions as shorthand for the credibility of internal foreign policy-making: "One can thus, by treating each state as having private information about the quality of its foreign policy determinants and as having limited information about the quality of other states' foreign policy determinants, rely on economic models of reputation that are based on asymmetric information."<sup>31</sup> In light of information asymmetries regarding states' intentions, the mere observation of a change in government will rarely prompt reevaluations of the state's reputation in the absence of strong new evidence of compliance.<sup>32</sup>

Second, Brewster asks, "A reputation for what?" Like Goldsmith and Posner, she notes that states have multiple reputations across different treaty regimes. Brewster further argues that "compliance with international rules is a function of domestic support for the goals of the treaty regimes as well as respect for international legal obligations. Changes within the state, such as a change in the coalition supporting the government in power, can lead to different policy preferences," which can affect compliance with some agreements but not others.<sup>33</sup>

Noncompliance in any one case may indeed be more rationally attributed to the state's situation than to its disposition. Guzman accounts for this distinction in his list of factors that influence the reputational impact of a violation: "(1) the severity of the violation, (2) *the reasons for the violation*, (3) the extent to which other states know of the violation, and (4) the clarity of the commitment and the violation."<sup>34</sup> If the reasons for the violation are clearly situational, then the state will not suffer reputational costs with respect to issue areas where the situation does not apply. To take Brewster's example, while a recession may result in domestic pressure to violate trade agreements, it probably will not make a state more likely to violate a military alliance or an environmental

---

30. *Id.* at 1839.

31. GOLDSMITH & POSNER, *supra* note 21, at 101.

32. See Miller, *supra* note 7, at 50 ("Reputations are important not just because of repeated interaction, but because information about an actor's preferences and intentions is incomplete. . . . This uncertainty [for firms in the market] is intensified in the anarchic international political system.").

33. Brewster, *supra* note 4, at 260 (emphasis omitted).

34. Guzman, *supra* note 3, at 1861 (emphasis added).

agreement.<sup>35</sup> Under such circumstances, other states might be expected to recognize specific situational factors behind the violation and might not make broad dispositional attributions regarding the state's general level of respect for international law.

Indeed, political scientist Jonathan Mercer notes that because "a reputation is a judgment about another's character, only dispositional attributions can generate a reputation."<sup>36</sup> But even if we assume that a rational state has situational reasons for violating international law, it may be unwise for it to assume that all other states are equally informed and rational, such that its reputational costs will be negligible.<sup>37</sup> Mercer applies his social psychology research to international relations and theorizes that "[a]s a result of [cognitive] biases, we are likely to view the cause of undesirable behavior to be the other's disposition, and the cause of desirable behavior to be the situation our policy either created or exploited:

Undesirable behavior → dispositional attribution  
Desirable behavior → situational attribution"<sup>38</sup>

Thus, social psychology suggests that reputation is created more readily by our adversaries' "undesirable" or "antisocial" behavior (e.g., breaking the law) than by their "desirable behavior." This result is magnified in the face of threat: "When a state acts in a way that threatens us, we assume the act was intended to threaten us and was taken in spite of our policy (never because of it); the act reflects on the state's disposition."<sup>39</sup> The conscious violation of ISL can result in the inference of an aggressive disposition, as in domestic criminal law where *mens rea* can be inferred from the

35. Brewster, *supra* note 4, at 259–60.

36. JONATHAN MERCER, REPUTATION AND INTERNATIONAL POLITICS 6 (1996).

37. Even within rationalist scholarship, the assumption of perfect rationality has often been relaxed. See, e.g., KEOHANE, *supra* note 13, at 67 ("Once the [institutionalist] argument has been established in this way, it can be modified . . . by relaxing the key assumptions of rationality and egoism to allow for the impacts of bounded rationality, changes in preferences, and empathy on state behavior."); Jerel A. Rosati, *The Power of Human Cognition in the Study of World Politics*, 2 INT'L STUD. REV. 45, 73 (2000) ("If we must 'black box' the state, it should be treated as a cognitive actor in pursuit of a dominant goal or preference. . . . [I]nternational actors are purposive, conditioned by bounded rationality and regular cognitive propensities.").

38. MERCER, *supra* note 36, at 63; see also ROBERT JERVIS, PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS 343 (1976) ("When the other behaves in accord with the actor's desires, he will overestimate the degree to which his policies are responsible for the outcome. . . . When the other's behavior is undesired, the actor is likely to see it as derived from internal sources rather than as being a response to his own actions.").

39. MERCER, *supra* note 36, at 62–63 (citing, *inter alia*, SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 86 (1984)).

conscious commission of a proscribed act. Therefore, even the most rational state must recognize the likelihood that its rivals will draw dispositional inferences—leading to reputational predictions—from its violations of international law.

On the other hand, Tomz argues that, at least in sovereign debt markets, reputations are formed through rational interpretations of states' histories of repayment.<sup>40</sup> Institutional investors, however, have access to financial data and can diversify their investments to manage risk. In contrast, when evaluating potential security threats, states are more likely to be risk averse and less likely to rely on objective data.<sup>41</sup> Therefore, states will more often make dispositional attributions in the face of security threats. Finally, even allowing for investors' fine situational distinctions, Tomz concludes that “empirical tests, across three centuries of financial history, give[] confidence in the reputational theory.”<sup>42</sup>

The classic social psychology concept of “fundamental attribution error” described by Mercer refers to the human tendency to *disproportionately* make dispositional attributions in response to the undesirable behavior of others. However, given the information asymmetries inherent in world politics, dispositional attribution will often be the rational response to noncompliance. Even without relaxing the assumption that every state is rational by relying on Mercer's social psychology theory, a reputation for threat will form whenever the limited information that a state receives about a rival's preference for noncompliance indicates that it does not intend to comply in the future.

At present, “our understanding of reputation is primitive.”<sup>43</sup> One finds “comments scattered throughout the international law literature implying that scholars understood all along that reputation and repeat play were important in the international legal system.”<sup>44</sup> But the systematic study of reputation in the field of international law is less than a decade old. Today, rationalist international law scholars generally limit their calculation of

---

40. TOMZ, *supra* note 28, at 18, 29 (referring to Mercer's psychological approach to reputation formation as an alternative to his more rationalist account).

41. See Miller, *supra* note 7, at 49–50 (“[T]here is nothing in international politics comparable to a credit report. States cannot evaluate past behavior as easily as economic actors can. . . . Although a company might have thousands of customers and could afford to alienate one or two, firms still care about their reputations. If a state, by contrast, loses one or two allies, that could be extremely damaging to its security.”).

42. TOMZ, *supra* note 28, at 229.

43. Guzman, *supra* note 22, at 390.

44. Guzman, *supra* note 3, at 1845 n.85; see also *id.* at 1846 n.91 (citing, *inter alia*, LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 46–59 (1979) (identifying reputation as a factor in states' compliance decisions)).

noncompliance reputational costs to the price a state pays when excluded from future treaties (or charged a high price of admission) due to its reputation as an unreliable treaty partner. From such limited reputational costs, it might follow that international law is powerless in the high stakes arena of international security. Part III of this Article, however, proposes a new form of noncompliance reputational costs.

### III. SECURITY THREAT FOCAL POINT THEORY

Following the approach of Guzman, Brewster, Goldsmith, and Posner, this Article turns now to international relations and game theory concepts to form the basis for its approach to international law compliance theory.

#### A. *Security Threat and Strategic Balancing in International Relations Versus International Law Theory*

Traditionally, international law scholars have either ignored or pushed back against—rather than made theoretical use of—realist concepts such as security threat and strategic balancing.<sup>45</sup> Jonathan Greenberg recently described the stigmatization of such realist concepts within the international law literature:

Because I share the values and research agenda of liberal internationalists, I am concerned that we've too quickly thrown out the baby (compelling insights and useful tools realism offers) with the bathwater (its limits and slipperiness as an explanatory theory,

---

45. This Article uses the term “realism” in the international relations sense, not to be confused with domestic “legal realism.” While both theories cite power and politics as key determinants of law, legal realism maintains that law still functions as an independent variable in domestic courts. See Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 750 (2010) (“For legal realists, however, it is not as if legal texts and legal doctrine do not matter at all. Legal texts and doctrine are simply insufficient to understand judicial interpretation and outcomes in actual cases.”). In contrast, international relations “structural realists” argue that international law is of little or no importance in the anarchic international system where states violate international law whenever it is in their interests to do so. See Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT’L L. 64, 71–76 (2006) (describing variations of realist theory). The institutional challenge to structural realism also assumes that states pursue their own self-interest in an international system lacking centralized enforcement of international law. See KEOHANE, *supra* note 13, at 108–09. Yet institutionalists, like domestic legal realists, assert that legal institutions often operate as independent variables, modifying the effects of power politics. As explained above, reputation is the linchpin of the institutionalist argument.

and its tendency to justify status quo power arrangements as a consequence of anarchy's inexorable logic).<sup>46</sup>

Some international law scholars have looked to the realist school of international relations as a source of academic insight,<sup>47</sup> while others have shown that realism faces serious challenges. For example, the extreme "structural realist" belief that international law is epiphenomenal faces the problematic fact that states allocate substantial resources toward influencing its development.<sup>48</sup> Nonetheless, Richard Steinberg has noted that "[m]any international law articles perpetuate a common misperception that realism is a monolithic approach that denies any role for law," while in fact "most contemporary realists believe that law may define credible commitments."<sup>49</sup>

Meanwhile, "[r]ealist perspectives remain dominant in current international relations scholarship," according to Greenberg.<sup>50</sup> Moreover, the most revered institutionalist voices continually reaffirm the centrality of security and power in international relations. For Keohane: "Realist theories that seek to predict international behavior on the basis of interests and power alone are important but insufficient for an understanding of world politics. They need to be supplemented, though not replaced, by theories stressing the importance of international institutions."<sup>51</sup> Similarly, Joseph Nye warns, "[t]o ignore the role of force and the centrality of

---

46. Jonathan D. Greenberg, *Does Power Trump Law?*, 55 STAN. L. REV. 1789, 1792 (2003).

47. See, e.g., Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1176 (1999) ("In this Article we have borrowed from two traditions in the international relations literature . . . Realism is skeptical about international cooperation and international law. By contrast, the second tradition—institutionalism—is more optimistic about international cooperation and international law."); Noah Feldman, *When Judges Make Foreign Policy*, N.Y. TIMES, Sept. 28, 2008, (Magazine), at 50, 66 ("Law comes into being and is sustained not because the weak demand it but because it is a tool of the powerful. . . . It is easier and cheaper to get the compliance of weaker people or states by promising them rules and a fair hearing than by threatening them constantly with force."). Of course, it is common for international law scholars to note the limitations of enforcement mechanisms or the distributive consequences of treaty negotiations.

48. Guzman, *supra* note 3, at 1837. Structural realists assume that in "an anarchic self-help state system, security depends on relative state power, which means that international outcomes are zero-sum." Steinberg & Zasloff, *supra* note 45, at 74–75 ("[O]ther than structural realists, few make this claim" that "international law has no autonomous explanatory power . . .").

49. Richard H. Steinberg, *Overview: Realism in International Law*, 96 AM. SOC'Y INT'L L. PROC. 260, 261 (2002). Steinberg also notes that although "most leading international law theorists pay some homage to power, the realist approach does not often find its way to the center of conversations in U.S. law schools." *Id.* at 260.

50. Greenberg, *supra* note 46, at 1804 ("Scholars representing a variety of approaches within a realist paradigm generate volumes of new research on issues of paramount concern to international law scholarship . . .").

51. KEOHANE, *supra* note 13, at 14.

security would be like ignoring oxygen. Under normal circumstances, oxygen is plentiful and we pay it little attention. But once those conditions change and we begin to miss it, we can focus on nothing else.”<sup>52</sup>

Nye envisions a spectrum along which the relationships of various adversaries or allies can be positioned between realist and institutionalist poles.<sup>53</sup> At the realist pole, “military force is the dominant instrument, and *security is the dominant goal*.”<sup>54</sup> Meanwhile, at the institutionalist pole, “economic manipulation and the use of international institutions are the dominant instruments,” and “*welfare is the dominant goal*.”<sup>55</sup> Importantly for present purposes, relationships can move along Nye’s spectrum over time as states become more or less focused on welfare maximization or security. When states move across the spectrum toward realism in response to a salient security threat, they will not only return their focus to maximizing relative power rather than global welfare, but they will also adopt strategies to counter that threat.

Stephen Walt employs a metaphor similar to Nye’s in expressing the centrality of security in international relations: although the underlying forces of realism are as strong and pervasive as gravity, an international institution may still be built to fly.<sup>56</sup> Those underlying forces are the uncertainty and anarchy natural to international relations, explaining the tendency of states to balance strategically. Where the uncertainty regarding others’ intentions can be decreased, even many realists theorize that security regimes can alter states’ behavior by shifting their expectations. According to Robert Jervis:

[I]f [a state] believes a regime is likely to last, [it] will be more likely to “invest” in it (in the sense of accepting larger short-run risks and sacrifices) in the expectation of reaping larger gains in the future. Important here is the expectation that peace could be maintained. If war were seen as likely, states would have to

---

52. Nye, *supra* note 8, at 550–51.

53. NYE, *supra* note 11, at 208. For example, Nye places the India-Pakistan and Israel-Syria dyads near the realist end of the spectrum and relations within the European Union near the institutionalist end of the spectrum. Notably, Nye suggests that the relationship between the United States and China is centered between realism and institutionalism. *Id.* at 207. *See infra* Part IV.D.2 (discussing the rise of China).

54. NYE, *supra* note 11, at 207 (emphasis added).

55. *Id.* (emphasis added).

56. Stephen M. Walt, *The Enduring Relevance of the Realist Tradition*, in *POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 201* (Ira Katnelson & Helen Milner eds., 2002).

concentrate on building up their short-run power to prepare for the coming conflict.<sup>57</sup>

But where states have invested in a security regime's promise of peace and that regime is then undermined by defection, risk-averse states will react by shifting their expectations to conflict. Expectations of conflict lead to increased alliance formation and armament as well as the denial of cooperation to limit rivals' relative power.<sup>58</sup>

Historically, there has been an "overwhelming tendency for states to balance rather than bandwagon" in response to security threats, "primarily because an alignment that preserves most of a state's freedom of action is preferable to accepting subordination under a potential hegemon."<sup>59</sup>

Because intentions can change and perceptions are unreliable, it is safer to balance against potential threats than to hope that strong states will remain benevolent. The overwhelming tendency for states to balance rather than bandwagon defeated the hegemonic aspirations of Spain under Philip II, France under Louis XIV and Napoleon, and Germany under Wilhelm II and Hitler.<sup>60</sup>

Therefore, perceptions of threat are more likely to hurt a state's interests than help it by increasing its coercive power: "the more aggressive or expansionist a state appears, the more likely it is to trigger an opposing coalition."<sup>61</sup>

Professor Walt was the first to formally articulate what is intuitive to observers of modern world politics: states tend to react against threats.<sup>62</sup> In contrast to Kenneth Waltz's structural realism—maintaining that states balance only against power and therefore tend to balance against all hegemons—Walt claims that states balance against the greatest threats to their security.<sup>63</sup> Professor Walt's theory thereby serves as a bridge

---

57. Robert Jervis, *Security Regimes*, in *INTERNATIONAL REGIMES* 182 (Stephen D. Krasner ed., 1981).

58. See *infra* Part IV.A.1 (discussing the expectations of conflict accompanying the rise of Germany before World War I).

59. Walt, *supra* note 8, at 15.

60. *Id.*

61. *Id.* at 13. See also Josef Joffe, *How America Does It*, 76 *FOREIGN AFF.* 13, 16 (1997) ("Those who coerce or subjugate others are far more likely to inspire hostile alliances than nations that contain themselves, as it were.")

62. Walt, *supra* note 8, at 12, 15.

63. Christopher Layne, *The War on Terrorism and the Balance of Power: The Paradoxes of American Hegemony*, in *BALANCE OF POWER: THEORY AND PRACTICE IN THE TWENTY-FIRST CENTURY* 113 (T.V. Paul, James J. Wirtz & Michel Fortmann eds., 2004).

connecting contemporary realism to institutionalist approaches.<sup>64</sup> For example, Nye's "soft power" theory also explains when states will tend to balance against threats:

American preponderance is softened when it is embodied in a web of multilateral institutions . . . . When the society and culture of the hegemon are attractive, the sense of threat and need to balance it are reduced. Whether other countries will unite to balance American power will depend on how the United States behaves as well as the power resources of potential challengers.<sup>65</sup>

Thus, the concept of balancing against security threat is integral to both Walt's contemporary realist theory and Nye's neoliberal institutionalism, which are among the most influential theories in international relations today.<sup>66</sup> Although Nye is more optimistic about states' abilities to avoid war, he does not discount the strategic costs incurred when a state is perceived as threatening.

While the concepts of security threat and strategic balancing are as omnipresent as "oxygen" and "gravity" to these international relations scholars, perhaps it is not surprising to find them conceptually unincorporated into most of the international law literature. After all, power politics is the antithesis of legal regulation. Rationalist international law scholars generally accept the institutionalist theory that states use international institutions to engage in strategic restraint, allowing for the pursuit of global welfare maximization.<sup>67</sup> However, these scholars do not

64. *Id.* at 114.

65. Nye, *supra* note 8, at 559 (citing Joffe, *supra* note 61, at 27). In fact, Nye's "soft power" theory expresses in positive terms essentially what Walt's "balance of threat" theory expresses in negative terms. Stated in the negative: when a state is perceived as threatening, others will balance against it. Stated in the positive: when a state is perceived as non-threatening—even to the extent that its policies are attractive—others will tend to bandwagon with it. Compare JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS*, at x (2004) ("As General Wesley Clark put it, soft power 'gave [the United States] an influence far beyond the hard edge of traditional balance-of-power politics.'"), with Walt, *supra* note 8, at 33 (explaining that the United States enjoyed a "favorable imbalance of power" during the Cold War because it was perceived by the medium powers of Europe and Asia as less threatening than the Soviet Union).

66. See Richard Jordan, Daniel Maliniak, Amy Oaks, Susan Peterson & Michael J. Tierney, *One Discipline or Many?: TRIP Survey of International Relations Faculty in Ten Countries* 43 (2009) (ranking Walt and Nye, as well as Keohane and Jervis, among the top twenty scholars having "the greatest influence on the field of IR in the past 20 years," as determined by a poll of 2,724 international relations scholars).

67. See, e.g., Guzman, *supra* note 3, at 1839–40 (adopting institutionalism). Institutionalism, like realism, treats states as "rational unitary agents interacting in an anarchical world," yet maintains "that institutions can reduce verification costs in international affairs, reduce the cost of punishing cheaters, and increase the repeated nature of interaction, all of which make cooperation more likely." *Id.*



seem to have considered what costs could result from reversals of restraint—i.e., the costs incurred when relations between states move away from institutionalism and toward realism on Nye’s spectrum, in response to a salient security threat.

Indeed, most rationalist international law scholars, such as Guzman, ignore the potentially prohibitive strategic costs of noncompliance in the “high stakes” security arena:

[I]nternational law is more likely to have an impact on events when the stakes are relatively modest. The implication is that many of the topics that receive the most attention in international law—the laws of war, territorial limits, arms agreements, and so on—are unlikely to be affected by international law.<sup>68</sup>

Although international law may be more likely to have an impact when the stakes are low,<sup>69</sup> it is far more consequential in the security context than Guzman suggests. For the sake of simplicity, Guzman’s model of reputational costs is based on the assumption that “countries will only enter into agreements with countries that have a good reputation.”<sup>70</sup> He acknowledges that violations of more important obligations lead to larger reputational costs.<sup>71</sup> Yet, for Guzman, it does not follow that ISL commitments are likely to be honored because the incentive to defect is greater when the stakes are high.<sup>72</sup> However, one would expect to find a strong correlation between high stakes defections and perceptions of security threats—leading to costly strategic balancing that is unaccounted for by Guzman’s model. When such strategic reputational costs arise, treaty exclusion costs will normally pale in comparison because strategic

---

68. *Id.* at 1825.

69. In general, IEL is more “enforceable” than ISL, but not necessarily because the stakes are lower. Rather, international trade law and international investment law both feature compulsory dispute settlement mechanisms. The World Trade Organization (“WTO”) and the International Centre for Settlement of Investment Disputes (“ICSID”) provide direct sanctions as well as clear focal points imposing reputational costs on states that refuse to comply. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (providing for compulsory dispute settlement in article 6 and authorizing trade sanctions in the event of noncompliance in article 22); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (entered into force on Oct. 14, 1966) (“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing [e.g., in an investment treaty] to submit to the Centre.”).

70. Guzman, *supra* note 3, at 1847.

71. GUZMAN, *supra* note 2, at 85.

72. *Id.*

costs imperil the violator's security. Although international law does not always prevent states from, for example, conducting illegal warfare, the potential for high reputational costs does affect state behavior in the security context.

This examination of the core international relations concept of security threat has shown how defection from international security institutions can provoke states to balance against the unrestrained threat. To better distinguish between the causal effect of a violation of international law and that of the underlying action itself, this Article now turns to the focal point concept from game theory.

### *B. Focal Points in Game Theory and International Law Theory*

Because information regarding rivals' strategic intentions is asymmetric, states face challenges—individually and collectively—in determining which rivals pose the greatest threats to their security. Allies will be wary of committing scarce resources to resist what they perceive as only a modest threat to their own security.<sup>73</sup> According to Henry Kissinger:

Only when a threat is truly overwhelming and genuinely affects all, or most, societies is such a consensus [for collective security] possible—as it was during the two world wars and, on a regional basis, in the Cold War. But in the vast majority of cases—and in nearly all of the difficult ones—the nations of the world tend to disagree either about the nature of the threat or about the type of sacrifice they are prepared to make to meet it.<sup>74</sup>

Given these coordination challenges, ISL violations are marshaled as evidence of the violator's threatening intentions. Even where the international community as a whole fails to coordinate a response, alliances coordinate for security, and individual states allocate their own resources, in response to the focal point of threat.

In 1960, game theorist Thomas Schelling defined a “focal point” as a “clue for coordinating behavior”—“each person's expectation of what the

73. See Miller, *supra* note 7, at 54–55 (“[I]f a potential ally has behaved aggressively in the past (that is, dragging an ally into an unwanted war), then fears of entrapment will be higher.”).

74. HENRY KISSINGER, *DIPLOMACY* 53 (1994). Not coincidentally, Kissinger excepts the major conflicts of the twentieth-century—including those that postdate the emergence of modern international law—from his rule that states tend to disagree about the nature of the threat and whether (or how) to coordinate a response.

other expects him to expect to be expected to do.”<sup>75</sup> Schelling explained that where states’ interests were aligned, “cheap talk” would suffice to create focal points of coordination; however, where there is a mixture of conflict and common interest, cheap talk is no longer sufficient to solve the coordination problem due to the distributive issues involved.<sup>76</sup> Schelling’s solution in such “mixed motive” games was to interpose a third party mediator: “When there is no apparent focal point for agreement, [the mediator] can create one by his power to make a dramatic suggestion,” which becomes, de facto, the most salient compromise option.<sup>77</sup> Schelling illustrated the focal point phenomenon with the image of a bystander jumping into a jammed intersection to direct traffic.<sup>78</sup> The bystander “is conceded the power to discriminate among cars by being able to offer a sufficient increase in efficiency to benefit even the cars most discriminated against; his directions have only the power of suggestion, but coordination requires the common acceptance of some source of suggestion.”<sup>79</sup>

Building upon Schelling’s work, legal scholars have hypothesized that law provides a focal point for coordinating behavior.<sup>80</sup> In Schelling’s example, law would be analogous to the installation of a traffic light. When the traffic light is red, the law expresses a highly visible signal that the driver is expected to stop. Even in the absence of a police officer to sanction violators, it is often more efficient to coordinate by following the law’s signals, and drivers ignore those signals at their peril.<sup>81</sup>

International law scholars have often suggested that a treaty’s substance provides focal points expressing to states how to coordinate in a given issue area.<sup>82</sup> In addition, Christopher Whytock has identified a

---

75. SCHELLING, *supra* note 9, at 57.

76. *Id.* at 14.

77. *Id.* at 144.

78. *Id.*

79. *Id.*

80. *See, e.g.*, Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1651 (2000) (suggesting that, in addition to its sanctioning function, law has an expressive function).

81. *See id.* at 1652 (“[The] proclamation—‘Drive on the right’—even one that carries no threat of sanctions, may cause people to drive on the right just because the proclamation makes everyone expect that others will drive on the right.”).

82. *See, e.g.*, Stephen D. Krasner, *Realist Views of International Law*, 96 AM. SOC’Y INT’L L. PROC. 265, 266 (2002) (“International law can provide a focal point for solving coordination problems.”); Geoffrey Garret & Barry R. Weingast, *Ideas, Interests, and Institutions: Constructing the European Community’s Internal Market*, in IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE 173 (Judith Goldstein & Robert O. Keohane eds., 1993) (analyzing the European internal market in terms of expressive legal focal points); *see also* Goldsmith & Posner, *supra* note 47,

possible “second approach emphasiz[ing] the role of focal points in coordinating cooperation among prospective decentralized enforcers of public law.”<sup>83</sup> Barry Weingast explored such a focal point enforcement theory in the context of constitutional law, but this approach has not been as well developed in international law scholarship.<sup>84</sup> Whytock found only a passing comment in the international law literature regarding focal points generated by the *violation* of international law: “Individuals and groups can zero in on international court decisions as focal points around which to mobilize . . . .”<sup>85</sup> In the absence of international court decisions, states make independent evaluations of the legality of other states’ actions and argue their cases through media or diplomatic channels, or in internal deliberations, zeroing in on international law violations as focal points of threat.

For an example of a focal point resulting from the violation of international law, one needs to look no further than Guzman’s analysis of the reputational costs of violating a bilateral investment treaty (“BIT”):

Even in the absence of an international legal commitment . . . a decision to expropriate will have a chilling effect on future investments. To the extent that investors view the legal obligation contained in the BIT as a credible commitment, however, the country becomes more attractive to investors and may enjoy higher levels of investment. If expropriation undermines this confidence, a

---

at 1134 (explaining the origins of customary international law norms in terms of focal point coordination).

83. Christopher A. Whytock, *Thinking Beyond the Domestic-International Divide: Toward a Unified Concept of Public Law*, 36 GEO. J. INT’L L. 155, 178–79 (2004).

84. *Id.* at 179 (noting that “the same logic would seem to apply” to focal points in international law) (citing Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997)).

85. Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT’L ORG. 457, 478 (2000); *see also* Steinberg & Zasloff, *supra* note 45, at 80 (“Law and legal institutions could make the transgression of a clear rule transparent, serve as a source of credible commitment by powerful states, and establish focal points for coordination.” (citations omitted)). Matthew McCubbins and Thomas Schwartz have also shown how, in the domestic setting, it is more efficient for legislators to monitor regulatory agencies by using “fire alarms” instead of “police patrols.” Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 168 (1984). The same logic would apply equally well in international law: where police patrols are impractical for reasons of sovereignty, international norms can nonetheless serve as fire alarms. In this way, “much of the [oversight] cost is borne by the citizens and interest groups who sound alarms” rather than by states themselves. *Id.*; *see also* DANIEL DREZNER, ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL REGULATORY REGIMES 70 (2007) (referring to the potential “fire alarm” and “focal point” functions of international NGOs). “Fire alarms” are another way to conceptualize security threat focal points.

portion of the lost investment can be attributed to a reputational effect resulting from the violation of international law.<sup>86</sup>

This “reputational effect” perceived by private investors is distinguishable from either direct sanctions or treaty exclusion. Guzman is articulating the costs incurred when a state undermines its previously signaled restraint, here in the context of IEL.

While occasionally providing mechanisms for direct sanctions (a function BITs happen to perform uniquely well), treaties more often serve as a device by which states pre-commit to elevating the prominence of specific threatening acts. In this way, international law makes credible the restraint promised when states bind themselves to international institutions. International law ensures that other states will be able to zero in on defection from those institutions. In the BIT example, because individual investors lack perfect information, treaty violations help identify threats by spotlighting certain previously identified acts that threaten investors most. Having focused on one threatening violation, investors will also question the state’s commitment to the rule of law moving forward. Thus, the potential for reputational costs in the investment market serves as a deterrent to BIT defections. Partly for investors, but especially for states—which must coordinate more closely against security threats—international law is a key source of focal points.

Noncompliance is not the only source of security threat focal points. Walt identifies four factors that determine the level of security threat that a state poses: “1) aggregate power; 2) proximity; 3) offensive capability; and 4) offensive intentions. . . . Perceptions of intent play an especially crucial role in alliance choices.”<sup>87</sup> Unlike with aggregate power, proximity, and offensive capability, states always exercise free will over their intentions. Given the information asymmetries inherent in world politics, however, states are not always successful in communicating their allegedly peaceful intentions.<sup>88</sup> By binding themselves to international institutions, states more effectively signal restraint. The successful communication of restraint reduces perceptions of threat and adverse

---

86. Guzman, *supra* note 3, at 1852 n.113.

87. Walt, *supra* note 8, at 9, 12 (“[A]ggregate power [refers to] a state’s total resources (i.e., population, industrial and military capability, technological prowess, etc.).”). Walt also predicted that “[p]erceptions of intent will be[come] increasingly important, because the distribution of capabilities will be more equal and geography may not offer clear guidance.” STEPHEN M. WALT, *ORIGINS OF ALLIANCES* vii (Cornell Univ. Press 1987).

88. “Determining intentions is not easy. Accordingly, statesmen often seek shortcuts to identify friends and foes.” WALT, *supra* note 87, at 180.

balancing strategies, and allows for welfare-maximizing opportunities.<sup>89</sup> Defection from such institutions has the opposite effect—increasing perceptions of threat and adverse balancing strategies, and reducing welfare-maximizing opportunities. “In a balancing world, policies that demonstrate restraint and benevolence are best.”<sup>90</sup>

In addition to highly visible violations of international law, there are other forms of evidence of threatening intentions.<sup>91</sup> As suggested above, beneath the formal legal violation, often the underlying act is also evidence of threat. For example, the use of force by the United States in Iraq in 2003 has often been described as illegal.<sup>92</sup> Even assuming that the use of force had been legal, the fact that the United States exhibited the offensive intention and capability to invade a Middle Eastern nation would still signal a security threat to some other states.

Nonetheless, *ceteris paribus*, the legal use of force will generally be perceived as far less threatening than the illegal use of force because it does not signal defection from the international security regime. An ISL violation (1) shines a spotlight on the threat of the underlying action, (2) creates the threatening perception that the state does not intend to be bound by the restraints to which it previously committed, and (3) facilitates international coordination in identifying and responding to the threat. With information regarding rivals’ strategic aims largely hidden, the conscious commission of an illegal act is an objective and vivid indicator of threatening intentions. Violations of ISL are perceived as provocative and often result in costly strategic balancing.

### C. Security Threat Focal Point Theory Summarized

In summary, contemporary international relations theorists have shown that states tend to “balance” against threats and “bandwagon” with less threatening powers. Yet states face difficulties in determining which

89. See Steinberg & Zasloff, *supra* note 45, at 79 (noting that institutionalists like Keohane have demonstrated how “international institutions could reduce transaction and information costs,” leading to information sharing that “favors cooperation, reduces uncertainty about intentions, and facilitates international stability”).

90. Walt, *supra* note 8, at 14.

91. For example, Brewster writes that the “refusal to take on legal obligations—rather than the violation of international law—might do much more to influence the popular perception of the state than violations of legal obligations do.” Brewster, *supra* note 4, at 238–39 (citing George W. Bush’s refusal to sign the Kyoto Protocol and “unsigned” of the Rome Statute of the International Criminal Court). Indeed, a state’s refusal to bind itself to an institution in the first place, or its decision to legally withdraw later, could constitute a separate security threat focal point.

92. See, e.g., Anne-Marie Slaughter, *The Use of Force in Iraq: Illegal and Illegitimate*, 98 AM. SOC’Y INT’L L. PROC. 262 (2004).

security threats warrant the allocation of their scarce resources, especially in multipolar eras when power is dispersed. Rational states confronting a compliance decision must account for varying perceptions of threat due to other states' imperfect information (and perhaps imperfect rationality). Noncompliance with ISL produces focal points of threat, making salient the violator's lack of restraint, and facilitating international coordination in response. As explored in Part IV, such noncompliance focal points have historically led to strategic costs: (1) adverse alliance formation, (2) rivals' increased armament, and (3) the denial of informal cooperation. These strategic reputational costs are potentially much higher than the cost of treaty exclusion because they jeopardize the violator's security interests. In short, ISL violations spotlight threatening defections from international security institutions, leading to significant strategic reputational costs as states balance against the unrestrained violator.

#### IV. HISTORICAL EXAMPLES OF STRATEGIC REPUTATIONAL COSTS

This section applies the theory of security threat focal points to major conflicts and alliance formations over the course of the past century in order to test its explanatory power. The subsections below provide initial analyses of the role of international law in (a) threat perception in the run-up to World Wars I and II in multipolar Europe, (b) the bipolar "balance of threat" during the Cold War, (c) security coordination successes and failures during unipolarity, and (d) threat perceptions during the return to multipolarity and the Chinese model of maximizing relative power while minimizing relative threat. Several of these historical episodes clearly support the theory, while others that might seem to contradict it at first blush are ultimately reconcilable.

##### *A. Multipolarity: Early Twentieth-Century Europe*

Prior to the twentieth century, European elites viewed war as sport, and ISL generally consisted of unrestrictive codes of honor and theological justifications for war.<sup>93</sup> The Great War spurred an era of ambitious ISL projects, most of which failed before the UN Charter was adopted after World War II. Nonetheless, even rudimentary ISL norms played some role

---

93. See STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 10 (1996) ("The 18th and the 19th century were dominated by an unrestricted right of war and the recognition of conquests . . .").

in shaping perceptions of threat and strategic behavior in early twentieth-century Europe.

*1. World War I: Before Bright Lines*

In the years leading up to World War I, Europe divided itself into the competing coalitions of the Triple Entente and the Triple Alliance. The Triple Entente was formed due, in part, to perceptions of Germany's expansionist intentions.<sup>94</sup> In a famous 1907 memorandum, British diplomat Sir Eyre Crowe pondered the key strategic question of his day—"whether Germany is in fact aiming at a political hegemony":

Either Germany is definitely aiming at a general political hegemony and maritime ascendancy, threatening the independence of her neighbours . . . ;

Or Germany, free from any such clear-cut ambition . . . is [merely] seeking to promote her foreign commerce . . . .

. . . .

. . . [S]o long as Germany's action does not overstep the line of legitimate protection of existing rights she can always count upon the sympathy and good-will[,] and even the moral support, of England.<sup>95</sup>

Crowe grappled for the "real advantage" he saw in making "as patent and pronounced [and] as authoritative as possible" the distinction between peaceful German expansion and unrestrained expansion, which would meet "determined opposition."<sup>96</sup> Yet the "line of legitimate protection of existing rights" traced by European diplomats proved too vague to restrain the rise of Germany as a military threat and the expectations of conflict that accompanied it.<sup>97</sup>

Crowe was searching for a pre-delineated security threat focal point, or, in other words, an international norm. But, in the absence of meaningful use of force restrictions or arms controls (much less a collective security

94. Walt, *supra* note 8, at 12 ("Although the growth of German power played a major role, the importance of German intentions should not be ignored.").

95. Eyre Crowe, *Memorandum by Sir Eyre Crowe on the Present State of British Relations with France and Germany*, in BRITISH DOCUMENTS ON THE ORIGINS OF THE WAR, VOLUME III: THE TESTING OF THE ENTENTE 397, 403, 417 (G.P. Gooch & Harold Temerley eds., 1928).

96. *Id.* at 418.

97. *Id.* at 417.



organization),<sup>98</sup> there was little role for international law to play in spotlighting threat or deterring war. Indeed, the most relevant international agreements in the years leading up to 1914 constituted not a set of international norms, but an intricate framework of hair-trigger alliances that helped plunge Europe deep into war.<sup>99</sup>

Nonetheless, “it appears that the critical trigger for cabinet approval of British intervention in the early stages of the war was the German violation of Belgian neutrality”—much to the surprise of Germany, which had expected Britain to remain neutral.<sup>100</sup> Even across the Atlantic, perceptions of German noncompliance with respect to the narrow issue of Belgian neutrality would “exert a profound impact upon the evolution of the U.S. government’s neutrality policy into a stance of ‘benevolent neutrality’ in favor of the Allies and against the Central Powers.”<sup>101</sup> Moreover, Germany’s noncompliance with the customary laws of maritime warfare had a “decisive impact upon American public opinion and governmental decision-making processes” from 1915 to 1917, when the United States finally entered the war.<sup>102</sup> Unfortunately, the British and American reactions to the German threat came too late to prevent disaster.<sup>103</sup>

Prior to World War I, meaningful treaty restrictions on the use of force or the European arms race were the exception rather than the rule. Far from being viewed as defections from the international order, the arms race and the use of force appeared inevitable.<sup>104</sup> In an international order with few bright line rules, expectations of conflict accompanied the rise of unified Germany and became a self-fulfilling prophecy.

## 2. *World War II: “The Lesson of Munich”*

The well-known story of appeasement might appear to contradict the security threat focal point theory. Instead of balancing against Germany in

---

98. See ALEXANDROV, *supra* note 93, at 26–27 (“The first significant step, designed to curtail the freedom of war in general international law, was the creation of the League of Nations [following World War I].”).

99. In addition to their complexity and frequent secrecy, some of these alliance commitments required the preemptive mobilization of armies, while others pledged to stand behind the aggressive use of force. See KISSINGER, *supra* note 74, at 203, 209.

100. Jack S. Levy, *The Role of Necessary Conditions in the Outbreak of World War I*, in EXPLAINING WAR AND PEACE: CASE STUDIES AND NECESSARY CONDITION COUNTERFACTUALS 47, 66 (Gary Goertz & Jack S. Levy eds., 2007).

101. FRANCIS ANTHONY BOYLE, *WORLD POLITICS AND INTERNATIONAL LAW* 48 (1985).

102. *Id.* at 49.

103. See KISSINGER, *supra* note 74, at 212.

104. See *id.* at 194.

the wake of its international law violations, the rest of Europe initially sought to placate the coercive state. Yet these coordination failures were attributable primarily to the incoherence and obsolescence of the international law that Hitler initially violated. High strategic costs later resulted from his violation of the unambiguous Munich Agreement.

From 1933 to 1938, Germany violated its commitments under the Treaty of Versailles by rearming, remilitarizing the Rhineland, and occupying Austria. Although Britain and France complained, they failed to coordinate an effective response.<sup>105</sup> When ethnic Germans rebelled in the Sudetenland in 1938, the British and French pressured Czechoslovakia to surrender the region to appease Hitler.<sup>106</sup> Britain, France, Germany, and Italy formalized this arrangement without Czechoslovakia in the Munich Agreement of September 1938.<sup>107</sup> When Hitler defected and invaded all of Czechoslovakia six months later, Britain and France failed to directly sanction Germany.<sup>108</sup> No longer naïve to Hitler's offensive intentions, however, Britain reacted to the Munich Agreement violation by pledging to defend Poland against the German threat.<sup>109</sup> Hitler invaded Poland on September 1, 1939, and two days later Britain and France declared war.

Drawing on Mercer's social psychology research, Daryl Press argues that the so-called "lesson of Munich"—that appeasement leads to a loss of the credibility necessary for deterrence—is premised on a flawed belief that states predict rivals' future behavior on the basis of their past actions.<sup>110</sup> Because Mercer and Press focus exclusively on deterrence theory, they overgeneralize from the finding that it "is wrong to believe that a state's *reputation for resolve* is worth fighting for" to the broad conclusion that the "belief in the importance of *reputation* is premised on a mistaken view of how people tend to explain behavior."<sup>111</sup>

105. Daryl G. Press, *The Credibility of Power: Assessing Threats During the "Appeasement" Crises of the 1930s*, 29 INT'L SEC. 136, 136 (2005).

106. *Id.* at 150.

107. KISSINGER, *supra* note 74, at 313–14.

108. *Id.*

109. France was already bound to defend Poland by a 1921 treaty. Press, *supra* note 105, at 158.

110. *Id.* at 136, 138. Press's findings "complement and extend Mercer's," and his focus is also limited to states' reputations for resolve in the context of deterrence theory. *Id.* at 140 n.12.

111. MERCER, *supra* note 36, at 1 (emphasis added); *see also* Miller, *supra* note 7, at 41 ("I suggest that Mercer's findings, though important, are incomplete. States, like firms, have many different kinds of reputations, and the emphasis on *resolve* does not account for the variety of other reputations that are attributed to a state.").

Mercer had applied social psychology to international relations, showing that:

When a decision-maker's policies work (meaning that an ally or adversary behaves "desirably"), this response only shows these policies caused that behavior. When his policies fail to elicit desirable behavior, this failure is taken not as a weakness of his policy, but as a reflection on whomever is messing up his plans.<sup>112</sup>

In other words:

"Undesirable behavior → dispositional attribution  
Desirable behavior → situational attribution"<sup>113</sup>

For an adversary, lack of resolve is a desirable behavior, so one would expect to find a tendency toward situational attributions to explain an adversary's lack of resolve.<sup>114</sup> Press's research confirms that "German discussions about the credibility of their adversaries emphasized the balance of power [i.e., the situation], not their history of keeping or breaking commitments [i.e., their disposition]."<sup>115</sup> Thus, reputation may be of minimal significance in the context of deterrence—unlike with rivals' violations of international law, which are almost always undesirable and would be expected to disproportionately trigger dispositional attributions.

More important for present purposes are the failures of the British and French to respond to the security threat focal points provided by Hitler's initial violations of international law. Germany's rearmament, remilitarization of the Rhineland, and annexation of Austria are all examples of undesirable behavior. Social psychology theory predicts that Germany's adversaries would have attributed to it an offensive disposition (in this case, rationally). But with the horrors of World War I fresh in their minds, the British and French leadership in 1938 sought to avoid war "at almost any cost."<sup>116</sup>

This initial coordination failure may be ascribed, in part, to the incoherence of the era's international norms. Woodrow Wilson's Fourteen Points embraced the slippery ideal of self-determination,<sup>117</sup> and the "gaps"

---

112. MERCER, *supra* note 36, at 62–63.

113. *Id.* at 63.

114. *See id.* at 62.

115. Press, *supra* note 105, at 138.

116. ROBERT H. MNOOKIN, *BARGAINING WITH THE DEVIL: WHEN TO NEGOTIATE, WHEN TO FIGHT* 85 (2010).

117. Due to the principle of self-determination and their historical ties, "the union of Germany and

in the Covenant of the League of Nations, as well as the non-participation of the United States, undermined collective security.<sup>118</sup> Most importantly, the 1919 Treaty of Versailles—requiring Germany to accept sole responsibility for World War I, pay exorbitant reparations, and make substantial territorial concessions—was obsolete by the 1930s.<sup>119</sup> According to Guzman:

[M]any western European nations had come to see the Treaty of Versailles as unnecessarily harsh and punitive, and had higher expectations of Germany's compliance with the Munich [Agreement]. So it was the violation of the latter agreement that caused the collapse of Germany's reputation and prompted the British and French to issue the March 1939 guarantee of Polish security against German aggression.<sup>120</sup>

Again, Guzman articulates a reputational cost distinguishable from either a direct sanction or treaty exclusion. Here, Britain and France coordinated to defend a third party's security in reaction to a threat signaled by a treaty violation.

Notwithstanding the lack of clarity in international law preceding the Munich Agreement, in 1936 Winston Churchill reacted to the remilitarization of the Rhineland by calling for a “pact among the western states, Holland, Belgium, France, and Britain for mutual aid in the event of unprovoked attack, and for keeping in being a force great enough to deter Germany from making such an attack.”<sup>121</sup> As early as 1933, “Churchill told his constituents, ‘There is grave reason to believe that Germany is arming herself, or seeking to arm herself, contrary to the solemn treaties extracted from her in her hour of defeat.’”<sup>122</sup> Again in 1938, Churchill

Austria had about it that sense of ambiguity so essential to the success of Hitler's early challenges.” KISSINGER, *supra* note 74, at 310.

118. See ALEXANDROV, *supra* note 93, at 33 (“The most serious gap was probably Article 15 (7) allowing States to go to war if the Council failed to adopt an unanimous report.”).

119. GOLDSMITH & POSNER, *supra* note 21, at 103 (“[M]any treaties are mistakes or are quickly rendered irrelevant by rapidly changing international relations. . . . The treaties of Versailles and Sevres at the end of World War I are only the most obvious examples.”).

120. GUZMAN, *supra* note 2, at 112.

121. Donald Cameron Watt, *Churchill and Appeasement*, in CHURCHILL: A MAJOR NEW ASSESSMENT OF HIS LIFE IN PEACE AND WAR 205 (Robert Blake & William Roger Louis eds., 2002).

122. MARTIN GILBERT, CHURCHILL: A LIFE 522 (1991). Churchill's warning came only a month after the distribution within the British government of “a secret memorandum setting out the evidence that Germany had begun to build military aircraft in violation of the Treaty of Versailles.” *Id.* at 521. The previous year, in 1932, Churchill supported British Foreign Secretary Sir John Simon's official note stating that the disarmament clauses of the Treaty of Versailles were still binding upon Germany. Churchill “argued that Simon's firm stand had ‘done more to consolidate peace in Europe than any

repeated his call for a strategic alliance to balance against the German threat, in response to Germany's annexation of Austria and the Czechoslovakian crisis.<sup>123</sup> Nonetheless, British Foreign Secretary Lord Halifax "drew a distinction between 'Germany's racial efforts' (i.e. the support of the Sudeten Germans) 'which none could question' and a 'lust for conquest on a Napoleonic scale' with which presumably Churchill credited Hitler but which Halifax himself 'did not credit.'"<sup>124</sup>

The lesson of Munich is that the appeasers were late in coordinating around the security threat focal points generated by Hitler's violations of the era's (admittedly equivocal) international norms. While Churchill saw the need to coordinate balancing strategies after the initial ISL violations betrayed Hitler's intentions, Lord Halifax and Prime Minister Neville Chamberlain did not.

Guzman draws a different lesson from Munich and its aftermath. For him, "Nazi Germany had no reason to value a good reputation."<sup>125</sup> Since "Hitler's ambitions required that he ignore international legal norms," it was pointless for him to cultivate a reputation for compliance.<sup>126</sup> In other words, since Germany could not have expected to conclude treaties with other states and simultaneously conquer Europe, "the harm to Germany's reputation as a result of its violation of the Munich [Agreement] imposed only a modest cost on the state."<sup>127</sup> For Guzman, the important lesson is that "when states have honest concerns about fundamental security interest[s] . . . international law is unlikely to have much influence on their decisions."<sup>128</sup>

Yet Guzman had earlier concluded that Hitler's Munich Agreement violation "caused the collapse of Germany's reputation and prompted the British and French to issue the March 1939 guarantee of Polish security against German aggression."<sup>129</sup> An opposing security alliance is a significant cost, especially for a state poised to go to war against one of its

---

words spoken on behalf of Great Britain for some years'. Simon had 'raised the hand of warning in the interests of peace.'" *Id.* at 509.

123. Watt, *supra* note 121, at 205 ("Churchill advocated an Anglo-French alliance and a joint effort to persuade the states of central Europe and the Balkans to unite against Hitler . . .").

124. *Id.* (citation omitted) (quoting another source); *cf.* Joffe, *supra* note 61, at 14 ("Hardly had the Versailles Treaty been sealed in 1919 when Britain returned to its older strategy of balancing against France, even though the real threat emanated from revisionist Germany.").

125. GUZMAN, *supra* note 2, at 111.

126. *Id.* To the extent that Guzman is suggesting (with good reason) that Hitler was not engaging in rational decision-making, a rational Germany might nonetheless have forecast that noncompliance would result in high strategic reputational costs.

127. *Id.*

128. *Id.* at 112–13.

129. *Id.* at 112.

members. If Germany's earlier international law violations resulted in only modest costs, then it was due to the obsolescence of the Treaty of Versailles combined with the appeasers' lack of resolve. Instead of coordinating around the focal points of Hitler's noncompliance with international law, Britain initially coordinated around his racial rhetoric with respect to the Sudetenland.<sup>130</sup> In retrospect, the central lesson of Munich was the rationality of coordinating for collective defense around the more objective ISL violations. Another lesson is the need to have on hand ISL norms that accurately flag those actions that states consider threatening. When critical ISL norms become obsolete, timely security coordination is more difficult to achieve.

### *B. Bipolarity: Cold War Threat Perception and International Law*

During the Cold War, even with only two poles of great power, international law still played an important role as generator of security threat focal points. This was true in the contexts of both (1) multilateral alliance formation, and (2) bilateral U.S.-Soviet relations.

#### *1. Alliance Formation*

International relations scholars have shown that critical industrialized states in Europe and Asia opted to balance against the Soviet Union and bandwagon with the United States, thereby tipping the Cold War balance of power in favor of the United States. An analysis of Cold War noncompliance helps explain the threat perceptions that drove such alliance formation.

##### *a. Cold War Balancing Against Security Threat*

In the bipolar era of the Cold War, grave security threats were somewhat easier to identify. In order to maintain its edge in the balance of power, the United States needed only to be perceived by key allies as less threatening than the Soviet Union. In his influential 1985 article, *Alliance Formation and the Balance of World Power*, Professor Walt showed that the global "balance of threat" explained why the balance of power greatly favored the United States and did not self-correct despite an "imbalance of power."<sup>131</sup>

---

130. See *supra* text accompanying note 124.

131. Walt, *supra* note 8, at 33. For example, in 1982 the Soviet alliance network accounted for

Walt analyzed alliance formation in the global North and South and found opposite results. In the North, for the medium powers of Western Europe and Asia, the United States was the perfect ally—sufficiently powerful to ensure their defense, yet sufficiently distant to pose a lesser threat itself.<sup>132</sup> In contrast, Soviet relations with those states were more hostile.<sup>133</sup> In addition to threatening the medium powers of Europe and Asia due to its proximity, perceptions of its offensive intentions also worked against the Soviets:

Actions like the invasion of Afghanistan, periodic interventions in Eastern Europe, support for terrorist organizations and revolutionary movements abroad, all reinforce global opposition to the Soviet Union. Although these actions may attract the support of radical forces around the globe, they have also increased the already strong tendency for the world's wealthiest and most stable regimes to ally together for mutual defense.<sup>134</sup>

In the South, however, Walt found these factors reversed, explaining why the Soviets attracted more allies there.<sup>135</sup> Since the Soviet capacity for global power projection was distinctly inferior to that of the United States, the United States was more “proximate” and more disposed to intervene in the South.

Walt concluded: “Thus where Soviet power and perceived intentions threatened the developed world but not the former colonies, American power and American actions did just the opposite. U.S. interventionism in the developing world drove more Third World regimes to the Soviet side than it attracted to its own.”<sup>136</sup> Because the balance of threat resulted in the medium powers of the industrialized world allying with the United States and the poorer third world countries allying with the Soviets, the global balance of power greatly favored the United States.<sup>137</sup>

---

only 12.4% of world population, 19.3% of world GNP, and 39.7% of world defense spending. *Id.* at 42. Meanwhile, the American alliance network accounted for 27.7% of world population, 62.8% of world GNP, and 46.5% of world defense spending. *Id.* at 43. *See also* Nye, *supra* note 8, at 557 (“Europe and Japan allied with the Americans because the Soviet Union, while weaker in overall power, posed a greater military threat . . .”).

132. Walt, *supra* note 8, at 36.

133. *Id.*

134. *Id.* at 37.

135. *Id.*

136. *Id.* at 38 (emphasis omitted).

137. *Id.* at 33–34, 37.

*b. Cold War Noncompliance and Threat Perception*

The conclusion of World War II produced a series of important international agreements, noncompliance with which became a key driver of postwar alliance formation. By 1949, Western Europe and the United States had created the North Atlantic Treaty Organization (“NATO”).<sup>138</sup> The powerful NATO allies were united by their perception of the Soviet Union’s threatening intentions, based at least partly on a pattern of Soviet violations of international agreements.

Although the Cold War lasted over four decades, the fundamental alliance system was effectively determined during its first four years. “Not long after the Yalta Conference—when the Russians forced a Communist government on Rumania”—the erstwhile Allies “began to awaken to the unpleasant truth.”<sup>139</sup> Soon it was the popular belief “that the Russians had treacherously broken their wartime agreements.”<sup>140</sup> Although no treaties had been concluded at the Teheran, Yalta, or Potsdam conferences, the Big Three (the U.S., U.S.S.R., and U.K.) did agree to formal declarations of intentions.<sup>141</sup> While such “soft law” commitments “do not represent a complete pledge of a nation’s reputational capital,” Guzman argues that “a failure to honor the terms of such an agreement is not costless.”<sup>142</sup> Indeed, costly focal points arise when a state fails to perform the formal commitments that it has put in writing for the world to see. This is especially true in the security context where states are highly sensitive to threats.

After World War II, the West coordinated around instantly recognizable Soviet violations as an iron curtain descended across Europe in contradiction to the declared Soviet intentions. For example, Yalta’s Declaration on Liberated Europe emphasized “the right of all peoples to choose the form of government under which they will live . . . .”<sup>143</sup> The United States also obtained formal Soviet commitments to political

138. North Atlantic Treaty, Apr. 4, 1949, 34 U.N.T.S. 243 (entered into force on Aug. 24, 1949).

139. Richard W. Van Alstyne, *The United States and Russia*, in *THE COLD WAR: A CONFLICT OF IDEOLOGY AND POWER* 46 (Norman A. Graebner ed., 2d ed. 1976).

140. *Id.*

141. *Id.*

142. See Guzman, *supra* note 3, at 1879–80 (defining soft law as “promises made by states through instruments that fall short of full-scale treaties, such as memoranda of understanding, executive agreements, nonbinding treaties, joint declarations, final communiqués, agreements pursuant to legislation, and so on”).

143. Melvyn P. Leffler, *Adherence to Agreements: Yalta and the Experiences of the Early Cold War*, 11 *INT’L SEC.* 88, 101 (1986) (quoting another source) (internal quotation marks omitted).



openness in Korea and Iran.<sup>144</sup> Such declarations were more than human rights commitments; they were also guarantees that Western democracies would retain a strategic foothold in the newly liberated states.<sup>145</sup>

The Truman administration's perception of—and reaction to—provocative Soviet noncompliance is particularly well documented. In 1946, “Truman lost faith in the Kremlin” and ordered his Special Counsel, Clark Clifford, to assess Soviet compliance.<sup>146</sup> Clifford later described the assignment as a result of Truman's disillusionment with attempts to cooperate with the Soviets:

At th[e Potsdam] conference, President Truman and Premier Stalin developed a mutual regard for each other and a relationship. The President had real hopes that under the leadership and cooperation of the United States and the Soviet Union a way could be found to bring peace to the world.

. . . .

. . . The Soviets did not keep a promise made at Potsdam, as I remember. They broke other agreements we had. They were just scraps of paper to them.<sup>147</sup>

Clifford and his assistant, George Elsey, “wrote a devastating critique of Soviet adherence to wartime and postwar agreements.”<sup>148</sup> After describing in detail Soviet noncompliance with a number of agreements, “they went on to attribute Soviet actions to Marxist-Leninist ideology, to claim that the Soviets sought world domination, and to recommend

144. *See infra* p.703 and notes 152–53.

145. *See* Leffler, *supra* note 143, at 117 (“The Yalta agreements provided a convenient lever to try to pry open Eastern Europe and to resist Soviet predominance . . .”).

146. *Id.* at 88.

147. Interview with Clark Clifford, Special Counsel to the President, 372–74 (Mar. 16, 1972) (transcript available in the Harry S. Truman Library), *available at* <http://www.trumanlibrary.org/oralhist/cliford.htm>.

148. Leffler, *supra* note 143, at 88 (citing the Clifford-Elsey memorandum in ARTHUR KROCK, MEMOIRS: SIXTY YEARS ON THE FIRING LINE app. A (1968)). According to Krock, the memorandum “was a fundamentally important American state paper” because it supplied Truman with a summary of the wartime relationship with the Soviet Union and “charted the postwar prospect with startling prescience in which the shape and thrust of Truman's subsequent great programs—the Greek-Turk aid legislation, the Marshall Plan, the North Atlantic Alliance (including NATO), and what later became known as the ‘Truman Doctrine’—were outlined.” KROCK, at 224. Krock, the “Dean of the Washington newsmen,” went so far as to claim that “[i]f Truman had been equipped with this Memorandum in May and June of 1945 . . . the Cold War, in the degree of intensity to which it grew, might have been averted” because Truman might not have committed his “greatest error” of prematurely demobilizing American forces after World War II. *Id.* at 223, 234.

adoption of a series of measures to assist prospective allies, augment American strength, and redress the balance of power.”<sup>149</sup>

Clifford, as Truman’s Special Counsel, structured the memorandum as if it were a persuasive legal brief. The opening “Outline of the Report” summarized its main arguments—striking examples of dispositional attributions explicitly drawn from “Violations of Soviet Agreements with the United States”:

INTRODUCTION ..... Page 1

a. Our ability to resolve the present conflict between Soviet and American foreign policies may determine whether there is to be a permanent peace or a third World War.

b. *U.S. policy toward the U.S.S.R. will be greatly affected by the extent of our knowledge of Soviet policies [i.e., intentions] and activities. A forecast of Soviet future policy toward this country can be based on the manner in which the U.S.S.R. has maintained her agreements with this country, and on recent Soviet activities which vitally affect the security of the United States.*

CHAPTER I: Soviet Foreign Policy ..... Page 3

a. Soviet leaders believe that a conflict is inevitable between the U.S.S.R. and capitalist states, and their duty is to prepare the Soviet Union for this conflict.

b. *The aim of current Soviet policy is to prepare for the ultimate conflict by increasing Soviet power as rapidly as possible and by weakening all nations who may be considered hostile.*

c. Soviet activities throughout the world . . . are in support of this policy of increasing the relative power of the Soviet Union at the expense of her potential enemies.

CHAPTER II: *Soviet-American Agreements, 1942–1946* ..... Page 15

a. By means of written agreements reached at international conferences, the United States Government has sought to lessen the differences between this country and the U.S.S.R. . . . .

. . . .

---

149. Leffler, *supra* note 143, at 88.

CHAPTER III: *Violations of Soviet Agreements with the United States* ..... Page 27

a. Soviet-American agreements have been adhered to, “interpreted,” or violated as Soviet officials from time to time have considered it to be in the best interests of the Soviet Union in accordance with Soviet policy of increasing their own power at the expense of other nations.

b. A number of specific violations are described in detail. . . .<sup>150</sup>

Clifford had requested reports on Soviet compliance and other activities from various agencies and then spent months compiling and summarizing that information with Elsey’s assistance.<sup>151</sup> Their memorandum catalogued the varying degrees of Soviet noncompliance with fifteen agreements formally pronounced between 1942 and 1945.<sup>152</sup> They wrote that “[m]ost of these violations have concerned matters of vital interest to the United States,” and focused particular attention on “violations concern[ing] Germany, Austria, the Balkan countries, Iran, Korea and Lend-Lease agreements.”<sup>153</sup>

150. Memorandum from Clark Clifford, Special Counsel to the President, to President Harry S. Truman, American Relations with the Soviet Union: A Report to the President by the Special Counsel to the President, at i–ii (Sept. 24, 1946) (emphasis added), available at <http://www.trumanlibrary.org/4-1.pdf>.

151. CLARK CLIFFORD, PERSONAL PAPERS, Harry S. Truman Library, Independence, Mo., Box 15. Clifford’s notes include memoranda alleging Soviet violations from, for example, the State Department, the Joint Chiefs of Staff, and ambassadors. Among Clifford’s notes is a sixty-five-page ledger listing “Treat[ies]” alongside detailed assessments of Soviet compliance. *Id.*

152. The memorandum claimed that “the Soviet Union has violated in whole or in part”: The United Nations Declaration (Jan. 1, 1942), Principles Applying to Mutual Aid (June 11, 1942), The Declaration on Austria agreed upon at the Moscow Conference of Foreign Ministers (Oct. 1943), The Declaration of the Three Powers regarding Iran agreed upon at the Teheran Conference (Nov. 1943), Armistice Agreement with Rumania (Sept. 12, 1944), Armistice Agreement with Bulgaria (Oct. 28, 1944), Armistice Agreement with Hungary (Jan. 20, 1945), The Declaration on Liberated Europe agreed upon at the Yalta Conference (Feb. 1945), Declaration Regarding the Defeat of Germany (June 5, 1945), Charter of the United Nations (June 26, 1945), Agreement on Control Machinery in Austria (July 4, 1945), European Advisory Commission Agreement (July 9, 1945), The Potsdam Declaration (July 26, 1945), The Protocol and Report of the Berlin Conference (July 17 to Aug. 2, 1945), and the “Moscow agreement provid[ing] that [a] joint commission [would] assist in the formation of a Provisional Korean Government” agreed upon at the Moscow Conference of Foreign Ministers (Dec. 1945). Clifford, *supra* note 150, at 31–48.

153. *Id.* at 28, ii. For example, the memorandum cited Soviet refusals to hold free elections in liberated Europe as violations of the Yalta agreement, which were “particularly flagrant in relation to Yugoslavia, Rumania, Bulgaria and Poland.” *Id.* at 29. Beyond Europe, the memorandum also described Soviet noncompliance in Iran and Korea. *Id.* at 30 (“The refusal of the Soviet occupation forces in northern Iran to permit the Iranian Government to send reinforcements to Tabriz when faced with a secession movement in Azerbaijan was a violation of the Teheran declaration . . .”).

The technical accuracy of Clifford's legal arguments is not as important as their persuasive effect.<sup>154</sup> The theory of Clifford's case was that the Soviet Union refused to restrain itself through compliance with international agreements and therefore had to be restrained through strategic action. Had Soviet violations been clearer, or had it violated "hard law" instead of "soft law," the resulting security threat focal points would have been even more glaring to the Truman administration.

Having "forecast [the] Soviet[s'] future policy . . . based on the manner in which the U.S.S.R. has maintained her agreements"<sup>155</sup>—the very definition of reputation—the memorandum then offered a series of strategic recommendations. On the one hand, Clifford recommended a strong military posture to "restrain" and "confine" the Soviets:

The United States . . . should *entertain no proposal for disarmament or limitation of armament* as long as the possibility of Soviet aggression exists. . . . In addition to maintaining our own strength, the United States should *support and assist all democratic countries which are in any way menaced or endangered by the U.S.S.R.* . . . . [T]he United States should *maintain military forces powerful enough to restrain the Soviet Union and to confine Soviet influence to its present area.*<sup>156</sup>

On the other hand, Clifford stressed the importance of signaling that "the United States has no aggressive intentions" to its allies as well as to the Soviets.<sup>157</sup>

154. Historian Melvyn Leffler—placing primary emphasis on the negotiating history of the wartime agreements—argues that "the Soviet pattern of adherence was not qualitatively different from the American pattern; both governments complied with some accords and disregarded others." Leffler, *supra* note 143, at 89. Yet Leffler concludes that Clifford, Elsey, and Truman "were convinced of Soviet duplicity and American innocence." *Id.* at 90. Moreover, Leffler concedes that "Moscow's refusal to ensure free elections and to establish representative governments constituted clear-cut violations of wartime agreements." *Id.* at 103. "If any doubts persisted, the Soviet failure to withdraw Russian armies from northern Iran by March 2, 1946 appeared irrefutable proof of the Kremlin's nefarious intentions." *Id.* at 111. Even if American pressures on Portugal, Iceland, and Ecuador to renegotiate status of forces agreements, *id.* at 111–12, could be construed as counter to the spirit of U.S. wartime agreements and "endangering vital Soviet interests just as Soviet violations may have imperiled critical American interests," *id.* at 89, Soviet violations went much further in endangering the security interests of the medium powers of Europe and Asia.

155. Clifford, *supra* note 150, at i.

156. *Id.* at 74, 75, 79 (emphasis added).

157. *Id.* at 75–77 ("[The United States should] support the United Nations and all other organizations contributing to international understanding . . . distribute books, magazines, newspapers and movies among the Soviets, beam radio broadcasts to the U.S.S.R., and press for an exchange of tourists, students . . . and cultural contacts . . .").

Thus, the memorandum “contained the seeds of the Marshall plan, the seeds of NATO and the basic principles upon which the President relied for the Truman Doctrine,” which was announced only six months after Clifford submitted the memorandum to Truman in September 1946.<sup>158</sup> Soviet noncompliance was at the core of the dispositional attributions underpinning Truman’s seminal Cold War policies, imposing great strategic costs on the Soviets for decades to come. In the words of Elsey, Clifford’s assistant:

The President . . . said he was concerned at the fact that the Russians couldn’t be trusted and didn’t keep agreements that they had made . . . . [T]he President seemed to be basing too much of his attitude towards the Russians at that point, on this rather narrow point of whether they did or did not adhere to agreements.<sup>159</sup>

Elsey was surely correct that Soviet-American relations were a “more comprehensive, much broader, matter than this technicality of agreement breaking or agreement keeping.”<sup>160</sup> With limited information upon taking power after Roosevelt’s death, however, President Truman naturally zeroed in on the Soviet violations as security threat focal points.

Clifford and Elsey had undertaken a task similar to that of Sir Eyre Crowe less than forty years before them. But where Crowe had struggled to trace some “line of legitimate protection of existing rights” that Germany should not overstep, Clifford and Elsey did not have to look far for such a tripwire.<sup>161</sup> The United States and the Soviet Union had formally agreed to declarations of intentions relating to grand strategy at the close of World War II. Though not the only evidence of the Soviet threat available in 1946, the repeated violation of those formal commitments served as the most salient focal point from the perspective of

---

158. Interview with Clark Clifford, Special Counsel to the President 80 (Apr. 13, 1971) (transcript available in the Harry S. Truman Library), *available at* <http://www.trumanlibrary.org/oralhist/clifford.htm>. Clifford and Elsey had a hand in drafting Truman’s speech on March 12, 1947, portions of which came directly from their memorandum. DAVID MCCULLOUGH, *TRUMAN* 545 (1992). That speech, announcing the Truman Doctrine, went too far for George Kennan. *Id.* at 546. Although Kennan’s “Long Telegram” predated the work of Clifford and Elsey, it was but “one of a number of inputs” they processed, and their strategic recommendations went much further than Kennan’s. Clifford, *supra* note 147, at 84–86. “Kennan’s was a lonely voice in opposition to NATO[, while] West Europeans craved reassurance against invasion” and most American officials viewed NATO as a bulwark against Soviet expansion. WALTER L. HIXON, *GEORGE F. KENNAN: COLD WAR ICONOCLAST* 77 (1989).

159. Interview with George Elsey, Harry S. Truman Library, Independence, Mo. 263 (Apr. 9, 1970), *available at* <http://www.trumanlibrary.org/oralhist/elsey.htm>.

160. *Id.* at 264.

161. Crowe, *supra* note 95, at 417.

Washington and as the impetus for balancing strategies of unprecedented scale.

From the perspective of London, meanwhile, in another wartime agreement, Churchill had secretly traded Soviet preponderance in Romania and Bulgaria for British influence in Greece.<sup>162</sup> In 1947, however, Britain was forced to withdraw its aid from both Greece and Turkey following a communist uprising in Greece and the Soviet Union's denunciation of a Turco-Soviet nonaggression treaty.<sup>163</sup> That same year, "claiming that the Soviets had not abided by a 'single' agreement, Truman insisted that he had to resort to 'other methods' and embarked on a policy of unrestrained competition."<sup>164</sup> In his 1947 address to Congress, the President announced the first hints of the Truman Doctrine and the Marshall Plan, providing \$400 million in aid for Greece and Turkey and a pledge to "assist free peoples," while avoiding any threat of U.S. military intervention.<sup>165</sup>

In contrast to the benevolent U.S. approach in Europe, the Soviet Union continued to threaten its neighbors to the west. The Soviets began to pressure Hungary's government, rooting out so-called "fascists," discovering conspiracies, and forcing resignations.<sup>166</sup> In 1948, the same year it aggressively blockaded Berlin, the Soviet Union supported a coup in Czechoslovakia. Therefore, it was no surprise that 1949 witnessed the signing of the North Atlantic Treaty by the United States and the medium powers of Western Europe, creating an institution to defend the territorial integrity of its member states.<sup>167</sup> Thus, the benefits of Soviet noncompliance in the late-1940s (i.e., maintaining control over its

162. J.P.D. DUNBABIN, *THE COLD WAR: THE GREAT POWERS AND THEIR ALLIES* 60 (1994).

163. See, e.g., Anne O'Hare McCormick, *Abroad: In Peace as in War Turkey is at the Crossroads*, N.Y. TIMES, Mar. 9, 1946, at 11 (explaining that the Soviets now laid claim to the Turkish border districts of Kars and Ardahan, and "since the Soviet Government denounced its twenty-year treaty of friendship with Turkey last March, the question of Russia's intentions toward the neighboring republic has clouded the international horizon . . ."). Turkey became a key U.S. ally, building the second-largest NATO army. See Walt, *supra* note 8, at 43.

164. Leffler, *supra* note 143, at 122.

165. DUNBABIN, *supra* note 162, at 83.

166. *Id.* at 67.

167. See North Atlantic Treaty, *supra* note 138, art. 5 ("The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.").

satellites) must be weighed against the costs of the widespread perception of the Soviet threat (i.e., adverse balancing strategies).<sup>168</sup>

The new “hard law” of the UN Charter also provided refined restrictions on the use of force, creating a much-improved mechanism for identifying threat.<sup>169</sup> To reduce perceptions of its threatening intentions, the Soviet Union often sought a measure of legal ambiguity in its Eastern European interventions through the use of proxies. For example, in 1956 when the Red Army invaded Budapest, Hungarian party leader Janos Kadar, having fled to the Soviet Union, announced the formation of a rival government and appealed to the Soviets to crush the forces of reaction.<sup>170</sup> The Soviets obliged, in a “blatant abuse of the right of collective self-defense.”<sup>171</sup>

“Another blatant example of illegal use of force” was the Soviet-led invasion of Czechoslovakia in 1968:<sup>172</sup>

Militarily the operation was a success, but politically it nearly miscarried. It had apparently meant to establish an emergency government, like Kadar’s in Hungary in 1956, that would appeal for intervention and then try [Communist Party Leader Alexander] Dubček as a saboteur of socialism; he was whisked off as a prisoner to the Soviet Union. No such government could be created; and the

---

168. Leffler describes the Soviets’ cost-benefit compliance analysis as follows: “On the one hand, compliance might moderate American suspicions, elicit American loans, and reap large reparation payments from the western zones of Germany; on the other hand, compliance might lead to the establishment of hostile governments on the Soviet periphery, risk the incorporation of a revived Germany into a British (or Anglo-American bloc), and arrogate the Kremlin and Eastern Europe to a position of financial and economic dependency.” Leffler, *supra* note 143 at 119–20. Perceptions of threat by the medium powers of Europe and Asia (and the associated strategic costs) must be added to the costs of Soviet noncompliance. See, e.g., *Statements to Security Council on Czechoslovak Case*, N.Y. TIMES, Mar. 23, 1948, at 12 (citing Soviet violations of Yalta commitments in Romania, Bulgaria, Albania, Hungary, Poland, and Czechoslovakia when British representative to the UN Security Council Sir Alexander Cadogan alleged the Soviet Union was a “threat of overwhelming force”).

169. The 1949 Geneva Conventions also improved upon the hard law of international humanitarian law. The discussion here focuses on *jus ad bellum* rather than *jus in bello* because the use of force more clearly reflects the fundamental security policies of the state rather than decisions of individual actors. However, where a state institutes policies in violation of *jus in bello*, security threat focal points can arise.

170. DUNBABIN, *supra* note 162, at 427.

171. ALEXANDROV, *supra* note 93, at 215–16 (“[T]he claim that there was a request by the legitimate authorities of Hungary was rejected by the majority of States . . .”).

172. *Id.* at 247 (“The objections made by most of the members of the Security Council were that there was no request by the Czechoslovak Government and that there was no external threat or attack on Czechoslovakia.”).

Czech Party held a defiant emergency Congress and elected an alternative leadership.<sup>173</sup>

Such tactics illustrated Soviet attempts to maintain a colorable argument of compliance with international law. Failing in these attempts, Soviet interventionism cemented its reputation as Europe's preeminent security threat. In fact, the Brezhnev Doctrine of 1968 pronounced the Soviet intention to invade any Eastern European state in which capitalism threatened communism—making it official Soviet policy to violate the fundamental international norm of sovereignty.<sup>174</sup>

Meanwhile, in the South, it was the United States that relied on intervention in pursuit of its containment policy. With the NATO alliance formed by 1949, however, subsequent U.S. interventions in the distant third world resulted primarily in strategic reputational costs vis-à-vis those weaker states. Walt explains that because those third world countries were less powerful potential allies than the medium powers of Europe and Asia, American interventions in the South were less costly than those of the Soviets in the North.<sup>175</sup>

Most U.S. Cold War interventions—either overt or covert—took place in Latin America. For example, the United States supported the 1954 coup in Guatemala, the 1961 Bay of Pigs invasion, and anti-communist forces in Central America during the 1980s; it also undertook small-scale military interventions in the Dominican Republic in 1965, Grenada in 1983, and Panama in 1989.<sup>176</sup> Remarkably, in 1986 the International Court of Justice formally pronounced that the United States had illegally used force in supporting the Contras in Nicaragua.<sup>177</sup>

Yet Latin American states were historically so weak and geographically isolated from potentially more powerful allies that resistance to the regional hegemon was futile.<sup>178</sup> This drastic power asymmetry throughout the Western Hemisphere explained Latin American states' unique tendency to bandwagon with the United States rather than

173. DUNBABIN, *supra* note 162, at 448–49.

174. The Brezhnev Doctrine was first articulated in S. Kovalev's September 26, 1968 article *Sovereignty and the International Obligations of Socialist Countries* in the official Soviet newspaper, Pravda. The article asserted that "the interest of maintaining socialism in every country of the socialist commonwealth must take precedence over the sovereignty of individual socialist states . . ." KAREN DAWISHA, *THE KREMLIN AND THE PRAGUE SPRING* 376 (1984).

175. Walt, *supra* note 8, at 33, 38.

176. See ALEXANDROV, *supra* note 93, at 199–202, 238–51. See generally WALTER LAFEBER, *INEVITABLE REVOLUTIONS: THE UNITED STATES IN CENTRAL AMERICA* (2d ed. 1993) (detailing U.S. interventions in Central America during the Cold War).

177. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 18–19 (June 27).

178. See Walt, *supra* note 8, at 36.



balance against it.<sup>179</sup> Nonetheless, the United States was generally the greatest external threat to Latin America during the Cold War—in terms of offensive intentions, proximity, aggregate power, and offensive capabilities—and those states that were not ruled by U.S.-backed dictators often looked to the Soviet Union for support.<sup>180</sup>

For Eurasian states in close proximity to the Soviet Union, U.S. interventions in remote Latin America were not nearly as threatening as the Soviet violations discussed above. Moreover, because the United States had indicated in its treaties that it would not abandon the Monroe Doctrine, its interventionist intentions were formally circumscribed to the Western Hemisphere.<sup>181</sup> The United States did not invoke the Monroe Doctrine itself (as opposed to the related treaty provisions) as legal justification for interventions in Latin America during the Cold War.<sup>182</sup> Yet the various manifestations of the Monroe Doctrine “may be viewed as the clearest communication to adversaries that expansions of power and changes in alliance pattern in the designated zones will be opposed by

---

179. *Id.*

180. *See, e.g.,* LAFEBER, *supra* note 176, at 340 (describing Soviet aid to Cuba and Central America).

181. The treaty establishing the League of Nations had explicitly provided: “Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe Doctrine, for securing the maintenance of peace.” League of Nations Covenant art. 21. The analogous provision in the UN Charter states: “Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security.” UN Charter art. 52, para. 1. In the 1947 Inter-American Treaty of Reciprocal Assistance (“the Rio Pact”) and the 1948 Charter of the Organization of American States (“OAS”), the United States inserted language meant to preserve its ability to legally intervene in the hemisphere via those regional arrangements. LAFEBER, *supra* note 176, at 94–96. Thus, while the Brezhnev Doctrine postdated the 1955 Warsaw Pact—which contained no exception to the principles of sovereignty and non-interference (unlike the OAS Charter)—the Monroe Doctrine predated and was partially incorporated into American ISL commitments. *See id.* at 95 (noting the “loophole” in Article 23 of the OAS Charter). President James Monroe conceived the doctrine in 1823 to defend Latin American sovereignty from European interference, but President Theodore Roosevelt’s corollary altered its meaning: “Eighty years later the power balance had shifted to the United States, and the Doctrine itself shifted to mean that Latin Americans should now be controlled by outside (that is, North American) intervention if necessary.” *Id.* at 38.

182. *Compare* John Norton Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT’L L. 43, 115 (1986) (“No American spokesman—or serious scholar—has invoked the Monroe Doctrine as a legal basis for U.S. actions in Central America [since the 1930s].”), *with* Organization of American States Tenth Meeting of the Consultation of Ministers of Foreign Affairs, Resolution of Inter-American Force, May 6, 1965, OEA/Ser. F/II.10, OAS Doc. 39 (English) Rev. Corr., 4 ILL.M. 594 (invoking the Rio Pact to create an Inter-American force to restore order in the Dominican Republic), *and* Gerald M. Boyd, *Honduras is Told U.S. Will Defend It*, N.Y. TIMES, May 22, 1985, at A5 (indicating Reagan administration officials said the U.S. commitment to defend Honduras against Communist aggression was in fact “a reaffirmation of obligations that already are found under the Inter-American Treaty of Reciprocal Assistance, known as the Rio Treaty, and the Charter of the Organization of American States.”).

force.”<sup>183</sup> Therefore, even assuming those U.S. interventions within the hemisphere were inconsistent with international law, they were relatively distinguishable and did not significantly undermine the credibility of its ISL commitments elsewhere. Regardless, the Soviet threat to the medium powers of Europe and Asia was so clear that the United States could threaten weaker Latin American states without losing the power advantage it gained from its key allies.

American interventions in Korea and Vietnam held the potential for greater threat perception by the medium powers because they were much larger in scale and projected power beyond the Western Hemisphere. A 1950 UN Security Council Resolution, however, authorized member states to “furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack [by North Korea] and to restore international peace and security in the area.”<sup>184</sup> The international legality of the use of force in Vietnam was far less clear, but the United States at least had a colorable argument that it was assisting in the self-defense of South Vietnam.<sup>185</sup> On a much smaller scale, the United States also intervened beyond the Western Hemisphere in 1958 in Lebanon at its request, in 1980 in an attempt to rescue hostages in Iran, and in 1986 by bombing Libya in response to terrorist attacks.<sup>186</sup> Of these operations, the Libyan bombing was of the most dubious international legality,<sup>187</sup> but it was too little and came too late to significantly alter Cold War threat perceptions.

This preliminary assessment of U.S. Cold War interventions indicates that they posed a level of threat that was inadequate to tilt a balance of power institutionalized across the Atlantic decades before. In the meantime, the 1979 Soviet invasion of Afghanistan was widely viewed as illegal, undoing any advantage in relative threat perception the Soviet Union might have gained from the U.S. interventions in the global South.<sup>188</sup>

183. W. Michael Reisman, *Critical Defense Zones and International Law: The Reagan Codicil*, 76 AM. J. INT'L L. 589, 589 (1982).

184. S.C. Res. 83 U.N. Doc. S/RES/83 (June 27, 1950); see also ALEXANDROV, *supra* note 93, at 262 (“[T]he use of force to defend South Korea was a legal collective self-defense action under Article 51.”).

185. See ALEXANDROV, *supra* note 93, at 223 (“[T]he United States could justify its intervention in Vietnam under Article 51 only if: (i) South Vietnam was an independent State; (ii) South Vietnam was the victim of an armed attack; and (iii) the United States engaged in collective self-defense of South Vietnam on its request . . .”). Alexandrov is doubtful that the Vietnam War fulfilled these criteria. *Id.* at 226. Regardless, since the United States had come to the aid of another NATO ally, France, in Indochina, the perceived threat to its critical European allies was minimized.

186. *Id.* at 184–85, 197, 217.

187. See *id.* at 184–85.

188. *Id.* at 227 (“The majority of Governments and world public opinion did not accept the Soviet

In sum, an initial review of Cold War noncompliance confirms Walt's assertion that the Soviet Union threatened the developed world but not the former colonies, while the opposite was true for America.<sup>189</sup> Repeated Soviet violations of wartime agreements and illegal interventions in Eastern Europe cemented an imbalance of power early in the Cold War, which could not be undone by less costly U.S. interventions in the weaker third world.

## 2. *U.S.-Soviet Arms Control*

Bilateral arms control negotiations are a classic example of a prisoner's dilemma.<sup>190</sup> The United States and the Soviet Union had many conflicting interests during the Cold War, but they had a shared interest in reining in the nuclear arms race.<sup>191</sup> The dilemma was that each side had to fear the other's temptation to gain from unilateral defection. Although defection is the dominant strategy in a single-play prisoner's dilemma game, the repeated interactions between the United States and the Soviet Union allowed reputations to form and cooperation to take place.<sup>192</sup>

By focusing on reputation as well as reciprocal abrogation as a form of direct sanction, Guzman fully accounts for the foreseeable noncompliance costs prompting the Cold War adversaries to comply with their various arms treaties. But this is only by coincidence. Reciprocity will often be weak medicine; generally the prospect of "simple abrogation of [a] treaty will not be enough to prevent a violation."<sup>193</sup> Arms control treaties, however, happen to be one area where reciprocity matters greatly because increased armament itself is a standard response to security threat. If one party were to find that the other had defected, it would then increase its own nuclear stockpile. But such reciprocity should not be mistaken for a mere "tit-for-tat" strategy meant to induce compliance,<sup>194</sup> nor disregard for a suddenly obsolete treaty. Rather, it also reflects strategic reputational costs; a clear violation of an arms control treaty would spotlight defection

---

Union's legal arguments [regarding the Afghanistan invasion].").

189. Walt, *supra* note 8, at 8–9.

190. See Guzman, *supra* note 3, at 1842–47 (explaining that in a simple prisoner's dilemma, where "(1) each country is better off if it violates the agreement while the other country complies, and (2) both are better off if they both comply than if they both violate," both countries can be expected to violate the agreement due to uncertainty regarding each other's intentions).

191. GUZMAN, *supra* note 2, at 30.

192. *Id.* at 32.

193. Guzman, *supra* note 3, at 1867.

194. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

and a lack of restraint, leading to increased armament to balance against the threatening violator.

Mercer explains that “when an adversary behaves congruent with our negative expectations, we make corresponding dispositional attributions (even though we would judge our own similar behavior as situational).”<sup>195</sup> He provides a Cold War example:

When the Soviets shot down [Korean Air Lines Flight 007 in 1983], President Reagan assumed it was intentional; he called it ‘an act of barbarism born of a society which wantonly disregards individual rights and the value of human life and seeks constantly to expand and dominate other nations.’ The [U.S. Navy’s 1988 downing of an Iranian airliner] was inconsistent with Reagan’s prior beliefs about the American military and judged situational; the Soviet action was consistent with Reagan’s prior beliefs about the Soviet military and judged dispositional.<sup>196</sup>

Understanding that ISL violations would naturally be perceived as threatening and provocative, the United States and the Soviet Union staked more than their reputations as reliable treaty partners on their bilateral arms control treaties. They also staked their reputations for restraint, thereby raising the foreseeable costs of noncompliance in order to alleviate the prisoner’s dilemma.

To be sure, a large part of the perceived threat resulting from arms control defection could be the adversary’s increased offensive capability. Yet, given that these treaties preserved both parties’ core deterrent power, the most significant effect of a serious violation would have been the strategic reaction to perceived offensive intentions. For example, in response to Soviet exploitations of arms control treaty ambiguities on the eve of the 1985 Geneva Summit, Secretary of Defense Caspar Weinberger and his assistant Richard Perle were “claiming that Soviet noncompliance constitutes a threat to vital American interests, justifies unilateral measures to enhance American security, and obviates the utility of negotiation.”<sup>197</sup> Secretary of State George Shultz and the Joint Chiefs of Staff, however, contended that the Soviets were largely in compliance, and President

---

195. MERCER, *supra* note 36, at 57.

196. *Id.*

197. Leffler, *supra* note 143, at 89 (“This line of reasoning closely resembles the arguments of Clifford, Elsey, and Truman at the onset of the Cold War.”).

Reagan pledged to continue to abide by existing arms control agreements.<sup>198</sup>

Although the Strategic Arms Limitation Treaty of 1979 (“SALT II”) was never ratified by the United States and was ultimately abandoned, the Cold War adversaries generally complied with their various arms control treaties.<sup>199</sup> President Reagan and his Soviet counterpart, Mikhail Gorbachev, slowly learned to “trust but verify,” finally agreeing to the Intermediate-Range Nuclear Forces (“INF”) Treaty at a December 1987 summit in Washington.<sup>200</sup> In contrast to the Truman years, during the 1980s the United States and the Soviet Union gained faith in the credibility of each other’s commitments, with profound strategic consequences:

Reagan and Gorbachev had walked their long road together out of the darkness of the Cold War. After the summits in Geneva, Reykjavik, Washington, and Moscow, they could glimpse the dawn of a restored relationship in which the United States and the Soviet Union would once again cooperate in international affairs. While both sides still possessed terrifying nuclear power, Gorbachev and Reagan had set back the doomsday clock. Their meetings marked the beginnings of an even brighter period in U.S.-Soviet relations that would be ushered in during the Bush administration when Gorbachev released the Soviet grip on Eastern Europe and allowed the Germans to tear down the Berlin Wall.<sup>201</sup>

These strategic benefits of arms control compliance resulted primarily from the successful communication of peaceful intentions, rather than the modest substantive achievements of the treaties themselves.

To borrow Guzman’s logic from the BIT example discussed in Part III above: to the extent that the Cold War adversaries viewed the arms control treaties as credible commitments—made possible through the “trust but

---

198. LOU CANNON, *PRESIDENT REAGAN: THE ROLE OF A LIFETIME* 670–71 (2d ed. 2000).

199. See Kenneth W. Abbott, “Trust but Verify”: *The Production of Information in Arms Control Treaties and Other International Agreements*, 26 *CORNELL INT’L L.J.* 1, 40, 49–51 (1993) (“In response to issues raised by the United States, the Soviets often responded with considerable explanatory data; in other cases they ceased the questioned activity. For its part, the United States apparently went to substantial lengths to clarify ambiguous situations questioned by the Soviets . . .”). Abbott also notes that although the Soviets failed to come forward with clarifying information regarding the Krasnoyarsk radar—often cited as an example of Soviet noncompliance—it later became clear to the United States that this “was not a significant treaty violation.” *Id.*

200. CANNON, *supra* note 198, at 696. The U.S. Senate ratified the INF Treaty in May 1988. *Id.* at 701.

201. *Id.* at 709–10.

verify” approach—if a defection had undermined that confidence, then a portion of the increased armament would be attributable to the reputational effect resulting from the violation of international law.<sup>202</sup>

Especially in multipolarity, where dispersed threats are more difficult to coordinate against, but also in bipolarity, defection from ISL poses a salient threat and invites other states to balance against the unpredictable defector.

### C. *The Unipolar Moment*

In the first decade after the Cold War, the United States advocated German reunification, pushed a resilient NATO east across Europe, and coordinated multilateral coalitions to intervene militarily in the Persian Gulf, Somalia, Bosnia, and Kosovo—routinely marshaling international law violations as security threat focal points in doing so.<sup>203</sup> In general, the United States continued to reaffirm its commitment to international law and was not viewed as an expansionist security threat, even as it exercised its overwhelming power in the Middle East, Africa, and Europe.<sup>204</sup>

Perhaps not coincidentally, the “unipolar moment”<sup>205</sup> seems to have ended around the time that the United States began to push the limits of ISL.<sup>206</sup> Certainly, other factors—most notably the economic rise of China, India, and Brazil—have contributed to the relative decline in U.S. power.

202. Guzman, *supra* note 3, at 1852 n.113; *see supra* Part III.B.

203. President George H. W. Bush cited Iraq’s illegal use of force in Kuwait in 1991, and President Bill Clinton cited human rights violations in the Balkans. *See generally* SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE (2002). While scholars tend to agree that the intervention to defend sovereign Bosnia did not run afoul of international law, the Kosovo intervention has at times been described as “illegal but legitimate.” Brewster, *supra* note 4, at 240; *see also* JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW, NORMS, ACTORS, PROCESS 937–57 (2d ed. 2006). In rationalist terms, “illegal but legitimate” corresponds with a formal violation that powerful states nonetheless agree is desirable policy. As Mercer has shown, desirable policies are less likely to result in dispositional attributions and, therefore, reputational costs. Nonetheless, the failure to obtain a Security Council resolution indicates that at least one powerful state does not view the use of force as desirable. The intervention in Kosovo resulted in a vivid security threat focal point from the Russian point of view.

204. *See* Joffe, *supra* note 61, at 16 (“America is different. It irks and domineers, but it does not conquer. It tries to call the shots and bend the rules, but it does not go to war for land and glory.”). Writing in 1997, Joffe noted the “genius” of American-made international institutions, *id.* at 27, and that “[w]here the United States does commit ground forces . . . their presence is accepted as legitimate,” *id.* at 21.

205. Charles Krauthammer, *The Unipolar Moment*, 70 FOREIGN AFF. 23 (1990).

206. *See* Richard N. Haass, *The Age of Nonpolarity: What Will Follow U.S. Dominance*, FOREIGN AFF. 44 (2008); FAREED ZAKARIA, *THE POST-AMERICAN WORLD* (2008).

Nonetheless, especially in its 2003 invasion of Iraq, the United States incurred significant costs, not only in blood and treasure, but also in terms of its reputation—reducing its soft power and prompting other states to reevaluate long-held strategies of bandwagoning with the United States rather than balancing against it.

The attacks of September 11, 2001 focused U.S. attention on security threats posed by terrorists and those states that harbored them. In that sense, the conflict in Afghanistan and Pakistan was a reaction to a newer form of security threat focal point, arising where states fail to control non-state threats emanating from within their borders. The Iraq War, however, was a more traditional conflict in that the United States and its allies targeted a rogue state. In Iraq, the United States alleged international law violations related to weapons of mass destruction as well as human rights.

Iraq's international law violations had made it a perennial target of the international community. In a world of myriad threats and asymmetric information, however, there was a lack of evidence regarding Iraq's relative threat in 2003 and disagreement over the appropriate coordination strategy. Regardless of its perceived offensive intentions, Iraq's aggregate power was low, and its "proximity" and offensive capabilities were overstated. Because the United States failed to convince the Security Council to explicitly authorize armed intervention and regime change, and since Iraq's actions did not rise to the level of an imminent attack, many commentators viewed the 2003 invasion as an illegal use of force.<sup>207</sup>

Reminiscent of the Brezhnev Doctrine, the Bush Doctrine was perceived to have made it official U.S. policy to violate fundamental international law by engaging in preventive war.<sup>208</sup> Nye argues that in the Iraq War, Bush "escaped the constraints of alliances and institutions that many in his administration chafed under, but he also produced

---

207. See Slaughter, *supra* note 92, at 262–63.

208. Compare NAT'L SEC. COUNCIL, EXEC. OFFICE OF THE PRESIDENT, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), available at <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf> ("Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. . . . [T]he United States cannot remain idle while dangers gather."), with Chairman Anand Panyarachun, *Report of the High-level Panel on Threats, Challenges, and Change*, ¶ 191, U.N. Doc. A/59/565 (Dec. 2, 2004), available at <http://www.un.org/secureworld/report.pdf> ("[T]he risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted.").

... widespread anxieties about how the United States would use its preponderant power.”<sup>209</sup> According to Walt:

[T]he global response to U.S. primacy does not resemble the coalitions that defeated Germany in both world wars or the Soviet Union in the Cold War. The reason other nations have not forged a formal anti-U.S. alliance is simple: the United States does not pose the same level of threat. Yet states are beginning to join forces in more subtle ways, with the explicit aim of checking U.S. power. Rather than forming an anti-U.S. alliance, countries are “soft balancing”: coordinating their diplomatic positions to oppose U.S. policy and obtain more influence together.<sup>210</sup>

It could be argued that the security threat focal point theory would have predicted greater strategic reputational costs resulting from the war in Iraq. One explanation could be that the legal issues were complex, partially obscuring the focal point.<sup>211</sup> Geography might also explain why the U.S. threat did not provoke “hard balancing” strategies. In addition to America’s geographic isolation, the United States did not violate ISL in proximity to the medium powers, as had the more threatening Soviet Union and Germany. More importantly, in a unipolar era, other states found themselves in no position to balance forcefully against the American security apparatus upon which they often relied themselves, and there was no alternative pole with which they could ally as was the case during the Cold War. As Nye has written, “[w]hether other countries will unite to balance American power will depend on how the United States behaves *as well as the power resources of potential challengers*.”<sup>212</sup> Finally, the United States may continue to benefit from the reputation it built over the last half-century in the industrialized North as a benevolent superpower and sponsor of the UN Charter. Allies that have enjoyed low cost security for fifty years while perceiving little threat from the United States are hesitant to fund their own security at great cost or to seek alliances with emerging powers that are hardly known quantities.

Nonetheless, strategic reputational costs did result from the war in Iraq. For Nye, examples of soft balancing in response to the American threat included the denial of bases and transport rights in Turkey and Saudi

---

209. NYE, *supra* note 65, at xii.

210. Stephen M. Walt, *Taming American Power*, 84 FOREIGN AFF. 105, 113 (2005).

211. See DUNOFF ET AL., *supra* note 203, at 908–14.

212. See Nye, *supra* note 8, at 559 (emphasis added).



Arabia.<sup>213</sup> Walt has cited further denials of informal cooperation, such as coordinated strategies to resist U.S. attempts to impose harsh sanctions on Iran and to stymie Bush's control of Latin American affairs.<sup>214</sup> Beyond soft balancing, Walt notes that states can adopt "asymmetric capabilities and methods," including (1) conventional military capabilities designed to neutralize U.S. strengths, (2) terrorism, the classic "weapon of the weak," and (3) weapons of mass destruction.<sup>215</sup> Cyber and space warfare capabilities should be added to this list.<sup>216</sup>

Although the magnitude and duration of the strategic costs of the Iraq War are still unclear, noncompliance reputational costs cannot be ignored. The geostrategic result of the first decade of the twenty-first century for the United States has been a decrease in its relative power coupled with an increase in its relative threat. This is not a promising trend, especially when compared to its Chinese rival.

#### *D. Return to Multipolarity*

Today we live in an increasingly multipolar world in which the potential sources of security threats are more dispersed. While Iran and North Korea, for example, make themselves the targets of strategic counteraction by defecting from international security institutions, China has pursued a rational strategy of maximizing its relative power and minimizing its relative threat.

##### *1. Coordinating Against Dispersed Threats*

Given the increased difficulty of coordination in multipolarity, the potential role of international norms to generate security threat focal points becomes more critical. According to Richard Haass, the multipolar world will "make it more difficult for Washington to lead on those occasions when it seeks to promote collective responses to regional and global challenges."<sup>217</sup> The increased difficulty of coordination in multipolarity is

---

213. NYE, *supra* note 65, at 27 ("Since the global projection of American military force in the future will require access and overflight rights from other countries, such soft balancing can have real effects on hard power.").

214. Walt, *supra* note 210, at 113.

215. *Id.* at 113–14 ("The U.S. military predominates in the world of *traditional* forms of warfare. Potential adversaries accordingly shift away from challenging the United States through *traditional* military actions and adopt asymmetric capabilities and methods." (quoting the Pentagon's 2005 National Defense Strategy)).

216. See *infra* Part IV.D.2 (discussing China's reliance on such asymmetric capabilities).

217. Haass, *supra* note 206, at 51–52. Haass prefers the term "nonpolarity" (as opposed to

a matter of simple arithmetic: “Herding dozens is harder than herding a few.”<sup>218</sup> Faced with these new coordination challenges, along with the relative decline of its power, the United States must rely even more heavily on the clear delineation of security threat focal points.

For example, when Russia invaded the Georgian region of South Ossetia in August 2008, American leaders charged that it had violated international law.<sup>219</sup> The dispute over an enclave in the Caucasus Mountains, with a population of only 70,000, was viewed as a disturbing sign of Russia’s lack of restraint, prompting reevaluations of the strategic outlook for NATO and the Balkans.<sup>220</sup> Due to the unique circumstance in which an entire alliance had already been institutionalized to balance against the Russian threat—and considering its nuclear capabilities and permanent seat on the Security Council—Russia’s stand in South Ossetia may result in bandwagoning rather than balancing strategies at Europe’s periphery.<sup>221</sup> Nonetheless, given the imperfect information in Washington and Brussels, the apparent violation of a fundamental norm of international law was a clearer focal point than fluctuations in Russia’s GDP, population, or defense spending, or even the slight southward shift in its troop alignment—reawakening the West to the Russian threat.<sup>222</sup>

More recently, the United States has coordinated sanctions against Iran, continually pointing to Iranian violations of the Nuclear Non-Proliferation Treaty (“NPT”) and subsequent Security Council resolutions requiring it to halt uranium enrichment.<sup>223</sup> Given the right to peaceful development of civil nuclear energy programs under the NPT, the focal points seized on by

“multipolarity”) because, he argues, power “will be diffuse rather than concentrated, and the influence of nonstate actors will increase.” *Id.*

218. *Id.*; see also Feldman, *supra* note 47, at 66 (“[T]he fragmentation of power after the cold war creates new dangers of disorder that need to be mitigated by the sense of regularity and predictability that only the rule of law can provide.”).

219. James Traub, *Coming to Grips with Russia’s New Nerve*, N.Y. TIMES, Sept. 7, 2008, at WK1, available at <http://www.nytimes.com/2008/09/07/weekinreview/07traub.html> (“For the first time in almost 30 years—at least since the invasion of Afghanistan—Russia has come to be seen as a threat to world order.”).

220. See, e.g., Clifford J. Levy, *Russia Declares Its Recognition of Two Enclaves*, N.Y. TIMES, Aug. 27, 2008, at A1; Traub, *supra* note 219.

221. Traub, *supra* note 219.

222. *Id.*

223. See, e.g., INT’L ATOMIC ENERGY AGENCY, IAEA DOC. GOV/2011/7, IMPLEMENTATION OF THE NPT SAFEGUARDS AGREEMENT AND RELEVANT PROVISIONS OF SECURITY COUNCIL RESOLUTIONS IN THE ISLAMIC REPUBLIC OF IRAN: REPORT BY THE DIRECTOR GENERAL 1 n.2 (Feb. 25, 2011) [hereinafter IAEA REPORT], available at <http://www.iaea.org/Publications/Documents/Board/2011/gov2011-7.pdf>; Scott Peterson, *NPT 101: Is Iran Violating the Nuclear Treaty?*, THE CHRISTIAN SCI. MONITOR (May 4, 2010), <http://www.csmonitor.com/World/Middle-East/2010/0504/NPT-101-Is-Iran-violating-the-nuclear-treaty>.

the United States are sometimes as seemingly obscure (as a factual matter) as the timing of Iran's reports to the International Atomic Energy Agency.<sup>224</sup> Yet, with asymmetric information, the U.S. attributes to Iran threatening intentions, based partly on its belligerent rhetoric, but also on its defection from the highly technical NPT regime.

The U.S. approach to North Korea has also relied on NPT focal points. North Korea withdrew from the NPT in 2003. Guzman explains that announcing an intention to withdraw, even if consistent with a treaty's withdrawal provisions, can lead to reputational costs, since other states perceive a violation of the withdrawing state's "implicit obligations."<sup>225</sup> Stated differently, North Korea's withdrawal from the NPT, though perhaps legal, is perceived by other states as a threatening defection from the nuclear security regime.

For Guzman, however, Iran and North Korea—"[a]lready pariah states"—have little reputational capital, and so one should not expect the NPT to deter them.<sup>226</sup> As with the lesson Guzman took from Munich that international law is powerless in the security context, here again strategic reputational costs are overlooked. Iran and North Korea may already be unreliable treaty partners, but by defecting from international security institutions, they create security threat focal points, making themselves the targets of strategic counteraction.<sup>227</sup> Especially with Iran, the technical NPT violation provided the legal hook for international coordination against the threatening (though allegedly civil) nuclear program.

It may be that such strategic reputational costs are outweighed by the benefits of a nuclear program and, having decided to pursue nuclear arms, Iran could hardly comply with the inspection regime. Yet this line of thinking illustrates precisely how a well-designed ISL regime can function as an early warning system. Again, the claim here is not that noncompliance reputational costs will always outweigh the benefits of defection, but that violations of international law can spotlight security threats and provoke—or hasten—strategic balancing.

---

224. Peterson, *supra* note 223.

225. Guzman, *supra* note 3, at 1863.

226. GUZMAN, *supra* note 2, at 81.

227. See, e.g., David E. Sanger, James Glanz & Jo Becker, *From Arabs to Israelis, Sharp Distress Over a Nuclear Iran*, N.Y. TIMES, Nov. 29, 2010, at A1 (indicating the WikiLeaks cables reveal how the United States has organized a coalition against the Iranian threat, which has "unified Israel and many longtime Arab adversaries—notably the Saudis—in a common cause."); Nicholas Kulish & Thom Shanker, *West Rejects Iran's Claim that Nuclear Deal is Near*, N.Y. TIMES, Feb. 7, 2010, at A13 (reporting that U.S. Secretary of Defense Robert Gates said that Iran had "done nothing to reassure the international community that they are prepared to comply with the N.P.T. or stop their progress toward a nuclear weapon").

Unlike Reagan and Gorbachev, who discerned their adversary's peaceful intentions by using ISL to "trust but verify," Iran has thwarted verification of its arms control compliance, throwing into sharp relief its threatening intentions.<sup>228</sup> Whereas the generally compliant United States and Soviet Union enjoyed the strategic benefits of de-escalating a nuclear standoff, noncompliant Iran suffers the strategic costs of escalating a confrontation with its neighbors and the West.

## 2. *Sticky Institutions and the Chinese Model of Threat Minimization*

China has taken full advantage of multipolarity, pursuing an effective strategy of maximizing its relative power while minimizing its relative threat. In general, China has achieved a high rate of compliance with ISL.<sup>229</sup> While Iran and North Korea have attracted negative attention by defecting from the NPT, China appears to have only gradually modernized its relatively small nuclear arsenal, consistent with its rights as a Nuclear Weapons State under the treaty.<sup>230</sup> Instead, China has focused on expanding its military capabilities below the radar, in areas largely unregulated by international law.

For example, Richard Clarke, former National Coordinator for Security and Counter-terrorism, describes the destruction that could result from a "cyber war" with China:

[T]he fact that we might be able to turn off the Chinese air defense system will give most Americans limited comfort if in some future crisis the cyber warriors of the People's Liberation Army have kept power off in most American cities for weeks, shut the financial markets by corrupting their data, and created food and parts shortages nationwide by scrambling the routing systems at major U.S. railroads. . . . What President would order the Navy into the

---

228. IAEA REPORT, *supra* note 223, at 10 ("Iran is not providing the necessary cooperation to enable the Agency to provide credible assurance about the absence of undeclared nuclear material and activities in Iran, and therefore to conclude that all nuclear material in Iran is in peaceful activities."). IAEA Director General Yukiya Amano also concluded that "Iran is not implementing a number of its obligations" under the NPT regime and various Security Council resolutions. *Id.*

229. ANN KENT, BEYOND COMPLIANCE: CHINA, INTERNATIONAL ORGANIZATIONS, AND GLOBAL SECURITY 66, 223, 226 (2007) (contrasting China's high rate of compliance with the treaties negotiated at the Conference on Disarmament with its low rate of compliance in the human rights context).

230. Chris Buckley, *China Military Paper Spells Out Nuclear Arms Stance*, REUTERS, Apr. 22, 2010; *see also* ZBIGNIEW BRZEZINSKI, SECOND CHANCE: THREE PRESIDENTS AND THE CRISIS OF AMERICAN SUPERPOWER 172 (2007) (referring to China's "strategic self-restraint" in the nuclear context).

Taiwan Straits, as Clinton did in 1996, if he or she thought that a power blackout that had just hit Chicago was a signal and that blackouts could spread to every major American city if we got involved?<sup>231</sup>

Clarke estimates that when cyber defense and cyber dependence are taken into consideration, along with cyber offense, the United States trails behind China, Russia, and even Iran and North Korea in “overall cyber war strength.”<sup>232</sup> In addition, China has tested anti-satellite weapons, “signaling its resolve to play a major role in military space activities”—an area in which the United States has rejected a weapons ban treaty.<sup>233</sup>

When states are unbound by international institutions in such issue areas, they face a security dilemma in the inevitable race to increase their offensive capabilities. Yet within those unregulated areas, any single state’s offensive intentions are less discernible because incremental threats never cross a bright line signaling defection—making rational security coordination more difficult. Since cyber and space warfare are largely unregulated by international law,<sup>234</sup> China’s development of such offensive capabilities has increased its relative power vis-à-vis the United States without creating significant security threat focal points. In the virgin legal territories of cyberspace and outer space, the United States faces a dilemma similar to that Sir Eyre Crowe confronted a century ago: how to make “as patent and pronounced [and] as authoritative as possible” the distinction between peaceful Chinese expansion and unrestrained expansion, which would meet “determined opposition.”<sup>235</sup>

Even in the less threatening field of IEL, China has exploited gaps in treaty coverage to pursue an apparently legal form of beggar-thy-neighbor

---

231. RICHARD A. CLARKE & ROBERT K. KNAKE, *CYBER WAR: THE NEXT THREAT TO NATIONAL SECURITY AND WHAT TO DO ABOUT IT* 156 (2010).

232. *Id.* at 148; see also Jack L. Goldsmith & Melissa Hathaway, *The Cybersecurity Changes We Need*, WASH. POST, May 29, 2010, at A19 (“[A] long-term trend of grabbing the economic gains from information technology advances and ignoring their security costs has reached a crisis point [in the United States].”).

233. William J. Broad & David E. Sanger, *Flexing Muscle, China Destroys Satellite in Test*, N.Y. TIMES, Jan. 19, 2007, at A1; see also Nick Cumming-Bruce, *U.N. Weighs a Ban on Weapons in Space, but U.S. Still Objects*, N.Y. TIMES, Feb. 13, 2008, at A11.

234. See Jack L. Goldsmith, *Can We Stop the Global Cyber Arms Race?*, WASH. POST, Feb. 1, 2010, at A17 (evaluating Secretary of State Hillary Clinton’s call to “create norms of behavior among states and encourage respect for the global networked commons”); see also Duncan B. Hollis, *An e-SOS for Cyberspace*, 52 HARV. INT’L L.J. 374 (2011).

235. Crowe, *supra* note 95, at 418. For example, Richard Clarke argues that the United States has a minimal ability to deter a cyber attack because it has not declared its intentions if such an attack were to occur, and adversaries may conclude that “the U.S. response to a cyber attack might be fairly minimal, or confused.” CLARKE & KNAKE, *supra* note 231, at 176.

mercantilism.<sup>236</sup> At the expense of its own consumers' welfare, China's currency manipulation has helped revise the international balance of economic power in its favor. However, in the absence of focal points generated by international law violations, the United States has struggled to coordinate an effective multilateral response.

In sum, China has maximized its relative power by pursuing asymmetric military capabilities and a mercantilist revision of the balance of economic power. It has minimized its relative threat because its actions do not appear to violate international law. This strategy is especially significant because China is the first great power to rise in the era of modern international law. China's rational strategy of power maximization and threat minimization illustrates the stickiness of international institutions: international law continues to operate as a restraint, even as the balance of power shifts. Thus far, China's rise has been unobstructed by its rivals, largely due to perceptions that it is relatively restrained by international law.

Two caveats are in order regarding China's rational strategy of threat minimization. First, it remains to be seen whether China will continue to follow the path of restraint as its power grows. For example, recent disputes in the South China Sea suggest that China seeks to extend not only its exclusive economic zone ("EEZ") but also its strategic sphere beyond the twelve-nautical-mile territorial limit established by the United Nations Convention on the Law of the Sea ("UNCLOS").<sup>237</sup> China's

236. Scholars have analyzed China's currency manipulation under the "hard law" of the WTO. Raj Bhala, *Virtues, the Chinese Yuan, and the American Trade Empire*, 38 HONG KONG L.J. 183, 219 (2008) (noting that a currency manipulation complaint would rely on "an untested, even obscure, provision of the General Agreement on Tariffs and Trade (GATT)"); Bryan Mercurio & Celine Sze Ning Leung, *Is China a "Currency Manipulator"?: The Legitimacy of China's Exchange Regime under the Current International Legal Framework*, 43 INT'L LAW. 1257, 1257 (2009) ("[W]hile China clearly manipulates its currency, its measures are not inconsistent with the IMF Articles or the applicable WTO agreements."). Scholars have also analyzed the "soft law" of the International Monetary Fund. Beth A. Simmons, *The Legalization of International Monetary Affairs*, 54 INT'L ORG. 573, 594 (2000) (describing reputational costs of noncompliance with IMF norms distinguishable from direct sanctions or treaty exclusion: "governments want to convince markets that they provide a desirable venue for international trade and investment").

237. See Thom Shanker, *Chinese and Americans Soften Tone on Disputed Seas*, N.Y. TIMES, Oct. 13, 2010, at A9, available at <http://www.nytimes.com/2010/10/13/world/asia/13gates.html>; Jerome A. Cohen & Jon M. Van Dyke, *High Stakes*, S. CHINA MORNING POST (Nov. 24, 2010), <http://www.cfr.org/china/high-stakes/p23594> ("It seems that China is putting forward an 'historic' claim to much of the South China Sea, but it has never clarified whether it is claiming these waters as internal waters, territorial sea, exclusive economic zone, extended continental shelf, or some status unique to the region."); Jerome A. Cohen & Jon M. Van Dyke, *Limits of Tolerance*, S. CHINA MORNING POST (Dec. 7, 2010), <http://www.cfr.org/china/limits-tolerance/p23593> ("In [its EEZ], a coastal country has complete control over all living and nonliving resources and can limit marine scientific research by other countries. But the US argues—and the text and negotiating history of UNCLOS appear to

opaque interpretation of UNCLOS has created an incipient security threat focal point around which its Southeast Asian neighbors have begun to coordinate.<sup>238</sup> Still, in contrast to the United States, China has ratified UNCLOS and continues to operate within its institutional framework.<sup>239</sup> If it does not avoid conflict, however, China's ability to influence interpretations of ISL—whether in regard to the South China Sea or Taiwan—will determine the magnitude of the resulting security threat focal point and strategic costs.

Second, China does have a very poor human rights record.<sup>240</sup> It has signed but not ratified the International Covenant on Civil and Political Rights,<sup>241</sup> although it did ratify the International Covenant on Economic, Social, and Cultural Rights.<sup>242</sup> Even assuming that China has violated those human rights commitments that it has undertaken, it is unlikely that such violations would trigger security threat focal points. In contrast to liberated Europe in 1946, there is little expectation of a strategic contest between superpowers to exert influence over China's population. Nor do China's human rights violations threaten to destabilize a politically sensitive region, as was the case in the Balkans and most recently in Libya.<sup>243</sup> International human rights law often does not directly concern relations between states because such treaties primarily obligate the state to ensure a baseline of decent treatment for its own citizens. From a rationalist point of view, human rights law is less likely than ISL to generate security threat focal points between states. Instead, human rights

---

support it—that the ships and planes of other countries, military and commercial, have navigational rights to operate in and over these waters.”) *But see* Kevin Lim, *China Says Will Not Threaten Anyone With Modern Military*, REUTERS (June 5, 2011), <http://www.reuters.com/article/2011/06/05/us-singapore-defence-idUSTRE75300920110605> (“China is committed to maintaining peace and stability in the South China sea,” [China’s defense minister] said[,] adding it stood by a 2002 code of conduct signed with members of the Association of South East Asian Nations to resolve peacefully the rival claims over the resource-rich region.”).

238. *See* Shanker, *supra* note 237, at A9.

239. *Id.*

240. *See, e.g.*, U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA (Apr. 8, 2011).

241. *See Status of Treaties: International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, Mar. 14, 2012, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=N=4&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=N=4&chapter=4&lang=en).

242. International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), *available at* <http://www.unhcr.org/refworld/docid/3ae6b36c0.html>. The treaty was ratified by China on March 27, 2001. *Id.*

243. *See, e.g.*, Rachel Donadio, *Libyan Immigrants Becoming Italian Immigrants*, N.Y. TIMES, May 14, 2011, at A4 (discussing the impact of Libyan unrest on a bilateral agreement with its European neighbor Italy).

advocates more often rely on normative and liberal theories of compliance.<sup>244</sup>

#### V. CONCLUSION: A GROWING ROLE FOR SECURITY THREAT FOCAL POINTS

International law reached a modern pinnacle in the decade following the Cold War.<sup>245</sup> With “the end of history,” it appeared to some that democratic peace was upon us and the great power conflicts that had characterized nearly the entire twentieth century might never return. In a unipolar moment dominated by a relatively benign hegemon, international relations could focus on welfare maximization and a humanitarian vision of collective security. As unipolarity recedes, however, one should remember Professor Nye’s warning: “It is equally mistaken to pretend that the whole world is typified by Hobbesian realism or by Kantian [institutionalism].”<sup>246</sup> When new security threats come into sharper focus in multipolarity, states will react with balancing strategies.

As high stakes rivalries reemerge, how should states coordinate against security threats and allocate their own scarce resources toward defense? We have seen that the correct lesson of Munich was the rationality of coordinating for security around violations of ISL, rather than the need to respond to minor threats with unilateral force. This lesson is especially crucial to heed in multipolarity, where it is more difficult for states to coordinate against dispersed threats.

Applying that lesson to U.S. relations in Latin America, for example, the United States should not resort to unilateral intervention in reaction to mere internal political threats, especially where its regional treaties provide no legal cover.<sup>247</sup> In today’s increasingly globalized, democratic,

244. See, e.g., Koh, *supra* note 1; Alex Geisinger & Michael Ashley Stein, *Rational Choice, Reputation, and Human Rights Treaties*, 106 MICH. L. REV. 1129, 1130 (2008) (“Guzman’s efforts to more fully describe the reputational aspects of international law within a rational choice framework are especially significant . . . [Yet] explaining states’ entry into human rights treaties requires a broader conception of reputation than *Rational Choice* allows.” (citing GUZMAN, *supra* note 2)); Nye, *supra* note 8, at 559 (“When the society and culture of the hegemon are attractive, the sense of threat and need to balance it are reduced.”).

245. The Clinton years witnessed the dramatic development of international criminal law (including the creation of the Yugoslavia and Rwanda tribunals and the International Criminal Court), see DUNOFF ET AL., *supra* note 203, at 652–58, the creation of the WTO and its enforceable dispute settlement mechanism, *id.* at 829, the remarkable proliferation of investment treaties, *id.* at 861, and the trend toward humanitarian intervention that is often associated with the “responsibility to protect,” *id.* at 955.

246. NYE, *supra* note 11, at 208.

247. With the democratization of Latin America, the United States has found it more challenging



and multipolar world, the costs in threat perception (and adverse balancing) of maintaining an interventionist Monroe Doctrine will often exceed the strategic benefits.<sup>248</sup> Instead, the United States should make clear its intentions to pursue mutual welfare gains, to support democracy at arm's length, and to coordinate regional security around focal points of threat such as ISL violations. In fact, the United States has largely pursued such a rational strategy of restraint in Latin America since the end of the Cold War.<sup>249</sup>

In general, for a powerful state, violations of ISL can lead to greater perceptions of threat, reducing its strategic advantage, especially as alternative poles of power emerge to balance against it. Even the greatest superpower, the United States, should not assume that its alliances are guaranteed in perpetuity, despite the stickiness of institutions such as NATO. Professor Feldman has noted that the United States has an ongoing “need to build and rebuild alliances—and law has historically been one of our best tools for doing so.”<sup>250</sup> In addition, powerful states will rationally bargain from a position of strength to create favorable institutions in those areas still unregulated by ISL, in order to more efficiently coordinate security strategy.<sup>251</sup>

Meanwhile, weaker states will seek credible commitments from more powerful states to attain lower cost security.<sup>252</sup> It will often be irrational for a weaker state to violate its own ISL commitments because the resulting security threat focal point can make it a target of strategic balancing, as well as direct sanctions.

---

to use regional treaties, such as the OAS Charter and the Rio Pact, to reduce the perceived threat of hemispheric interventions. See LAFEBER, *supra* note 176, at 284. Moreover, when the United States sided with Great Britain in the Falklands War against Argentina, its commitment to the regional alliance lost credibility. *Id.*

248. In other words, the Monroe Doctrine should be interpreted in its original sense, in defense of Latin American sovereignty, and the Roosevelt corollary should be abandoned. See *id.* at 38.

249. It would also be rational for the United States to pursue a similar strategy beyond the Western Hemisphere. Although the United States enjoyed Cold War alliances in both NATO and the Rio Pact, NATO provides the more promising model in multipolarity. While the United States resorted to costly interventions and dictatorships to maintain regional hegemony, it had a stronger alliance with Europe owed to its position as a powerful, yet less threatening, alternative to the Soviet Union. See *supra* Part IV.B.1. Alliances are more efficiently pursued by minimizing threat—often through compliance with ISL—while still offering the advantages of power.

250. Feldman, *supra* note 47, at 66.

251. See Ikenberry, *supra* note 11, at 45 (“[Institutions] allow powerful states to both lock in a favorable postwar order and overcome fears of domination and abandonment [among weaker states].”).

252. *Id.* (“Weak and secondary states get institutionalized assurances that they will not be exploited.”).

Thus, to return to the original question—*When will it be rational for a state to comply with international law?*—the answer appears to be: *more often than has previously been thought*. The potential reputational costs of violating international law are not limited to treaty exclusion but also include strategic costs. Violations of ISL generate security threat focal points, spotlighting the violator’s defection from the international security institution, evidencing its unpredictability and lack of restraint, and providing an impetus for states to balance against it.

The rational security strategy for states—best illustrated by a rising China—is to maximize their relative power while minimizing their relative threat. In today’s world of extensive international legal commitments, minimizing relative threat will often involve compliance with international law. Therefore, states may rationally create a presumption in favor of compliance with ISL, rebuttable where identifiable benefits of defection are clearly greater than the potentially high reputational costs.<sup>253</sup>

Although making conceptual use of realist tools, the security threat focal point theory suggests that international institutions will often endure beyond the balance of power existing at the time of their creation.<sup>254</sup> International law is not epiphenomenal, as structural realists maintain. States that did not shape the current framework of international law face significant strategic costs in opting to violate ISL norms perceived as not in their interests. It follows that the negotiation of treaties and the contestation over evolving interpretations of ISL are of great consequence to states’ strategic interests. Rational states will fully engage in the international legal process in order to maximize their security, in addition to their welfare.

253. This presumption in favor of compliance is distinguishable from that asserted by management theorists because it is based on an analysis of the unitary state’s rational compliance decision, rather than the tendencies of the state’s domestic institutions. *See* Chayes & Chayes, *supra* note 1, at 179 (“Compliance is the normal organizational presumption.”). A rational state must recognize varying levels of information (or rationality) among its potential rivals, leading to uncertainty regarding the attributions flowing from noncompliance. Therefore, a risk-averse state will rationally create a presumption against the violation of ISL, while a risk-seeking state might not.

254. This theory thereby follows Keohane’s guidance that realist concepts should be “supplemented, though not replaced, by theories stressing the importance of international institutions.” KEOHANE, *supra* note 13, at 14.