

# International Law in a World of Liberal States

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International law and international politics cohabit the same conceptual space. Together they comprise the rules and the reality of 'the international system', an intellectual construct that lawyers, political scientists, and policymakers use to describe the world they study and seek to manipulate. As a distinguished group of international lawyers and a growing number of political scientists have recognized, it makes little sense to study one without the other.

In keeping with this tradition, this article seeks to develop an integrated theory of international law and international relations. Previous efforts in this vein fall into several categories. Myres McDougal and Harold Lasswell, progenitors of the New Haven school, used a theory of domestic politics and domestic law to rethink the nature and definition of international law. The international legal process school, pioneered by scholars such as Abram Chayes and Louis Henkin, sought to explore and take account of the actual impact of international legal rules on international political processes, from crises to routine decision-making. The task was to determine to what extent law shapes 'how nations behave'.<sup>1</sup>

Both of these approaches were developed in response to ongoing work in political science. The young discipline of international relations surged to respectability on the tide of Realism, proffering a hard-boiled code of conduct for the Cold War and disdaining the dangerous moralism of international law. International lawyers thus faced the 'Realist challenge': the claim that law was simply irrelevant to international politics. McDougal and his disciples offered a theoretical response; international legal process scholars sought to establish more

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1 For an overview of these earlier efforts to integrate international law and international relations, see Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda', 87 *AJIL* (1993) 205.

empirical connections between international legal rules and foreign policy decision-making.

A third approach – the one pursued here – turns back to the discipline of international relations itself for inspiration. It takes the ‘law in context’ injunction seriously and acknowledges the capacity of many international lawyers for nuanced political analysis. Nevertheless, instead of canvassing the political dimensions of various international legal problems, it looks first to the discipline charged with thinking and theorizing systematically about State behaviour in the international system. Neither law nor politics may be a science, but international relations theorists have a comparative advantage in formulating generalizable hypotheses about State behaviour and in conceptualizing the basic architecture of the international system.

This approach would look first to the congruence between the image or model of the international system that implicitly or explicitly informs international law and the models used by international relations theorists. As political scientists, these scholars are concerned with the empirical validation of these models. Who are the primary actors in the international system? What are the primary determinants of their behaviour? To the extent that the resulting evidence disconfirms assumptions embedded in the models used by international lawyers, international law and international politics will become increasingly divorced. If, for instance, the primary actors in the system are not States, but individuals and groups represented by State governments, and international law regulates States without regard for such individual and group activity, international legal rules will become increasingly irrelevant to State behaviour.

The inquiry in this essay thus begins not with classical international law, but with the dominant positive analytical framework shared by both international lawyers and political scientists – Realism. Part I outlines the basic tenets of Realism and introduces the principal alternative to Realism in international relations scholarship – Liberalism. Liberalism and Realism proceed from different fundamental assumptions about the international system: assumptions about the identity of the primary actors in that system, the relationship of those actors to State institutions, and the primary determinants of State relations with one another. International lawyers seeking to develop integrated theories of international law and international relations must take the Liberal critique seriously, examining the ways in which Liberal assumptions conflict with assumptions underlying traditional international law.

The most distinctive aspect of Liberal international relations theory is that it permits, indeed mandates, a distinction among different types of States based on their domestic political structure and ideology. In particular, a growing body of evidence highlights the distinctive quality of relations among liberal democracies, evidence collected in an effort to explain the documented empirical phenomenon that liberal democracies very rarely go to war with one another. The resulting behavioural distinctions between liberal democracies and other kinds of States, or

more generally between liberal and non-liberal States, cannot be accommodated within the framework of classical international law.

The project here, consistent with an overall commitment to a new generation of interdisciplinary scholarship, is to reimagine international law based on an acceptance of this distinction and an extrapolation of its potential implications. Part II distills various factors that political scientists have correlated with the 'liberal peace', factors that can be translated into assumptions about political and economic relations among liberal States. Part III introduces the concept of a world of liberal States, acknowledging the distance between such a world and the present international system but arguing that the hypothesis may nevertheless describe an important dimension of the current system.

Part IV constructs a model of international law based on a hypothetical world of liberal States, integrating assumptions about relations among such States with the broader assumptions of Liberal international relations theory. It focuses first on relations among individuals and groups in transnational society, hypothesizing a set of voluntary norms selected by these actors but facilitated by States. The second level of law assumes the disaggregation of the State into its component political institutions – courts, legislatures, executives and administrative agencies – and examines the principles governing transnational interactions among these institutions. The third level examines the origin, form, negotiations and enforcement of inter-State agreements among liberal States. At each level the model seeks to define the relevant body of rules and doctrines that would be included in a definition of international law in a world of liberal States, and to introduce concepts and tools of analysis specific to relations among liberal States.

The model developed is advanced as a hypothetical positive model. To the extent it holds, however, it poses a set of normative challenges for international lawyers. Part V concludes with a preliminary effort in this vein, re-examining the norm of sovereignty in a world of liberal States. A central pillar of the positive model is the conceptualization of the State as a disaggregated entity composed of its component political institutions. Could the norm of sovereignty be similarly disaggregated? The discussion in this part sketches the potential form and substantive bases for complementary norms of judicial, legislative, and executive sovereignty in a world of liberal States.

The project in this essay is a thought experiment – a largely deductive effort supplemented with inductive illustrations – designed to generate a hypothetical model of international law based on a set of assumptions about the composition and behaviour of specific States. Its ultimate value must await empirical confirmation of specific hypotheses distilled from this model. At the same time, however, the explicit articulation of this model may cast a different light on current phenomena identified as exceptions to the classical model. Christoph Schreuer, for instance, has recently proposed a new paradigm for international law. He acknowledges, however, that in articulating his proposed paradigm he draws on examples from

Western Europe, the archetypal community of liberal States.<sup>2</sup> He may thus be proposing a paradigm that assumes underlying conditions prevailing only in those States.

The very idea of a division between liberal and non-liberal States may prove distasteful to many. It is likely to recall 19th century distinctions between 'civilized' and 'uncivilized' States, rewrapped in the rhetoric of Western political values and institutions. Such distinctions summon images of an exclusive club created by the powerful to justify their dominion over the weak. Whether a liberal/non-liberal distinction is used or abused for similar purposes depends on the normative system developed to govern a world of liberal and non-liberal States. Exclusionary norms are unlikely to be effective in regulating that world.

More generally, however, these concerns raise serious questions, questions that must and will be addressed if the insights generated by hypothesizing a world of liberal States prove capable of capturing significant aspects of actual relations among liberal States. For the moment, to the extent that a distinction is empirically supported, rather than normatively proclaimed, international lawyers have an obligation at least to assess its implications. A genuine commitment to interdisciplinary scholarship – to improving the conceptual fit between international law and politics – demands no less.

## **I. Liberalism and Realism in International Relations Theory**

Scholars of international relations generate a wide range of theories to solve the problems and puzzles of State behaviour. Each 'theory' offers a causal account of a particular outcome or pattern of behaviour in inter-State relations in a form that isolates independent and dependent variables sufficiently precisely to generate testable hypotheses. At a higher level of generality, however, these theories can be grouped into different families or 'approaches' based on a set of positive assumptions about the international system as a whole.<sup>3</sup> From these very general assumptions spring a host of more specific theories seeking to explain specific international events or phenomena, from the causes of war to the dynamics of international negotiation. Each of these theories can be disputed on its own terms, on the basis of inaccurate empirical data or faulty logic. Alternatively, the entire family of theories can be challenged on the ground that the underlying assumptions about the international system are either wrong or unhelpful.

This part sets forth two of the most common approaches in international relations theory: Realism and Liberalism. Political scientists would find the versions

2 Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?', 4 *EJIL* (1993) 447, 469.

3 The nature of these assumptions privileges the relative explanatory power of broad classes of causal factors, such as the distribution of power in the international system, international institutions, national ideology and domestic political structure.

presented here overly simplified and distilled. Yet as presented, each approach gives rise to a distinct 'mental map' of the international system, specifying the principal actors within it, the preferences (or motives) driving those actors, and the constraints imposed on those actors by the nature of the system itself. The following discussion presents Realism and Liberalism in terms of their competing assumptions along these three axes.

### A. Realism

The dominant approach in international relations theory for virtually the past two millennia, from Thucydides to Machiavelli to Morgenthau, has been Realism, also known as Political Realism. Realists come in many stripes, but all typically share the following assumptions. First, they believe that States are the primary actors in the international system, rational unitary actors who are functionally identical. Second, they assume that State preferences, ranging from survival to aggrandizement, are exogenous and fixed. Third, they assume that the anarchic structure of the international system creates such a degree of either actual conflict or perceived uncertainty that States must constantly assume and prepare for the possibility of war. In this context, outcomes of State interactions are typically zero-sum and thus are determined by relative power. For Realists, power is the currency of the international system. States interact with one another within that system like billiard balls: hard, opaque, unitary actors colliding with one another.<sup>4</sup>

To grasp the defining characteristics and theoretical force of Realism, it is necessary to understand not only what it includes within its analytical framework, but also what it excludes: national ideologies, from nationalism to fascism to communism; domestic regime type, from democracies to dictatorships; and transnational actors, from multinational corporations to non-governmental organizations (NGOs). International norms serve only an instrumental purpose, and are likely to be enforced or enforceable only by a hegemon. The likelihood of positive-sum games in which all States will benefit from cooperation is relatively low.

### B. Liberalism

A principal alternative to Realism among international relations theorists is Liberalism.<sup>5</sup> As in the domestic realm, Liberal international relations theories have

4 This is the classic Realist metaphor first used by Arnold Wolfers. A. Wolfers, *Discord and Collaboration: Essays on International Politics* (1962) 19-24.

5 I use 'Liberalism' here and throughout this paper as a term of art to refer to Liberal international relations theory. As Andrew Moravcsik has argued, the elements of this theory do indeed flow out of the political theory and philosophy that we call 'liberalism'. However, the transposition of liberal analytical assumptions from the domestic to the international realm is complicated. For present purposes it makes more sense to try and understand international Liberal theory on its own terms as a self-contained alternative to Realism. See A.M. Moravcsik, *Liberalism and*

been characterized repeatedly as normative rather than positive theories. The best known Liberal theory in this category is Wilsonian 'liberal internationalism', popularly understood as a program for world democracy. As used here, however, Liberalism denotes a family of positive theories about how States do behave rather than how they should behave. Efforts to reduce Liberalism to a set of core assumptions that can be stated as succinctly as their Realist counterparts are ongoing among a growing group of contemporary political scientists.<sup>6</sup> I draw here primarily on one particular version developed by Andrew Moravcsik.<sup>7</sup>

If Realists focus on States as monolithic entities in their interaction with other States within an anarchic international system, Liberals focus primarily on State-society relations. The first Liberal assumption is that the primary actors in the international system are individuals and groups acting in domestic and transnational civil society. Thus where Realists look for concentrations of State power, Liberals focus on the ways in which interdependence encourages and allows individuals and groups to exert different pressures on national governments.<sup>8</sup> Second, Liberals assume that the 'State' interacts with these actors in a complex process of both representation and regulation. Governments are assumed to represent some subset of individual and group actors. The fact and process of representation, however, entails regulation of the activities of all social actors, both those represented and those that are not represented. Thus where Realists assume 'autonomous' national decision-makers, Liberals examine the 'nature of domestic representation ... [as] the decisive link between societal demands and state policy'.<sup>9</sup> Third, Liberals assume that the nature and intensity of State preferences, determined as the aggregation of the preferences of individual and group actors represented in a particular State, will determine the outcome of State interactions. Thus where Realists model patterns of strategic interaction based on fixed State preferences, Liberals seek first to establish the nature and strength of those preferences as a function of the interests and purposes of domestic and transnational actors.

*International Relations Theory* (Center for International Affairs, Harvard University, Working Paper No. 92-6, 1992).

6 See Moravcsik, *supra* note 5; See, e.g., Deudney, 'Binding Powers, Bound States: The Logica and Geopolitics of Negarchy', Paper presented at the International Studies Association, Washington, D.C., 28 March - 2 April 1994; Zacher, Matthew, 'Liberal International Theory: Common Threads, Divergent Strands', Paper presented at American Political Science Association, Chicago, IL, 3-6 September 1992; Keohane, 'International Liberalism Reconsidered', in J. Dunn (ed.), *The Economic Limits to Modern Politics* (1990) 155; Nye, 'Neorealism and Neoliberalism', 40 *World Politics* (1988) 235; Risse-Kappen, 'Ideas Do Not Float Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War', 48 *International Organization* (1994) 185; Powell, 'Anarchy in International Relations Theory: The Neorealist-Neoliberal Debate', 48 *International Organization* (1994) 313.

7 Moravcsik, *supra* note 5.

8 The phenomenon of 'interdependence', defined as a situation in which two or more nations each depend on the other, whether symmetrically or not, by virtue of trade and investment patterns, population flows, or even cultural and other social exchanges, can be analyzed from either a Realist or a Liberal perspective. Realists focus only on the impact of interdependence on the power differential between the nations concerned, whereas Liberals analyze it as an international social phenomenon.

9 Moravcsik, *supra* note 5, at 11.

## II. Mapping the Attributes of the Liberal Peace

Liberal international relations theory applies to *all* States. Totalitarian governments, authoritarian dictatorships, and theocracies can all be depicted as representatives of some subset of actors in domestic and transnational society, even if it is a very small or particularistic slice. The preferences of such States are likely to differ from the preferences of States with more representative governments and more diverse and complex societies, but not necessarily and not on all issues. Thus, like Realism, Liberalism is a comprehensive theory of the international system.

Notwithstanding this universal applicability, however, Liberal theory explicitly takes domestic regime-type into account in its analysis of State behaviour. If the relevant universe for scholarly analysis is State-society relations, then the scope and density of domestic and transnational society, as well as the structure of government institutions and the mode and scope of popular representation, will be key variables. These variables will be interrelated: a strong civil society, for instance, is better able to support representative government institutions. Conversely, non-representative or oppressive governmental institutions can stunt the growth of domestic and transnational civil society. By taking account of these variables, in contrast to the uniform assumptions of State identity made by Realists, Liberal theory permits more general distinctions among different categories of States based on domestic regime-type.

The best-documented empirical distinction between different types of States by scholars working within the Liberal paradigm concerns the frequency of war among liberal States, as compared to war between liberal and non-liberal States or among non-liberal States alone. Liberal States are States with some form of representative democracy, a market economy based on private property rights, and constitutional protections of civil and political rights.<sup>10</sup> These States are far less likely to go to war with one another than they are to go to war with non-liberal States, giving rise to what some scholars have termed the 'liberal peace'.<sup>11</sup> The claim is not that liberal States are more pacific by nature, only that a variety of factors converge to reduce the likelihood of military conflict between them.<sup>12</sup>

To date, the phenomenon of the liberal peace is better documented than explained. Scholars have put forth a wide range of explanations focusing on variables related to the structure of liberal government and the nature and impact of

10 This is the definition used by Michael Doyle in his pioneering work on the phenomenon of peace among liberal States. See Doyle, 'Kant, Liberal Legacies, and Foreign Affairs', 12 *Philosophy and Public Affairs* (1983) 205, 207-208 (hereinafter Doyle, 'Liberal Legacies').

11 Scholars and policymakers use both the terms 'democratic peace' and 'liberal peace'. I use the term 'liberal peace', meaning the peace among liberal States, as a more accurate description of the empirical phenomenon.

12 The strongest form of the claim is that liberal States have never fought a war with one another. Many scholars, however, defining the criteria for both liberal State and war more broadly, would say 'hardly ever'. See B. Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World* (1993) 11-23.

liberal norms.<sup>13</sup> Other researchers argue that these are not causally relevant correlations, that the likelihood of peace and liberal government *both* correlate with other factors such as a high level of economic development, a high level of economic interdependence, a particular cultural tradition, or simply the presence of a common threat.<sup>14</sup> These scholars no longer deny that the liberal peace exists as an empirical phenomenon, but they dispute any causal analysis that posits a direct relationship between liberal governments and societies and the likelihood of war. Proponents of the liberal peace counter that factors such as economic interdependence have an *additional* impact on peace and may reinforce the beneficial influence of democracy.<sup>15</sup>

For present purposes, however, the precise mapping of cause and effect does not matter. That is a job for political scientists, who must determine whether democracy leads to peace, or economic prosperity leads to democracy and to peace, or peace leads to economic development which in turn strengthens democracy. In the meantime, international lawyers can canvass the available political science literature and note the presence of a set of attributes that correlate with regard to relations among a particular subset of States. These attributes provide a basis for a more generalized distinction between liberal and non-liberal States, a distinction that is positive rather than normative.

The following list of correlative attributes includes peace, liberal democratic government, a dense network of transnational transactions by social and economic actors; 'multiple channels' of communication and action that are both transnational and transgovernmental rather than formally inter-State; and a blurring of the distinction between domestic and foreign issues. From both a Realist and a classical international legal perspective, it is jarring to mix descriptions of the domestic characteristics of the States that function within this system with descriptions of the general conditions under which such States interact with one another. But from the perspective of Liberal international relations theory, these various characteristics are all important dimensions of the relations between States and domestic and transnational society.

13 Explanations put forth include the following: 1) democratically elected leaders do not need to turn to democratic ambition as a means of legitimating their rule; 2) those who bear the costs of war are those who decide whether to go to war; 3) citizens in a democratic State will respect the political structure of other democratic States and be hesitant to go to war with them; 4) electoral process produces risk-averse elites and centrist policies – attributes militating against war; 5) States willing to submit to the rule of law and civil society domestically are more likely to submit to their analogues internationally; 6) democratic debate exposes policy to the marketplace of ideas, thereby allowing unsound ideas to be critically evaluated and challenged. This summary is borrowed from Kupchan, Kupchan, 'Concerts, Collective Security, and the Future of Europe', 16 *International Security* (1991) 114.

14 See K.T. Gaubatz, *Still Hazy After All These Years: Kant's Secret Plan of Nature and the Expansion of Democratic States in the International System* (1993) (unpublished manuscript, on file with author); Gowa, Mansfield, 'Power Politics and International Trade', 87 *American Political Science Review* (1993) 408.

15 J.R. Oneal, F.H. Oneal, Z. Maoz and B. Russett, *The Liberal Peace: Interdependence, Democracy, and International Conflict, 1950-1986* (1994) (unpublished manuscript, on file with author).

## A. Peace

The assurance of peaceful relations is the assurance that conflict will not escalate into military conflict. It is important to recognize that this assumption does not posit automatic harmony of State interests. Far from it, conflicts of interest are an inevitable and important part of the international landscape. The posited difference affects only the means of resolving those conflicts. The assured choice of non-military means in turn establishes a different psychological and political context in which to interpret economic and political measures taken on either side of the conflict.

## B. Liberal Democracy

Liberal democracy can be defined in many ways. As used here, it denotes some form of representative government secured by the separation of powers, constitutional guarantees of civil and political rights, juridical equality, and a functioning judicial system dedicated to the rule of law. These particular features of domestic political structure are important determinants of the interaction between the State and individual and group actors in domestic and transnational society.<sup>16</sup> Representative government assumes that the government must be responsive to a wide range of social actors; the guarantee of civil and political rights assures individuals and groups the opportunity to interact in 'civil society' free of undue interference from State organs;<sup>17</sup> and the existence of a judicial system independent of political direction makes available a neutral arbiter for private disputes arising in domestic and transnational society.<sup>18</sup>

16 A world of liberal democracies is particularly susceptible (and may indeed particularly require) Liberal analysis because it is among such States that domestic and hence transnational civil society should be most developed.

17 The causal links between liberal democracy and civil society are confused and contested. On the one hand, the civil and political rights that are the hallmark of liberal States are both the rights that protect the individual from the State sufficiently to demarcate the State from society, and the rights that permit and encourage voluntary associations among individuals. See R. Beddard, *Human Rights and Europe* (3d ed., 1993) 2-3. Liberal States are thus the States that allow maximum room for the development and flourishing of civil society, within and across territorial lines. On the other hand, both democracy and the prosperity needed to support it appear to require not only specific institutional forms, but also a measure of civic engagement. Haas, 'Beware the Slippery Slope: Notes toward the Definition of Justifiable Intervention', in L.W. Reed, C. Kaysen (eds), *Emerging Norms of Justified Intervention* (1993) 63, 79; R.D. Putnam, *Making Democracy Work: Civic Tradition in Modern Italy* (1993).

18 Judges are both agents and shapers of domestic and transnational civil society. They are the curbers of the State, creating the breathing space for individuals and groups to flourish; but they are also the agents of individuals, resolving disputes, stabilizing expectations. The definition of an 'independent judiciary' is a judiciary that is not the handmaiden of State power, that answers to law rather than to the individuals who make it. Such a judiciary can set itself against the State, but can also regulate a realm in which the State does not intrude. In civil law systems it operates self-consciously in a 'private law' sphere, applying codes designed to protect and foster private activity; in common-law systems it responds to and regulates such activity.

### C. Market Economies

Market economies based on private property rights also assure at least the existence of an economic sphere distinct from the State, even if supported by State-created rights and subject to State regulation. The relatively unconstrained ability to pursue economic interest is an engine of social interaction, which in turn produces a climate of trust that facilitates economic expansion.<sup>19</sup> The pursuit of economic interest in a market economy is also a source of demand for legal rules and institutions, for the enforcement of property rights and the provision of the certainty and predictability necessary to minimize risk and permit calculation of future gain.

### D. A Dense Network of Transnational Transactions

Another factor that has been correlated with a reluctance to use force among liberal democracies is a high level of transnational social and economic relations among individuals and groups. Karl Deutsch argued in the 1950s that the density and level of transnational contacts, to be measured through communication flows, was a reliable indicator of a 'pluralistic security community', a group of States whose members share a sense of common identity and who rule out the use of force in resolving disputes.<sup>20</sup> A second approach focuses more on economic contacts, particularly on levels of economic interdependence. These scholars seek empirical confirmation of claims dating back to Kant and the Manchester School about the pacific consequences of trade. Yet they must contend with those who note that interdependence can breed friction and suspicion as easily as harmony and trust.<sup>21</sup> The most promising recent scholarship in this debate suggests that economic interdependence does have a positive impact on the likelihood of military conflict among States, an impact independent from and in addition to the impact of republican constraints on executive decision-making and democratic norms of peaceful dispute resolution.<sup>22</sup>

Yet a third approach suggests that democratic norms and structures and economic interdependence reinforce one another in contributing to peaceful conflict resolution. In a book that has become a classic in the American international relations curriculum, Robert Keohane and Joseph Nye developed a model of

19 Again, the causal arrows here are unclear. Putnam argues that civic engagement permits economic expansion; the converse observation that economic interest generates social interaction is easily apparent from the expense budgets and golfing proclivities of business executives the world over. Compare Susan Strange's discussion of the 'international business civilization' in Strange, 'The Name of the Game', in N. Rizopoulos (ed.), *Sea-Changes* (1990) 238, 260-265.

20 K. Deutsch et al., *Political Community and the North Atlantic Area* (1957).

21 For a revival of the original Kantian argument, see Doyle, *supra* note 10, at 230-32; see also R. Cobden, *Political Writings* (1867). Many scholars have countered with the example, *inter alia*, of the high level of interdependence between Great Britain and Germany just prior to World War I. See, e.g., S. Hoffmann, *The State of War* (1965). Seeking to move past this debate, recent work has emphasized different types of interdependence. Art, 'A Defensible Defense: America's Grand Strategy after the Cold War', 15 *International Security* (Spring 1991) 5.

22 See Oneal et al. *supra* note 15.

'complex interdependence' as an ideal-type of international relations.<sup>23</sup> This model correlated a reluctance to resort to the use of force among a group of States with 'multiple channels of contact connect[ing] societies'.<sup>24</sup> More recent work supports the proposition that

[p]olitical and economic freedoms allow individuals to form transnational associations and to influence policy in light of the resulting interests, inhibiting their governments from acting violently toward one another.<sup>25</sup>

The point here is not the mutual vulnerability that economic interdependence implies, but rather the corollary network of transnational transactions and communications among individual and group actors in liberal States. This is the common denominator of all three schools.

### E. Transgovernmental Communication

A subset of Keohane and Nye's model of complex interdependence is the phenomenon of 'transgovernmental communication', the existence of 'informal ties between governmental elites' and direct meetings and communications between bureaucrats from different countries.<sup>26</sup> These contacts coexist with 'formal foreign office arrangements'.<sup>27</sup> As they recognized, this dimension of inter-State relations cannot be accommodated within the traditional Realist conception of States as unitary actors.<sup>28</sup> It suggests instead an image of what I will call 'disaggregated sovereignty', the recognition of multiple actors exercising different types and modes of governmental authority. And when combined with the more general phenomenon of transnational communications among individuals and groups, it limits 'the ability of foreign offices tightly to control governments' foreign relations'.<sup>29</sup>

23 R.O. Keohane, J.S. Nye, *Power and Interdependence* (1977) 25.

24 Keohane, Nye, Jr., 'Power and Interdependence Revisited', 41 *International Organization* (1987) 725, 731. Russett characterizes an extension of this approach as 'transnationalism', the claim that 'individual autonomy and pluralism within democratic States foster the emergence of transnational linkages and institutions – among individuals, private groups, and governmental agencies'. He argues, however, that this factor cannot be isolated as a variable independent of democracy itself in explaining the liberal peace. Russett, *Grasping the Democratic Peace*, *supra*, note 12, at 26. Keohane and Nye themselves originally wrote before the phenomenon of the liberal peace had been identified, thus they made no effort to connect their model of complex interdependence to relations among liberal States *per se*. They did note, however, that the reluctance to use military force, a critical component of their model, was particularly observable 'among industrialized, pluralist countries'. *Power and Interdependence*, at 27. I have thus included aspects of their model as factors generally correlated with the liberal peace.

25 Oneal *et. al.*, *supra* note 15, at 4.

26 Keohane and Nye, *Power and Interdependence*, *supra* note 23, at 25-26.

27 *Ibid.*, at 26.

28 Keohane and Nye, *Power and Interdependence Revisited*, *supra* note 24, at 740.

29 *Ibid.*, at 738.

## F. Collapse of the Foreign/Domestic Distinction

The final attribute of inter-State relations that political scientists have correlated with peaceful relations among a particular group of States is the absence of a hierarchy of foreign affairs issues, a hierarchy that traditionally ranked the 'high politics' of security above the 'low politics' of economics.<sup>30</sup> The relative parity of security with economic and environmental issues in turn breaks down the distinction between foreign and domestic politics, as many issues reach the foreign policy agenda that have a direct impact on domestic actors.<sup>31</sup> The ability of those actors to influence policy decisions further decreases the traditional insulation of foreign policy, a trend that is strengthened by the assurance of peace itself.

The standard equation of foreign policy with security policy is reflected in a host of legal and constitutional arguments for the autonomy of executive control of foreign relations, free of the normal political and legal constraints on policymaking. Arguments justifying an autonomous executive sphere are typically based on the need for secrecy, speed and flexibility in foreign policy, reflecting an underlying assumption that national security is at stake. Conversely, the factors underlying the disintegration of the foreign/domestic distinction in relations among liberal States suggest that these arguments are of decreasing relevance. Foreign policy among such States should be subject to the same constraints as domestic policy.

## III. Hypothesizing a World of Liberal States

Taken together, the above six attributes describe a hypothetical world of liberal States, a world of peace, democracy, and human rights. By combining these attributes with the levels of analysis generated by Liberal international relations theory, we can generate a model of international law in such a world. This part will address the reasons for undertaking such an exercise and sketch the methodology for conducting a self-professed 'thought experiment'.

Why bother even hypothesizing a world of liberal States? It is manifestly not the world of traditional international law, a world that accepts many Realist assumptions about States as functionally identical unitary actors seeking primarily to preserve their own sovereignty. It is not the world of contemporary international politics, of Bosnia, Haiti, Rwanda or China. Nor is it a world likely soon to emerge. Do we then hypothesize such a world solely as a Utopia? Is the point simply to perform an abstract interdisciplinary exercise?

The answers are several. First, part of the world, a growing part, is composed of liberal States. The attributes listed above may be a more accurate description of relations among countries in this part of the world than the traditional model of the international system on which classical international law is based. If so, a model of

30 Keohane and Nye, *Power and Interdependence*, supra note 23, at 25.

31 Ibid., at 26-27.

international law derived from these attributes will capture more of the legal and political reality of relations among these countries. Legal relations among States such as the United States, Canada, the Member States of the European Union, Japan, Australia, and New Zealand are most likely to fit this model, but it could also at least provide a point of departure for conceptualizing the legal relations among Argentina, Chile, Brazil, Ecuador, and Mexico; Poland, Hungary, and the Czech Republic; Taiwan, South Korea, and the Philippines; India, Israel, and, with luck, South Africa.

Second, to the extent that this model shapes our expectations of how law operates among liberal States, it will also generate a corollary set of expectations concerning legal relations between liberal and non-liberal States. These twin sets of expectations will in turn provide the conceptual tools to grasp the differential significance of apparently universal phenomena. As a formal matter, for instance, all supranational tribunals are expected to wield the same authority. The judgments of the International Court of Justice and the European Court of Justice should thus have an equal impact on State behaviour. In practice, of course, our expectations of the effectiveness of these two tribunals vary considerably, but without justification or explanation in the language and conceptual framework of classical international law. A model of law among liberal States that analyzes the enforcement of international agreement in light of the underlying political configuration and the nature of individual and group interests in the States involved can instead generate a set of conditions in which we might expect supranational tribunals to be relatively more or less successful.

In both of the above categories, the model will provide a basis for empirical testing of specific hypotheses concerning legal relations among liberal States and between liberal and non-liberal States. If these hypotheses hold, the next step will be to develop a corresponding set of norms within each category. The positive model cannot itself give rise to normative propositions. Yet to the extent that the positive model gives rise to a different conceptualization of the principal actors engaged in legal relations and the nature of the relations between them, it will define the subjects of new norms and the type of activity such norms are designed to regulate. For instance, I will argue that legal relations among liberal States are characterized by 'disaggregated sovereignty', in which the 'State' is disaggregated into its component political institutions, each of which is bound to one another in a constitutionally determined set of relationships. This conceptualization would then require us to generate norms defining the content and limits of the sovereignty of each of these component institutions.

The third potential advantage of developing a hypothetical model of legal relations among liberal States flows from this normative project. We may find that in some instances it will be more attractive to use the model to generate a universal set of concepts and norms, applicable to liberal and non-liberal States alike. In many cases we are likely to find that relations between liberal and non-liberal States display some of the features of the model but not others. This congruity is to be

expected to the extent that non-liberal States display some of the political, economic, and social attributes described above but not others. In such cases, it may be preferable to accept the necessary fiction inherent in applying a positive model and its corollary norms to States that only partially fit the model than to sacrifice the principle of universality.

Assume, then, a world of liberal States. Assume further that the vision of the international system developed by Liberal international relations theory is correct: that the primary actors in this system are individuals and groups operating in domestic and transnational society; that States seek to regulate these individuals and groups but simultaneously represent some aggregation of individual and group preferences; that the strength of State preferences determines the outcome of inter-State interactions. What would international law in such a world look like? What rules would we expect to govern transnational and inter-State transactions?

'International law', as defined here, comprises all the law that regulates activity across and between territorial boundaries. It can include the law of peoples and the law of nations, the *jus gentium* and the *jus inter gentes*. Existing categories and distinctions such as public and private, domestic, transnational and international are immaterial. The identifying element that qualifies a rule or set of rules for inclusion in this category is the potential for contribution to international order, whether by constraining domestic forces that might otherwise escalate international disputes into military or severe economic conflict, by strengthening or regulating transactions in transnational society, or by directly regulating inter-State relations. The resulting body of 'law' is defined not according to subject or source, but rather in terms of purpose and effect, in conformity with a particular body of international relations theory.

#### **IV. International Law in a World of Liberal States**

To develop a model of international law in a world of liberal States, I combine the levels of analysis generated by Liberal international relations theory with the political, economic, and social attributes of a world of liberal States. As discussed above, Liberal international relations theory offers a set of fundamental assumptions about the international system: about its primary and secondary actors, their preferences, and the constraints imposed by the system itself. In accordance with these assumptions, an effort to think about legal relations within the international system would focus first on relations among individuals and groups in transnational society; second on State institutions in relation to these social actors; and third on inter-State interactions where State preferences are a changing function of individual and group interests as those interests are themselves defined in domestic and transnational society. Within each of these categories, the social actors and State institutions involved are assumed to interact with one another as dictated by the ideological and structural principles of a liberal State.

The first level comprises a network of transnational relationships among individuals and groups governed largely by rules of their own choosing. These rules may not be 'law' per se, but rather voluntary norms adopted by a wide range of professional associations. Alternatively, individuals and groups may choose pre-existing bodies of national law to govern transnational contracts. They may also choose where they would like their disputes resolved, and by which tribunals, either arbitral or judicial. Individuals and groups are the primary actors within this network. State institutions are relevant primarily to the extent that they promote or hinder these voluntary choices, through doctrines governing personal jurisdiction, forum selection, parallel litigation, evidence-gathering, and enforcement of arbitral agreements and awards. States may also decide to codify voluntary norms. The policies underlying these doctrines and decisions bear directly on the depth and breadth of transnational society, with resulting impact on the pressures that social groups can exert on representative institutions, the transmission of knowledge about foreign legal systems, and the socialization of individuals and groups subject to multiple bodies of national regulation.

The second level is the level of domestic governmental institutions, primarily courts and legislatures, interacting directly with one another in the process of making, selecting and enforcing the law governing transnational transactions. The 'State' at this level is disaggregated into its component parts: legislative, executive, administrative and judicial. The assumption of liberal States permits further assumptions about the representativeness and relative independence of these institutions within their respective spheres, resting on a common foundation of core protection of individual rights. The legal relations among these institutions primarily comprise questions of overlapping national jurisdiction, embodied in doctrines governing choice of law and extraterritorial application of law. By departing from the traditional conception of States as unitary actors on the international stage, it is possible to understand these relations in the context of a transjudicial and trans-legislative dialogue, in which courts and legislatures acknowledge and evaluate foreign law. It also facilitates the conceptualization of a transnational legal process encompassing disaggregated judicial, legislative and executive interaction.

The third level is the level of inter-State interaction, in which States must present themselves as unitary actors at least to the extent of having a sole representative in international negotiations. The difference between the analysis presented here and traditional public international law is that the States involved are presumed to be embedded in transnational society. The unitary facade is thus in fact very porous, open to penetration by individuals and groups. Further, the 'aggregation' of the political institutions themselves for purposes of international negotiation will be quite loose. The executive, as negotiating representative, will be accountable to the legislature; acts of the legislature approving and implementing the results of executive negotiation will be enforceable by the courts. These conditions affect the origins, form, negotiation and enforcement of international agreements.

Before proceeding to a more detailed analysis within each of these categories, a final methodological note is in order. The methods used to imagine or conceptualize legal relations in a world of liberal States are both deductive and inductive. They are deductive to the extent that they follow logically from the various assumptions and attributes already discussed. They are inductive to the extent that they draw on anecdotal examples of relations among liberal States, such as the States of the European Union or the OECD. Whether these examples will in fact prove representative of the larger phenomena postulated here is a subject for empirical testing; I offer them here to add concrete form to abstract propositions and to stimulate further expansion of existing categories of thought.

### **A. The Voluntary Law of Individuals and Groups in Transnational Society**

Much of the law governing relations among economic and social actors operating across borders is a decentralized network of self-selected and customized rules. These actors choose both the substantive law governing their association and the mode and forum for dispute resolution. Territorial boundaries impose no restrictions, but only delimit the menu of choices. Participants are free to choose the product of one legislature and the procedures and competence of another tribunal. A contract might thus specify that disputes will be tried in London under New York law. The resulting freedom and flexibility is particularly important for the efficient functioning of market economies.

#### *1. Formal and Informal Voluntary Norms*

The voluntary law governing transnational society divides into several categories. First is a category of proto-law generated by a wide range of business and professional organizations. In the domestic context, Robert Cooter has described these rules as the 'new law merchant', voluntary norms adopted by corporate networks, self-regulating professions, and business associations.<sup>32</sup> Many of these networks and associations extend transnationally as well, generating an accompanying network of transnational voluntary norms. These norms may not seem like law at all. Yet scholars and practitioners seeking to predict actual behaviour must take them into account as empirical facts that guide action. Further, as will be discussed below, these bodies of rules may be templates for future law.

A second category of rules governing transnational commerce is the law selected by individual actors to govern the interpretation and application of bilateral commercial agreements and the mode of resolving disputes arising out of those agreements. The actors enter into contractual relations. Their interaction is to be

32 Examples include rules promulgated by the VISA network, the American Bar Association ethical guidelines, and standards promulgated by the Association of Home Appliance Manufacturers. Cooter, 'Structural Adjudication and the New Law Merchant: A Model of Decentralized Law', *International Review of Law and Economics* (1994) 143, 144.

governed by the contract. But they also determine what law shall govern the contract and where and how disputes arising out of or related to the contract will be resolved. They can choose either a judicial or an arbitral forum. If they choose arbitration, they can also write their own rules of procedure governing the dispute resolution process.

Within international commercial arbitration, individuals and groups may find themselves, either by specification or not, governed by an independent body of law developed by international commercial arbitrators on the basis of customary transnational business practice. These rules have also been referred to as the 'new law merchant', or *lex mercatoria*. The arbitrators derive their authority from the arbitral agreement. They themselves form an informal network,<sup>33</sup> such that they can effectively draw on their collective experience in distilling and applying these rules. Formally, this body of law has no more status than voluntary norms developed and adopted by professional associations. It similarly evolves from social and economic practice in transnational society.

## 2. State Facilitation of Individual Choice

Thus far, the law of transnational society has been presented as essentially stateless. This is an accurate depiction in that individuals and groups are the primary actors; State functions are ancillary to individual choices. But the role of the State is nevertheless critical to the functioning of the system. It appears in several guises. First, of course, the State provides the bodies of rules available for selection by individual and group actors. State legislatures thus provide a public good. Second, States may ultimately adopt and codify the norms that individuals and groups have already developed through voluntary associations. Merchant custom, for instance, formed the basis for much of the common law. Today scholars from law and economics often urge the adoption of these voluntary codes by national legislatures. In this regard, developments in transnational society lay a foundation for subsequent State action.

Third, States determine to what extent bilateral commercial agreements will be enforced, thereby facilitating or blocking individual choice. This point has been most frequently recognized in the arbitral context; the availability of judicial enforcement – the coercive apparatus of the State – undergirds the entire system of international commercial arbitration. Thus States wishing to promote and facilitate commercial arbitration authorize their domestic courts both to compel arbitration at the request of one of the parties to the arbitral agreement and to enforce the ensuing award.<sup>34</sup> In the multilateral context, Michael Reisman observes that the New York

33 See Dezalay, Garth, 'Grand Old Men vs. Multinationals: The Routinization of Charismatic Arbitration into Off-Shore Litigation', Secs. IV, VI (American Bar Foundation Working Paper, No. 9317, 1994).

34 In the absence of State action, private trade associations can also provide enforcement mechanisms by enhancing reputation costs. This was the purpose of the associations arising out of the medieval 'champagne fairs'. Similar mechanisms, albeit less effective, are provided by Better Business

Convention<sup>35</sup> is effectively an agreement whereby each State acknowledges the legitimacy of each other State's control of the arbitral process and thus agrees to enforce the results.<sup>36</sup>

Equally true, although less often observed, is the role of the State in facilitating individual choice in transnational litigation. The parallel is easiest to see in doctrines governing forum selection and choice of law where a particular forum and governing law is specified by agreement. Similarly, doctrines governing parallel litigation, such as the issuance of antisuit injunctions, often function to prevent one party in transnational litigation from circumventing the forum and law specified in a contract. Yet doctrines governing service of process, personal jurisdiction, *forum non conveniens*, transnational discovery of evidence, and enforcement of foreign judgments can also be analyzed from the perspective of facilitating or hindering dispute resolution in transnational society. The interpretation and application of these doctrines typically arise where one party to an international transaction chooses a forum to which another party objects. Party A seeks to invoke the power of the forum State to conduct the litigation on its terms; Party B may in turn assert the power of a foreign State as a counterweight. But the forum itself, in hearing and pronouncing on these arguments, is less an agent of one particular sovereign State than one of a number of multiple centres of authoritative dispute resolution available to actors in transnational society.

### 3. Theoretical Implications

From a traditional Realist 'billiard ball' perspective, all of the above doctrines ultimately pose questions of State power. The issue is whether a particular transaction or the parties to it fall within one or another sovereign sphere. In case of disagreement on this score, the only solution is to mediate conflicting claims of power by multiple competing sovereigns. Assuming a world of liberal States, however, a number of very different features emerge. First, transnational economic and social interactions are an important and enduring dimension of relations among liberal States. Second, all potential dispute resolution fora within the realm of liberal States, whether judicial or arbitral subject to judicial supervision, are assumed to be neutral and independent of direct political influences. Third, the core rights of individual litigants are assumed to be constitutionally protected in every potential forum. One such right is the right of a litigant not to be forced to defend in a forum with which she has no connection. Given these preconditions, participants in transnational transactions have multiple potential fora from which to choose. To the extent that the provision of dispute resolution mechanisms is regarded as a core function of a unitary State, the proliferation of such choices contributes to the

Bureaus. See generally Milgrom *et al.*, 'The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs', 2 *Economics and Politics* (1990) 1.

35 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature*, 10 June 1958, 21 UST 2517, TIAS No. 6997, 330 UNTS 38.

36 M. Reisman, *Systems of Control in International Adjudication and Arbitration* (1992) 139.

dispersal of the core functions of the State across a particular transnational community.

Even doctrines that appear to enforce one party's choice of forum over another party's objection look quite different in the context of transnational transactions among liberal States. Given the assumed procedural and substantive safeguards, the primary import of these doctrines is the translation of economic interdependence into a set of diagonal relationships between individuals and groups and States other than their home State for the limited sovereign function of dispute resolution.<sup>37</sup> The contacts with a foreign legal system that either give rise to an economic or social transaction in the first instance, or that flow from such a transaction undertaken for other reasons, become the basis for a limited relationship with a foreign sovereign, a sovereign that can be guaranteed to provide the same minimum safeguards in the performance of this sovereign function that the individual's home sovereign would provide.<sup>38</sup> The equation is not a straightforward transformation of economic power into legal power, but rather a decision in favour of one individual's choice of forum over another's based on an assessment of a relationship between the individuals involved and each of their connections with different States.

The density and velocity of transnational transactions among liberal States is related to the phenomenon of the 'liberal peace', although the precise causal relationships have not been mapped out. We may speculate that cross-fertilization among legal systems may play some role; knowledge of multiple legal means to similar ends in systems with similar safeguards might dampen perceptions of difference and 'otherness' so likely to escalate conflict; opportunities for transnational formulation of norms through business and professional associations may facilitate legal convergence. It may also be that subjection to multiple bodies of law has an important socializing dimension, transferring individual expectations to more than one source of sovereign power. Finally, the picture of transnational society presented here has an important self-governing dimension. Whether through professional associations or bilateral contracts, individuals and groups in transnational society are often able to make and enforce their own rules and to customize their own modes of dispute resolution, choosing among a number of disaggregated State 'products'. Power and responsibility are equally dispersed, laying the foundation for a hypothetical transnational polity with multiple centres of authority.

- 37 See L. Brilmayer, *Justifying International Acts* (1989) 55-57, 84-87 for a discussion of 'diagonal relationships' crossing the 'horizontal' relationships among States and the 'vertical' relationships between citizens and their home State.
- 38 In a similar vein, Lea Brilmayer uses jurisdictional analysis to determine when a sovereign owes the same duties to a foreign citizen as it does to its own. Brilmayer, *supra* note 37, Chapter I.

## B. The Law of Transnational Governmental Institutions

If the first level of law among liberal States focuses on the rules encouraging and strengthening the formation and development of transnational society, the second level is the law governing relationships between governments and individual and group actors in transnational society. This law subdivides into two general categories: 1) the substantive law directly regulating these relationships, typically the domestic law of one or more States, and 2) the legal or quasi-legal principles regulating the interaction of governments themselves concerning the appropriate division of regulatory jurisdiction. At present, the relevant doctrines that would fit within these categories are an amalgam of private choice of law rules, public international law rules governing jurisdiction to prescribe and enforce, diverse domestic principles governing statutory interpretation, and various procedural rules governing the treatment of foreign governments in domestic court.

The traditional public international law doctrines governing State jurisdiction to prescribe and enforce conduct focus on the demarcation of horizontal relationships among competing sovereigns, relying on principles of territoriality and nationality as the legal corollaries of the physical limits of political power. Private international law doctrines, on the other hand, encompass a wide range of potential approaches, from territoriality to State interest-balancing to efforts to quantify and qualify the relationship between an individual or a dispute and a particular regulatory authority. Given its focus on State representation and regulation of individual interests, Liberal international relations theory would fit most comfortably with the amalgamated approach originally developed by Andreas Lowenfeld and adopted by the Third Restatement of American Foreign Relations Law, an approach combining links between the individual and her conduct and the States seeking to regulate that conduct, State interests, and individual expectations.<sup>39</sup>

The assumption of a world of liberal States would refine this analysis further by disaggregating the State itself. In such a world, each State is composed of roughly symmetrical and homogeneous domestic political institutions: representative legislatures, separate representative executives and administrative agencies,<sup>40</sup> and independent judiciaries. Each of these institutions, in turn, has a roughly similar relationship with individuals and groups in domestic society, performing the same functions within a broadly similar set of constraints designed to safeguard individual rights. It thus becomes possible to conceive of the State not as a unitary actor, but rather as a constellation of governmental institutions performing the three basic functions of law-making, execution, and enforcement, on the assurance that each State in our hypothetical world will replicate this structure.

39 See Lowenfeld, 'Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for their Interaction', 163 *Hague Academy of International Law* (1979-II) 311; *Restatement of Foreign Relations Law of the United States* (Third), paras. 402-403.

40 Even in parliamentary systems, the 'government' is distinct from the legislature; cabinet ministers in charge of different government departments often act on their own initiative.

Within each liberal State, these institutions form multiple centres of power, each reinforcing and checking the other. In international matters, however, the perceived threat to the State as a whole has often led legislatures and courts to line up behind the executive, the branch of government best equipped to engage in high-stakes international diplomacy. The assurance of peace in a world of liberal States, coupled with a presumption of stable and continuous relations with other liberal States, would be likely to remove these traditional impediments to independent judicial and legislative action. Executives and courts, legislatures and courts, legislatures and administrators could thus all interact across borders in multiple ways. Each would represent a facet of a particular State, but national allegiance would be counter-balanced by links to counterpart institutions performing the same functions in transnational society. The result would be a web of relations among multiple centres of State authority within and across borders.

Interactions among these institutions will typically be triggered by the interaction of individuals and groups in transnational society. Thus, for instance, a dispute between two citizens of different States regarding a transaction that took place in both States is likely to bring the courts of both States into contact with one another, directly or indirectly, to the extent that the two individuals involved each prefers to litigate the dispute in her home State. The same dispute may also bring the legislatures of the two States into contact with one another, directly or indirectly, to the extent that the two courts involved disagree over which legislature's prescriptions should apply to the conduct at issue. Alternatively, if only one court is involved, its disregard of a foreign legislature's prescriptions may invite a response from the foreign legislature itself or the foreign executive charged with implementing those prescriptions.<sup>41</sup>

The substantive legal rules applicable to a particular class of individuals or groups or of conduct in transnational society will thus be determined in the context of an interaction between the individuals and groups involved and two or more governmental institutions: courts, legislatures, executives and administrative agencies. The question then arises as to what principles should govern the interaction not of 'States', but of these specific institutions in interactions with one another in the larger context of regulating transnational society. To answer this question, it is helpful to begin first by analyzing actual and potential relations among like institutions across borders – court to court, legislature to legislature – in terms both of the principles that might govern an ongoing 'dialogue' between these institutions and the functions that such a dialogue might perform as part of a process of transnational governance. The final section examines interactions among all three institutions.

41 See Lowenfeld, *supra* note 39, at 330-331 (describing clashes of regulatory jurisdiction as involving two courts, one executive and one legislature).

### 1. A Transjudicial Dialogue

Courts in a world of liberal States would recognize each other as like units, dedicated to and legitimated by the same core principles of the rule of law: assumptions of impartiality in adjudication, of the separation of the political and judicial branches, and of the equality of all citizens before the law. They are likely to interact with and take account of one another in a form of transjudicial dialogue. This dialogue can be initiated by individuals, in the sense that the multiple transnational contacts of parties to a particular case raise choice of law questions. Alternatively, courts themselves can initiate the dialogue by seeking information as to how their counterparts in foreign countries resolve similar questions. This dialogue can take several forms, for several different purposes.<sup>42</sup>

First, the application of traditional choice of law rules can be conceptualized as a reciprocal dialogue in which courts of different States are engaged in a common endeavour to make transnational relations among individual and groups more certain and predictable while taking account of multiple State interests. Some conceptions of this dialogue would go further and envision a common effort to select and harmonize substantive rules. The significance of postulating a dialogue is that a court of one State may assume that its foreign counterpart will respond to signals of accommodation or confrontation in an ongoing conversation. Some conflicts-of-law scholarship has gone so far as to model this dialogue in game theoretic terms; other scholars argue that traditional notions of comity and reciprocity have long captured this phenomenon.<sup>43</sup>

The assumption of a world of liberal States means that this dialogue takes place in a setting in which national courts face fewer constraints on their application of foreign law. All courts can assume that a genuine 'choice of law' exists, in the sense of a choice between two rules arrived at by a process that both polities and societies would recognize as legitimate. The paradigm is set forth by a US court in the case *Bi v. Union Carbide Chemicals & Plastics Co.*,<sup>44</sup> in which the court recognized and gave effect to an Indian law on the ground that 'India is a democracy'.<sup>45</sup> The court looked only to affirm that the law in question had been 'passed by [India's] democratic parliament' subject to review by an independent judiciary.<sup>46</sup>

42 For a fuller exposition of different forms of transjudicial communication, see Slaughter, 'A Typology of Transjudicial Communication', *University of Richmond Law Review* (forthcoming 1995).

43 See, e.g., L. Brilmayer, *Conflict of Laws: Foundations and Future Directions* (1991) 155-167 (discussing game theoretical approaches in which actors have both common interests that they attain through cooperation and conflicting interests they realize at each other's expense); Larry Kramer, 'Rethinking Choice of Law', 90 *Colum. L. Rev.* (1990) 277, 339-344 (discussing choice of law in terms of prisoner's dilemma hypothetical); see also Weinberg, 'Against Comity', 80 *Georgia Law Journal* (1991) 53 (asserting that game theory as applied to conflicts of law reincarnates traditional notions of comity and reciprocity).

44 984 F.2d 582 (2d Cir. 1993).

45 *Ibid.*, at 586.

46 *Ibid.*

Further, the process of choosing and applying a foreign law takes place within what I have called a 'zone of legitimate difference'.<sup>47</sup> Courts will presume the legitimacy of a wide range of different means to achieve similar ends.<sup>48</sup> Where they do refuse to apply an otherwise applicable foreign law, it is likely to be based on the perception that although the societies in question adhere to the same fundamental values, the potentially applicable laws reflect different choices as to which of those values should trump. Such a refusal is to be contrasted to a more general refusal even to assess the validity of the foreign law in cases in which the societies in question diverge not on specific choices between competing values, but on the identity and validity of the underlying values themselves.

Finally, in all of these instances the institutions involved can be expected to recognize, either implicitly or explicitly, a common core of political and economic values that will preserve roughly the same boundary between 'political' and 'legal' questions as would exist in purely domestic cases. In a world in which courts and lawmakers in one country can find no recognizable counterpart in another, or in which foreign policy concerns connected to a particular dispute might raise even the distant spectre of military conflict, courts may understandably cede the field to the political branches. But where such counterparts are readily ascertainable and peace is assured, disputes raising questions of international politics should be as amenable to judicial resolution as disputes raising questions of domestic politics. The degree of that amenability will vary by country, depending on the degree to which the judicial system in question recognizes some domestic variant of the American political question doctrine.

A second version of transjudicial dialogue may occur where the courts of liberal States seek to improve the quality of their decision-making on important public issues. Mary Ann Glendon has documented the increasing willingness of European constitutional courts to take account of the solutions crafted by their foreign counterparts on issues ranging from free speech to abortion.<sup>49</sup> The German constitutional court, for instance, maintains a library of constitutional decisions from courts around the world.<sup>50</sup> The presupposition here is of multiple societies, similarly structured and dedicated to the same basic values, grappling with the resolution of conflicts of those values. The institutions charged with the resolution of those conflicts communicate the fruits of their common experience to one another.

Third, courts may communicate with one another to protect or persuade their home governments. Joseph Weiler has documented this phenomenon among

47 Burley, 'Law among Liberal States: Liberal Internationalism and the Act of State Doctrine', 92 *Colum. L. Rev.* (1992) 1907, 1919, 1946.

48 The American judge (later Justice) Benjamin Cardozo put it best: 'We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home...', *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201 (N.Y. 1918).

49 M.A. Glendon, *Rights Talk* (1991) 158-159.

50 D. Kommers, *The Federal Constitutional Court* (American Institute for Contemporary German Studies, Key Institutions of German Democracy No. 2, 1994) 17.

national courts in the European Community, observing that in the context of common supranational obligations courts seek to ensure that acceptance of these obligations as a matter of national law will not disadvantage their governments relative to other governments. They thus canvass comparable decisions by their foreign counterparts. Alternatively, where a national court wants to urge compliance with a supranational obligation, it may argue that it is just keeping pace with the decisions of its foreign counterparts.<sup>51</sup> The result is a transjudicial dialogue that shapes domestic judicial conversations with national executives and legislatures.

## 2. A Transnational Legislative Dialogue

The assumption of a world of liberal States allows us to assume competing spheres of public regulation of represented individuals. Moreover, we assume a dense transnational society, such that laws passed by one legislature will inevitably have an impact on individuals and groups outside the national territory and citizenry. And we assume that those affected individuals and groups will have access to their own legislatures.

The upshot of these assumptions is that, like courts, national legislatures should also be presumed to be engaged in a reciprocal dialogue with their foreign counterparts. Legislative measures that adversely affect individuals and groups outside the national polity will invite retaliation where those individuals and groups have sufficient power in their home countries to secure a foreign legislative response.

These assumptions should inform judicial analysis of extraterritorial application of national legislation. This analysis includes an initial determination of legislative power to legislate extraterritorially and a secondary determination of whether in fact the legislature intended to exercise that power with regard to the statute before the court. The result may well be a reinforced presumption of 'legislative comity', the deference that one legislature gives to another.<sup>52</sup> At the very least, courts might be expected to adopt principles of statutory interpretation designed to ensure that a legislature has taken account of retaliatory possibilities.

In the normative realm, the conception of legislatures operating in dialogue with one another in a world of liberal States could be used to generate a set of principles that could function as an informal transnational constitution. Common principles of limited government, individual liberty, and the certainty and predictability inherent in the rule of law could be generalized across borders to mandate presumptions in

51 Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors', 26 *Comparative Political Studies* (1994) 510, 521-522.

52 Compare Justice Scalia's distinction between legislative and judicial comity in *Hartford Fire Insurance Co. v. California*, 113 S.Ct. 2891, 2920 (1993) (Scalia, J., dissenting). Scalia distinguishes 'the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere' and "'prescriptive comity": the respect sovereign nations afford each other by limiting the reach of their law'. *Id.* Prescriptive comity is 'exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted'. *Id.*

favour of extraterritorial application of any statutes designed to limit the exercise of governmental authority and against the extraterritorial application of statutes restricting individual liberty where the individuals in question are demonstrably subject to competing regulation by their home legislatures. Further, common principles of representative government could lead to the adoption of principles designed to protect distortions of national legislative processes by rent-seekers trying to exploit transnational regulatory gaps.<sup>53</sup>

### *3. Disaggregated Transnational Judicial, Legislative, and Executive Interaction*

A final aspect of this second level of law among liberal States is the interaction of the three domestic branches of government in each State transnationally with one another in much the same way that they would interact with their co-branches of government at home. Thus, for instance, executive branches have to take account not only of their own courts, but of the decisions of foreign courts as having an impact on the concerns and constraints of diplomacy.<sup>54</sup> They might choose to respond to a foreign judicial decision by pressuring a fellow executive to urge a reversal or reinterpretation. Alternatively, however, they can be expected to intervene directly in foreign litigation by presenting their views to the foreign court itself. Finally, a struggle between two national courts may require executive intervention on both sides.

Conversely, courts may choose to treat foreign executive branches in the same way that they relate to their own national executive. The United States Court of Appeals for the Seventh Circuit, for instance, chose to defer to a ruling by the French executive branch under the same US doctrine that requires deference to US administrative agencies.<sup>55</sup> In the process, it acknowledged the common function of the two entities rather than differentiating between them by drawing a line between foreign and domestic affairs and waiting for a communication from the branch of its own government charged with the conduct of foreign affairs.

With regard to executives and legislatures, executive branches can lobby foreign legislatures directly through national law firms. Legislatures can also conduct their own diplomacy through delegations of national legislators visiting foreign executives and consultations with foreign parliamentarians. Alternatively, a legislature might respond to the actions of a foreign court, such as the British and

53 See Turley, 'Dualistic Values in the Age of International Legisprudence', 44 *Hastings Law Journal* (1993) 185, 243-245 (arguing for the elimination of the presumption against extraterritoriality to prevent exploitation of legislative processes by multinational rent-seekers).

54 To take one recent example, the executive and legislative branches of the European Community found themselves waiting in suspense to see how the US Supreme Court would rule on the validity of a unitary corporate tax imposed by the State of California. *US Supreme Court to Hear Unitary Tax Case*, 5 *Eurecom I* (No. 10, November 1993) (reporting the decision of the US Supreme Court to grant certiorari in *Barclays Bank Plc v. Franchise Tax Board of California* in accordance with 'EC and UK hopes, and disagreeing with the Clinton Administration').

55 *In the Matter of: Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978*, 954 F.2d 1279, 1312-1313 (7th Cir. 1990) (per curiam).

Australian legislatures did in enacting 'clawback' statutes to blunt US courts' extraterritorial application of US antitrust laws.<sup>56</sup> Finally, legislatures can pass resolutions requiring their executives to take a particular position in negotiations with foreign executives.

All of these interactions are sharply at variance with the classical 'billiard ball' image of inter-State relations. Each of the governmental institutions involved acts with a degree of autonomy determined as much by its specific function with regard to individuals and groups in domestic and transnational society as by its State allegiance. Moreover, each of these institutions acknowledges the autonomous functioning of counterpart and complementary functions. As discussed in Part V, the result challenges our conception of State sovereignty itself.

### C. The Law of Inter-State Relations

The third level of law in a world of liberal States is the law governing inter-State relations, the traditional province of public international law. This body of law includes inter-governmental agreements, customary international law, and the law of international institutions. Liberal international relations theory combined with an assumption of liberal States generates insights and predictions in all three areas. The discussion here, however, will focus only on inter-governmental agreements.

Assuming a world of liberal States leads to predictions about the origins, nature, incidence, negotiation and enforcement of such agreements. The baseline assumption is that governments will interact with one another within a web of individual and group contacts in transnational civil society. This larger context will affect inter-governmental agreements in a variety of ways. For instance, the plethora of individual and group transactions will obviate the need for some kinds of agreements altogether, such as treaties providing for cultural and educational exchanges and certain kinds of economic assistance. On the other hand, a need for national regulation is likely quickly to become a need for transnational regulation. In addition, the negotiators to all inter-governmental agreements in this world will be responsible to national legislatures, which themselves must be responsive to domestic and transnational group pressure. Finally, all States parties to all inter-governmental agreements will have well-functioning domestic legal systems, with national courts accustomed to laying down the law.

#### *1. Origins of Inter-Governmental Agreements among Liberal States*

Regarding the origins of inter-governmental agreements, imagine an idealized spectrum running from a world composed only of non-liberal States on one end and only of liberal States on the other. In a world only of non-liberal States, the initiative

56 See G. Born, D. Westin, *International Civil Litigation in US Courts* (2d. ed., 1992) 600-603 for a discussion of various foreign responses to extraterritorial application of US antitrust laws.

for inter-State transactions should come from State actors, on the simplified assumption that they control all important aspects of the polity, economy and society.<sup>57</sup> In the middle of the spectrum are relations between liberal States and non-liberal States, in which individual and group actors within the liberal State might push for inter-governmental agreements to foster their interests with respect to the non-liberal State. Such interests might include family reunification and visitation, communications of various sorts, humanitarian aid, and targeted economic assistance. Individuals and groups in the non-liberal State might also encourage economic agreements with the non-liberal State designed to encourage that State to liberalize its economy so as to create opportunities for foreign investors and traders. Finally, at the far end of the spectrum, we would expect a dense network of individual and group activity. These actors do not require State intervention to spur or substitute for transnational activity, but only to regularize and channel it. Most agreements would be designed to address specific issues or problems arising out of ongoing activity.

Another important category of inter-governmental agreements among two or more liberal States should flow from transnational regulatory activity. Domestic regulators must follow the actors they seek to regulate. The assumption of a dense transnational society assumes that regulated activities will spill over borders, requiring regulators to interact with their foreign counterparts. Both conflict and informal cooperation are likely to result. In the case of regulatory conflict, an inter-governmental agreement may be necessary to coordinate or harmonize regulatory action. Where a range of informal cooperative practices develop, an agreement may be useful to institutionalize them as the basis for further cooperation.

In all cases involving liberal States, however, a fairly lengthy period of relatively decentralized transgovernmental interaction is likely to precede and shape the agreement. The parties involved can count on long-term, relatively stable relationships, and at least a presumption of trust and good faith. Counterpart agencies may proceed by trial and error as they grope for common formulae. Less cooperatively, multiple branches of government may become involved across boundaries, as in a confrontation between a court in one nation and the executive branch of another, or a stand-off between two legislatures. Even as the rhetoric heats up, however, all parties are likely to assume that the pulling and hauling will ultimately result in a stable informal equilibrium or a negotiated solution. Where an inter-governmental agreement results, it will be not the result of a deliberate 'foreign' policy decision, but rather of the evolution, coordination or harmonization of pre-existing domestic policy.

57 'Non-liberal' State here refers to a State that has neither a representative government nor a market economy.

## 2. *Form of Agreements*

Agreements among liberal States could be expected to come in three broad generic types. First are specific problem-solving agreements, in which a large number of private individual and group actors already have an interest. Such agreements are likely to be detailed and direct, intended either for direct judicial enforcement or immediate incorporation into domestic implementing legislation. Their specific provisions will probably be shaped in the halls of private firms as much as at the inter-State negotiating table, as lobbying groups pressure their respective governments to support particular interests.

Second are relatively vague and general agreements designed primarily to create a framework for further transgovernmental cooperation. The generality of such agreements is, paradoxically, an indicator of trust and cooperation. Increased interaction breeds mutual confidence, allowing further interaction to take place on the basis of imprecise and open-ended agreements, to be filled in in good faith. In some cases a formal and relatively specific agreement will help spark the process of regulatory cooperation, which will then develop in ways that will outstrip the agreement and make the specified procedures seem slow and cumbersome. Extradition treaties, for instance, typically concluded primarily between States confident of the quality of each other's judicial systems, were originally intended to create the possibility of rendition of fugitives where no such possibility previously existed. Over time, however, they have come to co-exist with a plethora of informal procedures. The initial agreement thus provides an umbrella for multiple modes of informal cooperation in the shadow of the treaty. At the same time, each renegotiation of the treaty becomes progressively more general in form, moving from a specification of crimes for which fugitives could be extradited to a general 'criminality' clause, assuming that any crime in one State would be recognized in the other.<sup>58</sup> Underlying such an evolution is an assumption of steadily increasing domestic convergence, and growing trust.

Another example, although with a different genesis, is the US-EC Memorandum of Understanding on Antitrust Enforcement. Here the intergovernmental agreement was the culmination of a long-simmering inter-governmental conflict, spurred by private actors. It is nevertheless very general in form, leaving it to the government agencies involved to fashion their own modes of working together. A similar example in the security field is the North Atlantic Treaty, the founding document of NATO.<sup>59</sup> The relatively few and sparse phrases of its founding treaty provided the framework for decades of effective cooperation.

A third category of agreements among liberal States are not actually agreements at all, but rather model codes designed to spur harmonization through convergence

58 See generally, M.C. Bassiouni, *International Extradition: United States Law and Practice* (1987) 329-333 (noting that the 'contemporary trend in extradition treaties is to designate extraditable offenses' purely on the basis that the penalty applied in both States meets 'an agreed degree of severity').

59 North Atlantic Treaty, 4 April 1949, 63 Stat. 2241, TIAS No. 1964, 401 UNTS 75.

toward a common focal point. Assuming States organized along similar economic and political lines, we could expect a variety of regulatory means adopted to achieve broadly similar aims. The resulting conflicts and contradictions would make all States worse off, notwithstanding their common goals. Such difficulties should once again be perceived by national regulators working informally with one another. Rather than a formal inter-governmental agreement, however, many such problems can be solved by decentralized harmonization, a process by which each State chooses independently to conform its domestic law to a model promulgated by a neutral third party, such as the OECD. This model is much closer to the 'model codes' promulgated for adoption by the States of the United States than to formal international agreements.

### 3. *Negotiating Agreements*

Much of the above analysis dissolves the traditional model of States negotiating agreements as unitary actors seeking to secure exogenous preferences through arms-length bargaining, substituting instead the image of communication among a network of national regulatory officials. Yet even where the more traditional model holds, negotiations among liberal States should be more likely to conform to Robert Putnam's 'two-level game' model than negotiations between liberal and non-liberal States.<sup>60</sup> Because each liberal State is relatively transparent and porous concerning its domestic political processes, legislative involvement will become increasingly important at the international level. Each treaty party should thus become increasingly familiar with its partners' domestic constraints; many should seek directly to influence each other's domestic legislative process. Members of the United States Congress have often been included in treaty delegations; in the Uruguay Round of the GATT negotiators for a number of States were in direct contact with US senators back in Washington.

Conversely, the host of political constraints on national executives in liberal States is likely to cast a favourable light on international agreements as a way of accomplishing goals through an international mechanism that, domestically, would be politically impossible. National executives, for instance, can use the arena of an international regime to achieve objectives that they can then sell to their domestic constituencies as internationally necessary, or as a disagreeable but indispensable part of an otherwise desirable international agreement. Challenges can always be deflected in part by the cloak of special executive expertise in foreign affairs and appeals to the need for a unified national voice in dealings with other nations. Over time, the force of these appeals should diminish in a world of entirely liberal States, in part because the assurance of peace blunts the spectre of war lurking in the background of such traditional executive arguments. Arguments for a unified

60 Putnam, 'Diplomacy and Domestic Politics', 42 *International Organization* (1988) 427; P.B. Evans *et al.* (eds), *Double-Edged Diplomacy: International Bargaining and Domestic Politics* (1993).

national position will remain, but will have less resonance in the face of divergent domestic interests and transnational coalitions of domestic interest groups.

#### 4. *Enforcing Agreements*

Agreements concluded among liberal States are more likely to be concluded in an atmosphere of mutual trust, a precondition that will facilitate any kind of enforcement. In particular, however, the assumptions that these are agreements reached with the participation of a network of individuals and groups in the participating States, and that these States are committed to the rule of law enforced by national judiciaries should lead to more 'vertical' enforcement through domestic courts. This mode of enforcement contrasts with the traditional 'horizontal' mode involving State responsibility, reciprocity, and countermeasures.

Enforcement through the mechanism of a neutral tribunal backed by coercive force is an optimal way to ensure compliance with any agreement, whether between individuals or States. It is the mode of dispute resolution established where possible by societies the world over.<sup>61</sup> A system of horizontal counter-measures, by contrast, inevitably entails each party being judge in its own case, with the attendant illegitimacy of the resulting determination. International lawyers have long recognized the inferiority of this system, and thus have sought to rely on a general norm of enforcement of international obligations through domestic courts.<sup>62</sup> Yet horizontal enforcement remains prevalent. Why? One reason is that absent a minimum homogeneity of States, States cannot be certain that a treaty partner has the kind of domestic judicial system capable of or willing to enforce an international agreement against another branch of government.<sup>63</sup> Indeed, the risk averse position for all States in such a system is to assume that its treaty partners are subject to no domestic constraints.

The assumption of liberal States ameliorates these concerns in a number of ways. First, liberal States are States with governments of limited powers, powers limited by law enforced by courts. Such governments are thus accustomed to the application of a legal instrument to curtail asserted political power.<sup>64</sup> Second, the governments of liberal States are governments structured around a separation of powers. The courts of liberal States are thus governed by a constitution that specifies that they sit as a branch independent of the Executive. Third, liberal States

61 Martin Shapiro elegantly lays out the logic of such a system in his multi-country analysis of courts. M. Shapiro, *Courts: A Comparative and Political Analysis* (1981).

62 See Wyatt, 'New Legal Order, or Old?', 7 *EL Rev.* (1982) 147.

63 Based on this model, we should expect to find that tax treaties, extradition treaties and other types of treaties specifically negotiated on a *bilateral* basis are much more likely to be judicially enforceable than multilateral treaties. Each Member State could size up the domestic judicial system of its treaty partner, and design a mechanism of treaty enforcement accordingly.

64 Commenting on the power of the European Court of Justice's successful attempt to enlist national courts in the enforcement of the Treaty of Rome, Joseph Weiler writes: 'A state, in our Western democracies, cannot disobey its own courts'. Weiler, 'The Transformation of Europe', 100 *Yale Law Journal* (1991) 2403, 2421.

guarantee a host of individual rights against the government, to be enforced through legal action. Thus it is possible to imagine individuals as monitors of government compliance with agreed rules, whether arrived at through a domestic or an international legislative process. Fourth is a commitment to transparency as a key cog in the mechanism of liberal government. Treaty partners can thus be reassured that it will be relatively easy to monitor each other's political decisions. Fifth, liberal States are more likely to be monist than dualist, as evidenced by international 'override' provisions in domestic constitutions that mandate the supremacy of international over domestic law. These provisions are much more common in the constitutions of liberal States.<sup>65</sup>

In short, the domestic constraints on liberal governments are more likely to create the conditions in which States entering into an international agreement have reason to believe that their co-parties are equally constrained by domestic courts, such that domestic judicial enforcement would not handicap one party significantly more than another. If all States are similarly situated regarding this mode of enforcement, they will be prepared to acknowledge its relative efficiency in holding all parties to their initial bargain. Further, to the extent that the agreements concluded contain provisions of direct benefit to individuals and groups in circumstances in which the contents of such agreements are relatively well-publicized, private parties will have an incentive to use domestic courts to enforce these agreements. Indeed, in such circumstances, given representative legislatures, liberal governments may well need to hold out the prospect of domestic judicial enforcement to secure domestic ratification of the agreement.

Domestic judicial enforcement of international agreements can come in several modes. First is the requirement of domestic implementing legislation for an international agreement; legislation that will then be enforced by domestic courts as domestic law. The difficulty is monitoring conformity of the implementing legislation with the international agreement. Second is the self-executing treaty, in which the international agreement operates directly as law for domestic courts. Here the problem is likely to be variations in interpretation and application of the treaty provisions. In both these cases the possibility of having States be judge in their own cases remains, on the assumption that even an independent court is likely to be swayed more by the position of its executive versus that of a foreign executive. Thus a third mode of enforcement is to add an international tribunal to ensure impartiality and uniformity by deciding all questions of treaty law arising in cases brought to national courts that involve issues both of national law and treaty law. This type of system will give rise to a 'vertical dialogue' between national courts and the supranational court. Opportunities for this dialogue will be facilitated where members of the supranational tribunal are drawn from the ranks of well-respected domestic lawyers, such that the legitimacy and respect accorded members of the

65 See Stein, 'International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?', 88 *AJIL* (1994) 427, 428; Cassese, 'Modern Constitutions and International Law', 192 *RdC* (1985-II) 331, 352.

domestic bar in each country is transferred to the international tribunal. Finally, such a dialogue can be facilitated on a non-binding basis, in which domestic courts are instructed to 'take account' of the judgments of a supranational tribunal.

Vertical enforcement through domestic courts is not the only effective means of ensuring compliance with international agreements. It is also possible to bypass domestic courts altogether and rely on legislatures to take account of the judgments of a supranational tribunal. Yet this mechanism works best when embedded in domestic and transnational society, by empowering individuals and groups to bring cases in the first instance so that they can monitor and publicize the results as a means of pressuring domestic legislatures. Alternatively, a group of States can adopt procedural rules making the application of horizontal counter-measures dependent on the decision of a neutral third-party tribunal. Finally, a wide range of compliance measures and mechanisms exist that rely primarily on diplomatic suasion and informal dispute resolution. Nevertheless, the proposition here is that where available, vertical enforcement is the most secure means of assuring compliance with international agreements. And that means is most likely to be available in a community of liberal States.

## V. The Disaggregation of Sovereignty

If the model of law among liberal States developed here holds as a positive model, it will present international lawyers with a new set of normative challenges. We will have to redefine existing principles of international law and develop new principles to govern actors and processes that remain obscured when viewed through the lenses developed by Realist international relations theory and traditional international law to view the international system. The *Grundnorm* of sovereignty is a natural point of departure for this normative project. I offer here some preliminary thoughts on how sovereignty might be redefined as a foundational norm in a world of liberal States.

According to the analysis above, a world of liberal States would be a world of disaggregated States. It would be a world with the following attributes:

- 'the State' is composed of multiple centres of political authority – legislative, administrative, executive, and judicial;
- each of these institutions operates in a dual regulatory and representative capacity with respect to individuals and groups in domestic society. Each is defined in terms of a specific set of functions it performs for the members of domestic society, a set of functions that structures its interaction with its coordinate branches as co-representatives of 'the people'.<sup>66</sup> At the same time,

66 Although it may seem odd to speak of courts 'representing' the individuals who appear before them in private disputes, a judge's conception of her duty to resolve such disputes as they are presented before her also reflects a wider conception of the need to represent the interests of an entire class of potential litigants

each of these institutions represents a facet of the exercise of State power – making, implementing, and enforcing regulations against individuals on behalf of the whole;

- the proliferation of transnational economic and social transactions creates links between each of these institutions and individuals and groups in transnational society. The development of links between individuals and groups in transnational society with the political institutions of multiple States in turn generates contacts among these institutions, either directly or indirectly;
- interactions among counterpart or coordinate institutions from different States – court to court, court to legislature, legislature to legislature, executive to court – are shaped by both an awareness of a common or complementary function transcending a particular national identity, and a simultaneous recognition of an obligation to defend and promote the interests of a particular subset of individuals and groups in transnational society.

The State is disaggregated, but remains the State: a constellation of political institutions bound together by territory, text, history and culture. What then of sovereignty? If the State is disaggregated as a positive matter, can sovereignty continue to attach to a unitary State as a normative principle designed to constitute that State as a unitary entity?

A world of liberal States could be conceptualized as a transnational polity. The organizing principle of this polity would mirror the organizing principle of liberal States: the limitation of State power by establishing multiple institutions designed both to overlap and complement one another. The resulting system of ‘checks and balances’ – competition and coordination, division and duplication – creates sufficient friction to curb the abuse of power. The result, to borrow a term coined by political theorist Daniel Deudney, is a ‘negarchy’, a liberal political order between anarchy and hierarchy in which power is checked horizontally rather than vertically.<sup>67</sup> These divisions and deliberately created frictions are further designed to create space for individuals and groups to interact with and influence State institutions, rather than being passive subjects of their rule.

Transposed to a transnational plane, the principle of negarchy would require the vigorous interaction of the governmental institutions of participating States with one another in as many combinations as possible. Assuming that ‘sovereignty’ is the principle that both constitutes States and defines their rights and duties in the international system consistent with an overarching principle of international order, the task is then to redefine sovereignty to conform to the ordering principle of negarchy. In practice, the norm of sovereignty would have to be constructed so as to constitute and protect the political institutions of liberal States in carrying out their individual functions and in checking and balancing one another.

The first element of such a redefined norm of sovereignty might thus be one of non-interference with basic legislative, judicial, and executive functions on the part

67 Deudney, ‘The Philadelphian System: Sovereignty, Arms Control, and the Balance of Power in the American States-Union, circa 1781-1861’, 49 *International Organization* (forthcoming 1995).

of the component institutions of each State in the system. Each institution could assert sovereignty both as a constitutive norm and as a shield to protect its ability to represent and regulate a subset of individuals and groups in transnational society – the individuals and groups principally associated with its State. If the flip side of the constitutive norm of sovereign Statehood is currently non-intervention in matters within a State's domestic jurisdiction, parallel norms of legislative, judicial, and executive sovereignty in a world of liberal States would dictate non-interference with the basic provision of legislative, judicial, and executive functions for the nationals or territorial residents of a particular State. Viewed from a transnational perspective, this norm of non-intervention as attached to these component institutions would protect the integrity of each institution sufficient to allow it to check and balance its counterpart and complementary institutions.

The second element of a redefined norm of sovereignty would concern the interaction of these disaggregated State institutions with one another as centres of authority in a transnational polity. Such interaction should be structured to achieve two functions: the representation and regulation of particular subsets of individuals and groups in transnational society. Each institution would thus encapsulate the dual dynamic of State-society relations in liberal States, simultaneously standing for the autonomous power of the State and the delegated authority of the people. As such, each institution must have the capacity not only to engage with other institutions, but also to receive communication from and to respond to the concerns of individual and group actors. Each must have the capacity to represent as well as to regulate.

A more concrete expression of this second element could be a right of equal participation in transnational legislative, judicial, executive and administrative processes. Such a right would ground claims on the part of component State institutions to be recognized and taken account of by fellow institutions involved in the negotiation of an international agreement, the regulation of transnational conduct, or the resolution of a transnational dispute. These claims would in turn rest not on abstract conceptions of national power, but on the capacity to represent and regulate a particular subset of individuals and groups in transnational society. Competing claims would be resolved by assessing the relative capacity of these institutions to perform the asserted function and the legitimacy of the claimed representation.<sup>68</sup>

Abram and Antonia Chayes have recently written of 'the new sovereignty', arguing that full membership in the international community no longer means the prerogative of splendid isolation, but rather requires engagement in a network of multilateral commitments.<sup>69</sup> Much current writing on the 'transformation of sovereignty' adopts a passive voice, emphasizing the extent to which State borders

68 This new conception of sovereignty would exist side by side with more traditional conceptions, which are still accurate and important in relations between liberal and non-liberal States. Where a government controls its people absolutely, its 'sovereignty' is still largely unitary and subject to violation primarily by coercive intervention. Sovereignty here is constrained less by individuals and groups in transnational society than by other States or by international institutions.

69 Abram and Antonia Chayes, *The New Sovereignty* (forthcoming 1995).

have become permeable to forces beyond a particular government's control. The Chayes and Chayes conception, by contrast, redefines the active component of sovereignty in relation to increased mechanisms and systems of global governance. Sovereignty becomes the capacity to participate in an international regulatory process. The redefinition of sovereignty in a world of liberal States pushes this redefinition one step further, devolving it onto the component institutions of individual States and giving it substantive content with regard to the relationship between these institutions and individuals and groups in transnational society.

## VI. Conclusion

The purpose of this essay has been to reimagine international law from the perspective of Liberal international relations theory in a hypothetical world of liberal States. It has identified the relevant bodies of law governing different actors in this system – rules governing the voluntary interactions of individuals and groups in transnational society, rules selected and applied by national courts and legislatures, and inter-State agreements. It has mapped the interactions of the relevant actors and sketched new ways to interpret the results of those interactions.

The point of departure for this exercise was the proposition that international lawyers must be more explicit about their underlying political science. The 17th and 18th century fathers of classical international law internalized deep assumptions about the incidence of war and peace and the nature of States. These scholars lived in a world in which war was endemic and domestic governance structures diverse; a world in which furthering the domestic consolidation of power under an all-powerful sovereign and simultaneously delimiting that power in the international sphere offered the most promising hope of reducing violent conflict in both spheres.<sup>70</sup> The founding principle of the Westphalian system – *cujus regio, ejus religio* (look only to the prince and no farther) – was a formula for peace. A prohibition on taking account of domestic differences among States thus converged with an argument about the foundations of international security.

This convergence forged an analytical synthesis between classical international law and Realist international relations theory. Yet within political science, Liberal theorists consistently and successfully have challenged Realist assumptions about the nature of the international system. Their alternative framework assumes that how States behave depends on how they are internally constituted. Empirical research within this framework further suggests a fundamental difference in the nature of relations among liberal States as compared to relations between liberal and non-liberal States. My aim has been to consider this research and its underlying assumptions seriously and to explore its implications for international law.

70 See E.F. Hinsley, *Sovereignty* (1986) Chap. 5.

Imagining a world of liberal States is not a purely hypothetical exercise. The principles and postulates of classical international law have long been subject to numerous exceptions and modifications that reflect departures from the underlying positive assumptions of unitary and functionally identical States. Contemporary human rights law, for instance, was founded on the recognition that domestic political conditions have consequences for international security. To the extent that the existing catalogue of fundamental human rights expands to include a right of 'democratic governance', a right Thomas Franck proposes based in part on empirical evidence of peace among liberal States, international law will take the first step toward an explicit distinction among States based on domestic regime-type.<sup>71</sup>

Further, the record of bloodshed in the 20th century challenges the 18th century paradigm of the sources of international and domestic conflict. In many cases, strife appears to result more from the abuse than the absence of sovereign power. Representative political institutions, the protection of minority rights, and the furtherance of group autonomy short of Statehood appear more likely to further long-term domestic and international peace than the raising of new Leviathans. At the same time, the realm of peace and relative prosperity is no longer a condominium of all-powerful princes but rather a domain of representative governments embedded in a dense network of transnational economic and social transactions. The perception of such seismic shifts, to the extent they hold, could lead to the adoption of a new model of the international system, normatively applicable to all States even if positively descriptive of only some. Alternatively, the values of universalism could be sacrificed to the realism of recognizing that States in the international system inhabit very different worlds.

The world of liberal States, as hypothesized here, is a world of individual self-regulation facilitated by States; of transnational regulation enacted and implemented by disaggregated political institutions – courts, legislatures, executives and administrative agencies – enmeshed in transnational society and interacting in multiple configurations across borders; of double-edged diplomacy and inter-governmental agreements vertically enforced through domestic courts. Such a world is neither a utopia nor a panacea. It poses new problems and normative challenges, requiring the extension of domestic principles and safeguards to transnational and international governance processes. It requires a rethinking of the relationship between public and private international law, a reconceptualization of the rules that can be said to serve international order.

71 Franck, 'The Emerging Right to Democratic Governance', 86 *AJIL* (1992) 46.