
REALISM AND TRANSNATIONALISM: COMPETING VISIONS FOR INTERNATIONAL SECURITY

Nathan A. Canestaro*

I. INTRODUCTION	113
II. WHAT IS REALISM?	118
III. WHAT IS TRANSNATIONALISM?	122
IV. CAN TRANSNATIONALISM AND REALISM CO-EXIST?	128
A. <i>Structural and Compliance Issues</i>	129
B. <i>Likelihood and Importance of Interstate Cooperation</i> ..	141
C. <i>Should There Be a Moral Dimension to State Behavior?</i>	143
D. <i>The Use of Force in International Relations</i>	145
E. <i>The Transparency of State Motives</i>	147
V. RECONCILING TRANSNATIONALISM AND REALISM IN PRACTICE	152
VI. CONCLUSION: A HYBRID INTERNATIONAL SYSTEM?	161

I. INTRODUCTION

“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world . . .”

— Preamble, Universal Declaration of Human Rights¹

* Central Intelligence Agency, Office of Iraq Analysis, 2003-2008. LL.M., Georgetown University, 2006. J.D., University of Tennessee, 2001. Served in Operation Iraqi Freedom with the Department of Defense, Coalition Forces Land Component Command (CFLCC), 2002-2003. CIA Counterterrorism Center, 2002-2003. CIA Afghanistan and Balkans Task Forces, 2001. All statements of fact, opinion, or analysis are those of the author and do not reflect the official positions or views of the CIA or other U.S. Government agency. Nothing in the contents should be construed as asserting or implying U.S. Government authentication of information or Agency endorsement of the author’s views. This material has been reviewed by the CIA to prevent the disclosure of classified information. The author would like to thank Georgetown Professor Robert E. Dalton, Assistant Legal Adviser for Treaty Affairs, U.S. Department of State, for his guidance and assistance in the completion of this article.

¹ Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

“[T]he standard of justice depends on the equality of power to compel. . . . [T]he strong do what they have the power to do and the weak accept what they have to accept.”

— Thucydides, *The Melian Dialogue*, 431 BC²

Scholars, lawyers, and diplomats have long considered the motives behind state behavior. Despite years of analysis, debate, and study, no single comprehensive theory has emerged to explain why some states opt to compete rather than cooperate, while others rely on the rule of law over force of arms. One particular topic of debate is the role and function of international laws and structures in influencing state behavior. Many lawyers take for granted that international law is binding upon states,³ but in other fields of study outside the law there has been great debate on how or whether international norms, laws, and institutions shape state action, and to what degree compliance is due to a genuine sense of legal or moral obligation or the selfish pursuit of national interests.

This paper seeks to examine two competing theories of states' motives and behavior in international relations: realism and transnationalism.⁴ The first, realism, has been the dominant doctrine in international relations theory since the end of the Second World War.⁵ Realism suggests that states are constantly competing for security and power within an anarchical international system incapable of preventing aggression or

² THUCYDIDES, *THE PELOPONNESIAN WAR* 360 (Rex Warner, trans., 1962) (1954).

³ See generally Thomas M. Franck, *Centennial Essay: The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT'L. L. 88, 89 (2006).

⁴ While this paper seeks to present two competing theories of international relations, as with any generalization of human behavior within a social system, the described schools of thought are not intended to present universal or exclusive theories of state behavior or foreign relations. Different scholars and advocates often vary in their description of each school of thought, while others combine elements of different theories to develop other doctrines not described here. See JACK DONNELLY, *REALISM AND INTERNATIONAL RELATIONS* 131 (2000) (“[Any two theoretical approaches to international relations] are ‘competing’ only in the sense that they focus on different forces and thus may provide ‘better’ or ‘worse’ . . . insights in particular cases.”). See also Robert O. Keohane, *International Institutions: Two Approaches*, in *INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* 187 (Robert J. Beck et al. eds., 1996) [hereinafter *INTERNATIONAL RULES*] (“Deterministic laws elude us, since we are studying the purposive behavior of relatively small numbers of actors engaged in strategic bargaining. . . . [W]e must understand that we can aspire only to formulate conditional, context-specific generalizations rather than to discover universal laws, and that our understanding of world politics will always be incomplete.”).

⁵ Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L. L. 64, 73 (2006).

conflict.⁶ Because every state maintains an offensive capacity to harm others, each must gain and retain power at any cost or risk predation by aggressors.⁷ Realism is pessimistic about the likelihood of long-term cooperation, as competition for security between states is a zero-sum game, with advances on the part of one state inherently threatening to the security of others.⁸ International law and international institutions sometimes dictate courses of action that run parallel with states' interests, but compliance often erodes when international law requires behavior that is to their detriment. In the absence of centralized enforcement or adjudication of international law, realists argue that the international system remains anarchical, with law reduced to empty legalisms used to justify the pursuit of national ends.⁹

A competing philosophy, transnationalism (also known as liberalism),¹⁰ offers a dramatically different vision of international relations. Transnationalism suggests that cooperation, not competition, is the defining characteristic of international relations, and that democratization and global economic interdependence reduce the benefits of interstate conflict and encourage long-term cooperation.¹¹ Transnationalists assert that states have binding legal obligations under international law, and those rules are gradually developing into a rule-based community capable of regulating the behavior of states.¹² Through a framework of international laws, norms, and regimes, the sovereignty of the state is slowly yielding to international legal norms that lessen the likelihood of conflict, facilitate interstate cooperation, and promote universal human values such as justice, human rights, and international equity.

This paper seeks to determine if these two competing philosophies can be reconciled, particularly in relation to national security. At first glance, they have little in common. One is pessimistic about the likelihood of long-term international stability and suggests that competition and war

⁶ JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* 32-33 (2001).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Transnationalism, as it is used in this paper, does not claim to be a new theory of international relations, but rather a synthesis of a number of theories and doctrines in both international relations and international law. It includes major elements from liberalism and neoliberalism, but also regime theory, cosmopolitan theory, and functional institutionalism. While the author's conception of transnationalism is generally equivalent to liberalism, the author believes the term "transnationalism" is more descriptive and avoids any suggested linkage to a particular political affiliation.

¹¹ MEARSHEIMER, *supra* note 6, at 1.

¹² See Joseph M. Greico, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, in *INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* 147-150 (Robert J. Beck et al. eds., 1996).

might be inevitable “states of nature.”¹³ The other is optimistic and normative, encouraging inter-state cooperation as a means towards a Wilsonian vision of what the international system could and should be.¹⁴ The two doctrines sharply disagree on most fundamental issues, including the structural nature of the international system, the duty to comply with international law, the transparency of states’ motives, the role of force and morality in international relations, and the likelihood of cooperation.

A close review of transnationalism and realism suggests that there is theoretical room for both. A lack of clarity in the historical record on states’ motives and frequent coincidences of interest between states’ self-interest and respect for international law means that states’ behavior can be interpreted either as realist competition or internationalist cooperation, depending on the observer’s point of view. For example, states routinely obey their treaty obligations, comply with fundamental international norms, and cooperate with other nations within the framework of international regimes such as the World Trade Organization (WTO) or United Nations (UN). Realists argue that this adherence is due to states’ perceptions of the greatest benefit to be had; weaker states desire orderly and predictable international relations that might lessen their chance of being victimized, while more powerful nations have a vested interest in preserving the status quo from which they benefit.¹⁵ In contrast, transnationalists counter that states comply with these largely unenforceable rules because the states regard the rules as legitimate, have consented to be bound, and believe in the larger body politic to which they are obligated.¹⁶ Additionally, the normative nature of transnationalism allows proponents to argue that even if states are still primarily motivated by a pursuit of their national interests, a sense of legal obligation to international norms and laws strengthens as compliance becomes habitual.¹⁷

Where realism and transnationalism are far less reconcilable, however, are in matters perceived to be critical to national defense or survival. If,

¹³ MEARSHEIMER, *supra* note 6, at 17.

¹⁴ See generally Charles W. Kegley Jr., *The Neoliberal Challenge to Realist Theories of World Politics: An Introduction*, in *CONTROVERSIES IN INTERNATIONAL RELATIONS THEORY: REALISM AND THE NEOLIBERAL CHALLENGE* 9-10 (Charles W. Kegley, Jr. ed., 1995) [hereinafter *CONTROVERSIES*].

¹⁵ MEARSHEIMER, *supra* note 13, at 364 (quoting LOTHAR GALL, *BISMARCK: THE WHITE REVOLUTIONARY: 1851-1871*, at 59 (1986)).

¹⁶ See generally Anthony Clark Arend, *Toward an Understanding of International Legal Rules*, in *INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS*, 289, 293 (Robert J. Beck et al. eds., 1996) (noting that international law is not law in the traditional domestic sense but rather a “system of rules which conduces to a fairly high level of perceived obligation among members of a voluntarist community” (quoting THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 40 (1990))).

¹⁷ HEDLEY BULL, *THE ANARCHICAL SOCIETY* 139 (1977).

as Louis Henkin once famously suggested, “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time,”¹⁸ the minority of instances where states do not comply involve the most sensitive of national security issues—such as response to external threats, protection of territory, access to resources, and proliferation of weapons. States generally do not subordinate their interests to an international “common good” when the result is detrimental to their national security, and in such cases they are more likely to disregard international norms in order to defend or pursue interests they perceive as vital.

The general unwillingness of states to compromise and cooperate on national security issues, however, does not preclude them from cooperating in other fields. There is considerable evidence of states’ increased willingness to be bound by international laws and norms in the fields of international trade, finance, and investment, even while they compete for power and security. As global commerce and interdependence has increased in recent decades, many states have entered into bilateral or multilateral economic arrangements that have limited their policy options, while international institutions are now managing economic issues that were previously the sole domain of the state. As the pace of globalization has rapidly accelerated in recent years, there has been a growing disconnect between international economic-political and military-security issues, with states frequently complying with international law in the former even if they are unwilling to cede to the will of others on the latter. While scholars disagree on the reasons behind this split, the international system appears to be increasingly bifurcated, with economic-financial dealings regulated by international law and international rules on military-security issues of diminishing relevance.

In order to determine whether and how realism and transnationalism might be reconcilable in international relations, this paper will first examine the doctrines of realism and transnationalism in order to define their basic philosophical tenets. Part III will compare and contrast the major points of disagreement between the two doctrines, including the structure of the international system, compliance with international law, the likelihood of cooperation, international morality, and the utility of the use of force in international relations. Part IV will examine the international justification for the war in Iraq as a practical case study of tension between perceived security interests and international norms and law, and contrast those developments with the increased legalization of international commerce and financial matters. Finally, the conclusion will summarize the findings of this paper and examine how transnationalism and realism might be viewed as not mutually exclusive.

¹⁸ LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979).

II. WHAT IS REALISM?

Realism suggests that foreign policy is driven by national interest, not legal rules, and that power relationships, not legal institutions, determine state behavior.¹⁹ Realism has five major premises.²⁰ First, states are the primary actors in international affairs, and each state's survival depends primarily on its own efforts to maintain its security.²¹ Second, due to the anarchical nature of the international system, states are preoccupied with power and security and as a result compete, rather than cooperate, for power and resources.²² Third, states are rational actors who seek to maximize their power and, fourth, are sensitive to relative erosions of their position and capabilities in comparison to other nations.²³ Finally, realism states that international laws and organizations do little to affect the overall likelihood of cooperation.²⁴

First, realism holds that states are the major actors in international relations.²⁵ There is no authority or sovereignty above the level of the state,²⁶ and state sovereignty allows each nation to pursue its own objectives and interests independent of the welfare of others.²⁷ Under realism, as noted by Charles De Visscher, a former President of the International Court of Justice, the state is "an end in itself, is free of any moral rein; it seeks unlimited power and answers to no one for what it does."²⁸

Second, realism presumes that the international system is anarchical, lacking a central authority capable of preventing the use of force.²⁹ Wars

¹⁹ INTERNATIONAL RULES, *supra* note 4, at 94. A focus on anarchical nature of the international system is characteristic of the neorealist (also known as defensive or structural realism) school of thought, as defined by Kenneth Waltz and others. See MEARSHEIMER, *supra* note 6, at 19. Alternate definitions of classical, or offensive realism, insist that it is not the nature of the international system, but rather man's "will to power" that pushes states to strive for supremacy. See *id.* For a legal examination of variations on realism, see Steinberg & Zasloff, *supra* note 5, at 73-76.

²⁰ See Greico, *supra* note 12, at 149.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ See generally JOSEPH S. NYE JR., THE PARADOX OF AMERICAN POWER 155-156 (2002).

²⁷ The 1648 Treaty of Westphalia ended the Thirty Years War and marked the formal recognition of states as sovereign, independent political units, "confirm[ing] the plural and secular system of a society of independent states." CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE 21 (2005). See also CHARLES DE VISSCHER, THEORY AND REALITY IN INTERNATIONAL LAW 7 (P.E. Corbett trans., 1968).

²⁸ *Id.* at 8.

²⁹ MEARSHEIMER, *supra* note 6, at 3.

occur because there is nothing to prevent them,³⁰ and states that do not protect their security or vital interests risks being victimized by aggressors.³¹ Every state has the offensive capability to harm or destroy others, and accordingly, states can never be certain of others' intentions.³² As stated by Kenneth Waltz, "In the absence of a supreme authority, there is then constant possibility that conflicts will be settled by force."³³ The intentions of other states can rapidly change from benign to hostile, so while alliances do occur, states cannot assume the loyalties of their allies.³⁴ Faced with potential adversaries on all sides and unable to depend on others to guarantee their continued existence, each state's survival depends solely on its own efforts to preserve its security.³⁵

Third, in the theory of realism, states are preoccupied with power and security, and are predisposed towards conflict and competition.³⁶ International politics is a "ruthless and dangerous business,"³⁷ and power is the means by which states guarantee their survival. The more strength a state has in relation to its rivals, the less likely it will be attacked.³⁸ Accordingly, each state attempts to maximize its power, either absolutely or in relation to neighbors and rivals. As this usually comes at the expense of other states, each is constantly looking to either gain an advantage or prevent others from gaining an advantage over them.³⁹

³⁰ See KENNETH N. WALTZ, *MAN, THE STATE AND WAR: A THEORETICAL ANALYSIS* 205 (1959) ("In international politics there is no authority effectively able to prohibit the use of force.").

³¹ See MEARSHEIMER, *supra* note 6, at 32-33.

³² *Id.* at 30-31.

³³ WALTZ, *supra* note at 30, at 188. See also *id.* at 159 ("With many sovereign states, with no system of law enforceable among them, with each state judging its grievances and ambitions according to the dictates of its own reason or desire—conflict, sometimes leading to war, is bound to occur.").

³⁴ See MEARSHEIMER, *supra* note 6, at 33. See also Greico, *supra* note 1224, at 148 ("According to realists, states worry that today's friend may be tomorrow's enemy in war"). Greico explains how states can turn on former allies if the opportunity presents itself: "Minds can be changed, new leaders can come to power, values can shift, new opportunities and dangers can arise." *Id.* at 156 (quoting Robert Jervis, *Cooperation Under the Security Dilemma*, 30 *WORLD POLITICS* 167, 168 (1978)).

³⁵ Stephen A. Kocs, *Explaining the Strategic Behavior of States: International Law as System Structure*, 38 *INT'L STUD. Q.* 535, 536 (1996). See MEARSHEIMER, *supra* note 6, at 33.

³⁶ See MEARSHEIMER, *supra* note 6, at 32-33. See also DE VISSCHER, *supra* note 27, at 22 ("Between States equally imbued with their sovereign prerogatives, competition became the law of international relations.").

³⁷ See MEARSHEIMER, *supra* note 6, at 35.

³⁸ *Id.* at 33.

³⁹ See *id.* at 2. See also Frederick L. Schuman, *International Ideals and the National Interest*, 280 *ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE* 27, 29 (1952) ("It is therefore the obligation of every statesman to pursue power rather than virtue. Under anarchy the virtuous who lack power succumb, while

Accordingly, interstate security competition is constant, with little likelihood of long-term tranquility.⁴⁰ When international peace or stability occurs, it is the result of a balance of power—between nations that have banded together to protect themselves from aggressors or to prevent one nation from imposing its will upon the rest.⁴¹

Fourth, realism maintains that states are “rational egoists” that are sensitive to costs, and determine their actions in light of their own interests, not that of others.⁴² They are aware of their environment and think strategically about how to survive and prosper in it in relation to other states.⁴³ States are acutely aware of erosions in their relative capabilities, which they rely upon to maintain their security and independence in a system often prone to violence.⁴⁴ They “do not subordinate their interests to the interests of other states or to those of the so-called international community,”⁴⁵ and pursue other goals—such as economic well being—only so long as they do not interfere with their security interests.⁴⁶

the powerful who lack virtue often survive.”). According to realists, the zero-sum nature of states’ competition for power leads to the “security dilemma,” where one states’ acquisition of power is inherently threatening to others. MEARSHEIMER, *supra* note 6, at 36 (quoting John H. Herz, *Idealist Internationalism and the Security Dilemma*, 2 *WORLD POLITICS* 157, 157 (1950) (“Striving to attain security from . . . attack, [states] are driven to acquire more and more power in order to escape the impact of the power of others. This, in turn, renders the others more insecure and compels them to prepare for the worst. Since none can ever feel entirely secure in such a world of competing units, power competition ensues, and the vicious circle of security and power accumulation is on.”))

⁴⁰ See MEARSHEIMER, *supra* note 6, at 33.

⁴¹ See generally HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 197 (4th ed. 1967) (“The metaphor of two scales kept in balance by an equal distribution of weights on either side, providing the mechanism for the maintenance of stability and order on the international scene, has its origin in . . . mechanistic philosophy. It was applied to the practical affairs of international politics in the spirit of that philosophy.”). See generally Kegley, *supra* note 14, at 1, 5 (discussing mechanisms for states to balance power). In a strategy known as “balancing,” states may band together to offer mutual protection against a rival state or groups of states. Alternatively, states may also “bandwagon,” allying with a rising power in order to improve their odds of survival. MEARSHEIMER, *supra* note 6, at 139-140.

⁴² ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 66 (2005).

⁴³ MEARSHEIMER, *supra* note 6, at 31. See also WALTZ, *supra* note 30, at 160 (“[S]o long as the notion of self-help [in the use of force] persists, the aim of maintaining the power position of the nation is paramount to all other considerations.”) (quoting FREDERICK S. DUNN, *PEACEFUL CHANGE* 13 (1937)).

⁴⁴ Greico, *supra* note 12, at 152-53.

⁴⁵ MEARSHEIMER, *supra* note 6, at 33.

⁴⁶ *Id.* at 46.

Finally, realists assert that international norms and institutions only marginally affect the prospects for cooperation.⁴⁷ In their constant competition for power and security, states often fail to cooperate even when they have common interests.⁴⁸ Where states do enter into cooperative agreements, fears of cheating and exploitation limit their ability to commit fully.⁴⁹ Each participant measures its gains in comparison to those of its partners to insure that the other is not benefiting disproportionately, and may abandon the effort or limit its involvement if potential rivals are receiving benefits far in excess of its own.⁵⁰ Fear of cheating becomes more acute as the size of the joint effort grows; as the number of participants increases, so do the cost of monitoring and enforcement, leading to a greater chance of free-riding.⁵¹ This sensitivity to relative gains is heightened if the partner state is a long-term adversary, if the gain is in military rather than economic power, or if the home state's power is already in decline.⁵² While fear and uncertainty about cheating and exploitation do not eliminate the chance of cooperation, long-term alliances are "sometimes difficult to achieve and always difficult to sustain."⁵³

Realists note that there is a long historical record of states working to shift the balance of power in their favor, and argue that this proves the predictive power of their theory. For example, realists point to Japan from 1868 to 1945, the Soviet Union from 1917 to 1991, and Germany from 1862 to 1870, and again from 1900 to 1945, as textbook cases for realist state behavior.⁵⁴ In each of these cases, Japan, Germany, and the

⁴⁷ See Greico, *supra* note 12, at 156; MEARSHEIMER, *supra* note 6, at 52.

⁴⁸ See Greico, *supra* note 12, at 156; MEARSHEIMER, *supra* note 6, at 52.

⁴⁹ See Greico, *supra* note 12, at 156; MEARSHEIMER, *supra* note 6, at 52.

⁵⁰ See Greico, *supra* note 12, at 156; MEARSHEIMER, *supra* note 6, at 52.

⁵¹ JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 36 (2005).

⁵² See also Robert J. Beck, *International Law and International Relations: The Prospect for Interdisciplinary Collaboration*, in *INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* 3, 16 (Robert J. Beck et al. eds., 1996) ("state positionality may constrain the willingness of states to cooperate") (quoting Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 *INT'L ORG.* 485, 499 (1988)).

⁵³ MEARSHEIMER, *supra* note 6, at 51.

⁵⁴ *Id.* at 168. Readers may note that military aggression eventually proved the undoing of each of these states cited above as demonstrating realist behavior. Realists deny that expansionism is ultimately self-defeating, however, and note that studies have suggested that initiators of wars prevailed in approximately 60% of the 63 wars between 1815 and 1980. See *id.* at 39 (citing JOHN ARQUILLA, *DUBIOUS BATTLES: AGGRESSION, DEFEAT, AND THE INTERNATIONAL SYSTEM* 2 (1992)). The key to victory, structural realists suggest, is for states to avoid overexpansion and to avoid sparking conflicts that they probably will lose, a goal that requires rational and calculating responses to their individual circumstances. See *id.* at 211. One example

Soviet Union feared foreign invasion or the encroaching power of potential adversaries into their spheres of influence.⁵⁵ Accordingly, each defined its national policy primarily in relation to its security needs, and aggressively sought to prevent victimization by preemptively increasing its power relative to other states.⁵⁶ Realists also point to the nuclear arms race between the Soviet Union and the United States as a good example of states positioning for superiority in security and power. Both the US and USSR devoted considerable resources to gaining a nuclear advantage over the other.⁵⁷ Both sides in this arms race were uncertain of the other's motives and intentions, and were acutely sensitive to erosions in their numerical or technological superiority.⁵⁸

III. WHAT IS TRANSNATIONALISM?

The philosophy of transnationalism, in contrast, suggests that the behavior of states in international relations should reflect more than just the states' short-term calculations of interest. Transnationalism is optimistic about human nature and the potential for mutual aid and collaboration, and it holds that human concern for the welfare of others and cooperative action by states make possible international peace and stability.⁵⁹ Transnationalists argue that great powers should no longer view each other as competitors and potential military rivals, but instead as a family of nations, an "international community."⁶⁰ Cooperation, transnationalists argue, is emerging as the defining characteristic of international relations, with states less likely to compete for security or engage in war

of beneficial expansion that developed into self-defeating overexpansion is Germany from 1862 to 1945. *See generally id.* at 181-90. During the early part of this period, Germany under Otto von Bismarck unified and strengthened itself by sparking three wars from 1864-1870, but then largely refrained from further expansion for the next thirty years out of a belief that "the German army had conquered about as much territory as it could without provoking a great-power war, which Germany was likely to lose." *Id.* at 184. Its eventual defeat, however, was due to later conflicts intended to "defeat Germany's great-power rivals decisively and redraw the map of Europe," suggesting that they overreached in attempting to dominate the international system rather than settle for benefiting disproportionately from it. *See id.* at 188-90.

⁵⁵ *See id.* at 168-90.

⁵⁶ *See id.*

⁵⁷ *See id.* at 226-33.

⁵⁸ *See id.*

⁵⁹ Kegley, *supra* note 14, at 4. *See also* Mark W. Zacher & Richard A. Matthew, *Liberal International Theory: Common Threads, Divergent Strands*, in *CONTRADICTIONS IN INTERNATIONAL RELATIONS THEORY: REALISM AND THE NEOLIBERAL CHALLENGE* 107, 110 (Charles W. Kegley, Jr. ed., 1995).

⁶⁰ MEARSHEIMER, *supra* note 6, at 1.

as global economic and political interdependence increases.⁶¹ Where conflict does occur, it is not due to evil intent, but rather to bad institutions and structural arrangements that encourage some states to behave selfishly.⁶² Accordingly, transnationalists believe that war is not inevitable and its frequency can be reduced by improving international institutions and governance, primarily by encouraging free trade and the spread of democratic values.⁶³

Transnationalists assert that states have binding legal obligations under international law, rules that derive their authority from a moral community of shared values. Over time, transnationalists insist, these laws will strengthen into a Wilsonian international system dedicated to the pursuit of peace, and built on justice, democracy, and respect for human rights.⁶⁴ This is not a world government, but instead a Kantian rule-based international society composed of liberal, sovereign states, in which transnational cooperation creates mutuality of interest across national lines.⁶⁵ International law, even if imperfect, offers opportunities to, in the words of Hersch Lauterpacht, “enhanc[e] the stability of international peace, . . . protec[t] . . . the rights of man, and . . . reduc[e] the evils and abuses of national power.”⁶⁶

Transnationalists, like realists, believe that states are important actors in the international system, but argue that increasing economic and political interdependence has decreased their ability to control their own destinies.⁶⁷ With the spread of globalization, international, non-governmental institutions such as the United Nations (UN) or the World Trade Organization (WTO) are playing an increasing role in facilitating inter-state cooperation, promoting the evolution of accepted norms, rules, and decision-making procedures between states. These institutions make cooperation more beneficial in the long-term than competition, reducing the overall chance of war.⁶⁸ As the number of international issues regulated by these institutions has increased over time—including human rights,

⁶¹ *Id.* at 360. See Anne-Marie Slaughter, et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT’L L. 367, 370 (1998).

⁶² Kegley, *supra* note 14, at 4.

⁶³ *Id.* See Kegley, *supra* note 14, at 4. See also PHILLIPPE SANDS, *LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES* xi (2005).

⁶⁴ Kegley, *supra* note 14, at 9-10.

⁶⁵ Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2610 (1997).

⁶⁶ Steven R. Ratner, *International Law: The Trials of Global Norms*, 110 FOREIGN POLICY 65, 65-66 (1998) (quoting Lauterpacht).

⁶⁷ Ole R. Holsti, *Theories of International Relations and Foreign Policy: Realism and Its Challengers*, in *CONTROVERSIES IN INTERNATIONAL RELATIONS THEORY: REALISM AND THE NEOLIBERAL CHALLENGE* 35, 43 (Charles W. Kegley, Jr. ed., 1995).

⁶⁸ See Kegley, *supra* note 14, at 4, 12-13.

arms control, international economics, and international environmental issues—national sovereignty has yielded control over matters that once were exclusively within the jurisdiction of states.⁶⁹

Transnationalism as a doctrine gained strength after the end of World War II, and traces its philosophical roots to President Woodrow Wilson's Fourteen Points in 1918⁷⁰ and to the 1941 Atlantic Charter.⁷¹ While Wilson's vision of a just international community based on democracy, free trade, and self-determination never materialized, similar values enshrined in the Atlantic Charter codified the fundamental principles for the West's post-War order. In that instrument, US President Franklin D. Roosevelt and British Prime Minister Winston Churchill called for states to refrain from using force against each other except where authorized by the community of nations, to maintain basic standards in human rights, and to promote economic liberalization through free trade.⁷² While the Charter was only a statement of shared values rather than a binding legal instrument, subsequent events—such as the formation of the Bretton Woods economic institutions in 1947⁷³ and the enactment of the Universal Declaration of Human Rights in 1948⁷⁴—codified the Charter's core values.

It was the 1990s, however, that proved to be transnationalism's most important period. The collapse of the Iron Curtain and the rapid spread of democracy across Eastern Europe triggered a surge of optimism about a new world order in which rule-governed interdependence would be the foundation of an enduring global peace.⁷⁵ For almost ten years, the accelerating legalization of international relations, the increasing strength and influence of international institutions, and the success of numerous mul-

⁶⁹ See Koh, *supra* note 65, at 2624; Slaughter, *supra* note 61, at 370.

⁷⁰ See Kegley, *supra* note 14, at 9.

⁷¹ THE ATLANTIC CHARTER (1941) (reprinted in SANDS, *supra* note 63, at 240-41). American President Woodrow Wilson can be considered one of the founding fathers of the policy doctrine of liberalism. See generally Kegley, *supra* note 14, at 9. In the wake of World War I, he argued that international security should not be based on a balance of powers between great nations, but rather predicated on democracy, free trade, and the universal rights of man, and overseen by an international mechanism dedicated to the preservation of peace. See generally MARGARET MACMILLAN, PARIS 1919, at 12-13, 20-24 (2002).

⁷² THE ATLANTIC CHARTER (1941) (reprinted in SANDS, *supra* note 63, at 240-41).

⁷³ The Bretton Woods Conference of 1947 resulted in the creation of three economic institutions intended to keep the peace—the International Monetary Fund (IMF), The World Bank, and the General Agreement on Tariffs and Trade. See Jim Chen, *Pax Mercatoria: Globalization as a Second Chance at "Peace for Our Time,"* 24 FORDHAM INT'L L.J. 217, 227 (2000).

⁷⁴ Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

⁷⁵ William C. Bradford, *International Legal Regimes and the Incidence of Interstate War in the Twentieth Century: A Cursory Quantitative Assessment of the Associative Relationship*, 16 AM. U. INT'L. L. REV. 647, 650 (2001).

tinational UN deployments—such as the Gulf War and the interventions in Bosnia, Somalia, and Haiti—bolstered transnationalists' visions for a just international society.⁷⁶ These developments led many transnationalists to believe that “[i]nternational legal rules, procedures, and organizations are more visible and arguably more effective than at any time since 1945. If the United Nations cannot accomplish everything, it once again represents a significant repository of hopes for a better world.”⁷⁷

During the 1990's, the Clinton Administration articulated much of its foreign policy in transnationalist terms, expressing optimism for the emergence of transnationalism as the dominant theory in international relations for the 21st century. Arguing that democratic and prosperous states are unlikely to fight each other, and that international institutions enable states to avoid war and concentrate on building cooperative relationships, President Clinton disputed the place of *realpolitik* in the 21st century. “[I]n a world where freedom, not tyranny, is on the march,” he stated in 1992, “the cynical calculus of pure power politics simply does not compute. It is ill-suited to a new era.”⁷⁸ “[E]nlightened self-interest, as well as shared values,” he asserted, “will compel countries to define their greatness in more constructive ways . . . and will compel us to cooperate.”⁷⁹

The first and most important principle of internationalism is that states have binding legal and moral obligations codified in international law.⁸⁰ While it is not law in the traditional domestic sense, international law is binding because it is based on shared norms and “specific, substantive legal commitments . . . contained in treaties and other formal agreements to which [they] have given their explicit consent.”⁸¹ States follow custom-

⁷⁶ See Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 609 (2003) (“[I]n the wake of our unchallenged primacy, a reasonable expectation arose that, with America’s new-found muscle, a different, more enduring, and more noble stability would be achieved in international relations and, moreover, that this could be brought about by rediscovering the Charter’s founding principle [against the use of aggressive force]”).

⁷⁷ Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 205 (1993).

⁷⁸ MEARSHEIMER, *supra* note 6, at 23 (quoting Bill Clinton, “American Foreign Policy and the Democratic Ideal,” campaign speech in Milwaukee, Wisconsin, 1 October 1992).

⁷⁹ *Id.*

⁸⁰ See GOLDSMITH & POSNER, *supra* note 51, at 187. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 101 (1986) (defining international law as “rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical”).

⁸¹ Kocs, *supra* note 35, at 538. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(1) (1986) (defining a rule of international law as “one that has been accepted as such by the international community of states (a) in the form of

ary international norms out of a sense of *opinio juris*, a sense of legal and moral obligation,⁸² or because they have given their consent to be bound through international treaties or conventions, known as *pacta sunt servanda*.⁸³

Transnationalists' faith in the authority of international law is also based in part on conceptions of an international "moral community."⁸⁴ Akin to the *civitas maxima* in Roman jurisprudence, transnationalists believe in a larger body politic, an intangible international whole from which emerges a collective social bond that contains "duties that transcend[] the interests of the singular."⁸⁵ Law is more than a force that binds states; it is an expression of basic values shared by all, such as

customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world"). See generally Arend, *supra* note <CITE_REF181259669">, at 289, 293 (noting that international law is not law in the traditional domestic sense but rather a "system of rules which conduces to a fairly high level of perceived obligation among members of a voluntarist community" (quoting THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 40 (1990))).

⁸² RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1986).

⁸³ See Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 ("Pacta sunt servanda; every treaty in force is binding upon the parties to it and must be performed by them in good faith."); The Paquete Habana, 175 U.S. 677, 711 (1900) ("The law is of universal obligation and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. . . . This is not giving to the statutes of any nation extraterritorial effect. . . . [B]ut it is recognition of the historical fact that by common consent of mankind these rules have been acquiesced in as of general obligation."). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §102(b) cmt. b (1986) ("Practice of states' . . . includes diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy . . . [T]here is no precise formula to indicate how widespread a practice must be [to constitute sufficient evidence of customary law], but it should reflect wide acceptance among the states particularly involved in the relevant activity.").

⁸⁴ See generally Andrew Hurrell, *International Society and the Study of Regimes: A Reflective Approach*, in *INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* 206, 214-20 (Robert J. Beck et al. eds., 1996).

⁸⁵ M. Cherif Bassiouni, *The Perennial Conflict between International Criminal Justice and Realpolitik*, 22 GA. ST. U. L. REV. 541, 544 (2006). See also DE VISSCHER, *supra* note 27, at 89 ("Of these reasonings, as of all those built upon the primacy of the *Civitas Maxima* . . . it may be said that they take as proven precisely what requires proof: namely the existence of a sense of community and the willingness of particular collectives to keep their conduct in conformity with the higher good of a universal community."). De Visscher further notes that the "[b]elief in a community wider and higher than the political units into which men are divided certainly meets a demand of reason." *Id.*

human rights, democracy, and justice.⁸⁶ Law as enacted by states in an international community becomes a realization of those values and exerts a normative pull on state behavior, bringing them into compliance with accepted norms.⁸⁷ As stated by Anne-Marie Slaughter Burley, former President of the American Society of International Law, “[i]n a genuine community bound together by common values, ‘the law’ can be identified as the authoritative expression of those values.”⁸⁸

Third, transnationalists have greater optimism for interstate cooperation than realists, and believe that international institutions facilitate interstate cooperation, reducing the overall likelihood of war.⁸⁹ By creating an environment where cooperation is more beneficial than competition, international institutions and law can help states work together to achieve mutually beneficial outcomes and overcome suspicions and obstacles.⁹⁰ These institutions help states to abstain from short-term power maximizing behavior by creating an institutional framework that sets norms of state behavior, reduces verification costs, creates iterativeness, and facilitates the identification and punishment of cheaters.⁹¹

Fourth, transnationalists favor the continued erosion of the sovereignty of the state in favor of non-state actors. They have applauded the rapid expansion of the role of international legal regimes since the end of the Cold War, and their increasing encroachment on issues previously viewed as the exclusive domain of the state.⁹² Transnationalists argue that these international institutions are in the best position to manage the interactions of states and address global problems—such as climate change, poverty, and diseases such as AIDS and avian influenza—that are beyond the capacity of any one state to resolve.⁹³

⁸⁶ See Hurrell, *supra* note 84, at 218 (noting that many international norms derive their compliance from a shared sense of justice, including human rights, prohibitions against aggression, and conquest of territory). See also Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (defining *jus cogens* (peremptory norm) this way: “a peremptory norm of general international law is a norm accepted and recognized by the international community of states . . . as a norm from which no derogation is permitted”).

⁸⁷ GOLDSMITH & POSNER, *supra* note 51, at 15.

⁸⁸ Burley, *supra* note 77, at 211.

⁸⁹ MEARSHEIMER, *supra* note 6, at 17. See generally Greico, *supra* note 12, at 151-52.

⁹⁰ KEOHANE, *supra* note 4, at 97.

⁹¹ *Id.*

⁹² Ratner, *supra* note 66, at 66. See generally Greico, *supra* note 12, at 149.

⁹³ See generally *id.* at 149-50. “[N]ot even the strongest of states,” notes one scholar, “can protect its individuals against economic forces, or against the risks of war which modern technical developments have made so destructive that humanity can no longer afford to use it.” Clyde Eagleton, *International Law or National Interest*, 45 AM. J. INT’L L. 719, 720-21 (1951).

Fifth, transnationalists have an abiding skepticism of the utility of force as a tool in international relations. In sharp contrast to realists, who argue that violence is inevitable due to the anarchical nature of the international system, transnationalists argue that international instruments such as the UN Charter have created a system of international laws and norms that discourages aggression between states.⁹⁴ Through consensual compliance with international treaties such as the Kellogg-Briand Pact and the UN Charter, states have willingly accepted a customary “norm of illegality” for wars waged outside of self-defense, prohibiting force as an instrument of national policy.⁹⁵ As international jurist and scholar Antonio Cassese stated, “peace became the supreme goal of the world community and States decided to agree upon serious and sweeping self-limitations of their sovereign prerogatives in the form of the mutual obligation to refrain from using or threatening force.”⁹⁶

Finally, transnationalists assert that increasing democratization and high levels of economic interdependence among states reduce the likelihood of violence.⁹⁷ It is a transnationalist truism that democracies seldom, if ever, go to war against each other.⁹⁸ Accordingly, they argue that long-term international stability is most likely to occur under a liberal economic order that facilitates free and equitable economic exchanges between states.⁹⁹ Greater international prosperity and democratization reduces the number of revisionist states unhappy with their lot, while increased economic interdependence makes war less profitable by disrupting the enriching network of interdependence.¹⁰⁰

IV. CAN TRANSNATIONALISM AND REALISM CO-EXIST?

At first glance, realism and transnationalism seem mutually exclusive. The two doctrines, while seeking to explain how and why states interact with each other, reside at opposite ends of the ideological spectrum. They hold opposing views on the structural nature of the international system, the duty to comply with international law, the likelihood of international cooperation, the place of morality in international affairs, the role of force in the international system, and the transparency of state

⁹⁴ Kocs, *supra* note 35, at 547-48.

⁹⁵ *Id.* at 547. See also Richard A. Falk, *The Adequacy of Contemporary Theories of International Law—Gaps in Legal Thinking*, 50 VA. L. REV. 231, 246 (1964) (“War was to be banished from the system of international relations by the processes of sovereign consent.”).

⁹⁶ Kocs, *supra* note 35, at 547 (quoting ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 137 (1986)).

⁹⁷ MEARSHEIMER, *supra* note 6, at 16.

⁹⁸ John M. Owen, *How Liberalism Produces Democratic Peace*, 19 INT’L SEC. 87, 87 (1994).

⁹⁹ MEARSHEIMER, *supra* note 6, at 16.

¹⁰⁰ *Id.* at 370.

motives. Realists are critical of the structural shortcomings of the international system, particularly the lack of centralized enforcement and adjudication. They argue that there is no duty to comply with international law, although states sometimes do so when those rules are beneficial to them. Realists also believe that the threat and use of force are inevitable in relations between states, and that suspicion of the intentions and motives of other states limits the likelihood of cooperation between states. As the fear of predation by others forces states to obtain and pursue power by any means, realists argue, state action cannot be judged by domestic moral standards. Additionally, the unpopularity of the pursuit of power and the need to confuse or divide rivals often requires states to provide legal or moral rationalizations for self-serving behavior.

In contrast, transnationalists believe that states comply with international norms and laws even in the absence of enforcement for a number of different reasons—including a respect for the values they embody, a belief that the process that created international law is legitimate, out of institutional habit, or because of a recognition that the erosion of the international system would threaten their security in the long term. States also recognize international law's obligatory nature because they have consented to be bound through treaties, or because the law is based on state practice. Cooperation not only is likely between states, transnationalists argue, but is necessary and beneficial in an international system where self-sufficiency is increasingly difficult, and where long-term compliance with international norms offers more benefits than a short-term pursuit of interests. As international interdependence increases, violence and the threat of violence becomes anachronistic; power is no longer based only on military strength, but is developing political, economic, and cultural dimensions. While rogue states may still rationalize their selfish behavior in legalistic terms, transnationalists argue, the fact that they feel the need to refer to those norms at all suggests their authority.

A. *Structural and Compliance Issues*

The structural weaknesses in the international community have long been a focus of realist criticism. Realists argue that the institutional shortcomings of the “international order”—especially its lack of central enforcement or authoritative judiciary—force states to provide for their own security. The central quality of any legal system, realists argue, is a mechanism for enforcement and the threat of punishment; legal systems that lack such a mechanism lack “the essential quality of law.”¹⁰¹ Secondly, realists argue that international law is not “real law” because there is no effective judiciary capable of rendering authoritative judgments on

¹⁰¹ John H.E. Fried, *International Law—Neither Orphan Nor Harlot, Neither Jailor Nor Never-Never Land*, in *THE RELEVANCE OF INTERNATIONAL LAW* 128 (Karl Deutsch and Stanley Hoffman eds., 1971).

what it really means.¹⁰² This lack of an official interpretative body leads to crippling ambiguities, as states are free to employ self-serving interpretations of law to determine the lawfulness of their own behavior.¹⁰³ Moreover, compromises in the terms of international law made to secure broad consensus further dilutes its specificity, magnifying states' ability to manipulate the law to justify their own agendas. Without an effective international judicial body to provide authoritative rulings, realists argue, international law is merely a vehicle for justifying pursuit of state interests.¹⁰⁴ As stated by one observer, the freedom of states "to define the rules for themselves, particularly where [there are] highly general and strong political motives [that] govern behavior, builds into a strong case for rule-skepticism."¹⁰⁵

Without any international central authority capable of enforcing or authoritatively defining the law, realists argue that anarchy remains the defining characteristic of the international system. Because there is nothing to prevent states from using force against each other, states must seek to maximize their power in order to guarantee their security, while international regimes, institutions, rules, and norms affect the prospects for stability only at the margins.¹⁰⁶ In the words of Stanley Hoffman, international law as a system of restraint is "weak law" in an international

¹⁰² JOYNER, *supra* note 27, at 5. See also Falk, *supra* note 95, at 235-36 ("In a domestic society, there is an official decision-maker regularly available to render an authoritative judgment as to what the law is at a given time and place. With rare exceptions, such an authoritative interpretation is not obtainable in the international system.").

¹⁰³ Fried, *supra* note 101, at 152 (noting the problems associated with states being "the judges of their own . . . behavior").

¹⁰⁴ See MORGENTHAU, *supra* note 41, at 271 (noting that "it is the subjects of the law themselves that not only legislate for themselves but are also the supreme authority for interpreting and giving concrete meaning to their own legislative enactments. They will naturally interpret and apply the provisions of international law in the light of their . . . conceptions of the national interest."). See also Falk, *supra* note 95, at 237 (noting that international lawyers' nationalism often trumps any moral obligation to be a neutral interpreter of law).

¹⁰⁵ Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 119 (1986). See also INTERNATIONAL RULES, *supra* note 5, at 96, quoting MORGENTHAU, *supra* note 41, at 269. ("The lack of precision, inherent in the decentralized nature of international law, is breeding ever more lack of precision, and the debilitating vice, which was present at its birth, continues to sap its strength."). See also DE VISSCHER, *supra* note 27, at 79-80 ("Reason may have been pushed to the bold height of a genuinely social conception of international relations . . . [but] it is still paralyzed by the absence of objective rules of justice or reason strong enough to control the individualism of States.").

¹⁰⁶ INTERNATIONAL RULES, *supra* note 4, at 144.

system “in which . . . restraint on behavior happens to be the crucial issue.”¹⁰⁷

According to realism, rather than reflecting an embodiment of shared norms, the international system is an expression of the established balance of power between dominant states.¹⁰⁸ International rules and norms are “purely reflective of the power and interests of states.”¹⁰⁹ Accordingly, state compliance with norms that preserve international order are merely a “by-product of the self-interested behavior of the system’s great powers [and the] unintended consequence of great-power security competition, not the result of states acting together to organize peace.”¹¹⁰

Few transnationalists dispute the realist contention that the international community is a “legal system of imperfect obligation.”¹¹¹ They dismiss, instead, realists’ presumptions that the law has to be centrally enforced in order to be strong. There are important differences between international law and domestic criminal law; instead of punishing mundane, daily offenses, international law regulates behavior of states—large institutions with complex interactions.¹¹² A more accurate paradigm than the enforcement model is that of constitutional law; like international law, constitutional law deals with the behavior of large collectives, conflicting interests of great importance, and has a minimal enforcement mechanism based primarily on the consent of participants.¹¹³ Like international law, constitutional law seeks to prevent conflict rather than punish violations.¹¹⁴ The frequent ambiguity of fundamental principles in both constitutional and international law suggest that subjectivity is not a deficiency of those bodies of law, but rather an indication of the importance of the interests they seek to reconcile.¹¹⁵

Transnationalists also argue that the domestic criminal paradigm is further inapplicable to international law because it creates unreasonable expectations of compliance. Violations of a body of law do not discredit that body of law—as suggested by realists—and transnationalists point out that even strong domestic criminal legal regimes have high rates of

¹⁰⁷ Stanley Hoffman, *International Law and the Control of Force*, in *THE RELEVANCE OF INTERNATIONAL LAW* 40 (Karl Deutsch & Stanley Hoffman eds., 1971). See also *id.* at 41 (“The failure of the constraining function has always been at the heart of the weakness of international law.”).

¹⁰⁸ See *supra* note 41 for a full explanation of realists’ theories on the balance of power.

¹⁰⁹ Hurrell, *supra* note 84, at 207.

¹¹⁰ MEARSHEIMER, *supra* note 6, at 49.

¹¹¹ JOYNER, *supra* note 27, at 6.

¹¹² See Fried, *supra* note 1031, at 136 (“[Domestic law] insofar as it applies to petty everyday affairs cannot suitably be compared with international law.”).

¹¹³ *Id.* at 136-37.

¹¹⁴ *Id.* at 143.

¹¹⁵ *Id.* at 165.

violation.¹¹⁶ “If one examines the domestic incidence of murder or rebellion in the best-ordered society,” asserts Richard Falk, “the record discloses a frequency of violation that would disappoint any legal perfectionist.”¹¹⁷ Violations of international norms are inevitable not because of a lack of effective constraint, but because there is an “inevitable discrepancy” between how people ought to behave and how they actually do.¹¹⁸ The power of law to secure compliance is not based on coercion and enforcement, but rather on the “general belief of those to whom the law is addressed that they have a stake in the rule of law itself: that law is binding because it is the law.”¹¹⁹

Transnationalists concede that the ambiguity of international norms and law resulting from the absence of an authoritative judiciary means that “reasonable persons can differ” on the definitions of permitted behavior.¹²⁰ They argue that varying interpretations of law are an inevitable component of any legal regime, international or domestic. International political disputes about national rights will inevitably lead to a clash of opposing legal interpretations, “just as we . . . expect that a private dispute about rights and duties will lead opposing counsel to develop contradictory interpretations of the relevant legal rules.”¹²¹ But despite these differences in opinion, transnationalists insist that transnational rules and norms have core meanings which are clear and generally accepted throughout the international community.¹²² For example, while transnationalists differ on some aspects of the rules regulating the use of

¹¹⁶ For example, see Schachter, *supra* note 105, at 130 (challenging assumptions that frequent violations of international laws disrupts their binding authority). Referring to repeated violations of article 2(4) of the UN Charter, Schachter asserts that the suggestion these violations have reduced the authority of legal prohibitions on the use of force “is no more convincing than the assertion that if a large number of rapes and murders are not punished, the criminal laws are supplanted and legal restraints disappear for everyone.” *Id.*

¹¹⁷ Richard A. Falk, *The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View*, in *THE RELEVANCE OF INTERNATIONAL LAW* 190 (Karl Deutsch & Stanley Hoffman eds., 1971). See also Falk, *supra* note 95, at 254 (noting that no law can induce perfect compliance with its fundamental norms).

¹¹⁸ Hoffman, *supra* note 107, at 35. See also Falk, *supra* note 117, at 190 (“No system of law can. . . attain perfect, or anything close to perfect, compliance.”). See generally Fried, *supra* note 101, at 175-76 (noting that international law “can never ‘abolish’ famine and conflict, poverty and revolution—just as thousands of years of domestic law have not ‘abolished’ theft and murder.”).

¹¹⁹ Franck, *supra* note 3, at 91.

¹²⁰ Schachter, *supra* note 105, at 119.

¹²¹ Falk, *supra* note 117, at 236. See also ABRAHAM CHAYES, *THE CUBAN MISSILE CRISIS* 27 (1974) (“[U]nder the conventions of the American legal system, no lawyer or collection of lawyers can give a definitive opinion as to the legality of conduct in advance.”).

¹²² Schachter, *supra* note 105, at 119-20.

force—for example, the scope of exceptions such as pre-emptive attacks, humanitarian intervention, and implied authorization from the UN Security Council—the underlying principle, a prohibition on international aggression, is clear. While there is no determinative adjudication, third party judgments are in fact made by other states, and “[i]nternational rules are not frequently seen as providing an independent benchmark against which to assess the justification of behavior . . . which is politically or morally contentious.”¹²³

Furthermore, many transnationalists insist that the lack of central enforcement is irrelevant, provided that states still comply with international norms and laws in its absence.¹²⁴ If it can be proven that states moderate their actions even in the absence of enforcement, the lack of an enforcement mechanism is immaterial, scholars such as Louis Henkin argue:

[W]hat matters is whether international law is reflected in the policies of nations and in relations between nations [T]he question is not whether law is enforceable or even effectively enforced; rather, whether law is observed, whether it governs or influences behavior, whether international behavior reflects stability and order.¹²⁵

Henkin further argues that “law observance, not violation, is the common way of nations.”¹²⁶ Citing the apparent realist misimpression that “international law is sown with violated norms and broken treaties,” Henkin asserts that compliance with international norms is a daily occurrence in international relations.¹²⁷ “Every day nations respect the borders of other nations, treat foreign diplomats and citizens . . . as required by law, [and] observe thousands of treaties.”¹²⁸ Other transnationalists, such as Thomas Franck, make similar arguments. Suggesting that “rules are not enforced yet they are mostly obeyed,” Franck highlights the “not inconsequential amount of habitual state obedience to rules and accept-

¹²³ SANDS, *supra* note 63, at 7. See also Schachter, *supra* note 105, at 121 (“[S]elf-serving unilateral justifications are not always accepted by the international community.”).

¹²⁴ See J. CRAIG BARKER, *INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* 14 (2000) (quoting TERRY NARDIN, *LAW, MORALITY, AND THE RELATIONS OF STATES* 120 (1983)) (“The important question for international relations theory is whether a body of rules governing the relations of states can exist in the absence of authoritative central institutions.”).

¹²⁵ HENKIN, *supra* note 18, at 26.

¹²⁶ *Id.* at 49.

¹²⁷ *Id.* at 46. See also *id.* at 47 (“Violations of the law attract attention and the occasional important violation is dramatic; the daily, sober, loyalty of nations to the law and their obligations is hardly noted.”).

¹²⁸ *Id.*

ance of obligations despite the underdeveloped condition of the system's structures, processes, and, of course, enforcement mechanisms."¹²⁹

Transnationalists further argue that the lack of central enforcement is irrelevant because, as in domestic law, obedience with the law is based on more than physical coercion.¹³⁰ States, like people, comply with rules for a variety of reasons, including a sense of duty or honor, belief in the legitimacy of those rules, institutionalized habit or inertia, or self-interest.¹³¹ Most importantly, transnationalists assert, international law is binding on states because states accept that it is binding on them.¹³² They do so mainly because those rules coincide with their own principles of legitimacy, and because the rules institutionalize principles of international behavior that are in states' interest—such as sovereignty, independence, and territorial integrity.¹³³ Accordingly, international law is “legal” in that it embodies accepted norms of state behavior, defining with a “certain solemnity” the political framework of international relations, establishing rights and duties designed to give a “measure of stability and certainty” to those relations.¹³⁴ Louis Henkin makes a similar argument, suggesting that international law establishes the “submerged”¹³⁵ rules of states' expected behavior with the system, codifying basic, necessary principles for their daily functions and interactions:¹³⁶

Although there is no international “government,” there is an international “society”; law includes the structure of that society, its institutions, forms, and procedures for daily activity, the assumptions on which the society is founded and the concepts which permeate it, the status, rights, responsibilities, obligations of the nations which comprise that society, the various relations between them, and the effects of those relations.¹³⁷

Most importantly, international rules establish accepted criteria on which national governments can be perceived as acting reasonably.¹³⁸ This establishes thresholds for state behavior that provide suggested courses of behavior for states to take in order to avoid escalating ten-

¹²⁹ THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 3, 33-34 (1990) (emphasis removed).

¹³⁰ HENKIN, *supra* note 18, at 92-93.

¹³¹ See Hurrell, *supra* note 91, at 210.

¹³² BARKER, *supra* note 124, at 19.

¹³³ Kocs, *supra* note 35, at 542.

¹³⁴ Hoffman, *supra* note 107, at 54. See also Burley, *supra* note 77, at 211-12 (arguing that the law was never intended to restrain states but rather serve as a framework under which international values are realized).

¹³⁵ HENKIN, *supra* note 18, at 21.

¹³⁶ See *id.* at 17, 21, 319.

¹³⁷ *Id.* at 14.

¹³⁸ Burley, *supra* note 77, at 220.

sions.¹³⁹ In this manner, the central principles of customary international law—sovereignty, self-determination, honoring of treaty commitments—allow states to act in a manner that other states accept as reasonable or non-threatening, reducing the overall likelihood or severity of war.¹⁴⁰

Law also plays an important role in structuring the functions of international relations and providing a framework for states' daily interactions. It coordinates expectations, communicates claims and provides the subjects with a zone of predictability which reduces uncertainty over the motives of other states.¹⁴¹ Law provides mechanisms and procedures by which nations maintain their relations, carry on trade, and peacefully resolve their differences.¹⁴² It contributes to order and stability and provides a basis and a framework for common enterprise and regular, predictable transactions.¹⁴³ There is also a shared recognition that erosion of these norms would be costly in the long-term.¹⁴⁴ In the transnationalist framework, once states see themselves as having a stake in guaranteeing the continuance of the international legal system, then the idea of obligation to international rules can acquire legitimacy and gain distance from the immediate interests of states.¹⁴⁵

States may also consent to be bound by international law out of their perceptions of proper behavior or out of their desire to avoid sullyng their reputation with long-term negative consequences.¹⁴⁶ "Considerations of honor, prestige, leadership, influence, reputation . . . figure prominently in governmental decisions [and] often weigh in favor of observing law," notes Louis Henkin.¹⁴⁷ If, as suggested by Henkin, law codifies the basic rules of coexistence among states, it also mobilizes compliance with accepted rules; states may decide to comply with the law because they fear the extra-legal consequences if they do not.¹⁴⁸ While there is no central enforcement mechanism in the international system, states exert "extra-legal" pressures upon each other that often induce compliance.¹⁴⁹ The most powerful of these is reciprocity; states fear that others will retaliate in kind for violations, leading to losses in other dealings or disrupt-

¹³⁹ *Id.*

¹⁴⁰ See generally Kocs, *supra* note 35, at 542. See also Falk, *supra* note 117, at 193, noting that international rules "function to illuminate thresholds which when crossed endanger the confinement of conflict within previously accepted and acceptable limits."

¹⁴¹ Hoffman, *supra* note 107, at 40.

¹⁴² HENKIN, *supra* note 18, at 18.

¹⁴³ *Id.* at 29.

¹⁴⁴ Kocs, *supra* note 35, at 543-44.

¹⁴⁵ Hurrell, *supra* note 91, at 214.

¹⁴⁶ See HENKIN, *supra* note 1918, at 52 ("Nations generally desire a reputation for principled behavior, for propriety and respectability.")

¹⁴⁷ *Id.*

¹⁴⁸ See generally BULL, *supra* note 17, at 141.

¹⁴⁹ See HENKIN, *supra* note 18, at 88, 92-93.

tions of a rule-based order which has proved profitable for the violator.¹⁵⁰ Even if a state is opposed to a particular principle of law, Henkin suggests, it will continue to comply with international law writ large in order to avoid reciprocal violations that would threaten the norms they do care about.¹⁵¹ As Henkin stated, “Even the rich and mighty . . . cannot commonly obtain what they want by force or dictation and must be prepared to pay the price of reciprocal or compensating obligation.”¹⁵²

Other transnationalists suggest that states comply with largely unenforceable international rules because they feel those rules are legitimate, or because they recognize them as a moral obligation of statehood.¹⁵³ According to Thomas Franck, nations obey rules “[b]ecause they perceive the rule and its institutional penumbra to have a high degree of legitimacy.”¹⁵⁴ Rules are perceived as legitimate, he argues, because they come into being in accordance with a prescription for legitimate rule-making, incorporate principles of fairness, or embody a shared sense of justice.¹⁵⁵ It is this legitimacy that creates compliance because states

¹⁵⁰ See Karl W. Deutsch, *The Probability of International Law*, in *THE RELEVANCE OF INTERNATIONAL LAW* 99 (Karl W. Deutsch & Stanley Hoffman eds., 1971). “Most of international law was enforced not by any international or supranational authority, nor by any collective security efforts of many governments, but by the high costs of non-coordination which would follow upon long or frequent non-compliance. . . . [T]hey are being enforced by the costs of transgressing them, that is, by the material and psychic costs of upsetting expectations, diminishing the chances for coordination, and enhancing the risks of destructive conflict.” *Id.* at 99-100. See also HENKIN, *supra* note 18, at 55 (noting that “treaty violations . . . have their spectrum of possible responses that tend to deter violation”).

¹⁵¹ See *id.* at 51-52 (“Nations . . . observe laws they do not care about to maintain others which they value, and to keep ‘the system’ intact; a state observes law when it ‘hurts’ so that others will observe laws to its benefit.”).

¹⁵² *Id.* at 31.

¹⁵³ Different components of the state may have different perceptions of the legitimacy of international law. For example, the realist exercise of power is often linked to executive authority, and those bodies may hold a dim view of international restraints on their policy options. Realists typically deal with states as interchangeable units, however, downplaying the importance of sub-state factors such as institutional process or personal traits of a state’s leadership in influencing state action. They would argue that the perceptions of state subcomponents, while not properly excluded from consideration, are less important in their impact on state behavior than their “will to power” or the anarchical nature of the international system. See WALTZ, *supra* note 30, at 231 (suggesting that international anarchy is a “final explanation” of the frequency of conflict between states because “it does not hinge on accidental causes—irrationalities in men, defects in states—but upon [the] theory of the framework within which *any* accident can bring about a war”).

¹⁵⁴ FRANCK, *supra* note 129, at 25. Franck defines legitimacy as “a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively.” *Id.* at 16.

¹⁵⁵ *Id.* at 38.

believe that the rule or institution has “come into being and operates in accordance with generally accepted principles of right process.”¹⁵⁶

Transnationalists argue that the “habit and inertia”¹⁵⁷ of compliance within the bureaucratic process, or a culture of compliance within governmental institutions, is in part responsible for state compliance with international law. For example, Hedley Bull argues that states obey international law due to “habit or inertia; they are . . . programmed to operate within the framework of established principles.”¹⁵⁸ Others have made similar arguments, suggesting that bureaucracies operate on the basis of reciprocity, restraint, fairness, reasonableness, and a respect for rules.¹⁵⁹ And once bureaucracies internalize these international principles, compliance becomes habitual.¹⁶⁰

States may also recognize rules as the price of membership in the international community or of recognition by other states. There is a general impression that since the end of the Second World War, states have given greater weight to considerations of commonly-shared values, and some have argued that this recognition of shared values and interests “presupposes the existence of a community that postulates . . . moral imperatives that require *inter alia* certain actions, while proscribing others.”¹⁶¹ Complying with accepted standards of behavior is thus seen as an acknowledgement of a moral obligation, or as compliance with a larger set of values that the state believes is binding upon it.¹⁶² As stated by Thomas Franck, states “recognize that the obligation to comply is owed by them to the community of states as the reciprocal of that community’s validation of their nation’s statehood.”¹⁶³ Louis Henkin agrees, asserting that “more or less willingly, all governments give up some autonomy and freedom and accept international law in principle as the price of ‘membership’ in international society and of having relations with other nations.”¹⁶⁴

Both realists and transnationalists agree that, in some cases, states can gain security by complying with international norms and laws. It is in this perceived self-interest, argues Hedley Bull, where real strength of international law resides. Its importance “does not rest on the willingness of states to abide by its principles to the detriment of their interests, but in

¹⁵⁶ *Id.* at 19.

¹⁵⁷ BULL, *supra* note 17, at 140.

¹⁵⁸ *Id.* at 139. See also Falk, *supra* note 117, at 147 (“Large modern states operate as law-oriented bureaucracies. This assures the automatic application of international law in many areas of transnational activity.”).

¹⁵⁹ FRANCK, *supra* note 129, at 3.

¹⁶⁰ HENKIN, *supra* note 18, at 58-63. See also *id.* at 247 (observing that “law observance is the daily habit of government officials.”).

¹⁶¹ Bassiouni, *supra* note 85, at 543.

¹⁶² See generally BULL, *supra* note 17, at 139.

¹⁶³ FRANCK, *supra* note 129, at 196.

¹⁶⁴ HENKIN, *supra* note 18, at 30.

the fact that they so often judge it in their interests to conform to it.”¹⁶⁵ For example, states are reluctant to breach the legal constraints on the use of force imposed by law because those constraints also limit other states from using force against them.¹⁶⁶ One scholar observes that “states follow specific rules, even when inconvenient, because they have a longer-term interest in the maintenance of law-impregnated international community.”¹⁶⁷ For smaller, especially weaker, states there is an inherent value in supporting a rule-based international order that is more predictable and transparent than a realist, Hobbesian state of nature.¹⁶⁸ Additionally, rich and powerful states have a “disproportionate stake in maintaining the stability of the status quo” in which they are dominant.¹⁶⁹ While transnationalists concede that powerful states can get away with occasional violations of the law, they argue that even powerful states recognize that blatant rule-breaking might disrupt the legal order on which their own prosperity or security ultimately depends.¹⁷⁰

Paradoxically, realists rely on very similar arguments to assert the opposite conclusion—that law is merely an instrument of power.¹⁷¹ Because an orderly international system is in the interest of smaller states, realists argue, powerful states use international law “as a means of regulation as well as of pacification and stabilization of their dominance.”¹⁷² International laws and institutions institutionalize the political status quo at the time of their drafting, and are resistant to subsequent shifts in the balance of power. Accordingly, powerful states may comply with international law because doing so preserves an international order in which they are dominant, especially if the state is unable to enforce that dominance through extra-legal means.¹⁷³ International institutions also give weaker states increased influence, encouraging them to concede to the established balance of power, thereby lowering for great powers the costs of pacifying weaker ones.¹⁷⁴ International law’s emphasis on precedent and order “allows previous generations to rule over present ones,” preventing rising powers from remaking the international legal

¹⁶⁵ BULL, *supra* note 17, at 140.

¹⁶⁶ Kocs, *supra* note 35, at 542, 546.

¹⁶⁷ Hurrell, *supra* note 84, at 213.

¹⁶⁸ *Id.* at 213-14 (“For weak states, then, the legal conventions of sovereignty and the [protection] of the international legal order bolster their ability to maintain themselves as ‘states’ and provide a powerful incentive to take legal rules seriously . . .”). See also Kocs, *supra* note 35, at 536.

¹⁶⁹ Hurrell, *supra* note 84, at 214.

¹⁷⁰ Kocs, *supra* note 35, at 543.

¹⁷¹ See generally Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT’L L. 369 (2005).

¹⁷² *Id.* at 371.

¹⁷³ *Id.* at 373.

¹⁷⁴ *Id.*

order in their own image.¹⁷⁵ Accordingly, system-wide perceptions of the legally binding nature of international law is a social construct manufactured by larger states that serves to cement their grip on system-wide dominance.¹⁷⁶

A large body of realist scholarship has criticized the transnationalist contention that states obey international law even when it is not in their self-interest, arguing that states purportedly respect international norms and laws out of a pursuit of rational interests, or “because they fear retaliation from the other state or some kind of reputational loss” that might ultimately damage their security.¹⁷⁷ “States do not act in accordance with a rule that they feel obliged to follow[,]” writes one scholar.¹⁷⁸ “[T]hey act because it is in their interest to do so. The rule does not cause the states’ behavior; it reflects their behavior.”¹⁷⁹ Some have even challenged whether states actually feel a sense of legal obligation in complying with customary law, arguing that “[s]cholars who think that customary international law results from a sense of legal obligation fail to distinguish between a pattern of behavior and the motives that cause states to act in accordance with that pattern.”¹⁸⁰

One of the most recent assaults on transnationalist theories of compliance was made by Jack Goldsmith and Eric Posner, two prominent scholars in the legal realism school. In their book, *The Limits of International Law*, Goldsmith and Posner argue that “international law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power.”¹⁸¹ In an analysis of compliance with international law, Posner and Goldsmith found that compliance with international law was directly linked to states’ perceptions of the benefits of compliance. “[P]references for international law compliance,” the scholars wrote, “tend to depend on whether such compliance will bring security, economic growth, and related goods; and that . . . [nations] are willing to forgo international law compliance when such compliance comes at the cost of these other goods.”¹⁸² Goldsmith and Posner found no evidence that states were compelled to comply with international law because it reflects morally valid procedures or

¹⁷⁵ *Id.* at 377. “The establishment of institutions, even if initially based on the converging self-interests of states, can transform the standards of legitimacy in international society and thus make later attempts by rising powers to change the institutional structure more difficult: other states have then become subject to hegemonic socialization.” *Id.* at 375.

¹⁷⁶ *Id.* at 374-75.

¹⁷⁷ GOLDSMITH & POSNER, *supra* note 51, at 90, 100.

¹⁷⁸ *Id.* at 39.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 3.

¹⁸² *Id.* at 9.

internal value sets.¹⁸³ Instead, states were most likely to make or comply with treaty obligations when there was a coincidence of interest, or when the treaty required no more of the states than “they would do on their own.”¹⁸⁴ This behavior persisted into the long-term when the party to the treaty obtained sustained benefits that outweighed the benefits of violation. “States independently pursuing their own interests will engage in symmetrical or identical actions [such as cooperation and compliance] simply because they gain nothing by deviating from those actions.”¹⁸⁵ Accordingly, Posner and Goldsmith concluded that international law is “not a check on state-self interest; it is a product of state self-interest,” and that “the possibilities for what international law can achieve are limited by the configurations of state interests.”¹⁸⁶

Realists also doubt that full compliance with international norms can be achieved as the pursuit of states’ national security often comes at the expense of other states. Accordingly, it is difficult to reach mutual international accommodation among groups of states when acting to secure national interests. In the words of Charles De Visscher, “Interests that governments hold to be intimately connected with the preservation or development of State power must be classified as very generally refractory to legal integration. Treaties that touch upon these interests . . . spring from momentary convergences of policy and do not survive their passing.”¹⁸⁷ Realists further argue that while compliance with international law may be to states’ benefit much of the time, international law and custom are not always synonymous with national interest. Compliance with the law is not a guarantee of protection from aggressors who rarely follow international rules; states must still accumulate and preserve power to safeguard their security—in violation of international law, if need be—because effective international protection may not be forthcoming.¹⁸⁸

Transnationalists concede that self-interest plays is one of the strongest factors encouraging compliance with international law.¹⁸⁹ They rely on the normative nature of transnationalism, however, to argue that as state acceptance of those rules increases, they will eventually evolve into a rule-based structural framework for the international system.¹⁹⁰ This evolution towards obligatory, well-defined legal rules will continue, transnationalists argue, as long as states internalize and self-enforce interna-

¹⁸³ *Id.* at 15.

¹⁸⁴ *Id.* at 28.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 13.

¹⁸⁷ DE VISSCHER, *supra* note 27, at 74.

¹⁸⁸ Kocs, *supra* note 35, at 542.

¹⁸⁹ *Id.*

¹⁹⁰ HENKIN, *supra* note 18, at 338-339.

tional norms.¹⁹¹ While they do not always obey the letter of the law now, the fact that it has been codified at all represents a first step towards broader compliance. For example, Charles De Visscher notes that while states generally do not comply with the Kellogg-Briand Pact,¹⁹² its “significance lies in the moral imperative . . . Such an imperative, so long as it lives in the consciences of men, survives the weaknesses of positive organization; sooner or later it imposes itself on the legal order.”¹⁹³ In another example, transnationalists point to the gradual extension of criminal liability to individuals for war crimes as one example of international legal norms solidifying into enforced standards of conduct.¹⁹⁴ Once primarily based on reciprocity, the law of war crimes has slowly strengthened into an enforceable system of binding rules, as seen in the Nuremberg Principles and the International War Crimes Tribunals for Yugoslavia, Rwanda, and elsewhere.

B. *Likelihood and Importance of Interstate Cooperation*

Realists and transnationalists disagree on the prospects and importance of international cooperation. Realists believe that the anarchical structure of the international system limits the likelihood of sustained cooperation; states are more likely to compete because each is attempting to maintain or strengthen its position in relation to other states that may become future rivals.¹⁹⁵ While states band together and cooperate in the short-term to oppose the emergence of a powerful adversary, the zero-sum nature of power and security limits permanent, system-wide alliances.¹⁹⁶ In contrast, transnationalists insist that realists underestimate the impact that international institutions can have on facilitating international cooperation.¹⁹⁷ Economic “self-reliance and self-sufficiency have . . . become less and less possible,”¹⁹⁸ transnationalists argue, and now a wide variety of transnational issues—such as international trade and commercial transactions, environmental matters, intellectual property, and foreign investment—are too far reaching for any single state to manage effectively by itself.¹⁹⁹ These dealings, instead, are best managed by interna-

¹⁹¹ See generally *id.* at 540. See also GOLDSMITH & POSNER, *supra* note 51, at 134; HENKIN, *supra* note 18, at 338-39 (suggesting that progress towards a rule based society is steady and inevitable).

¹⁹² General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact or Pact of Paris), Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57.

¹⁹³ DE VISSCHER, *supra* note 27, at 299.

¹⁹⁴ Sands, *supra* note 63, at 49-54.

¹⁹⁵ MEARSHEIMER, *supra* note 6, at 35.

¹⁹⁶ Kegley, *supra* note 14, at 4-5.

¹⁹⁷ Greico, *supra* note 12, at 147, 149.

¹⁹⁸ Fried, *supra* note 101, at 124.

¹⁹⁹ See Ratner, *supra* note 66, at 75.

tional regimes that encourage multilateral cooperation and compliance, and that make participants' behavior more predictable.²⁰⁰ These regimes do not enforce rules per se, but rather tilt the costs and benefits in favor of cooperation, creating a constructive environment for cooperation under which states receive higher payoffs.²⁰¹ Sustained cooperation is more profitable than repeated "go it alone" negotiations because compliance with pre-established accepted procedures eases uncertainty by limiting the range of expected behaviors, eliminates the need to renegotiate terms, reduces verification and transaction costs, and creates economies of scale through repeated transactions.²⁰² In effect, regimes alter the cost-benefit calculus, creating "coincidences of interest" for all players where long-term cooperation is more profitable than a pursuit of immediate interests.²⁰³ In the words of Robert Keohane, "They do not override self-interest but rather affect calculations of self-interest."²⁰⁴

Institutions also maximize the penalties for self-serving behavior by increasing transparency and overall accountability for violation of accepted procedures, facilitating the identification and punishment of cheaters or free-riders.²⁰⁵ Participants enforce the regimes, with issue linkages allowing states to retaliate against violators in other dealings, raising the costs of deception and cheating beyond just a single issue group.²⁰⁶ This dramatically increases the penalties for defecting, thereby reducing the likelihood that participants will be double-crossed or exploited by partners.²⁰⁷ By increasing overall accountability within the system, international regimes "link the future with the present," and insure that a given violation will be treated not as an isolated incident, but as one in a series of interrelated actions.²⁰⁸ As stated by Keohane and Axelrod, "International regimes do not substitute for reciprocity; rather,

²⁰⁰ See KEOHANE, *supra* note 42, at xi (defining international regimes as "clusters of principles, norms, rules, and decision-making procedures [that] reduce transaction costs for states, alleviate problems of asymmetrical information, and limit the degree of uncertainty that members of the regime face in evaluating each others' policies").

²⁰¹ GOLDSMITH & POSNER, *supra* note 51, at 12. See also KEOHANE, *supra* note 42, at 84, noting that "[i]f the egoists monitor each other's behavior and if enough of them are willing to cooperate on condition that others cooperate as well, they may be able to adjust their behavior to reduce discord."

²⁰² KEOHANE, *supra* note 42, at 90, 246.

²⁰³ *Id.* See generally GOLDSMITH & POSNER, *supra* note 51, at 12.

²⁰⁴ KEOHANE, *supra* note 42, at xi.

²⁰⁵ Robert Axelrod & Robert O. Keohane, *Achieving Cooperation Under Anarchy: Strategies and Institutions*, 38 *WORLD POLITICS* 226 (1985). See also KEOHANE, *supra* note 42, at 97, 246.

²⁰⁶ KEOHANE, *supra* note 42, at 97.

²⁰⁷ *Id.* at 97, 105-106.

²⁰⁸ Axelrod & Keohane, *supra* note 205, at 234.

they reinforce and institutionalize it. Regimes incorporating the norm of reciprocity delegitimize defection and thereby make it more costly.”²⁰⁹

C. *Should There Be a Moral Dimension to State Behavior?*

Realists have long criticized the moral overtones of transnationalism, which they contend is an erroneous extension of domestic legal ethics into an international forum.²¹⁰ They argue that because of the zero-sum nature of power in the international community, policymakers historically have not been held to the bounds of domestic morality. In the words of Frederick Schuman, “In all politics those who acquire power, wield it, and seek to retain it, have from time immemorial been judged to occupy a position with respect to moral standards which is not quite the same as that of ordinary citizens or private entrepreneurs.”²¹¹ “Those who call ‘power politicians’ immoral simply because they play the game of power politics,” continues Kenneth Waltz, “have transferred a definition of immorality from one social setting to another, and in the other it is not applicable without serious qualification.”²¹²

One of the most vocal criticisms of the moral aspects of transnationalism came from George F. Kennan, the chief architect of the US containment policy during the Cold War and one of the most influential figures in American diplomacy during that period. In a 1951 lecture, he charged that the “legalistic-moralistic approach to international problems” constituted the “most serious fault” in past US foreign policy.²¹³ Deriding as misguided the “belief that it should be possible to suppress the chaotic and dangerous aspirations of governments in the international field by the acceptance of some system of legal rules and restraints,”²¹⁴ Kennan argued that such an approach is not suited for dealing with revisionist states, and questioned the propriety of limiting international behavior to the confines of domestic morality:

²⁰⁹ *Id.* at 250.

²¹⁰ See Arend, *supra* note 16, at 292-93 (referring to realist dismissal of international law as mere “positive international morality”); Burley, *supra* note 77, at 208, (referring to realist dismissals of international law as a “repository of legal rationalizations”).

²¹¹ Schuman, *supra* note 39, at 28.

²¹² WALTZ, *supra* note 30, at 207-08. See also Falk, *supra* note 95, at 233 (“For the theorist to assume the social and political environment of international law is to risk other perils, the most frequent of which is implicit reliance upon a model of law transplanted from domestic life. . . . [S]uch a model does not fit the international setting.”).

²¹³ George F. Kennan, *Diplomacy in the Modern World*, reprinted in INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 99, 101 (Robert J. Beck et al. eds., 1996).

²¹⁴ *Id.* at 102.

[T]he idea of the subordination of a large number of states to an international juridical regime, limiting their possibilities for aggression and injury to other states, implies that these are all states like our own, reasonably content with their international borders and status [which has] generally been true only of a portion of international society [But] there is a greater deficiency . . . [t]hat is the inevitable association of legalistic ideas with moralistic ones: the carrying over into the affairs of states of the concepts of right and wrong, the assumption that state behavior is a fit subject for moral judgment.²¹⁵

Kennan, along with other prominent scholars, such as former Supreme Court Justice Oliver Wendell Holmes, believed that codes of conduct for state behavior should reflect the *actual* behavior of states, rather than play a normative role in suggesting how they *should* behave.²¹⁶ Realists argue that international law has evolved into an unrealistic ideological code that is unconnected to the actual practice of statecraft. “The received rules of international law,” argues Michael Glennon, “neither describe accurately what nations do nor predict reliably what they will do, no[r] prescribe intelligently what they should do.”²¹⁷

Transnationalists dispute that compliance with international norms is merely a distillation of ethical norms. Instead, international law merely

²¹⁵ *Id.* at 103, 105. Kennan warned of the dangers of introducing a moral element into matters of national security, and closely identified legalism with concepts of total war and total victory. *Id.* Moral judgment breeds moral superiority, he argued, and when that bleeds over into conflict, “[i]t is a curious thing . . . that the legalistic approach to world affairs, rooted . . . in a desire to do away with war and violence, makes violence more enduring, more terrible, and more destructive to political stability than did the older motives of national interest. A war fought in the name of high moral principle finds no early end short of some form of total domination.” *Id.* at 105. See HANS MORGENTHAU, IN DEFENSE OF THE NATIONAL INTEREST 33-35, quoted in Eagleton, *supra* note 93, at 719. Morgenthau echoed Kennan in his condemnation of fusions between morality and politics without consideration of realist principles. “[A] foreign policy guided by moral abstraction, without consideration of the national interest, is bound to fail[.]” In the end, he states, the two are incompatible, and it is “an iron law of international politics, that legal obligation must yield to the national interest.” *Id.* See also MORGENTHAU, *supra* note 41, quoted in Burley, *supra* note 77, at 207-08 n.6 (asserting that the “great attempts at organizing the world, such as the League of Nations and the United Nations,” are based on a misguided “conviction that the struggle for power can be eliminated from the international scene”).

²¹⁶ Michael J. Glennon, *Why The Security Council Failed*, 82 FOREIGN AFFAIRS 16, 31 (May/June 2003) (quoting Oliver Wendell Holmes) (“The first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong.”).

²¹⁷ Andreas Paulus, *The War Against Iraq and the Future of International Law: Hegemony or Pluralism?*, 25 MICH. J. INT’L L. 691, 717 (2004) (quoting MICHAEL GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO 2 (2001)).

codifies standards states accept on their own conduct. “Law is not a description of actual behavior, nor a prediction of future behavior, nor a system of moral or ethical norms,” argues one transnationalist.²¹⁸ “[L]aw is composed of the norms that are accepted by a society as prescriptions for behavior.”²¹⁹ To argue that these factors are purely moralistic ignores the “lessons of justified pragmatic considerations, enlightened self-interest, and prudent judgment.”²²⁰

D. *The Use of Force in International Relations*

Realism and transnationalism are profoundly different in their views on the role of force in international relations. For realists, violence, and the threat of violence, is inseparable from international politics, a condition reflected in the structure of the international system.²²¹ Because there is nothing to prevent the outbreak of war, states are forced to protect their security and vital interests by whatever means necessary—including force—or else risk destruction by other states.²²² Accordingly, the protection of state interests and defense against potential aggressors trump legal restrictions on the use of force. “There are certain international situations of conflict and crisis,” states Richard Falk, “in which the overriding goals of national policy are chosen almost independently of what the law, impartially assessed, might be supposed to require.”²²³ Where states choose to avoid employing force, it is not due to respect for the law, but for some other self-serving consideration, such as avoiding the threat of violence in return.²²⁴

Realism, transnationalists counter, is no longer an adequate theory for explaining state behavior because the use of force is becoming less common in the developed world. In the words of one British diplomat, “A large number of the most powerful states no longer want to fight or conquer.”²²⁵ The exponential growth of economic interdependence has made the cost of war too prohibitive for states to consider.²²⁶ Instead, states now profit most from commercial exchanges with other countries,

²¹⁸ Paulus, *supra* note 218, at 717.

²¹⁹ *Id.*

²²⁰ Bassiouni, *supra* note 85, at 2.

²²¹ See generally WALTZ, *supra* note 30, at 159 (“With many sovereign states, with no system of law enforceable among them, with each state judging its grievances and ambitions according to the dictates of its own reason or desire—conflict, sometimes leading to war, is bound to occur.”).

²²² Greico, *supra* note 12, at 155. See also MEARSHEIMER, *supra* note 13, at 2-3, 32-33.

²²³ Richard A. Falk, *New Approaches to the Study of International Law*, 61 AM. J. INT’L L. 477, 481 (1967).

²²⁴ Hoffman, *supra* note 107, at 49.

²²⁵ ROBERT COOPER, *THE POSTMODERN STATE AND THE WORLD ORDER* 22 (2000).

²²⁶ Greico, *supra* note 12, at 149.

and they often rely on others to help achieve national goals, such as growth, full employment, and price stability.²²⁷ Accordingly, each state has an interest in greater global stability and views other states as potential partners rather than rivals.²²⁸

Former Assistant Secretary of Defense Joseph Nye is one of several Clinton-era policymakers who have been outspoken in their advocacy of transnationalist values in American foreign policy. The Clausewitzian acceptance of force as an instrument of policy, Nye argues, is a relic of the past, based on outdated virtues of 19th century *realpolitik*.²²⁹ While state security historically was linked to military force, power in the information age is now “becoming less tangible and less coercive, particularly among the advanced countries.”²³⁰ Power, Nye contends, has become multi-dimensional, incorporating all elements of states’ influence:

[P]ower today is distributed among countries in a pattern that resembles a complex-three dimensional chess game. On the top chessboard, military power is largely unipolar [in favor of the United States] But on the middle chessboard, economic power is multipolar, with the United States, Europe, and Japan, representing two-thirds of the world’s product The bottom chessboard is the realm of transnational relations that cross borders outside of government control. . . . On this bottom board, power is widely dispersed, and it makes no sense to speak of unipolarity.²³¹

In order to fully succeed in the 21st century, Nye argues, great powers such as the United States must work to dominate the non-military components of power, an effort that will require more economic and cultural “soft power.”²³² For example, Nye argues that “the United States should help develop and maintain international regimes of laws and institutions that organize international action in various domains—not just the trade

²²⁷ *Id.* See generally NYE, *supra* note 26, at 6.

²²⁸ Greico, *supra* note 12, at 149.

²²⁹ See generally NYE, *supra* note 27, at 11-12. See also CARL VON CLAUSEWITZ, ON WAR 610 (Michael Howard & Peter Paret eds., trans. 1984) (“War is an instrument of policy; it must necessarily bear the character of policy and measure by its standards. The conduct of war, in its greater outlines, is therefore policy itself, which takes up the sword in place of the pen, but does not on that account cease to think according to its own laws.”).

²³⁰ NYE, *supra* note 26, at 11.

²³¹ *Id.* at 39.

²³² See generally *id.* at 8-10. See also Joseph Joffe, *America the Inescapable*, N.Y. TIMES MAG., June 8, 1997, at 8 (“Unlike centuries past, when war was the great arbiter, today the most interesting types of power do not come out of the barrel of a gun. . . . Today there is much bigger payoff in ‘getting others to want what you want’ and that has to do with ‘cultural attraction’ and ‘ideology,’ with ‘agenda setting’ and holding out big prizes for cooperation, like the vastness and sophistication of the American market.”).

and environment, but weapons proliferation, peacekeeping, human rights, terrorism, and other concerns.”²³³ By exporting US values, culture, and democratic traditions, by promoting peace and human rights, and by respecting the opinions of others, the US can exercise more power and influence in the world than if it employed force alone.²³⁴ An open and pluralistic foreign policy can reduce surprises in transnational relations, allow others to have a voice, and create a forum where we can exercise our soft power.²³⁵ “By resting our actions on a legal basis (and accepting its correlative restraints),” Nye argues, “we can make the continued exercise of our disproportionate power easier for others to accept.”²³⁶

E. *The Transparency of State Motives*

As explained above, realists and transnationalists differ sharply on why states act the way they do. Realists contend that if states obey international law they do so out of a sense of self-interest, while transnationalists argue that states respect the norms of international law and behavior out of a respect for those laws. The difficulty of determining the course of the decision-making process has limited efforts to determine the motives behind their behavior. Gaps or ambiguities in the official record, the twists of institutional decision-making, irrationality on the part of government officials, and the clouding effect of official rhetoric often obscure the reasons why one course of action was chosen over another.

A lack of transparency in national decision-making processes poses the largest obstacle to explaining why states act the way they do. Adequate records do not exist, are classified, or do not address underlying motives. Key officials, when willing or able to be interviewed, may have a limited perspective on the larger issue.²³⁷ And even when the various institutional forces affecting decision-making are evident, it is difficult to deter-

²³³ NYE, *supra* note 26, at 145.

²³⁴ *See id.* at 137 (“Failure to pay proper respect to the opinion of others and to incorporate a broad conception of justice into our national interest will eventually come to hurt us.”). *See also* R.W. Apple Jr., *VISIONS: POWER; As The ‘American Century’ Extends Its Run, the Dangers Grow More Complex*, N.Y. TIMES, Jan. 1, 2000, at E2 (quoting Richard Haas, Director of Policy Planning for the State Department under President George W. Bush, arguing that American unilateralism would “stimulate international resistance,” making “the costs of hegemony all the greater and its benefits all the smaller.”); *See also* Sebastian Mallaby, *The Clinton Affair (Multiple Choice)*, WASH. POST, Jan. 31, 1999, at B01 (“The paradox of American power . . . is that it is too great to be challenged by any other state, yet not great enough to solve problems such as global terrorism and nuclear proliferation. America needs the help and respect of other nations.”).

²³⁵ NYE, *supra* note 26, at 17.

²³⁶ *Id.* at 158, quoting Joshua Murachavik, *American Power—for What? A Symposium*, COMMENTARY 41 (January 2000).

²³⁷ HENKIN, *supra* note 18, at 6.

mine their relative weights and influence in the process.²³⁸ States' decision-making processes may not always be rational; policymakers' decisions are often based on incomplete or inaccurate information, may be hampered by poor planning, or slanted by institutional or personal bias. Furthermore, decisions are made under the considerable pressures of time and political scrutiny, and may be emotional or irrational in response to provocative events.²³⁹ In the end, Louis Henkin complains, "the processes by which decisions in foreign policy are made are mysterious [S]ometimes [it] is not made; it happens, and can only be later sorted out of the confusions of many actions and inactions."²⁴⁰ As a result, ambiguity in states' motives allows scholars and academics from different fields or ideological leanings to interpret the same set of facts very differently. As Henkin said, "The lawyer may see what law there is and what law does; the critic may see only what law there is not and what law has not achieved."²⁴¹

One of the few places to look for substantive explanations of states' behaviors is their public rhetoric, but transnationalists and realists disagree as to the meaning and importance of what they say. For example, states often provide legal or moral justifications for their actions, no matter how self-serving those actions are. Furthermore, regardless of the nature or purpose of the conflict, states frequently claim legal justification for their use of force under the UN Charter on the grounds of self-defense, invitation, humanitarian intervention, or protection of the rights of oppressed minorities.²⁴² As stated by Charles De Visscher:

Even when [states] violate treaties, rulers are careful not to dispute the respect due to the given word; from the written text they appeal to some higher principle, to the right of self-preservation, to inevitable change, to natural law, to the laws of eternal morality. Every political enterprise is clothed in some kind of moral justification, every program of expansion combines with the use of force the formulas of a civilizing ideal.²⁴³

²³⁸ *Id.* ("[M]otivations of governmental behavior are complex and often unclear to the actors themselves.").

²³⁹ *Id.* at 50 ("[F]oreign policy often 'happens' or 'grows.' Governments may act out of pique, caprice, and other irrationality, as well as thoughtlessness and bad judgment.").

²⁴⁰ *Id.* at 6. *See also id.* at 68 ("Law observance is usually the rational policy, but nations do not always act rationally. . . . [G]overnments do not always act deliberately on the basis of a careful calculus of cost and advantage.").

²⁴¹ *Id.* at 9.

²⁴² Schachter, *supra* note 105, at 117-18. *See also* JOYNER, *supra* note 27, at 166-67.

²⁴³ DE VISSCHER, *supra* note 27, at 95. *See also* Fried, *supra* note 101, at 130 ("Experience shows that the most flagrant breaches of the rules will usually be accompanied by particularly self-righteous professions of adherence to them.").

Even Adolf Hitler, notes Louis Henkin, “pretended that he was acting consistently with Germany’s international obligations at the time of his most terrible violations.”²⁴⁴ Accordingly, it is very difficult to know the true motives behind state action, as talk does not always equal intent.

Realists assert that this talk is mere propaganda, intended to avoid the unpopularity of the naked pursuit of power among western political constituencies.²⁴⁵ Legal and moral rhetoric, realists argue, are pretexts self-serving behavior intended to accumulate power.²⁴⁶ While policymakers speak the language of internationalism and political morality in public, behind closed doors, they “speak mostly the language of power, not that of principle.”²⁴⁷ When legal arguments are made, they are used to justify a position made on the basis of the pursuit of power, “so that official action will seem legally defensible, especially in the eyes of domestic public opinion.”²⁴⁸ Ethical principles, even if invoked in public, have “no operational function save as devices to rationalize the quest for aggrandizement . . . and thus to persuade the gullible that the dictates of [*r*]ealpolitik are equivalent to the injunctions of morality.”²⁴⁹

Transnationalists dismiss these arguments on grounds that states feel the need to rationalize their behavior in the language of legalism because those norms maintain some force of compliance. Even though those rationalizations may be primarily intended to advance a self-serving course of action, the fact that governments feel they have to legally justify their behavior betrays the importance of the norms they are attempting to violate.²⁵⁰ While lip-service to international norms does not amount to

²⁴⁴ HENKIN, *supra* note 18, at 45.

²⁴⁵ See MEARSHEIMER, *supra* note 6, at 25-27.

²⁴⁶ GOLDSMITH & POSNER, *supra* note 51, at 170.

²⁴⁷ MEARSHEIMER, *supra* note 6, at 25. Mearsheimer thinks American foreign policy has usually been guided by realist values, “although the public pronouncements of its leaders might lead one to think otherwise.” *Id.* at 26.

²⁴⁸ Falk, *supra* note 223, at 481.

²⁴⁹ Schuman, *supra* note 39, at 32. See also Falk, *supra* note 223, at 481 (“The role of international law has in [the international use of force] been restricted to one of rationalization, and there is little indication that the existence of international law has had much bearing on the execution of the various phases of foreign policy.”). See also MORGENTHAU, *supra* note 41, quoted in INTERNATIONAL RULES, *supra* note 4, at 96 (“Governments . . . are always anxious to shake off the restraining influence which international law might have upon their international policies, to use international law instead for the promotion of their national interests, and to evade legal obligations which might be harmful to them. They have used the imprecision of international law as a ready-made tool for furthering their ends. They have done so by advancing unsupported claims to legal rights and by distorting the meaning of generally recognized rules.”).

²⁵⁰ Schachter, *supra* note 105, at 123 (“Though such legal justification may merely rationalize a decision made for reasons of interest or power, the felt need of governments to advance a legal argument is itself a fact of some consequence. The

respect for “rule governed” conduct, it demonstrates that states are aware that the illicit use of force is not without costs.²⁵¹ According to Louis Henkin, “Even when a nation hypocritically invokes international law as a cover for self-interested diplomacy . . . it is significant that it feels the need to pay this homage to virtue.”²⁵²

Further compounding the difficulty of distinguishing true respect for international legal norms from self-serving pursuit of power is the fact that for less powerful states, the two aims may dictate the same course of conduct. For example, in *Of Paradise and Power*, a study of the growing variances in “strategic culture” between the United States and Europe, Robert Kagan argues that Europe is becoming more transnationalist, withdrawing into a “self-contained world of laws and rules and transnational negotiation and cooperation.”²⁵³ In this ordered society, European states achieve their international ends through a “nuanced and sophisticated” combination of subtlety, negotiation, diplomacy, and persuasion.²⁵⁴ They are quicker to appeal to international law, international conventions, and international opinion to adjudicate disputes than their American cousins, who often employ strategies of coercion.²⁵⁵ The difference is not due to a greater European respect for international law, but rather the relative power of these nations, as commerce, international law, diplomacy, and persuasion are the tools of weaker, smaller nations.²⁵⁶ As European military strength and hard power has declined in the latter half of the 20th century, Europeans have worked to create a legalistic international order where their military deficiencies matter less

fact that their legal arguments may be rationalizations does not mean they are without influence”).

²⁵¹ *Id.*

²⁵² HENKIN, *supra* note 18, at 45.

²⁵³ ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* 3-5 (2003). See also Franck, *supra* note 3, at 90 (noting that American realists’ attempts to “unmask the law’s fecklessness . . . finds virtually no echo among legal scholars outside the United States”).

²⁵⁴ KAGAN, *supra* note 253, at 5.

²⁵⁵ *Id.* at 5. Despite Kagan’s dismissal of Europeans as multilateralists, several European states remain avowedly realist in their response to certain issues. France, for example, has been very assertive in intervening in former colonies in Africa and the Caribbean—most recently, in Haiti and the Ivory Coast, and has threatened nuclear retaliation in the event of a terrorist attack. See generally France ‘Would use Nuclear Arms’, BBC NEWS, Jan. 19, 2006, <http://news.bbc.co.uk/1/hi/world/europe/4627862.stm>; Henri Astier, *France’s Watchful Eye on Ivory Coast*, BBC NEWS, Feb. 27, 2003, <http://news.bbc.co.uk/1/hi/world/africa/2275828.stm>; *Ivorian Leader Hits Out at France*, BBC NEWS NOV. 14, 2004, <http://news.bbc.co.uk/1/hi/world/africa/4011203.stm>; *French Consider Haiti Peace Force*, BBC NEWS, Feb. 17, 2004, <http://news.bbc.co.uk/1/hi/world/europe/3496011.stm>; *World Moves to Stem Haiti Crisis*, BBC NEWS, Feb. 26, 2004, <http://news.bbc.co.uk/1/hi/world/americas/3488082.stm>.

²⁵⁶ KAGAN, *supra* note 253, at 10-11.

than their growing economic and soft power.²⁵⁷ As the Europeans cannot conduct unilateral military operations, they use their influence on the UN Security Council as a substitute for the power they lack.²⁵⁸ In working with the UN to prohibit unilateral uses of force, the Europeans are merely compensating for their weakness by preventing the US from doing what they cannot.²⁵⁹ From Kagan's perspective, the Europeans—while justifying their actions under transnationalism—are driven by realist motives. In any anarchic world, the less powerful fear that they will be victims and seek the order and stability that come with a predictable, transparent international system regulated by accepted rules.²⁶⁰ In defending these rules, the Europeans “secure the conditions of their own continued existence” and gain leverage over stronger powers.²⁶¹

In contrast, Kagan argues, powerful nations employ force and the threat of force to achieve their goals, and often fear rules that constrain their options more than they do anarchy and violence.²⁶² For example, when European states were powerful during the late 19th and early 20th centuries, they employed power-based approaches to international relations, and were ardent nationalists and practitioners of *realpolitik* that often promoted their national ends through military means.²⁶³ On the other side of the Atlantic, US statesmen—with much less “hard power” to rely on, favored commerce and international law over brute force.²⁶⁴ According to Kagan, the US's “unipolar moment” came with the collapse of the USSR.²⁶⁵ With the dissolution of the Soviet counterweight, the US became free to protect its national interests through force, and did so in places such as Panama, Kuwait, Somalia, Haiti, Bosnia, and Kosovo.²⁶⁶ Because it has the ability to project military power to protect its interest,

²⁵⁷ *Id.* at 37. See also *id.* at 18 (noting Europe's strategic dependence on the US since the end of the Second World War).

²⁵⁸ *Id.* at 40. Europeans want to wield power by constraining the US through the United Nations Security Council; “they want to control the behemoth by appealing to its conscience.” *Id.* at 41.

²⁵⁹ *Id.* at 38.

²⁶⁰ Kocs, *supra* note 35, at 540; KAGAN, *supra* note 253, at 38.

²⁶¹ Kocs, *supra* note 35, at 540. See also NYE, *supra* note 26, at 158 (“It is no wonder that France prefers a multipolar and multilateral world, and less developed countries see multilateralism as in their interests, because it gives them some leverage on the United States.”).

²⁶² See generally KAGAN, *supra* note 253, at 11, 38.

²⁶³ *Id.* at 8-9.

²⁶⁴ *Id.* See also Glennon, *supra* note 216, at 29-30 (noting that in the 19th century, the United Kingdom, which maintained the strongest navy in the world, opposed limitations on the use of force to execute naval blockades, while the US and other weaker states supported the limitations).

²⁶⁵ KAGAN, *supra* note 253, at 26.

²⁶⁶ *Id.*, at 26-27.

the US has developed a problem-solving mentality, fixing problems through force or the threat of force because, in effect, it can.²⁶⁷

V. RECONCILING TRANSNATIONALISM AND REALISM IN PRACTICE

Examination of the theoretical basis of both transnationalism and realism suggests that there is theoretical room for both, primarily because of uncertainty over the true motives that cause states to choose either compliance or non-compliance with international law. On a practical level, the two doctrines are not mutually exclusive because of fractures between different issue groups in international relations. There is little connection between international economic relations and military-security issues; states are increasingly willing to comply with international law on the former, while the authority of international law in the latter appears to be on the decline. Nowhere is this split more evident than in the behavior of the United States, the largest force behind the increasing legalism of international trade and investment but also the most ardent challenger of international legal rules justifying the use of force.

Transnationalists' assertion that cooperation is the defining characteristic of international relations seems borne out by developments in interstate economic relations over the course of the last fifty years. Since the creation of the Bretton Woods system in 1947, a "general proclivity towards international law among powerful states" in regards to international trade and finance has been the norm.²⁶⁸ What started as a loose framework of regulatory instructions has since evolved into a highly ordered system that encourages and protects the complex economic interactions that make up the world today. International organizations such as the General Agreement on Tariffs and Trade (GATT) evolved from "skeletal institutional arrangements" into broader and stronger international regimes such as the World Trade Organization (WTO) that have accelerated global economic growth and prosperity.²⁶⁹ These institutions, while reducing barriers to international trade, limiting the influence of

²⁶⁷ *Id.* at 32-33.

²⁶⁸ Krisch, *supra* note 171, at 383.

²⁶⁹ See Barton & Carter, *International Law and Institutions for a New Age*, 81 GEO. L.J. 535 (1993), reprinted in BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 17 (3d ed. 1999). See generally John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 514-15 (2000) ("Since 1947, the General Agreement on Tariffs and Trade (GATT) has served as a framework for several global negotiating 'rounds' in which signatories have agreed to substantial reciprocal tariff reductions."). Under the GATT, average world tariffs have declined from approximately 40% in 1947 to less than 5% in the early 1990's. *Id.* at 516. See also Chen, *supra* note 73, at 246 (citing A.T. Kearney, Inc., Global Business Policy Council, *Globalization Ledger*, at 8 (estimating that economic growth associated with globalization during the 1980's lifted 1.4 billion people out of absolute poverty)).

national protectionism and bolstering global economic growth have also received “an unequivocal mandate to keep the peace.”²⁷⁰ To make the most of this mandate, organizations such as the WTO have developed “a logic and a life of their own,”²⁷¹ slowly imposing constraints on the economic policy options available to their member states.²⁷²

No single country has been a larger force behind legalization of international trade and investment than the United States. Since the drafting of the Atlantic Charter in 1941, the US has been a tireless advocate for international economic liberalization and the rule of law in governing those interactions. The US views free trade as the best method by which to “promote prosperity, the rule of law and liberty,”²⁷³ and trade expansionist policies have grown to constitute the “heart of US engagement with international law.”²⁷⁴ As the nation with the most overseas investments, the United States has supported the international free trade rules needed to create the stability and certainty that favors American investors and protects their intellectual property rights.²⁷⁵ The US helped forge multilateral institutions such as the WTO and North American Free Trade Agreement (NAFTA), and pushed for similar rules in other areas of the world, such as Central and South America.²⁷⁶ Most importantly, the US has willingly agreed to tighten international regulatory controls on international trade and investment in the context of the WTO, and has accepted the authority of international judicial mechanisms to resolve disputes within that framework.²⁷⁷

²⁷⁰ Chen, *supra* note 73, at 227-30.

²⁷¹ SANDS, *supra* note 63, at xvii.

²⁷² See also Moshe Hirsch, *Compliance with International Norms in the Age of Globalization: Two Theoretical Perspectives*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION* 166, 169 (Eyal Benvenisti & Moshe Hirsch eds., 2004). See generally McGinnis & Movsesian, *supra* note 269, at 514-15. The WTO’s Ministerial Conference and its General Council both have the authority to adopt binding interpretations of multilateral agreements upon a three-fourths vote. See *id.* at 533.

²⁷³ SANDS, *supra* note 63, at 97 (quoting Robert Zoellick, United States Trade Representative, Address at the National Press Club, Washington D.C. (Oct. 1, 2002)).

²⁷⁴ Krisch, *supra* note 171, at 384.

²⁷⁵ See SANDS, *supra* note 63 at 119.

²⁷⁶ *Id.* at 21. See also Krisch, *supra* note 171, at 384.

²⁷⁷ See SANDS, *supra* note 63, at 21. Under the WTO, disputes are handled under the Dispute Settlement Understanding (DSU), a non-binding panel of experts that issues recommendations as to the disagreement between the WTO member states affected. See McGinnis & Movsesian, *supra* note 269, at 531. Appeals are directed to a seven member appellate body that is “broadly representative” of the makeup of the WTO. *Id.* Evidence of realist, self-serving pursuit of national interests is not absent from international economics and trade, however. International trade scholars such as Raj Bhala point out that the United States retains a “statutory arsenal of unilateral trade weapons” and refuses to forswear “implicit or overt threats of unilateral trade action”—often to further its national security interests. See Raj Bhala, *Hegelian*

While it has played a major role in developing the international economic order, the United States has historically been skeptical of international constraints on its military and security options, such as the use of force.²⁷⁸ Disputes over the international role in authorizing the War in Iraq have brought into direct conflict transnationalists' views on the moral obligations of international law with realists' skepticism of legal constraints on the use of military force. Since then, accusations and counter-accusations of arrogance and naiveté have flown between the two sides, with US realists arguing that the pursuit of American interests will not be restrained by the irrelevant "debating society" of the United Nations, and transnationalists countering that US attempts to push its influence at the expense of international organizations was a manifestation of its "unilateralism, arrogance, and parochialism."²⁷⁹

At the heart of the debate was compliance with one of the central tenets of modern international law: the prohibition on the use of force

Reflections on Unilateral Action in the World Trading System, 15 BERKELEY J. INT'L L. 159, 160, 191-92 (1997). As a primary example, Bhala cites § 301 of The Trade Act of 1974, 19 U.S.C. § 2411 (2006), authorizing the US Trade Representative to take retaliatory action in response to trading activity that is unfairly prejudiced against the United States. *Id.* at 160. The U.S. Trade Act of 1974 establishes that "If the United States Trade Representative determines under section 2414(a)(1) of this title that— (A) the rights of the United States under any trade agreement are being denied; or (B) an act, policy, or practice of a foreign country— (i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or (ii) is unjustifiable and burdens or restricts United States commerce; the Trade Representative shall take action authorized in subsection (c) of this section, subject to the specific direction, if any, of the President regarding any such action, and shall take all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to enforce such rights or to obtain the elimination of such act, policy, or practice. Actions may be taken that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the foreign country."

19 U.S.C. § 2411(a)(1) (2006). *See also* Krisch, *supra* note 171, at 388-90 (highlighting US attempts to slant its international economic obligations to its favor through a preference for bilateral, vice multilateral, agreements). The US has acceded to only 60% of the multilateral treaties deposited with the UN since 1945, compared to 93% for other members of the G-8. *Id.* Krisch argues that this preference may reflect the US's ability to exploit power imbalances in bilateral negotiations, resulting in terms that are more favorable than it could obtain in multilateral negotiations where smaller states can band together. *Id.*

²⁷⁸ *See generally* Franck, *supra* note 3, at 89 ("As for the leaders of the executive branch, it appears to be common intuition that international law is to be seen as an anomaly, a myth propagated by weak states to prevent the strong from maximizing their power advantage.")

²⁷⁹ NYE, *supra* note 26, at xii.

except in self-defense as enshrined in articles 2(4)²⁸⁰ and 51²⁸¹ of the UN Charter. The framers of the Charter, working in the shadow of the Second World War, believed that armed force was too dangerous to be allowed as a means for political or territorial changes. In limiting the use of force to self-defense, the drafters sought to bring within the realm of law “those ultimate political tensions and interests that had long been deemed beyond control by law.”²⁸² Since then, transnationalists assert, this core precept of international law has been repeatedly affirmed in international law, and an understanding that war is not acceptable has taken hold among the nations of the world.²⁸³ Transnationalists point to the codification of these principles in a host of international treaties and judicial rulings—including the Protocols Additional to the Geneva Conventions,²⁸⁴ the Rome Treaty of the International Criminal Court,²⁸⁵ the International Criminal Tribunals for Yugoslavia and Rwanda,²⁸⁶ and the International Court of Justice’s findings in *Nicaragua v. United States*²⁸⁷ and in *Legality of the Threat or Use of Nuclear Weapons*²⁸⁸—as evidence that states accept that international law imposes limits on their recourse to force.

²⁸⁰ “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.” U.N. Charter art. 2, para. 4.

²⁸¹ “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.” *Id.* at art. 51.

²⁸² HENKIN, *supra* note 18, at 137.

²⁸³ *Id.* at 139. *See also id.* at 148-49.

²⁸⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 1949 (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

²⁸⁵ The Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998).

²⁸⁶ Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res 827, U.N. GAOR, 48th Sess., 3217th mtg., U.N. Doc. S/Res/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994).

²⁸⁷ Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 1 (June 27).

²⁸⁸ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

In contrast, this “most political of norms”²⁸⁹ against the use of force in international relations has been the target of realists’ ire since its inception, who assert that the proliferation of conflicts across the globe since the end of the Second World War demonstrates that states pay only lip-service to supposed legal restraints on their military options. Many of the legal instruments purporting to regulate the use of force, realists argue, are limited by either political considerations or the non-participation of powerful states.²⁹⁰ Decades of political maneuverings and self-serving rationalizations have stretched the notion of self-defense beyond any reasonable degree of enforceability. As noted by one observer, “[W]hat was supposed to be an exception not much larger than a needle’s eye has become a loophole through which armies have passed.”²⁹¹

The battle lines for a debate on the binding power of international law between the United States and the international community were evident even before the September 11 attacks. Many senior policymakers in the new Bush administration betrayed their skepticism of international law and their belief that international institutions were merely venues for smaller nations to restrain the United States like “Gulliver among the Lilliputians.”²⁹² For example, during the 2000 Presidential campaign, future National Security Advisor and Secretary of State Condoleezza Rice—an avowed realist—stated that the US should “proceed from the firm ground of the national interest and not from the interest of an illusory international community.”²⁹³ Future UN Ambassador John Bolton made similar comments in 1994, stating:

It is a big mistake for us to grant any validity to international law even when it may seem in our short-term interest to do so—because, over the long term, the goal of those who think that international law really means anything are those who want to constrict the United States.²⁹⁴

²⁸⁹ HENKIN, *supra* note 18, at 137.

²⁹⁰ The ICTY and ICTR were judicial bodies with jurisdiction only over the conflicts in Rwanda and the former Yugoslavia. See Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc.S/Res/827 (1993), and Statute of the International Criminal Tribunal for Rwanda, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994). The 1977 Protocols Additional to the Geneva Convention were not ratified by several major states, including the United States. The US has also expressed its intent to not be bound by the Rome Treaty of the ICC, and has not conceded to the ruling of the ICJ in *Nicaragua v. US*. See SANDS, *supra* note 63, at 14, 48-49.

²⁹¹ Hoffman, *supra* note 107, at 44-45.

²⁹² See NYE, *supra* note 27, at 158.

²⁹³ *Id.* at 137.

²⁹⁴ Ambassador John Bolton, *quoted in* Samantha Power, *Boltonism*, NEW YORKER, March 21, 2005, available at http://www.newyorker.com/archive/2005/03/21/050321ta_talk_power.

Instead, US policymakers emphasized the importance of state sovereignty as the “bedrock” of the international system, and evinced a willingness to be bound by international accords “only so far as they suit America, which is prepared to conduct policy outside their constraints.”²⁹⁵

One of the primary expressions of this unwillingness to be bound could be seen in the Bush Administration’s adoption of the doctrine of preemption. In its 2002 national security strategy, the US asserted a right to prevent its enemies from striking first: “To forestall or prevent . . . hostile acts by our adversaries, the United States will, if necessary, act preemptively.”²⁹⁶ Although there is great debate on the legality of pre-emptive force as a policy tool, this shift in strategy caused many European allies to voice concern about the US “assumption that a conflict between the pursuit of national interests and commitment to the interests of a far-from-illusory international community.”²⁹⁷

It was against the background of this pre-existing tension that the UN Security Council showdown over Iraq occurred. In justifying the need for the use of armed force against Saddam’s regime, British and American diplomats argued that Iraq was in “material breach” of the conditions of the ceasefire imposed by UN Security Council Resolution (UNSCR) 687 in 1991. Implicit in the arguments of London and Washington was the belief that the Security Council should allow wide latitude to states in order to fill the vacuum of that body’s inability to act.²⁹⁸ In a speech before the UN General Assembly, President George W. Bush challenged the UN to take action against Baghdad for failing to disarm. He warned that “[i]f the United Nations doesn’t have the will or the courage to disarm Saddam Hussein . . . the United States will lead a Coalition to disarm [him].”²⁹⁹

After eight weeks of debate, the UN Security Council responded to Bush’s challenge on November 7, 2002, by unanimously adopting UNSCR 1441, finding Iraq in material breach of its obligations, and warn-

²⁹⁵ David B. Rivkin Jr. & Lee A. Casey, *The Rocky Shoals of International Law*, THE NAT’L INTEREST, Winter 2000, at 42, *quoted in* NYE, *supra* note 26, at 155 (“[T]he United States should strongly espouse national sovereignty, the bedrock upon which democracy and self-government are built, as the fundamental organizing principle of the international system.”). *See also* *Working Out the World*, THE ECONOMIST, March 31, 2001, at 24, *quoted in* NYE, *supra* note 26, at 156 (defining “parallel unilateralism” as “a willingness to go along with international accords, but only so far as they suit America, which is prepared to conduct policy outside their constraints”).

²⁹⁶ OFFICE OF THE PRESIDENT OF THE UNITED STATES, UNITED STATES NATIONAL SECURITY STRATEGY 15 (September 2002), *available at* <http://www.whitehouse.gov/nsc/nss.pdf>.

²⁹⁷ Peter Ludlow, *Wanted: A Global Partner*, THE WASH. Q., Summer 2001, at 167.

²⁹⁸ Paulus, *supra* note 217, at 701.

²⁹⁹ Glennon, *supra* note 216, at 17.

ing of “serious consequences” if it did not disarm.³⁰⁰ The resolution did not explicitly approve or deny the use of force, however, and it soon became clear that there were a wide variety of interpretations as to the resolution’s meaning and significance. French, Chinese, and Russian diplomats said the instrument did not authorize the use of force against Iraq, while US legal advisors argued that the finding of a material breach made the unilateral use of force lawful.³⁰¹ The UK sought for several weeks to obtain a second resolution that clarified the situation by acknowledging Iraq had not met its final opportunity to comply.³⁰² However, in early March 2003, France, China, and Russia announced that they would block any subsequent resolution to authorize the use of force against Saddam, and US and British troops started their offensive against Iraq two weeks later.³⁰³

Some five years later, realists and transnationalists still disagree on the legal and ideological consequences of the war. There is a general consensus that, at a minimum, the Iraq war constituted a severe setback for attempts to regulate the use of force through international law.³⁰⁴ But realists argue that the failure of article 51 of the UN Charter was long in the making. By erroneously assuming the sovereign equality of states, realists argue, the UN system failed to compensate for growing disparities in power between its members.³⁰⁵ American unipolarity after the collapse of the Soviet Union eroded the Council’s credibility and reduced it to a forum in which other states attempted to limit the power of the US.³⁰⁶ Without a balance of power between member states, the UN system was doomed to fail.³⁰⁷ The “grand attempt to subject the use of force to the rule of law” had finally collapsed, not due to a unilateral use of force in defiance of the Security Council, but rather as a result of cumulative geopolitical forces too strong for the legalist structure of the UN to withstand.³⁰⁸ Law cannot persist if the ground beneath it has changed,

³⁰⁰ S.C. Res. 144, U.N. SCOR, 57th Sess. 4644th mtg., at p. 13, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

³⁰¹ Paulus, *supra* note 217, at 697; SANDS, *supra* note 63, at 188-89.

³⁰² SANDS, *supra* note 63, at 185-87.

³⁰³ Glennon, *supra* note 216, at 17-18.

³⁰⁴ Paulus, *supra* note 217, at 714.

³⁰⁵ Glennon, *supra* note 216, at 32-33.

³⁰⁶ *Id.* at 18-19, 26.

³⁰⁷ *See id.* at 30 (“Any system with one ‘hyperpower’ will have great difficulty maintaining or establishing an authentic rule of law.”). *See also* Hans Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT’L L. 260, 275 (1940) (“Where there is neither community of interests nor balance of power, there is no international law.”).

³⁰⁸ Glennon, *supra* note 216, at 16.

rebus sic stantibus,³⁰⁹ and the UN system was the victim of a shift in world power towards US supremacy that was “simply incompatible with the way [it] was meant to function.”³¹⁰

Realist arguments that the UN Security Council had become merely a forum for states to attempt to constrain the US are bolstered by statements of officials from states that opposed the war.³¹¹ These statements make very clear that European legal arguments against the war were based, at least in part, on realist principles, using the pretext of international compliance with the UN Security Council as a check against the United States. The French were the most outspoken. Pierre Lellouche, a senior foreign policy advisor to President Jacques Chirac, left no doubt that, in working to strengthen the role and authority of the UN Security Council, Paris hoped to establish “a multipolar world in which Europe is the counterweight to American political and military power.”³¹² President Chirac himself was quoted as saying that “any community with only one dominant power is always a dangerous one and provokes reactions.”³¹³ Chirac’s former Foreign Minister, Hubert Vedrine, stated that “We cannot accept a . . . politically unipolar world . . . [T]hat is why we are fighting for a multipolar one.”³¹⁴ The German government, while more muted, voiced similar intentions. Former German Chancellor Helmut Schmidt stated, “I do not feel obliged to other governments . . . [Germany and France] share a common interest in not delivering ourselves into the hegemony of our mighty ally, the United States.”³¹⁵

Many transnationalists have regretfully concluded that the idea of the rule of law in restraining the use of force is waning.³¹⁶ For example, Thomas Franck feared that the pre-war decision-making crisis in the UN doomed the potential for legal controls on the use of force in the future. If the US recourse to force was merely an act of legitimate self-defense by the Coalition, Franck reasons, it would verify the strength of the article 2(4) system, the right of self-defense, and the authority of the UN Security Council to authorize collective action under Chapter VII of the UN

³⁰⁹ “The principle that all agreements are concluded with the implied condition that they are binding only as long as there are no major changes in the circumstances.” BLACK’S LAW DICTIONARY (8th ed. 2004).

³¹⁰ Glennon, *supra* note 216, at 18.

³¹¹ See also *id.* at 28 (noting similar views held by former President of the American Society of International Law Anne-Marie Slaughter, who argues that United States should remain engaged in the United Nations because other nations “need a forum . . . in which to . . . restrain the United States”).

³¹² *Id.* at 19.

³¹³ *Id.*

³¹⁴ *Id.* In a separate statement, Vedrine stated that France has to “keep defending our vital interests just as before; we can say no, alone, to anything that may be unacceptable.” *Id.* at 25.

³¹⁵ *Id.* at 19, 20.

³¹⁶ Paulus, *supra* note 217, at 693.

Charter.³¹⁷ Instead, he argues, the US bypass of the Security Council was a result of American fears of subordinating their sovereignty to others, particularly within a system that gives other states power and influence far in excess of their actual status.³¹⁸ While disputing that states such as France and Germany, who opposed the war, were merely “power-jealous,” Franck notes that an overwhelming majority of nations believed that either Iraq did not have a significant quantity of weapons of mass destruction, or that they posed no credible threat to other nations.³¹⁹ The crux of the matter was not who was right or wrong in the factual determinations, but how the decision to go to war was made.³²⁰ In this regard, unilateral action by the US and UK brought down the mechanism for collective decision-making.³²¹ “[A]fter a decade’s romance with something approximating law-abiding state behavior,” Franck despairs, “the law-based system is once again being dismantled. In its place we are offered a model that makes global security wholly dependent on the supreme power and discretion of the United States.”³²²

In contrast, other scholars, such as prominent German philosopher and social theorist Jürgen Habermas, have noted that the victim of the war in Iraq is not international law, but the acceptance of normative values within the international community, particularly the moral capital previously held by United States. In subverting the UN, the US lost the persuasive power of the ideas on which its power had rested, as much as it had on its economic and military strength.³²³ Other scholars such as Andreas Paulus have voiced some hope that the UN system is not completely dead, as its prime repudiator, the United States, continues to work within its framework. Even while Operation Iraqi Freedom was raging, the US was litigating in the International Court of Justice against Iran, and later negotiated for a UN resolution authorizing the occupation of Iraq. While its system of restraint appears gravely wounded, Paulus insists that the UN is unique in affording the legitimacy of action that the

³¹⁷ Franck, *supra* note 76, at 607, 610.

³¹⁸ *Id.* at 615.

³¹⁹ *Id.* at 616.

³²⁰ *Id.*

³²¹ *See id.*

³²² *Id.* at 608. Franck notes that ten years earlier, he said, “It seems this is not an age when men act by principles simply because that is what gentlemen ought to do. But living by power alone . . . is a nerve-wracking and costly business.” *Id.* at 607 (citing Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT’L L. 809, 836 (1970)). Strangely, in a later publication, Franck reverses himself, arguing that the international legal system is viable but warning that criticisms of its impotency by realists are “a self-fulfilling prophecy.” *See* Franck, *supra* note 3, at 90 (“When a community loses faith in law’s power to restrain and channel conduct, this perception propels the descent into anarchy.”).

³²³ Paulus, *supra* note 217, at 692.

US alone cannot provide.³²⁴ While power politics may interfere with its operation, international law remains the “only avenue towards a peaceful and just international order.”³²⁵

VI. CONCLUSION: A HYBRID INTERNATIONAL SYSTEM?

In sum, there is room for both transnationalism and realism in the scope of international law. This is due in part to a lack of clarity on the true motives behind state behavior, which has allowed scholars, academics and policymakers room to interpret states' actions in accordance with their own theoretical paradigms. In a practical sense, however, the ability of states to act simultaneously in both realist and transnationalist fashions stems from increasing divisions between daily diplomatic and economic transactions and more crucial but less frequent military-security issues. Henkin's dictum that most states obey international law most of the time does not preclude realist power politics or confirm the existence of a transnational order; instead, it reflects states' apparent acceptance that *realpolitik* is inevitable in a limited number of fields, while regulated, orderly international behavior is required in others.

Transnationalism is most successful in explaining the growth of global economic interdependence and the willingness of many states to tie themselves into international institutions or comply with customary norms of international behavior. Whether due to conceptions of moral obligation, acceptance of customary bounds of state behavior, belief that rules are legitimate, or the bureaucratic habit or inertia of continued compliance, a growing number of states seem willing to be bound in their daily economic and commercial interactions by systems of international norms, laws, and institutions. There is every indication that the long-term benefits offered by these arrangements, and increasing public expectations of the benefits of those relations, may further institutionalize rule-based economic interactions in the coming years.

Transnationalism falls flat, however, in explaining why states behave in contradiction of law. Even respectable states compete for power and security, employ violence and the threat of violence to achieve their ends, disrespect or violate accepted international norms, and pursue strategic ends such as the acquisition of nuclear weapons in direct violation of their treaty obligations. It is in this military-security spectrum that realism is most predictive, defining the international system as an anarchical forum in which individual states compete to secure and maintain power and security against rivals and aggressors. While instances of selfish pursuit of national interests may occur less frequently than decades of law-abiding

³²⁴ *Id.* at 718.

³²⁵ *Id.* at 695.

daily interactions, when supreme interests of national security clash with international law, most frequently it is the law that bows.³²⁶

Nowhere is the separation between the transnationalist-economic and realist-security spheres of international relations more evident than in the 2003 controversy over the use of force in Iraq. In the months preceding the war, the United States and Britain—two nations with a long history of promoting international law, particularly in the areas of trade and commerce—employed military force without the explicit authorization of the UN Security Council. In so doing, they challenged international restrictions on the use of force, and potentially even the collective-security framework of the United Nations. Meanwhile, the states that rallied to the defense of those norms seemed more motivated by their geopolitical strategic ambitions than by a genuine concern for the rule of law. Scholars and policymakers still debate whether these actions were a death blow to legal efforts to regulate international military-security issues. Despite this major disruption, there is little evidence that the economic sphere suffered as a result. Economic ties and relations between states on opposite sides of this conflict continued as before; trade arrangements were maintained, boundaries were honored, and diplomatic protections continued. The apparent divisions between economics and security affairs, while not impenetrable, were high enough in 2003 that even a major dispute over the role of law in restraining the use of force did not disrupt them.

It is impossible to say whether, as transnationalists suggest, this hybrid system is an indication that the world is in a transitional stage between 19th century *realpolitik* and a future Kantian international order. Certainly the next few years may be determinative of the role of international law in security-military issues for decades to come—the policies of a new US administration, the continuance of the “war on terror,” a potential nuclear showdown with Iran or North Korea—all hold historic opportunities to either reinforce or repudiate international norms and institutions. In the meantime, it seems prudent to suggest that we can neither completely adopt nor dismiss transnationalism or realism as explanative doctrines in international relations. These two doctrines can be reconciled not because their tenets are complementary—but instead because their two worlds seem to co-exist in the course of daily affairs.

³²⁶ Hoffman, *supra* note 107, at 47 (“In a clash between inadequate law and supreme political interests, law bows—and lawyers are reduced to serve either as a chorus of lamenters with fists raised at the sky and state or as a clique of national justifiers in the most sophisticatedly subservient or sinuous fashion.”).