

Liberal International Law Theory and the United Nations Mission in Kosovo: Ideas and Practice

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The creation of the United Nations Mission in Kosovo was a unique moment in international politics, a moment when events compelled the key players in international politics to reveal what they thought about a crucial question of international affairs: what is a state? The way the important individual states, the United Nations, the North American Treaty Organization, the European Union, and other international organizations went about creating a new government from thin air provides important insight into both what ideas dominated international law thinking at the time and, perhaps more importantly, how ideas impact decision-making at the international level.

This Article argues that “disaggregated sovereignty,” and the general corpus of “Liberalism” in international relations and international law, provided the dominant understanding of state behavior in late twentieth century legal scholarship. Moreover, the Article will argue that the principles of this legal and international relations literature underlay the design of the United Nations Mission in Kosovo (UNMIK). The administrative and legal framework of UNMIK closely resembles the idea of a modern liberal state inherent in the disaggregated sovereignty literature.

As such, this Article attempts to use the creation of UNMIK instrumentally. Through analyzing its structure, it tries to understand what international decision-makers think about the crucial question of what a “state” is (or rather, thought at the time of the creation of UNMIK), the ways in which the answer to this question impacted the citizenry of Kosovo, and the implications this has for contemporary international law theory. This Article argues that, in contrast with the predictions of purely sociological analyses of the way ideas travel in world society, the internal structure of disaggregated sovereignty theory was a crucial reason for its adoption as a model for UNMIK.

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It has become commonplace to say that ideas have real-world consequences. Understanding which ideas have what consequences, however, is a difficult endeavor. Determining which ideas dominated international discourse on an important but theoretically complex topic and how they impacted policy-making can be a virtually impossible task. History, though, is sometimes kind to researchers: when events compel the international community to make collective decisions, researchers can analyze the results to see which ideas were most influential and what role they played in the actual decision-making of people in positions of power. The creation by the international community of a state-like governing apparatus in Kosovo was one of these rare occasions. The way the United Nations (U.N.), the North American Treaty Organization (NATO), the European Union (EU), important individual states, and a number of international organizations went about creating a new government gives important insight into both which ideas dominated

international law thinking at the time, and perhaps more importantly, how ideas impact decision-making at the international level.

More specifically, this Article will argue that “disaggregated sovereignty” and the general corpus of “Liberalism” in international relations and international law provided the dominant understanding of state behavior in late twentieth century legal scholarship and that the principles of this legal and international relations literature underlay the design of the United Nations Mission in Kosovo (UNMIK). The administrative and legal framework of UNMIK closely resembles the idea of a modern liberal state inherent in the disaggregated sovereignty literature. Although this correlation does not prove that the literature directly informed the people and organizations responsible for designing UNMIK, it does provide evidence that the dominant ideas in world society animated international policy-making. Moreover, the internal structure of the disaggregated sovereignty idea created this possibility; the claim that nonliberal states could be transformed into liberal ones through links between substate institutions, like regulatory agencies and courts, served as the crucial intellectual bridge for that idea to be used as the model for UNMIK. The correlation between scholarship and implementation creates a challenge for those scholars who seek to explain the transfer of legal and political ideas solely by sociological means (i.e., the pressures and lures created by other states and international organizations and interactions of individuals and nonstate actors with global culture). The structure of the ideas, and specifically whether they are considered *by their holders* to be universally applicable, turns out to be crucial for determining whether they will spread through international institutions and make their way into state practice.

I. INTRODUCTION: USING UNMIK INSTRUMENTALLY

The withdrawal of the Federal Republic of Yugoslavia’s military in May 1999 left Kosovo without a functioning government.¹ In response, the United Nations assumed responsibility for the civil administration of the territory.² For many years, the United Nations ran various, limited forms of “international territorial administration” through its peace-keeping and humanitarian arms and had been engaging in various governing projects in Bosnia-Herzegovina since 1995. Kosovo, however,

1. Ralph Wilde, Comment, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 AM. J. INT’L L. 583, 593 (2001).

2. See Judith Miller, *Crisis in the Balkans: The Administrators: As Task Force Chief, UN’s No. 2 Official Is Put to Test*, N.Y. TIMES, June 12, 1999, at A8.

presented a far greater challenge.³ The solution the United Nations proposed did not resemble any previous U.N. mission, nor did it resemble the historical examples of post-World War II Japan or Germany.⁴ The mission in Kosovo represented something new: a governance structure, rather than a unitary government, with various functions run by different international organizations for an area rather than a state, as the future sovereignty of the territory was—and is still—in doubt.⁵

A few analysts have examined the effect the choice of this institutional form has had on Kosovo.⁶ However, virtually nothing has been written about what the structure reveals about its creators: the United Nations, the international community, and important states and organizations like the United States and the European Union. As such, this Article will attempt to use the creation of UNMIK instrumentally. By analyzing UNMIK's structure, this Article will try to understand how international decision-makers conceived of a "state" at the time of the creation of UNMIK, the ways in which the answer to this question impacted Kosovo's citizenry, and the implications this issue has for contemporary international law theory.

A group of American constitutional law scholars has long relied on the assumption that "legal argument and judicial explanation . . . unselfconsciously reflect underlying assumptions about actual and potential social relations and about the institutional arrangement and forms of political life fit for those relations as they are and are capable of becoming."⁷ According to this premise, judges do not understand or care about broad theoretical concerns.⁸ However, judicial decisions are still rooted in theory. Because judges exist in a specific intellectual and psychological milieu, their thinking about specific cases and controversies reflects certain ideas and assumptions about society.⁹ The

3. Eric Schmitt, *U.N. Drags Feet in Kosovo, Pentagon Leaders Declare*, N.Y. TIMES, July 21, 1999, at A10.

4. *See id.*

5. Laura Palmer, *A Very Clear and Present Danger: Hate Speech, Media Reform, and Post-Conflict Democratization in Kosovo*, 26 YALE J. INT'L L. 179, 182 n.12 (2001).

6. *See, e.g.*, Hansjorg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46 (2001); Palmer, *supra* note 5.

7. Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 444 (1989); *see also* Richard Parker, *Political Vision in Constitutional Argument* (unpublished manuscript), *quoted in* HENRY J. STEINER, *MORAL ARGUMENT AND SOCIAL VISION IN THE COURTS* 205-06 (1987).

8. Gregory S. Alexander, *Takings, Narratives and Power*, 88 COLUM. L. REV. 1752, 1753 (1988).

9. *See id.*

fact that judges do not much consider theory, according to these scholars, makes it possible to read judicial decisions for their theoretical subtext.¹⁰ “[D]octrine is generated not by any abstract methodological or theoretical concern, but by the pictures that judges have in their heads. . . . These pictures, or narratives, are shaped by underlying political visions, that is, belief structures about how society is and ought to be organized.”¹¹ These scholars attempt to understand what those “underlying political visions” are and use this understanding to comment on both doctrine and the validity and usefulness of those visions.¹²

This Article relies on a similar assumption about international law. A number of different international law and international relations theories argue that the interests of states are shaped by norms and ideas that exist in the international community.¹³ What states want, and what guides policy, is not inherent in what a “state” is, but rather it is a

10. *See id.*

11. *Id.*

12. *See id.*

13. *See, e.g.,* Harold Hongju Koh, *Why Do Nations Obey International Law*, 106 *YALE L.J.* 2599, 2633-34 (1997). Koh found that

[u]nlike interest theorists, who tend to treat state interests as given, “constructivists” have long argued that states and their interests are socially constructed by “commonly held philosophic principles, identities, norms of behavior, or shared terms of discourse.” Rather than arguing that state actors and interests create rules and norms, constructivists argue that “[r]ules and norms constitute the international game by determining who the actors are, what rules they must follow if they wish to ensure that particular consequences follow from specific acts, and how titles to possessions can be established and transferred.”

Id. (citations omitted) (alteration in original). *See generally* Alexander Wendt, *Constructing International Politics*, 20 *INT’L SECURITY* 71 (1995) (reviewing a neorealist critique of critical international relations theory); Alexander Wendt, *Collective Identity Formation and the International State*, 88 *AM. POL. SCI. REV.* 384 (1994) (arguing that state identity changes in response to systemic interactions); Andrew Hurrell, *International Society and the Study of Regimes: A Reflective Approach*, in *REGIME THEORY AND INTERNATIONAL RELATIONS* 49 (1993) (discussing Regime Theory in light of traditional European thought on international law).

Although Koh criticizes constructivism as unable to explain “the transmission belt” of norms to domestic policy, he and other writers in the transnational legal process tradition rely on a similar assumption about the importance of norms and ideas in international law constraining domestic behavior.

[Koh’s] model of “transnational legal process” . . . argues . . . that compliance with international rules is not explained entirely by the functional benefits it provides but, rather, by the process of internalization of international legal norms into the internal value sets of domestic legal systems

. . . .
 . . . [T]his idea [is] a central feature of his model.

Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 *AM. J. INT’L L.* 367, 381 (1999).

function of what individuals and organizations think and what other states want.¹⁴ The state is “socially constructed.”¹⁵ These norms and ideas underlie the decisions states and other actors make when forming policy.

Of particular interest here is a group of scholars often referred to as the World Society School.¹⁶ Their core insight is to use contemporary sociological institutionalism to examine why states are surprisingly similar to one another in terms of their organizational framework and often their policies.¹⁷ The World Society School is “trying to account for a world whose societies, organized as nation-states, are structurally similar in many unexpected dimensions and change in unexpectedly similar ways.”¹⁸ These scholars argue that a set of norms which develop internationally—in the “rationalized world institutional and cultural order”—shape national decision-making.¹⁹ This rationalized order

14. See Jutta Brunnee & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19, 26 (2000).

15. See *id.*

16. While the World Society School is in some ways different from constructivism, both groups come from the common sociological tradition and argue that national policy and identity are socially constructed in world society and world culture:

Of course, [the World Society] approach is broadly constructivist in that we argue that states are products of cultural and associational processes. But the approach advanced in this Article qualifies (and supplements) conventional constructivist theories in important respects. First, our approach differs sharply from bottom-up constructivist models. Our model views states as shaped by cultural processes that are substantially organized on a global level. This approach emphasizes the ways in which states reflect their wider institutional environment. Second, our model identifies different social mechanisms from those identified by traditional constructivist approaches. Rather than emphasizing persuasion and habituation as the processes through which institutions influence state action, we stress the ways in which orthodoxy and mimicry shape state identity, interests, and organizational structure. Finally, in terms of methodology, our approach supplements, or perhaps serves as a corrective to, constructivist legal scholarship by using empirical and quantitative methods that help specify when, under what conditions, and to what extent, state behavior is shaped by social structure.

Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1753 (2003); cf. John Gerard Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 INT'L ORG. 855, 857-62 (1998) (noting the influence of Weber and Durkheim on constructivism, as well as noting more recent developments); John W. Meyer et al., *World Society and the Nation-State*, 103 AM. J. SOC. 144, 145 (1997) (“Worldwide models define and legitimate agendas for local action, shaping the structures and policies of nation-states and other national and local actors . . .”).

17. See Meyer et al., *supra* note 16, at 145.

18. *Id.*

19. While they acknowledge that “states, organizations, and individuals also contribute to the content and structure of world culture,” World Society scholars focus on the way that world society and culture shapes and controls states, organizations and individuals. *Id.* at 150-51.

consists not only of states, but also of international organizations, nongovernmental organizations (NGOs), cultural influences, professional associations, and epistemic communities in thousands of areas.²⁰

The question, then, is how. The rationalized world institutional order impacts national policies in three major ways: (1) international society constructs the identity and purpose of nation-states by providing recognition—formal and informal—to nation-states that fit certain ideas, and by serving as models that other nations mimetically reproduce; (2) international society actively maintains that identity through the advice and aid of other nation-states, international organizations, and nonstate actors; and (3) international society legitimizes individuals who wish to push their own states toward international standards.²¹ Most of the work of the World Society scholars is dedicated to explaining how specific internationally determined norms explain policies in individual countries at different levels of development and in very different cultural milieus. Studies have shown everything from female enrollment in education,²² demographic record-keeping technology,²³ the existence of science policy review boards,²⁴ and the structure of military forces,²⁵ to

20. From the perspective of a single national polity, the outside world consists of much more than a “system of states” or “world economy” or “international system.” Rather, the global environment is a sea teeming with a great variety of social units—states and their associated polities, military alliances, business enterprises, social movements, terrorists, political activists, NGOs—all of which may be involved in relations with the polity. Some of these actors are seen as beneficial, others as antagonistic. In either case, they are all part of the larger world and must be dealt with in some way:

Besides actors, the world polity contains raw materials, labor, manufactured products, scientific knowledge and other resources It contains structures of rules regarding access to those resources and theories explaining why they are essential [T]he world polity contains complex sets of rules . . . regarding how the polity can and should structure its relations to the larger world Some rules are formal and explicit, such as rules of positive international law, contracts, and interstate organizations. Others are informal, such as international customary law, state “practice” and generalized expectations regarding what states and other actors may and ought to do.

Finally, the world polity contains a multitude of even more loosely structured “cultural” elements.

John Boli, *Sovereignty from a World Polity Perspective*, in *PROBLEMATIC SOVEREIGNTY* 53, 59-60 (Stephen D. Krasner ed., 2001) (citations omitted).

21. See Meyer et al., *supra* note 16, at 157.

22. See Karen Bradley & Francisco O. Ramirez, *World Polity and Gender Parity: Women's Share of Higher Education, 1965-1985*, 11 *RES. SOC. EDUC. & SOCIALIZATION* 63, 63-91 (1996).

23. See CONNIE L. MCNEELY, *CONSTRUCTING THE NATION STATE: INTERNATIONAL ORGANIZATION AND PRESCRIPTIVE ACTION* 73-115 (1995).

24. See MARTHA FINNEMORE, *NATIONAL INTERESTS IN INTERNATIONAL SOCIETY* 34-68 (1996).

the existence of welfare systems²⁶ or constitutions,²⁷ varies along with international standards, rather than in response to domestic needs, and can be explained by the influence of World Society through these three mechanisms.

Most of this research comparatively examines national policies in an issue area and then determines whether there is international coherence, and whether changes in a few nations reverberate through the international system.²⁸ This works extremely well for specific policies with easily observable variables. It is not necessarily well suited, however, to explain how more general ideas about the nature of politics influence policy. Since this Article seeks to identify the dominant idea of "the state" in the world polity, it must employ a different methodology.

A technique and an assumption similar to that of the constitutional law theorists described above provide a method for answering these questions. The assumption is that the U.N. effort to build an entirely new political unit in Kosovo reveals how international policy makers conceived of a state. The technique is to analyze the decisions made by the United Nations, the Organization for Security and Cooperation in Europe (OSCE), NATO, the European Union, their constitutive members, NGOs, and individuals in shaping post-war Kosovo through the lens of international law theory, just as constitutional law theorists examine judicial opinions through the lens of political theory. The process of setting up UNMIK serves as a natural experiment. In creating a "state," the international community almost necessarily had to reveal its underlying ideas about what a state is and how a state operates.

II. DISAGGREGATED SOVEREIGNTY AND UNMIK: APPLYING THE METHODOLOGY

Inside the legal academy, one of the dominant *fin de siècle* ideas about the nature of the state was the notion of disaggregated sovereignty. Following Kenneth Abbott's call to arms for a connection between international law and international relations, a group of law scholars

25. See Martha Finnemore, *Norms, Culture, and World Politics: Insights from Sociology's Institutionalism*, 50 INT'L ORG. 325, 336-37 (1996).

26. See *id.* at 336; Andrew Abbott & Staley DeViney, *The Welfare State as Transnational Event: Evidence from Sequences of Policy Adoption*, 16 SOC. SCI. HIST. 245, 245-46, 266, 269 (1992).

27. John Boli, *World Polity Sources of Expanding State Authority and Organizations, 1870-1970*, in INSTITUTIONAL STRUCTURE: CONSTITUTING STATE, SOCIETY AND THE INDIVIDUAL (George Thomas et al. eds., 1987).

28. See sources cited *supra* notes 22-27.

began plumbing the idea of “Liberalism” in international relations.²⁹ Led by Anne-Marie Slaughter, these scholars argued that the modern liberal state was not, as Realist international relations (IR) scholars argued, a unified, rational actor possessing freedom of action over a defined area due to its sovereignty. The state’s actions were, and are, not merely efforts to defend its predefined interests in an anarchic world.³⁰ Nor were the modern liberal state’s interests and policies defined merely by the interplay of domestic political actors.³¹ Rather, modern liberal democracies are a compendium of interests—governmental ministries, agencies and officials, independent regulatory bodies, nongovernmental actors, and citizens—working in networks to create policy in a variety of fields.³² The insight of these scholars was to argue that these substate level actors not only related to one another domestically, but also created policy internationally. In other words, substate actors in modern liberal democracies worked across borders to make international policy. This was, in Slaughter’s famous phrase, “the real new world order.”³³

This idea of the state animated the creation and structure of UNMIK. Moreover, the introduction of a certain *meme* to the general “disaggregated sovereignty” concept—that it is possible to expand the “club of democracy” through links between individual agencies in constitutional democratic states with those in nondemocratic nonliberal ones—was the intellectual bridge that justified the adoption of disaggregated sovereignty as a governing ideology for UNMIK.³⁴ This is not to say that the scholarship inspired the structure of UNMIK. Rather, the scholarship was representative of the dominant mode of thinking about what “states” were in the post-cold war, post-Westphalian system of the late 1990s. And that mode of thinking *was* responsible for the structure of UNMIK.

This finding should influence World Society literature. Most of the scholarship in this area has sought (1) to prove that ideas are

29. See Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. INT’L L.* 335, 338, 340, 342 (1989); Slaughter et al., *supra* note 13, at 367; see also David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 *N.Y.U. J. INT’L L. & POL.* 335, 388-89 (2000).

30. See Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 *EUR. J. INT’L L.* 503, 508 (1995).

31. See *id.*

32. See, e.g., Anne-Marie Slaughter, *The Real New World Order*, 76 *FOREIGN AFF.* 183, 184 (1997); Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 *COLUM. L. REV.* 1907, 1917 n.25 (1992).

33. See Slaughter, *supra* note 32, at 183.

34. Compare Burley, *supra* note 32, at 1921, with Slaughter, *supra* note 32, at 185.

disseminated throughout the world, (2) identify the means by which this is done, and (3) evaluate the effectiveness of those means for diffusing ideas internationally. This Article points to another question: what types of ideas travel and which do not. Ultimately, this Article argues that one crucial factor in answering that question lies in the structure of the ideas themselves. Over time, disaggregated sovereignty scholars espoused the belief that liberal states could reproduce themselves in nonliberal areas by linking the subgovernmental institutions of the liberal state to those of the nonliberal state. This belief resulted in the use of the disaggregated sovereignty idea of state as the basis for forming a new state.

Previous ideas of state were different, not only in their content but in their structure. The dominant idea of state during the League of Nations Mandate System of the interwar period—the last major period of international state-building—held, as a matter of definition, that Western states could not be fully replicated in the developing world.³⁵ As a result, the League of Nations did not try to replicate European states in full form in non-European settings. Despite similar institutional frameworks for the dissemination of ideas, the differences in the content of those ideas changed when they were transmitted.³⁶ The World Society literature, which, for the most part, treats the expansion of certain ideas as a result of sociological factors, ignores the effect ideas themselves play in their own expansion.

The rest of this Article is organized as follows. Part III examines the rise of disaggregated sovereignty as an idea and charts its changes over time. Part IV examines the structure of UNMIK and argues that it is organized along the ideas of disaggregated sovereignty theorists. Part V concludes the Article by discussing how the questions raised by the relationship between international state-building and ideas of state should impact World Society literature.

III. THE RISE OF DISAGGREGATED SOVEREIGNTY IN INTERNATIONAL LAW SCHOLARSHIP

To show that the conception of the state behind the disaggregated sovereignty literature heavily influenced the institutional design of UNMIK, it is important to establish exactly what that idea of the state

35. See Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy and the Mandate System of the League of Nations*, 34 N.Y.U. J. INT'L L. & POL. 513, 533-36 (2002).

36. *Id.*

is.³⁷ Doing so will reveal that the conception of the state in the disaggregated sovereignty literature actually consists of a number of different elements, many of which are shared by the other important modes of thinking in modern international law theory, especially “transnational legal process” theory.

A. International Relations and International Law: History and Primer

New theoretical paradigms rarely fit the end of historical periods as neatly as the use of IR theory to deal with international law fit the end of the Cold War. The period in American public international law theory dating from the end of World War II to 1989 was marked by the “80 miles of I-95” distinction between the Columbia and New Haven schools of thought.³⁸ The New Haven School, led primarily by Myres McDougal and Harold Lasswell, developed a response to the IR realists who thought that the behavioral “norms” which comprise international law were largely epiphenomenal.³⁹ The New Haven School argued that international law was not a set of rules created by norms of behavior but rather the result of the need for policy-makers to make an “authoritative decision” about international issues.⁴⁰ Norms were not the guiding force of international law—policy was. To them, policy was “a category of judgment and political management standing outside of hard and soft law, rules and principles.”⁴¹ The search for better policy was to be done through “empirical knowledge analyzed by reference to purposive outcome.”⁴² The pursuit of knowledge by decision-makers aimed at achieving world order and human dignity created international law.⁴³ The defense of international law rested on a defense of these principles, which led the New Haven School to resist communism and to justify military actions that served to protect civil liberties and rights.⁴⁴

37. Again, it should be noted that this Article makes no claim that the literature itself impacted the structure of UNMIK. Rather, its claim is that the set of ideas of which legal scholarship was a representative part influenced the structure of UNMIK.

38. See Kennedy, *supra* note 29, at 380-90.

39. See *id.*

40. See *id.*; see also 1 HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY* 24-25 (1992).

41. Kennedy, *supra* note 29, at 384; see, e.g., Myres S. McDougal, *Law and Power*, 46 *AM. J. INT'L L.* 102 (1952).

42. Richard A. Falk, *Casting the Spell: The New Haven School of International Law*, 104 *YALE L.J.* 1991, 1992 (1991).

43. *Id.*

44. *Id.* at 2002-03 (“McDougal and Lasswell had an early and historically prophetic grasp on the fundamental ideological struggle of the last half-century, and they resolved it in favor of

The Columbia School, led by Louis Henkin and others, believed that international law, while not providing a strict set of rules, provided a number of norms that allowed for the peaceful coexistence of different types of peoples and states in the world.⁴⁵ Columbia School scholars believed that international organizations, especially the United Nations, could provide the flexible management necessary for peaceful coexistence.⁴⁶ While out of favor with most important policy-makers outside of the U.N. system after 1960, the Columbia School dominated the thinking of academics and international lawyers, "emphasizing norms over policy and international community over the interests of sovereigns."⁴⁷

After the Cold War, though, neither resolute anticommunism nor détente seemed like necessary goals for the study or content of international law. Kenneth Abbott's seminal article, *Modern International Relations Theory: A Prospectus for International Lawyers*, was written just before the fall of the Berlin Wall.⁴⁸ Rather than continue to question what international law should look like in a bipolar world, it aimed to create a deeper explanation for why international law exists in the first place.⁴⁹ Abbott argued that international law analysis was under-theorized; it had skipped the question of *why* states create international law to work on the issue of *what* that international law should be.⁵⁰ The existence of international law needed to be explained, he argued, and to do so, international lawyers should turn to international relations theory, which "seek[s] to explain the underlying bases of conflict and cooperation in international politics."⁵¹ This was a direct indictment of the Columbia School—the international law establishment among academics and lawyers—which he thought was unable to respond to the criticisms leveled by Realist international relations scholars.⁵² What Abbott sought to do, though, was to co-opt the logic of international relations critics of international law, and harness it into a set of justifications for international agreements.⁵³ By appearing in 1989, with

the West in a manner that has been abundantly validated but that was by no means self-evident when initially articulated.”).

45. See Kennedy, *supra* note 29, at 383.

46. See *id.*

47. *Id.*

48. Abbott, *supra* note 29 (published summer 1989; the Berlin Wall fell Nov. 9, 1989).

49. See *id.* at 335-40.

50. See *id.* at 336-37.

51. See *id.* at 340.

52. See *id.*

53. See *id.* at 405.

the future of world politics unclear, this call for a renewal and a justification of international law had deep effects.

Abbott's own theory was drawn from one branch of international relations: Regime Theory, or Institutionalism.⁵⁴ This theory is based on the basic assumptions of Realist international relations that states are sovereign, unitary, rational actors driven solely by the pursuit of their national interests and that the world system is characterized by anarchy.⁵⁵ Realists used these assumptions to argue that no international law could bind states because, when rules worked against the interests of a state, it simply would not follow them.⁵⁶ Institutionalists used game theory and market failure analogies to explain why nations developed "regimes" governed by international law.⁵⁷ International norms were created, Abbott argued, to allow rational self-interested states to work together, much the way contracts and commercial norms allowed businesses to work together.⁵⁸ International law existed because it helped these autonomous states further their interests.⁵⁹

Although Institutional research in international law continues,⁶⁰ it was quickly supplemented by efforts to use other branches of international relations for the types of formal, deep explanations and resultant policy prescriptions Abbott had suggested were necessary for international law.⁶¹ Most notable of these was the connection between IR Liberalism and international law, which took its most advanced form in Anne-Marie Slaughter's work on disaggregated sovereignty.⁶²

54. *See id.* at 388.

55. *See id.* at 346-51.

56. *See id.* at 337-88.

57. *Id.* at 405-07.

58. *See id.* at 405.

59. *See id.*

60. *See, e.g.,* Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOL. 3 (1998); Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334 (1999).

61. *See* Abbott, *supra* note 29, at 335-40.

62. Kennedy, *supra* note 29, at 388-89.

These scholars, the leading "new" scholars of my generation—people like Koh, Slaughter, Alvarez, Kingsbury, and Teson, many of them law school classmates, friends, and colleagues—urge movement toward a new understanding of international community and a new appreciation for an anti-formalist international law. In the new post-Cold War world, they reaffirm some of the field's most familiar and dogmatic propositions: that sovereignty has eroded, that international law should be understood politically, that the boundary between international and municipal law is porous, that international law may not be as universal as it pretends, and that the international regime is better understood as a process or multilevel game than as government by legal norms. They have taken ideas that have been part of disciplinary common sense

Liberalism in international relations starts with radically different assumptions than does Realism, the dominant mode of IR theory for most of the second half of the twentieth century. Rooted in the Kantian idea of "perpetual peace," Liberalism abandons the idea of the state as a unitary, self-interested actor in an anarchical world.⁶³ Instead, the theory studies the actions of individuals:

Liberals insist on methodological individualism, viewing individuals and private groups as the fundamental actors in international (and domestic) politics. States are not insignificant, but their preferences are determined by domestic politics rather than assumed interests or material factors like relative power. This approach implies that interstate politics are more complex and fluid than realists and institutionalists assume: national preferences can vary widely and change unpredictably. It calls for careful attention to the domestic politics and constitutional structures of individual states—a daunting prospect for analysts of international relations.⁶⁴

A theory that relies on the mechanisms of domestic politics to systematically explain the behavior of states internationally must develop assumptions and beliefs about how states work internally. This has long been the focus of international law scholarship. Starting as it does with the general assumption of state sovereignty, international law theory has had to explain why states comply with international law when it is not in their direct interest.⁶⁵ Louis Henkin famously observed that "almost all nations observe almost all principles of international law . . . almost all of the time."⁶⁶ Exactly why this is true, however, has been a crucial problem in international law.

Just as some scholars were starting to apply liberal IR theory to international law, Harold Koh and others were creating a set of ideas to deal with the compliance problem under the banner of "transnational legal process."⁶⁷ Although Koh comes from a different starting point, his

for a century—pragmatism, anti-formalism, interdisciplinarity—and turned them into a fighting faith. This methodological self-confidence announces a political optimism: the end of the Cold War will complete the internationalist project, inaugurating a humanitarian "civil society"—an "international community" that will dethrone the state, welcome wider participation, and open international law to the political.

Id.

63. See Burley, *supra* note 32, at 1914-17 (discussing Kantian ideals).

64. Kenneth Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT'L L. 361, 366 (1999).

65. See Koh, *supra* note 13, at 2655.

66. LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979) (emphasis omitted).

67. See Koh, *supra* note 13, at 2645-46.

work shares many of the beliefs of liberal IR theory about the attributes of states that make them comply with international legal norms.

In international law, Liberals usually examine how liberal states—democracies with market economies that protect basic human rights—behave.⁶⁸ Although it is sometimes difficult to define exactly who is and who is not part of the club of liberal states,⁶⁹ Liberals assert an empirical claim that power in these states is diffused to various constituent parts of government. “The state is not disappearing, but disaggregating into its separate, functionally distinct parts.”⁷⁰ To understand how policy is made in a specific area, it is as necessary to look at the network of various government officials who work in that area as it is to look at the policies of the head of state. Further, they argue, “These parts—courts, regulatory agencies, executives and even legislatures—are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order.”⁷¹ The future of international law lays in the complex relations between these subgovernmental parts, not in the relationships between sovereign leaders, big or powerful international organizations, or the power of global civil society.⁷²

While this understanding of state policy-making will be explored in more depth in Part III.B, it can be seen from even this simple explanation that this understanding overlaps with—but is not identical to—transnational legal process ideas on how states operate. Transnational legal process theorists argue that institutionalists, liberal IR theorists, and constructivists are all right to some extent about why states obey international law.⁷³ According to Koh, international rules are made through an iterative, or repetitious, process.⁷⁴ First, transnational actors—individual policy entrepreneurs who may be part of the government—

68. See Slaughter, *supra* note 30, at 508.

69. Koh, *supra* note 13, at 2650.

Its essentialist analysis treats a state's identity as somehow exogenously or permanently given. Yet as constructivist scholars have long recognized, national identities, like national interests, are socially constructed products of learning, knowledge, cultural practices, and ideology. Nations such as South Africa, Poland, Argentina, Chile, and the Czech Republic are neither permanently liberal nor illiberal, but make transitions back and forth from dictatorship to democracy, prodded by norms and regimes of international law.

Id. (citation omitted).

70. Slaughter, *supra* note 32, at 184.

71. *Id.* at 185.

72. *Id.* at 183-85.

73. See Koh, *supra* note 13, at 2646.

74. See *id.*

interact with one another, creating or interpreting international norms.⁷⁵ By doing so, they insert themselves into their domestic "internal normative system."⁷⁶ This creates a rule which countries will follow to the extent it has been internalized in its domestic idea-set. The more this process takes place, the firmer the rules become. "[E]ventually, repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process."⁷⁷ This process, though, relies on a vision of states that is not unitary: individual policy actors—and not rational, unitary states—are given the lead position in negotiating norms in transnational space.

Koh excoriates liberal IR scholars for treating the creation of liberal states as exogenous and thereby missing the idea of how international law forms the liberal identity of states.⁷⁸ He claims that liberal IR scholars ignore the ways nonliberal states obey international law, which runs into empirical problems (nonliberal states often do obey international law) and normative ones (denying the universality of international law).⁷⁹ However, if one cabins discussion to how acknowledged liberal states behave among themselves and ignores how they change over time, it is hard to distinguish transnational legal process from liberal international relations/international law (IR/IL) thinking. The state is not a unified actor pursuing its interests. Instead, a state is composed of many subsets of actors, all of which negotiate and discuss issues internationally in complicated issue webs, and which then influence, or simply create, domestic policy. Policy is enforced by states,

75. *See id.*

76. *Id.*

77. *Id.*

78. *See id.* at 2650.

79. *Id.*

Identity analysis leaves unanswered the critical, constructivist question: To what extent does compliance with international law itself help *constitute the identity* of a state as a law-abiding state, and hence, as a "liberal" state? Furthermore, the notion that "only liberal states do law with one another" can be empirically falsified, particularly in areas such as international commercial law, where states tend to abide fastidiously by international rules without regard to whether they are representative democracies. Moreover, like the discredited "cultural relativist" argument in human rights, the claim that nonliberal states somehow do not participate in a zone of law denies the universalism of international law and effectively condones the confinement of nonliberal states to a realist world of power politics.

Id. (citation omitted).

which maintain their monopoly on the legitimate use of force, but it is created through the negotiations and interactions of substate parts.⁸⁰

These ideas and their similar conceptions of the state have gained great prominence in international law theory. The history of this rise has been relentlessly chronicled.⁸¹ Rather than repeat this extensive project of intellectual history, the next Part will flesh out the conception of a state in disaggregated sovereignty theory and show how this conception changed over time before proceeding to explain that conception's role in shaping UNMIK.

B. Disentangling Disaggregated Sovereignty: Four Themes

Although the last Part discussed why disaggregated sovereignty theorists think liberal states create more law than nonliberal ones, it did not explore what attributes render a state "liberal." Because the IR/IL literature is massive and most authors are almost infinitely vague about their answer to this question, I am going to follow the work of the unquestioned leader in the field: Anne-Marie Slaughter. Through a close reading of four of her most prominent articles on the subject, I will attempt to make clear what conception of state lies at the core of the disaggregated sovereignty literature and how this idea changed over time.

Through a series of articles in the 1990s, Slaughter laid out a detailed map of how liberal states behave in international law.⁸² She was intentionally vague, however, about what constitutes a liberal state.⁸³ By reasoning backwards, however, we can explore what traits a liberal state must have in order to engage in international law-making of the type Slaughter describes.

Before doing so, though, it is important to note that as defined by both IR and IL/IR scholars, "Liberalism" is a method and not a

80. To be fair, Koh puts a great deal more emphasis on the role of civil society, but his idea of the state, the crucial question for this Article, is the same. *See, e.g., id.* at 2651-54 (discussing why Israel participated in the Oslo process).

81. *See, e.g.,* Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 24 (2002); Don Suh, *Situating Liberalism in Transnational Legal Space*, 12 DUKE J. COMP. & INT'L L. 605, 618 (2002); Anne Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347, 353 (2001); Slaughter et al., *supra* note 13, at 367. This is only a very partial list.

82. Slaughter recently released a book that summarizes a great deal of this literature. ANNE-MARIE SLAUGHTER, *NEW WORLD ORDER* (2004). However, because it came after the event at issue—the founding of UNMIK—it will not be discussed here.

83. *See* José E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 EUR. J. INT'L L. 183, 193 (2001).

definition of state policy or type.⁸⁴ "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 domestic slice."⁸⁵ As a method, "Liberalism" separates itself from "Realism" by arguing that regime type matters. In the classic Realist model, states, no matter who governs, how they govern, or how the leaders of the state were selected, behave in the same fashion in an international context.⁸⁶ Liberalism rejects the idea of the autonomous state and replaces it with contextual analysis of how different types of regimes act.⁸⁷ The crucial players are substate actors: individuals, governmental bureaucracies, and NGOs.⁸⁸ "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."⁸⁹

Andrew Moravcsik, perhaps the leading proponent of Liberalism in international relations, argued that the method was reducible to three basic postulates: (1) individuals and privately constituted groups are the central actors in world politics; (2) all regimes are influenced by at least some group of domestic interests; and (3) the behavior of states reflects the preferences of the individual actors who comprise and influence the state.⁹⁰

This type of analysis can be used to analyze any type of regime because individuals are players in even the most autocratic state. It is particularly useful, though, for understanding modern democracies because it is both easier to see and more important to understand the behavior of individuals in a system that gives them formal decision-making authority. IR/IL scholars have created a large body of work on how this specific type of state (henceforth referred to as a "liberal state") operates and makes law in an international context.

84. See Slaughter, *supra* note 30, at 509.

85. *Id.*

86. *Id.* at 506.

87. See *id.* at 508.

88. See *id.*

89. *Id.*

90. See Andrew Moravcsik, *Liberalism and International Relations Theory* 6, 9, 11 (Working Paper, Ctr. for Int'l Affairs, Harvard Univ., 1992), cited in Anne-Marie Slaughter Burley, *International Law and International Relations: A Dual Agenda*, 87 AM. J. INT'L L. 205, 227 (1993).

Liberalism has both positive and normative aspects.⁹¹ It is hard to separate the positive predictions about how liberal states behave from the clear belief among liberal scholars that this behavior is good. The positive analysis about how liberal states behave serves as the basis for normative suggestions about how states become more liberal.⁹² Moreover, the decision to split liberal states into a separate category has been accused of being highly politically charged.⁹³ For the purposes of this Article, it is enough to say that the theory, as adopted by international policy-makers, was both positive (in that it provided a description of how modern capitalist democracies behaved) and normative (in that its description of the world and international policy-making was generally seen as a good thing for those states).⁹⁴

Through analyzing Slaughter's four major articles on the subject, it is possible to see the contours of Liberalism's view of liberal states at the end of the twentieth century.

91. See Burley, *supra* note 32, at 1910 ("The liberal internationalist model can be used interpretively, predictively, and normatively:").

92. See Alvarez, *supra* note 83, at 189 ("Notwithstanding normative disclaimers, Slaughter's sympathies for the law-making regimes and political institutions of the West are never in doubt. The political message liberal theory conveys to international policy-makers is not subtle: 'hopes for international order should be pinned on our hopes for democracy.'" (quoting Anne-Marie Burley, *Toward an Age of Liberal Nations*, 33 HARV. INT'L L.J. 393, 403 (1992)).

93. See *id.* at 192 ("Harsher critiques have emerged from some of those who consider themselves as either 'critical' legal scholars . . . or scholars of the 'sub-altern' or the 'post-colonial.' For these critics, liberal theory . . . is the oppressive voice of neo-liberal hegemony:" (emphasis omitted)).

94. It should also be noted that this paper is uninterested in the truth-value of liberal claims or the advisability of policies promoted by those who use liberalism normatively. Determining the importance of the theory is enough. That said, I should note the contours of this argument. José Alvarez, among others, has challenged the claims that (1) liberal states make more law with one another than do nonliberal ones and (2) that liberal states are less likely to go to war with one another. Alvarez claims that the argument that transnational governance networks have created a lot of international policy by claiming that "Slaughter builds her theory . . . on a selective compiling of very recent evidence while ignoring . . . notorious counterexamples." *Id.* at 220. This seems right but not entirely inconsistent with Slaughter's argument is that something has changed very recently and that the development of governance networks is piecemeal and not complete. Moreover, evidence has piled up that governance networks have been increasing in scope, if fitfully. See, e.g., Raustiala, *supra* note 81, at 53-54; David Schleicher, Book Review, *Mark A. Pollack & Gregory C. Schaffer's Transatlantic Governance in the Global Economy*, 43 HARV. INT'L L.J. 605, 608 (2002). Alvarez also argues that, because Slaughter is unable to explain why a Kantian perpetual peace exists between liberal states, her arguments about how to use this evidence (which he also disputes) are weak. See Alvarez, *supra* note 83, at 235-38. Moreover, he claims that differentiating between liberal and nonliberal states just gives liberal states license to go to war with nonliberal ones. Neither of these criticisms says much to Slaughter's central empirical claim, which is that the existence of a "zone of peace" makes it likely that there is also a "zone of law."

1. *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine* (1992)⁹⁵

Slaughter's first major article on the subject was a discussion of the Act of State doctrine in American law.⁹⁶ She sought to unravel a classical theoretical problem in American law: American courts refused to challenge the validity of the laws of communist and other unfriendly, nondemocratic states, but were more than willing to overrule laws of friendly democratic countries through ordinary conflict of laws rules.⁹⁷ To explain this, Slaughter turned to differences between these types of states.

The basic source of her argument was Kant's *The Eternal Peace*.⁹⁸ Kant argued that in a world characterized by liberal republics with representative governments, a law of nations based on federalism between these republics and "a cosmopolitan law establishing the right of universal hospitality," could avoid war indefinitely.⁹⁹ Slaughter notes that this had, in a way, come to pass: international relations scholars had spent years developing statistical models to show that, with very few exceptions, liberal democracies did not go to war with one another.¹⁰⁰ From this massive data project, scholars made two relatively simple findings: (1) liberal states were fundamentally different from nonliberal

95. Burley, *supra* note 32, at 1907.

96. *See id.* at 1910.

97. *See id.*

Deceptively simple to formulate, the act of state doctrine has nevertheless presented a perennial challenge for scholars and practitioners determined to unravel the mysteries of its evolution and application. From a liberal internationalist perspective, however, the doctrine appears to embody exactly the paradox predicted by the liberal internationalist model, which I will henceforth call the sovereignty paradox. On the one hand, at least until 1989, U.S. courts were willing to "respect the independence" of states such as Czechoslovakia, East Germany, Iran, Libya, Cuba and the former Soviet Union—allowing challenged acts by these states to stand unreviewed even when they clearly contravened U.S. law. On the other hand, in cases involving challenged acts of states such as Australia, Canada, Great Britain, Israel, Japan, the Netherlands, New Zealand and Switzerland, U.S. courts have either evaluated the validity of the challenged act under U.S. or foreign law or chosen to override the foreign law based on superior U.S. interests.

Id.

98. *Id.* at 1914 (citing IMMANUEL KANT, *THE PHILOSOPHY OF KANT: IMMANUEL KANT'S MORAL AND POLITICAL WRITINGS* 430-76 (Carl J. Friedrich ed., Random House 1949) (1795)).

99. *Id.* (citing KANT, *supra* note 98, at 446).

100. For this proposition, Slaughter cites the work of Michael Doyle. *Id.* at 1914-15; *see* Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205, 206 (1983); Michael W. Doyle, *Liberalism and World Politics*, 80 AM. POL. SCI. REV. 1151, 1155-56 (1986).

states, and (2) the lack of conflict between liberal states was a function of this difference.¹⁰¹

Slaughter's innovation was to argue that these findings, based on political and military relations among states, "apply equally to international legal relations."¹⁰² She argued that courts were willing to review the law of other liberal states because liberal states existed in a "zone of law," characterized by mutual recognition of the rule of law, dialogue between courts, and because there was no threat that legal disputes would result in war.¹⁰³ Conflicts of laws were just that and not conflicts between nations.¹⁰⁴ Courts would not overrule the decisions of nonliberal states because relations between liberal and nonliberal states took place in a "zone of politics."¹⁰⁵ The decisions of nonliberal states were not easily translatable into the American discourse of law, and overlaying any dispute between a liberal and a nonliberal state was the possibility that the dispute would lead to war.¹⁰⁶ American courts do not use ordinary conflict of laws to deal with the decisions of nonliberal states because their decisions are not "legal" in any meaningful sense.¹⁰⁷ Slaughter argued that the Act of State doctrine served as the "tacit line of demarcation between" the liberal zone of law and the nonliberal zone of politics.¹⁰⁸

This, of course, begged the question: what is a liberal state? Slaughter defined it as a state "with juridical equality, constitutional protections of individual rights, representative republican governments, and market economies based on private property rights."¹⁰⁹ This is a static definition; it would fit the United States as well in 1890 as it did in 1990. It provides little help in determining what the popular conception of liberal states was at the time of the creation of UNMIK. However, Slaughter's paper made one central idea explicit: liberal states are different from nonliberal ones.¹¹⁰ As we will see, this concept was relaxed in later articles, and the intellectual move this represented explains a great deal about the structure of UNMIK. Further, Slaughter's

101. See Burley, *supra* note 32, at 1916.

102. *Id.*

103. *Id.* at 1917.

104. See *id.* at 1918-20.

105. *Id.* at 1920.

106. See *id.* at 1921.

107. See *id.*

108. *Id.* at 1952-53.

109. *Id.* at 1909.

110. *Id.*

paper emphasizes relations between substate entities across borders—in this case courts—which makes clear Slaughter's insistence that the foreign policy of states is made by a variety of actors, including nondemocratically elected technocrats like judges, exercising power at different levels in international and national systems and not just by foreign ministers or presidents.

2. *International Law and International Relations: A Dual Agenda* (1993)

In an article Slaughter wrote just one year later, her earlier simple, static definition of liberal states was replaced with a sense that some major changes were going on in the relationships between liberal states in the post-Cold War world.¹¹¹ Slaughter's article began by explaining how "the Realist challenge" shaped the discussion between international relations and international law for the entire period of the Cold War.¹¹² Slaughter argued that the traditional debate between international law scholars and IR experts had lost most of its urgency because of the end of the Cold War and the increasing amount and importance of international law in the late 1980s and early 1990s.¹¹³ This period, right before and after the end of the Cold War, was marked by the rise of international law and international relations scholarship under the rubric of Institutionalism.¹¹⁴

This rich vein of scholarship in both international relations and international law was well-suited for explaining a number of different phenomena in international law, especially treaty formation.¹¹⁵ Slaughter argued that by 1993, Institutionalism had run its course as well.¹¹⁶ While Institutionalism was useful at explaining some things, any theory that depended on the basic tenets of Realism, she argued, was limited in its usefulness because of changes in the world happening in the early 1990s.¹¹⁷ First, "Institutionalism cannot take account of individual-state relations, either domestic or transnational, or transnational individual-individual relations. It thus cannot provide a politico-economic theory to help conceptualize and analyze the law that regulates these relations."¹¹⁸

111. See Burley, *supra* note 90, at 207-16.

112. *Id.* at 207-09.

113. *Id.* at 220-26.

114. *Id.* at 220-24.

115. *Id.*

116. *Id.* at 225.

117. *Id.*

118. *Id.*

These issues, she argued, were of increasing importance as both economic behavior and the legal regulation of that economic behavior became more and more internationalized.¹¹⁹ Further, Institutionalism could not explain the democratic peace.¹²⁰ This, too, was an increasingly significant flaw because of the dramatic increase in the number of democratic states.¹²¹

Slaughter argued that researchers should turn to Liberalism as model to look at the problems of contemporary IR/IL.¹²² Although Liberalism can be used to understand any type of state, Slaughter's argument about its usefulness in relation to institutionalism was based on the fact that Liberalism would be a more effective lens to look at the characteristic issues of a world full of liberal states.¹²³ Realism could explain, perhaps, relations between nuclear-armed superpowers and Institutionalism could explain peace treaty creation and the formation of large international institutions.¹²⁴ Neither, however, was particularly useful in a world where states simply did not want to go to war with one another and where most important international regulation did not happen through large international treaties but through coordination among individuals and regulators.¹²⁵

When discussing the problems of the use of Liberalism in international law, Slaughter asked:

A second problem concerns the relative power of Liberalism versus Realism and Institutionalism. Even assuming that Liberals do succeed in formulating substantive theoretical propositions, under what conditions will those propositions explain more than Realism and Institutionalism? In other words, even if Liberal propositions offer a more accurate description of empirical phenomena, do they ultimately add anything to our ability to explain and predict such phenomena? If not, why displace the relative parsimony and power of Realism and Institutionalism?¹²⁶

119. *Id.* at 226.

120. *Id.* at 225-26.

121. *Id.* at 226.

122. *Id.* at 226-27.

123. *Id.* at 228-30.

124. *Id.* at 237-38.

125. *Id.*

126. *Id.* (emphasis omitted) (citation omitted).

Underlying these questions is an inherent philosophical pragmatism.¹²⁷ In this view, Liberalism is not better or more true than Institutionalism or Realism on an absolute scale. It simply may be more useful for creating answers to the problems facing the world in 1993. For the purposes of this Article, it is not important whether Liberalism actually provided good solutions for contemporary international legal problems. Rather, we look to Slaughter's assessment of what problems Liberalism might seek to solve. It is here that the underlying assumptions about what modern states look like lie.

Liberal scholarship, according to Slaughter, was particularly useful for explaining the role which law, constitutions, and law-making by courts play in modern states, particularly through comparative constitutional analysis; commercial regulation by states of international actors (so-called "transnational law"); international cooperation in the creation of regulatory regimes; and the democratic peace among liberal states.¹²⁸ These are the problems of liberal states. As Slaughter notes, "A . . . final question is the extent to which transnational law can be understood as a distinctive feature of law among liberal states."¹²⁹

Moreover, these problems are not the problems of liberal states operating relatively independently of one another. In her model, international transactions and mobility mean that efforts by states to regulate behavior necessarily have to be cooperative and international in scope if they are to be effective.¹³⁰ "Transnational law . . . is growing apace."¹³¹ Courts have to react to these same forces because their caseload is increasingly international and because the problems faced by different countries—again as a result of economic, technological and social changes—are largely the same.¹³² Slaughter argued that it was necessary to understand the law through an international lens because the subjects of the law are now international.¹³³

Finally, the theme, advanced obliquely in the *Act of State*, that substate actors in specific issue areas make foreign policy in conjunction

127. By philosophical pragmatism, I simply mean that the "truth" of ideas lies only in their usefulness in solving concrete problems. The relationship between philosophical pragmatism and the law (particularly legal realism) has been extensively chronicled. See generally LOUIS MENAND, *THE METAPHYSICAL CLUB* (2001).

128. See Burley, *supra* note 90, at 228-38.

129. *Id.* at 232.

130. See *id.* at 230.

131. *Id.*

132. See *id.* at 230-32.

133. See *id.*

with their counterparts in other countries, was enhanced. When discussing legal policies, Slaughter does not mention Congress; it is the courts, acting in concert with foreign courts, that have the onus of responding to the problems created for private law regulation created by globalization.¹³⁴ Similarly, it is regulators, working internationally, who respond to the problem of creating international regulatory norms.¹³⁵ Policy-making is, in this view, largely done by nonpolitical technocrats, and the internationalization of problems leads to an internationalization of technocratic policy-making. The model for this is clear: when Slaughter looked at the world, she saw the European Union, with its complex web of state-based and internationally appointed officials working in harmony and toward harmonization.¹³⁶

3. *International Law in a World of Liberal States* (1995)¹³⁷

Mid-decade, Slaughter's ideas about the current status of the liberal state emerged in their fully formed version. In this piece in the *European Journal of International Law*, she hypothesized a world consisting only of liberal states and attempted to explain what international law would look like in such a world.¹³⁸ To do this, she had to define what makes a state liberal and why this was a worthwhile project.

According to Slaughter, liberal states participating in a Kantian eternal peace have six characteristics.¹³⁹ The first three—peace, liberal democracy, and a market economy—were present in her definition of liberal states in *Act of State*.¹⁴⁰ To these, she added three other traits, changing the model into a discussion of what a liberal state was in the post-Cold War world. The first was that liberal states formed “a dense network of transnational transactions.”¹⁴¹ Rather than just having trade ties, liberal states participating in a liberal peace shared “complex interdependence,” or connections at all levels of society, ranging from the economic to the cultural and political.¹⁴² Secondly, these states had high levels of transnational communication or connections between low-level

134. *See generally id.*

135. *See generally id.*

136. *Id.* at 238-39.

137. Slaughter, *supra* note 30, at 503.

138. *Id.* at 514-15.

139. *Id.* at 511-12.

140. *Id.*; *see* Burley, *supra* note 32, at 1909.

141. Slaughter, *supra* note 30, at 512.

142. *Id.* at 513.

government officials and government elites.¹⁴³ This was disaggregated sovereignty, as “the more general phenomenon of transnational communications among individuals and groups . . . limits the ability of foreign offices tightly to control governments’ foreign relations.”¹⁴⁴ Finally, these states have collapsed the “foreign/domestic” policy distinction.¹⁴⁵ Foreign policy is not just the “high politics” of war-making, but is also economic and environmental policy that crosses state lines.¹⁴⁶

Within a world of liberal states, individuals and government officials at all levels, through the pursuit of their own ends and visions of public policy, create policy in different areas. Individual market actors interact across state lines, choosing where to invest their money and which law to be governed through contract law. In such a world, these transactions and markets (and their effects) are not regulated merely by individual states and strict rules of international law and international organizations like the World Trade Organization (WTO), but rather by disaggregated parts of states. “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.”¹⁴⁷ All law is international law and it is created, interpreted and administered through a complex interaction between the governed and the governments in which they are and, importantly, are not represented.

These institutions interact with one another not only along vertical lines within individual states but also across state lines, making international policy in areas like antitrust, environmental regulation, and contract law in a complex, interdependent way. Courts create judicial policy through transnational judicial contact and mutual recognition, legislators discuss policy with one another without direct influence from the state department or foreign ministry, and administrative bodies engage each other to deal with the activities of transnational corporations and to regulate transnational policy problems. They come together to create solutions to specific problems, to create dialogue to handle future

143. *Id.*

144. *Id.* (citation omitted).

145. *See id.* at 514.

146. *Id.*

147. *Id.* at 523.

problems and to generate model codes that can be incorporated into domestic law.¹⁴⁸

This, of course, creates enormous problems for traditional understandings of sovereignty and democracy. Slaughter proposes a redefinition of the idea of “the State” in international law and, hence, of sovereignty. According to her, the state would be defined along the following lines:

- The State is composed of multiple centers 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.¹⁴⁹
- 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.”¹⁵⁰
- At the same time 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.¹⁵¹
- 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.¹⁵²
- The State is disaggregated, but remains the State: a constellation of political institutions bound together by territory, text, history and culture.¹⁵³

Sovereignty would then be a broad agreement not to violate these mutually linked aspects of the separation of powers.¹⁵⁴ “The first element

148. *Id.* at 514-16.

149. *Id.* at 534.

150. *Id.*

151. *Id.* at 534-35.

152. *Id.* at 536.

153. *Id.*

of such a redefined norm of sovereignty might thus be one of noninterference with basic legislative, judicial, and executive functions on the part of the component institutions of each State in the system."¹⁵⁵ This is a rich definition, replete with all sorts of theoretical interests and problems. Most notably, it takes an empirical observation—that sub-state institutions are creating foreign policy through their interactions with one another in some liberal states in some areas—and uses it as a basis for a new understanding of all of international law.¹⁵⁶

Slaughter's proposal takes a very American concept—separation of powers—and grafts it onto the states of the entire world, most of which (including most liberal states) are marked by far less division within their governments. The state in Slaughter's *International Law in a World of Liberal States* is defined by these divisions, and the composite parts of these states are defined internationally through their relations with other states.¹⁵⁷ Making noninterference with each different component part of government crucial to the idea of sovereignty makes each governmental institution equal and not interdependent. In American constitutional terms, this is logical, even necessary. But for countries that feature parliamentary supremacy or heavily executive focused administrative states, this is an unnatural division. Moreover, it ignores the worry that these institutions, unchecked, lack democratic accountability.

This last concern is mostly a product of the assumptions with which she begins her paper. Her world of liberal states posits pre-existing, legitimate liberal states, and as such, there is little concern about creating legal rules that enforce democratic accountability and the legitimate stability of government decision-making; these are assumed rather than proved. Thus the model reads out of the world any concern about creating legitimacy for the state.

International Law in a World of Liberal States provides the clearest expression of the idea of disaggregated sovereignty.¹⁵⁸ As will be seen below, the state as it exists in this paper—comprised of internationally defined component parts, marked by strong separation of powers and functions, unconcerned about legitimacy, and with a legal system featuring both domestic and international components—is the state on which UNMIK was modeled.

154. See *id.*

155. *Id.* at 535-36.

156. See *id.*

157. Slaughter, *supra* note 32, at 183-86.

158. See Slaughter, *supra* note 30, at 534-37.

4. *The Real New World Order* (1997)¹⁵⁹

Before 1997, Slaughter kept the world of liberal states and the world of nonliberal states sharply divided. In her article in *Foreign Affairs* that mostly served as a popularization of her ideas, this distinction crumbled.

Rather than contrasting her ideas with her old foes—IR Realists and Institutionalists—Slaughter began *The Real New World Order* by contrasting her ideas about disaggregated sovereignty with those of the “new medievalists,” who believed, in short, that nongovernmental institutions, like NGOs and multinational corporations, were taking political power out of the hands of territorial states.¹⁶⁰ These scholars, Slaughter argued, failed to understand that governments remained a locus of power as a result of their regulatory strength, democratic accountability, and control over the legitimate use of violence.¹⁶¹ She also contrasted her ideas with those of idealistic liberal internationalists, who wanted massive, global governing institutions.¹⁶² Instead of thinking about globalism as a stateless arena, with governing needs taken care of by either supranational institutions or international private actors, a network made up of the disaggregated parts of national states could provide the policy-making needed in a rapidly globalizing world.¹⁶³

Much of the argument followed the lines of her previous pieces, with one notable exception. Slaughter now argued that issue networks made up of disaggregated parts of states could help achieve U.S. President Clinton’s avowed goal of “enlargement” of the number of democratic liberal states.¹⁶⁴ She argued that government networks spanned across the liberal and nonliberal divide and could be used to increase the capacity of nonliberal states, one institution at a time.¹⁶⁵ “Transgovernmental ties can strengthen institutions [in nondemocratic states] in ways that will help them resist political domination, corruption, and incompetence and build democratic institutions in their countries, step by step.”¹⁶⁶

159. Slaughter, *supra* note 32, at 183.

160. *Id.* at 183-84.

161. *Id.* at 184-85.

162. *Id.*

163. *Id.* at 185 (“Transgovernmentalism also offers promising new mechanisms for the Clinton administration’s ‘enlargement’ policy, aiming to expand the community of liberal democracies.”).

164. *Id.*

165. *Id.* at 194.

166. *Id.*

Although Slaughter did not note it, this argument was a dramatic step away from her previous work. Legitimate, liberal states were assumed to exist in previous papers and nondemocratic, nonliberal states were assumed away. Here, she made a bold, new claim: the framework that served to regulate behavior between liberal states could be used to create them.¹⁶⁷ Unlike the rest of her work, which drew heavily from IR scholars, this claim seems to be *ex nihilo*.¹⁶⁸ Moreover, nothing in the article, or elsewhere in her work, responded to common claims made by IR scholars that democratization and modernization often work at cross purposes. This claim served, though, an enormous purpose in the overall structure of the article. The previous pieces served to create a model of regulation among a coterie of liberal states; with the inclusion of this claim, Slaughter's theory could be said to be a "real new world order," complete with a battle plan for how to transform the world as it stood into the world of her models.

Slaughter also moved her theory forward on two other grounds. The first was in the domestic political realm. She argued that both conservatives and domestic liberals could agree on disaggregated sovereignty because it achieved the ends of regulating international economic behavior, but avoided huge international bureaucracies.¹⁶⁹ "Transgovernmental initiatives are a compromise that could command bipartisan support."¹⁷⁰ Also, democratic accountability was not a major problem, she claimed, because the policy-making by substate actors internationally is formally the same as them making it domestically.¹⁷¹ Legislatures and private actors have come up with ways to regulate and monitor the behavior of the administrative arms of the welfare state and should be able to do the same thing with a disaggregated international regulatory regime.¹⁷²

With political support from both major parties and a model for creating liberal states, Slaughter's model was relatively complete. The model, originally an extension of Kantian themes to solve a difficult

167. *Id.* at 196-97.

168. It does, however, bear a close family relationship to the work of the World Society scholars. However, they focus on the role of ideas and international institutions and their interplay with state officials, rather than just on substate governmental interactions. The claims of the World Society scholars, in this regard, bear a closer relationship to Koh's idea of compliance than they do to Slaughter's work.

169. Slaughter, *supra* note 32, at 192-93.

170. *Id.* at 193.

171. *Id.* at 195-97.

172. *Id.* at 197.

riddle on an arcane legal matter, had transformed itself into a model built for the exigencies of the world as it existed at the end of the century. “[G]overnment networks are government for the information age. They offer the world a blueprint for the international architecture of the 21st Century.”¹⁷³ While later pieces fleshed out this model, especially relating to the typology of different types of transgovernmental issue networks,¹⁷⁴ *The Real New World Order* presented what was a fully formed theory of how the world operated and what states looked like in 1997.¹⁷⁵

As noted above, this theory gained great prominence in the realm of international law and on the world stage. As this Article argues below, the image of the state that this theory created served as a model for the creation of UNMIK. In the service of analytic simplicity, it is necessary to distill exactly what traits “the State” has in this model. In addition to the traits of the autarkic liberal state discussed in *The Act of State Doctrine*, modern states in the liberal model have these five traits:¹⁷⁶

(1) Disaggregation: This is the most central concept in Slaughter’s work. She argues that the modern liberal state, both in the ways it behaves at home and in the creation of foreign policy, is not unitary but made up of formally and legally distinct bodies. The separation of powers between these bodies is, to her, the central idea of “new sovereignty,” and fudging the lines between them or creating strict hierarchies of power between them is the cardinal violation of the sovereignty of the states.

(2) Apoliticism: The modern state is apolitical in two important senses. The first is that the basic tenets of her new state—disaggregation, the importance of “low politics,” and “the internationalization of decision-making”—are supported by a broad mass of political actors (both among liberal states and within them, as her invocation of the potential for support from both Republicans and

173. *Id.*

174. See, e.g., Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191 (2003); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 4 MICH. J. INT’L L. 1041 (2003); Slaughter, *supra* note 81, at 347; Anne-Marie Slaughter, *Building Global Democracy*, 1 CHI. J. INT’L L. 223 (2000); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103 (2000).

175. Her new book, *A New World Order*, lays out effectively the same model, untouched by the events of the beginning of the twenty-first century. She is so wedded to this understanding that she chooses not to discuss the attacks of September 11th, the wars in Iraq and Afghanistan, or the primacy of international terrorism as political issues, even to argue that they have not affected the ways in which countries in the world relate to one another. See SLAUGHTER, *supra* note 82.

176. The following list summarizes Slaughter’s liberal state model, discussed *supra* Part III.

Democrats for her ideas makes clear). Secondly, it is broadly technocratic in that most decisions are not made by traditional democratic means, that is, as the result of majoritarian elections. Instead they are made through negotiations between appointed or elected officials across state lines.

(3) Internationalism: traditional notions of sovereignty are not compatible with the modern, liberal state. Because problems are international, solutions and decision-making must be as well. As such, international norms play an important role in even domestic decision-making, even if only as a model for potential choices.

(4) Presumptive legitimacy: The modern liberal state is democratic and seen as legitimate within its own borders. It is therefore relatively unconcerned with the problems of democratic accountability, as the existing institutions of democracy can provide oversight for otherwise nondemocratically accountable decision-makers.

(5) Capable of recreation through institution-by-institution links: liberal states can recreate themselves by crafting institution-by-institution links. Nonliberal states can be transformed through the interaction of their disaggregated parts with the parts of liberal states. Institution-by-institution, then, a modern, liberal state can be created.

IV. UNMIK AS A LIBERAL STATE

The formation of UNMIK represented a broad change in the way the United Nations viewed its responsibilities and powers in relation to nongoverned areas.¹⁷⁷ It also represented an enormous shift in how international and national bodies understood the proper way to create a new state. The decisions made by the United States, other international organizations, and relevant nation-states about how to structure UNMIK were fundamentally influenced by the inherent understanding of what a liberal state is within the disaggregated sovereignty literature. This, of course, does not mean that the literature caused or even directly influenced the decisions made by the key players in the process of setting up UNMIK. Instead, the claim is that the conceptions of what comprises a state that were rife in World Society expressed themselves both in scholarly literature and in policy-making. That the U.S. decisions and the academic community had *some* effect on one another seems rather likely,

177. See Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 AM. J. INT'L L. 76, 78 (2001) (noting that "the Kosovo conflict presented a radically different situation from" previous U.N. interventions).

but those causative strings are better left to biographers and historians. Instead, this Part will focus on the broad correlation between the image of state in the scholarly literature and the structure of UNMIK. It can be said, however, that the scholarship was not reactive to the decisions of the United Nations. The formation of the disaggregated sovereignty model in its most complete form predated the war in, and the reconstruction of, Kosovo. The central argument of this Article is that these ideas—whether expressed in scholarly publications or held in the minds of influential policy-makers—had consequences.

A. *How UNMIK Came To Be: Kosovo, NATO, and the United Nations*

Kosovo had been a rather autonomous region for significant periods of its history, but in 1999 it did not have any real governing institutions of its own.¹⁷⁸ The NATO bombing campaign began in March 1999 and, during the conflict, eight prominent foreign ministers established:

[A] set of general principles on the political solution to the Kosovo crisis, which included, among other things, an immediate and verifiable end to violence and repression in Kosovo; withdrawal from Kosovo of Serb military, police, and paramilitary forces; and the deployment in Kosovo of effective international civil and security presences.¹⁷⁹

These principles were eventually accepted by the Federal Republic of Yugoslavia as part of the deal ending the war.

When the Yugoslav military withdrew, the situation in Kosovo was dire:

Out of a total population of about 1.7 million, 800,000 Kosovars had fled or been driven out of the province and as many as 500,000 others had been internally displaced; most of these refugees followed NATO troops back into Kosovo, but many found their homes and possessions destroyed or stolen. At the same time, economic activity in much of the province had come to a halt as a result of Serb repression, war damage, the collapse of financial services and investment, and the departure of key personnel. Serb officials and technical personnel had largely abandoned Kosovo and the FRY [Federal Republic of Yugoslavia] had ceased funding municipal governments, causing schools, public transport, the courts, and other vital

178. See Paul R. Williams, *Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status*, 31 *DENV. J. INT'L L. & POL'Y* 387, 396 (2003) ("From 1989, the Kosovar Albanians were denied the ability to exercise any sovereign authority or functions or even to participate in the federal government.").

179. See Matheson, *supra* note 177, at 78 (quotations omitted).

services essentially to shut down. Relations between the Albanian and Serb residents of Kosovo were in serious disrepair, punctuated by widespread reprisals, looting, and seizures of homes and other property, with no functioning law enforcement system to provide justice.¹⁸⁰

Although the United Nations had engaged in a variety of other projects that Ralph Wilde describes as International Territorial Administration, "a formally constituted, locally based management structure operating with respect to a particular territorial unit," it had never administered a country.¹⁸¹

Following a proposal laid out at a G-8 summit, the United Nations began to do just that by passing Resolution 1244 on June 10, 1999.¹⁸² It authorized member states, and particularly NATO, to establish an international security force with a unified command and control apparatus to establish secure conditions and assist the return of displaced persons.¹⁸³ Further, the Secretary-General was empowered:

[T]o establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions.¹⁸⁴

The Secretary-General formally established UNMIK and appointed a special representative to come up with a plan for how the new "government" should be run and how it should relate to the Kosovo Force (KFOR), that is, the body of mostly NATO troops stationed in Kosovo.¹⁸⁵

180. *Id.* (citations omitted); *see also* Strohmeyer, *supra* note 6, at 48.

181. Wilde, *supra* note 1, at 585.

Because of the plenary administrative powers seemingly asserted in the Kosovo and East Timor projects, and the involvement of the United Nations, the two projects are often regarded as groundbreaking. An extreme view holds that the East Timor undertaking is unprecedented, since nowhere else has UN administration been used to bring a new state into existence. No doubt, these projects are unusual and in some respects unique.

Id. at 585-86.

182. S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg. at 10, U.N. Doc. S/RES/1244 (1999).

183. *See id.* cl. 7.

184. *Id.* cl. 10.

185. *See Security Council Authorizes UN Presence in Kosovo War Ends After 78 Days of Bombing*, U.N. CHRON., June 22, 1999, at 12.

This plan had to be developed quickly, given the pressing needs of the citizenry of Kosovo for a government of some sort, and had to be done without the benefit of much historical precedent.¹⁸⁶ Even if the United Nations had run a large number of quasi-governing projects like refugee camps and cities, it had, with one short exception in the early 1960s, never administered an entire territory.¹⁸⁷ The novelty of the problem and the required speed of the answer are crucial to the key theoretical step of this Article.

As noted above, legal scholars have long relied on the assumption that judicial opinions can reveal underlying assumptions even when they do not rely on these assumptions as the basis of their holdings.¹⁸⁸ Since there was no apparatus to deal with these types of “governing problem[s.]”¹⁸⁹ and because the lack of time to make such a decision precluded a wide-ranging public debate on the subject, the actual decision about how to structure UNMIK provides the only evidence of what the relevant decision-makers thought about when creating a state. Because these decision-makers included, at the very least, the Security Council, NATO (because NATO troops became the basis of KFOR), the European Union and OSCE, of which both have a formal role in the administration of UNMIK, we can say that this decision was made by the developed world as a whole and parts of the less-developed world as well.¹⁹⁰ If the assumption legal scholars make about judicial opinions applies equally well to questions of international institutional design, then it is possible to use the decision about how to structure UNMIK as a means to analyze the dominant image of the state in World Society in 1999.

If one is willing to take this leap, then it is possible to examine what that governing image looked like. The next Part of this Article will argue that this image was the disaggregated notion of state popularized by the liberal IR/IL scholars discussed above.

186. See Jacob S. Kreilkamp, *UN Postconflict Resolution*, 35 N.Y.U. J. INT’L L. & POL. 619, 644 n.126 (2003) (“[O]nly two days before the Resolution was passed, there was still no consensus on whether the United Nations or some other organization should take the lead in running Kosovo’s civil administration.”).

187. The exception is the seven months the United Nations administered West Irian in 1962-63. See Wilde, *supra* note 1, at 588.

188. See *supra* note 7 and accompanying text.

189. See Wilde, *supra* note 1, at 605.

190. See generally The Secretary-General, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, U.N. Doc. S/1999/779 (July 12, 1999) [hereinafter *July 12 Report*].

B. UNMIK and the Liberal State: A Point-by-Point Comparison

In Part III of this Article, five crucial characteristics of a liberal state were identified. The last of these—the ability of the liberal state to recreate itself in nonliberal areas by institutional links—is of a different type; it is broadly about how a state comes into being rather than what the state looks like when it does. As such, it will be discussed separately in Part V. For the thesis of this Article to hold, the other four must be accurate descriptions of the institutional set-up of UNMIK. Looking at each of them in turn will show that they are.

1. The Disaggregated State: UNMIK's Impossible Flow Chart

Power inside UNMIK is nothing if not disaggregated. The general structure of UNMIK was laid out in Resolution 1244 and two reports from the Special Representative to the Security Council for Kosovo, on June 12 and July 12, 1999.¹⁹¹ The plan presents a highly decentralized government, with final power resting in the UN special representative, but day-to-day operation of a variety of crucial tasks in the hands of a number of different organizations.¹⁹² “The Mission will rely on the capabilities and expertise of the various international organizations that will participate, while maintaining coherence and effectiveness.”¹⁹³ As one scholar noted, “The structure [the Special Representative] created for UNMIK reflected the heavy dependence of the operation on the efforts and resources of various states and international organizations.”¹⁹⁴ The issues of how authority would work, how policy would be made when different organizations collided, and how these organizations would interrelate was left to informal negotiations among the relevant policy-makers.

The initial plan for UNMIK consisted of four “pillars.”¹⁹⁵ Pillar I related to humanitarian assistance and was led by the Office of the United Nations High Commissioner for Refugees.¹⁹⁶ This office was supposed “to ensure that adequate shelter, food, clean water, medical

191. S.C. Res. 1244, *supra* note 182; The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 10 of Security Council Resolution 1244 (1999)*, U.N. Doc. S/1999/672 (June 12, 1999) [hereinafter *June 12 Report*].

192. See S.C. Res. 1244, *supra* note 182; *June 12 Report*, *supra* note 191; *July 12 Report*, *supra* note 190.

193. *June 12 Report*, *supra* note 191, ¶ 2.

194. Matheson, *supra* note 177, at 79.

195. UNMIK, *UNMIK at a Glance*, <http://www.unmikonline.org/intro.htm> (last visited Jan. 18, 2006).

196. *June 12 Report*, *supra* note 191, ¶ 5(b).

assistance and employment will be available to meet the needs of the growing number of returnees inside Kosovo itself," by providing assistance through its own auspices and by coordinating the work of a variety of U.N. agencies and independent humanitarian groups.¹⁹⁷ These agencies and groups included the World Food Programme (WFP), the International Federation of Red Cross and Red Crescent Societies (IFRC), the International Office of Migration (IOM), the Office for the Coordination of Humanitarian Affairs (OCHA) within the Secretary General's office, the United Nations Children's Fund (UNICEF), Kosovo's Red Cross and a large number of NGOs.¹⁹⁸ The United Nations directly ran Pillar II, which involved the general civil administration of Kosovo, including health policy and judicial affairs.¹⁹⁹ The United Nations also shared responsibility for policing with KFOR, which continued to be stationed in Kosovo, and local Kosovo police service, which it was supposed to train.²⁰⁰ OSCE was responsible for Pillar III, which dealt with democratization and institution building, including responsibility for developing political parties, holding elections, organizing the development of the media and ensuring compliance with human rights norms.²⁰¹ Redevelopment of the heavily damaged local economy was put in the hands of the European Union (Pillar IV), which would coordinate development aid, help reconstruct the local infrastructure, and construct a functioning, market-based economy.²⁰²

The Special Representative to the Secretary General was in charge of coordinating the activities of these different pillars, with the head of each pillar (appointed by the lead organization) serving as a Deputy Special Representative.²⁰³ "The deputy special representatives will report directly to the Special Representative and will also be responsible for ensuring the effective coordination of all activities, both of UNMIK and its partners, within their areas of designated responsibility."²⁰⁴ These Deputy Special Representatives would also play a role in a variety of committees, including the Executive Committee and the Joint Planning Group, each of which were designed to negotiate and coordinate policy between the pillars. Exactly how they would adjudicate these disputes,

197. *July 12 Report*, *supra* note 190, ¶ 92.

198. *Id.* ¶¶ 91-100.

199. *Id.* ¶¶ 54-59, 66-78.

200. *Id.* ¶¶ 60-65.

201. *Id.* ¶¶ 80-90.

202. *Id.* ¶¶ 101-109.

203. *See id.* ¶¶ 46; *June 12 Report*, *supra* note 191, ¶ 4.

204. *July 12 Report*, *supra* note 190, ¶ 46.

though, was left unclear.²⁰⁵ “The UNMIK model of several pillars, under different multilateral organisations’ leadership, brings a proliferation of competing agendas and interests from both multilateral and national participants. . . .”²⁰⁶

Power and reporting relationships among the Pillars and between the Pillars and the Special Representative were left to negotiation rather than fit into strict lines of authority. Similarly, inside the Pillars, the two reports envisioned that the lead organization would be just that: an organization entrusted both with playing a part and coordinating the activities of other organizations in their area of responsibility.²⁰⁷ For instance, Pillar IV was supposed to coordinate between all potential donors (i.e., all interested states), representatives of the Kosovar community, the U.N. Development Programme, other interested U.N. agencies, and international financial institutions.²⁰⁸ In addition, the European Union (which is, itself, of course, hardly a unified body) divided responsibility internally among the EU Pillar, the European Commission Task Force for the Reconstruction of Kosovo, and the European Commission Humanitarian Aid Office.²⁰⁹ On top of this, each of the other Pillars had important economic portfolios: Pillar I was in charge of “economic and budget affairs,” governmental regulations, and the areas of telecommunications, health, and property rights; Pillar II was in charge of certain sectors of the economy, especially electronic and print media; Pillar III was in charge of humanitarian assistance and providing employment opportunities.²¹⁰ These overlaps were confused even more by the fact that the organizations that worked with one Pillar also worked with others. For instance, USAID, the US foreign aid office, played a crucial, often commanding, role in both the provision of

205. *Id.* ¶¶ 47-48.

206. Tony Preston-Stanley, *Doubts over a UN Role in Post-War Iraq: After Kosovo, the United Nations Has Severe Limitations for Building Institutions and Offering Governance*, CANBERRA TIMES (Austl.), Apr. 29, 2003, at 11.

207. *See June 12 Report, supra* note 191, ¶¶ 2-14.

208. *July 12 Report, supra* note 190, ¶¶ 101-102, 109.

209. *See* European Union Pillar of UNMIK, *European Union Mission in Kosovo*, <http://www.euinkosovo.org/pdefault.asp?id=78&Lang=2> (last visited Jan. 12, 2006); *see also* European Agency for Reconstruction, *Kosovo*, <http://www.ea.eu.int/kosovo/kosovo.htm> (last visited Jan. 12, 2006).

210. *June 12 Report, supra* note 191, ¶¶ 8-14; *July 12 Report, supra* note 190, ¶¶ 14-16, 59-78, 80-90, 99-100.

humanitarian assistance under Pillar III and the development of Kosovo under Pillar IV.²¹¹

A full detailing of the organizations involved in each area can be found in the document itself and on the various websites run by UNMIK.²¹² For the purposes of this Article, an organizational flow-chart is unnecessary. Instead, it should just be noted that (1) power was diffused to a number of different organizations termed “Pillars”; (2) the Special Representative was formally in charge of all UNMIK operations, but most day-to-day decisions were conducted within these Pillars; (3) within each issue area, a whole variety of organizations, substate governmental officials and other interested parties coordinated to make policy without formal chains of responsibility; (4) conflicts between organizations, both inside the Pillars and between them, were supposed to be negotiated by both formal and informal means without a clear decision mechanism aside from the potential of executive action.²¹³

On top of this structure was the creation of KFOR, the nominally U.N.-controlled military operation consisting mostly of NATO troops that ran all quasi-government functions in Kosovo for the first six months after the withdrawal of the Yugoslav army (because UNMIK had not yet entered into Kosovo).²¹⁴ Resolution 1244 made clear that UNMIK would “coordinate closely with the international security presence to ensure that both presences operate towards the same goals and in a mutually supportive manner.”²¹⁵ KFOR was supposed to “establish and maintain a secure environment in Kosovo, including public safety and order; to monitor, verify and when necessary, enforce compliance with the agreements that ended the conflict; and to provide assistance to the UN Mission in Kosovo (UNMIK).”²¹⁶ KFOR troops have also been at the forefront of providing humanitarian assistance.²¹⁷ While NATO is

211. See Preston-Stanley, *supra* note 206, at 12 (“The current SRSB, Michael Steiner, recently described CFA [Central Fiscal Authority] as one of the most successful institution-building components of UNMIK. The CFA was part of the EU pillar although most international staff came almost entirely under a contract funded by the US government, through USAID, from September 1999.”); U.S. AGENCY FOR INT’L DEV., KOSOVO TRANSITION INITIATIVE, *available at* http://www.usaid.gov/press/releases/fs991110_4.html.

212. See generally *July 12 Report*, *supra* note 190.

213. A simple Web search for “UNMIK” supplies countless examples. See, e.g., UNMIK Home Page, www.unmikonline.org. See generally *July 12 Report*, *supra* note 190, ¶¶ 4-7.

214. See *July 12 Report*, *supra* note 190, ¶¶ 4-7.

215. See S.C. Res. 1244, *supra* note 182, cl. 6.

216. Kosovo Force, *About KFOR*, <http://www.nato.int/kfor/kfor/about.htm> (last visited Jan. 18, 2006) [hereinafter *About KFOR*].

217. Kosovo Force, *Background to the Conflict*, <http://www.nato.int/kfor/kfor/intro.htm> (last visited Jan. 12, 2006) [hereinafter *Background to the Conflict*].

responsible for the command of KFOR, a total of thirty countries, including non-NATO members, have contributed troops.²¹⁸ Exactly how KFOR and UNMIK were to relate to one another was left to negotiation. According to the June 12 report, "effective arrangements will be established for regular consultations between the Special Representative of the Secretary-General and the Commander of the international security presence."²¹⁹

On top of the mixed competencies of KFOR and UNMIK and the relationships among the constituent organizations of UNMIK, the development of local governance added to the web of decision-making. The Special Representative was given all legislative power in Kosovo, but there was a complicated relationship with both the nascent efforts by UNMIK to create local self-governance structures and with budding efforts by Kosovars at governing themselves.²²⁰ Exactly what competencies were to be given to Kosovars themselves, and how that power would conflict with or eventually usurp the power of the Special Representative, was left relatively unclear. Prior to the arrival of UNMIK, Hashim Thaçi, leader of the Kosovar Liberation Army, took control of political and administrative power in twenty-seven of the twenty-nine municipalities.²²¹ UNMIK formally sidelined this government, but local UNMIK officers "had little guidance" about how to share power with Thaçi's local officials.²²² Several months after the entry of UNMIK into Kosovo, the *Irish Times* described local governance in this way: "In truth there are . . . competing sources of state authority in Kosovo today, none with more than one of the prerequisites of successful statehood, authority, legitimacy, or executive power."²²³ Others have been less critical of the set-up, noting the difficulty of such an unprecedented grant of responsibility to an international organization, and have argued that the system of mixed competencies was the best response to an unsure and underfunded operation.²²⁴ But no one disagrees

218. See *About KFOR*, *supra* note 216; *Background to the Conflict*, *supra* note 217.

219. *June 12 Report*, *supra* note 191, ¶ 7.

220. See *July 12 Report*, *supra* note 190, ¶¶ 35, 44.

221. See INT'L CRISIS GROUP, WAITING FOR UNMIK: LOCAL ADMINISTRATION IN KOSOVO (1999), available at http://www.crisisweb.org/library/documents/report_archive/A400012_18101999.pdf [hereinafter WAITING FOR UNMIK].

222. See *id.*

223. Patrick Smith, *In Kosovo Everything from Teachers to Power Workers Must Be Provided*, IRISH TIMES, Nov. 9, 1999, at 14.

224. Williams, *supra* note 178, at 410-11 ("While the local municipal political structures were slow to implement legislation and were often charged with petty corruption, the overall consensus among international observers is the municipal governments are functioning as basic

with the proposition that power was extremely diffused in Kosovo and that government power was disaggregated among various players, each of which had complicated and unclear relationships with one another.

The structure of UNMIK, then, was a response to the situation that was presented to the United Nations, but it was not the only possible response. Though different in many aspects, Allied control of Germany and U.S. military control of Japan both shared the basic problem faced by UNMIK—the withdrawal or collapse of government after a successful military campaign. Those operations were structured very differently, along a model that can roughly be described as a military protectorate, with clear formal lines of authority and clear lines of command.²²⁵ The U.S.-run government in Iraq following the fall of Saddam Hussein also did not have the complicated, multiorganizational power-sharing system of UNMIK. This organizational structure was a choice and it was a choice informed by the underlying belief in the international community at the time about what a state is and how it can be created.

2. The Apolitical State: Technocrats and the Choice of Law

Another crucial part of the liberal model of the modern state is that most decisions are apolitical. Relying on substate actors to make policy internationally, as the model suggests they do, raises questions about democratic control and separation of powers within a state. The response—or rather, the lack of a response—relies on a worldview that reasonable governmental officials can work together to solve problems in ways that are roughly “right.” Anne-Marie Slaughter describes the Memorandum of Understanding, the most common means of agreement between regulatory agencies in different states as “good-faith agreements, affirming ties between regulatory agencies based on their like-minded commitment to getting results.”²²⁶ In this conception, “getting results” is a neutral concept, based on the facts. This gives politics, or contested ideas about what good results are, a backseat, leaving those disputes as either unimportant because everyone agrees or as something that can be worked out in informal negotiations or by skilled work by talented bureaucrats.

political entities and are capable of assuming increasing degrees of authority and are likely to play a constructive role in protecting human rights and promoting a normalization of life in Kosovo.”).

225. See RAY SALVATORE JENNINGS, *THE ROAD AHEAD: LESSONS IN NATION BUILDING FROM JAPAN, GERMANY, AND AFGHANISTAN FOR POSTWAR IRAQ* 13-18 (2003).

226. Slaughter, *supra* note 32, at 190.

Perhaps the biggest test faced by UNMIK in the early stages of its governance of Kosovo was the determination of what law would govern the territory. The decision (or rather, decisions, as the Special Representative changed the policy a number of times) bears the hallmark of this type of apolitical ideal.

Resolution 1244 directly dealt with the question of the law that would govern Kosovo.²²⁷ Specifically, it declared that the law, criminal and civil, that governed Kosovo immediately before the NATO bombing campaign would continue to govern *mutatis mutandis* except as far as the laws conflicted with regulations passed by UNMIK.²²⁸ This meant Yugoslav or, in the opinion of the Albanian Kosovars, Serbian law. Administrability and ease of transition counseled for such a choice. "This decision was made solely for practical reasons: first, to avoid a legal vacuum in the initial phase of the transitional administration and, second, to avoid the need for local lawyers, virtually all of whom had obtained their law degrees at domestic universities, to be introduced to an entirely foreign legal system."²²⁹

The very first regulation passed by UNMIK placed another condition on the maintenance of Yugoslav law. It stated:

[L]aws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo insofar as they do not conflict with . . . internationally recognized human rights standards and shall not discriminate against any person on any ground such as sex, race, color, language, religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or other status.²³⁰

The decision to use Yugoslav law was deeply unpopular with the Albanian majority in Kosovo, particularly the criminal laws, which were seen as part of a decade-old system of legal oppression and discrimination aimed at ethnic Albanians.²³¹ Despite the addition of the

227. See S.C. Res. 1244, *supra* note 182, cl. 11.

228. See *id.*

229. Strohmeyer, *supra* note 6, at 58.

230. The Special Representative of the Secretary-General, *On the Authority of the Interim Administration in Kosovo*, §§ 2-3, UNMIK/REG/1999/1, July 25, 1999 [hereinafter *Report of the Special Representative*].

231. Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the Rule of Law*, 101 MICH. L. REV. 2275, 2291-92 (2003).

The problem was that to Kosovo's one and one-half million ethnic Albanians, the applicable laws in Kosovo before the bombing campaign began were "Serb laws," a key symbol of Serbian oppression against the Albanians. While the concept of "honor" may have little salience in modern America, in Kosovo it remains of great cultural

condition that laws that discriminate or violate human rights would not apply, Albanian politicians in Kosovo threatened to stop cooperating with UNMIK, and a number of judges and prosecutors quit in protest.²³² They demanded that Kosovo be governed by a set of laws that existed ten years earlier, when Kosovo was a relatively independent province within then-communist Yugoslavia.²³³ This criminal code, not surprisingly, was problematic in its own right, both unpopular with the Serbian minority and inconsistent with modern notions of the rule of law.²³⁴

The decision to use Yugoslav law subject to the condition that human rights norms would limit its bad effects relied heavily on the ability of international and newly appointed judges to get the right results. Regulation 1999/1

importance. After ten years of Serb oppression, an ethnic cleansing campaign, an armed struggle, and, perhaps, a narrowly averted genocide, the idea that the UN would issue a decree requiring the Kosovar Albanians to continue to live under Serb law was profoundly insulting to many Kosovars. To the bureaucrats at UNMIK, the fact that the pre-1999 laws had been promulgated by Serbs seemed purely academic, but to many Kosovars, it was an offense to honor of the deepest sort.

It made no difference that UNMIK Regulation Number 1 said that human-rights standards would trump the laws on the books in the event of a conflict. To the Kosovars, Serb law was Serb law, and they wanted none of it. Nearly all of the fifty-five people sworn in by UNMIK to serve as judges and prosecutors in UNMIK's new "Emergency Judicial System" immediately declared that they would not apply Serb law.

Id.

232. Wendy S. Betts et al., *The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts To Establish a Judiciary and Rule of Law*, 22 MICH. J. INT'L L. 371, 374-75 (2001).

In August 1999, the provisional Kosovar Albanian judges, appointed by UNMIK, began to protest openly against the presumed application of FRY/Serbian law. Among these judges, the SRSG's selection of applicable law was considered tantamount to re-establishment of the prior, oppressive FRY/Serbia regime. The resistance to FRY/Serbian law resulted in confusion in the legal system. The interim judges, the Kosovo Implementation Force (KFOR), and the UNMIK Civilian Police each applied a diverse collection of legal provisions and standards, including FRY/Serbian law, pre-1989 criminal law, and Albanian criminal law, to alleged perpetrators of crimes. Consequently, many trials were delayed and the alleged perpetrators of crimes remained in detention for extended amounts of time.

Id.

233. See Brooks, *supra* note 231, at 2292-93.

234. *Id.* at 2293.

Ironically, the pre-1989 laws, so dear to the Kosovar Albanian community, were far less consistent with modern international human-rights standards than the post-1989 Serb law they had so vehemently rejected. The pre-1989 laws were designed in the Communist era, before the fall of the Berlin Wall and the advent of greater openness in Yugoslavia.

did not actually spell out the laws or specifically identify the elements that were inconsistent with internationally recognized human rights standards. Rather, it required the lawyers, many of whom were inexperienced, to engage in the complex task of interpreting the penal code or the criminal procedure code through the lens of international human rights instruments, applying those provisions that met international standards, while disregarding those that did not, and substituting for the latter the appropriate standard under international law.²³⁵

This is consistent with the assumed apolitical nature of regulatory decisions in the liberal model of the modern state.

The difficult decision about the content of laws was put aside, as it was believed that regulators, lawyers, and judges could informally develop fair standards and keep the peace without such overtly political and contentious decisions such as what law should govern. Moreover, doing so avoided what was perhaps the most ominous ideological problem for UNMIK: looking like colonists. Rather than imposing a new law from on high, UNMIK decided to use the products of local decision-making, ignoring the fact that such local decision-making is exactly what led to the war in Kosovo.²³⁶

UNMIK later revised its decision in Resolution 24, declaring that the law would be the law in force in 1989 (the old Kosovar law).²³⁷ This led to problems as well. Not many people knew the old law, and much of it was not available in translation.²³⁸ Moreover, the goal of consistency and administrability was hindered by such a massive change in the law at a time when many trials were in process and judges and lawyers were coming to terms with the first choice of law.²³⁹ These problems have led many commentators to call for an internationally created legal framework that can be imported into U.N.-administered territories immediately.²⁴⁰ Whatever the merits of such a policy, it clearly was not what the founders of UNMIK had in mind. Instead, the choice about

Id.

235. Strohmeier, *supra* note 6, at 59.

236. *See Report of the Special Representative, supra* note 230, § 3.

237. *See* The Special Representative of the Secretary-General, *On the Law Applicable in Kosovo*, § 1.1, UNMIK/Reg/1999/24, Dec. 12, 1999 ("The law applicable in Kosovo shall be: (a)(a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and (b)(b) The law in force in Kosovo on 22 March 1989.").

238. *See* Betts et al., *supra* note 232, at 376 & n.17.

239. *See id.*

240. *See, e.g.,* Strohmeier, *supra* note 6, at 66.

what law would govern derived from the liberal model of state that animated the structure of UNMIK.

3. The Legitimate State: Assuming Away the Problem of Sovereignty

As noted above, the fullest explanation of the IR/IL project in the legal scholarship is Slaughter's *International Law in a World of Liberal States*, which explains how international law would function if the world consisted exclusively of liberal states. Most of the paper focuses on one aspect of her thought experiment: that all states in her imaginary world are liberal. However, just as important to her theory is the idea that it can safely be assumed that all states are *states*, that is, sovereign over their territory and able to control their populace through a monopoly on the legitimate use of force. The liberal states in Slaughter's thought experiment are unconcerned with worries about revolts of the citizenry and are generally accepting of their territorial bounds. To the extent they are not, problems can be solved by internal negotiations (i.e., elections) or international ones (either state-to-state or by resorting to an internationally recognized arbitrator).²⁴¹ The way UNMIK dealt with two crucial problems, the final legal status of the territory and how to involve local politicians in the decision-making apparatus, shows that it generally accepted the idea that issues like sovereignty and state legitimacy, traditionally the core of both international law and international territorial administration, were less important than creating a governance structure and could be solved by negotiation or some other means.

Looming over the entirety of the decision to create UNMIK was the problem of the final status of the province. The negotiated settlement to end the war did not make Kosovo independent but left it part of Yugoslavia (now Serbia and Montenegro).²⁴² However, Kosovo was to "enjoy substantial autonomy within the Federal Republic of Yugoslavia."²⁴³ The meaning of this phrase was left unclear, as was the question of how to resolve this ambiguity.²⁴⁴

Instead of focusing on the question of who was sovereign over Kosovo, the United Nations' focus was to create the institutional apparatus of governance. Resolution 1244 laid out the "main responsibilities" of UNMIK, including "[p]erforming basic civilian administrative functions where and as long as required . . . [o]rganizing

241. See generally Slaughter, *supra* note 30.

242. See Kreilkamp, *supra* note 186, at 644.

243. *Id.*

244. See *id.* at 644 & n.128.

... elections ... [and m]aintaining civil law and order,” along with other functions that, taken as a whole, gave the United Nations authority to run the territory.²⁴⁵ The establishment of government services was supposed to predate any solution to the major political questions. Kosovars were supposed to run Kosovo, according to the Resolution, once the governance apparatus was established, but the final question of who controlled the territory was left unanswered, “pending a political settlement.”²⁴⁶ The belief was that, once there were structures of government, Kosovo, Albania (which a large number of Kosovar’s wanted to join), and Serbia could negotiate a political settlement.²⁴⁷ Rather than government being a function or decision made by a sovereign, or the organization running the protectorate, sovereignty is, in this model, a product of governance. Once there were officials and a working civil service, the emotional issues of sovereignty would seem less important and could be resolved through negotiations.²⁴⁸

That this was even considered an option shows how deeply the liberal state model influenced UNMIK. Traditionally, questions of sovereignty were supreme in international law—the whole “Westphalian system” is predicated on the supremacy of sovereigns over their territory.²⁴⁹ Sovereigns made all political decisions and international law dealt with questions surrounding the relations between sovereigns.²⁵⁰

In Kosovo, the United Nations decided not to decide on a process for resolving the sovereignty question or a timeline for giving up power. The idea that *de facto* governance matters more than *de jure* sovereignty, with all its attendant questions about nationalism, is a deeply liberal one.²⁵¹ The European Union, after all, is the model for the liberal model

245. S.C. Res. 1244, *supra* note 182, cl. 11.

246. *Id.* cl. 11(c).

247. *Id.*

248. Palmer, *supra* note 5, at 182 n.12.

However, the member states involved in UNMIK have different conceptions of the character and goals of the mission. While some advocate independence for the province, others support continued Yugoslav sovereignty over the province. This fundamental lack of consensus has caused great complications as the United Nations has sought to create a workable administration for the province.

Id.

249. Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283, 283-84 (2004).

250. *Id.* at 284.

251. Slaughter, *supra* note 30, at 535.

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?

and its focus on de-emphasizing national solutions in favor of regional ones was predicated on an assumption that effective regional governance and the prosperity it would produce would overcome national hostilities. UNMIK made a similar assumption, namely that Kosovars would care more about having running water than they would about which country retained ultimate sovereignty over the territory.²⁵² This can be stated differently: UNMIK worked on the presumption that if it was effective it would be legitimate.

The approach Resolution 1244 took toward self-governing institutions shows a similar assumption of legitimacy. Specifically, it did not take any stance toward them whatsoever. According to a 1999 report by the International Crisis Group, Resolution 1244 “is vague about the timing and purpose of elections.”²⁵³ When local UNMIK officials arrived, they were greeted by a government on the ground—the provisional forces of the KLA, led by Thaçi.²⁵⁴ The plan for UNMIK was unclear about how international officials should treat these local leaders (who were also accused of committing atrocities). The flexibility of the governing networks of officials was supposed to take local considerations into account, but exactly how was left to them.²⁵⁵ UNMIK ignored claims that the legitimacy of its operation rested on its ability to incorporate or displace domestic political groups and, instead, focused on

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. 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.

Id.

252. Although this is not important for the general question of the Article, the role of ideas in the creation of the structure of UNMIK, it should be noted that this assumption is still disputed. U.N. Secretary-General “Annan’s reports continue to strike a positive tone, focusing on the mission’s successes. Nonetheless, the consistent problems that stem, in part, from the uncertain final status of the province still permeate even these official narratives.” Kreilkamp, *supra* note 186, at 651.

253. INT’L CRISIS GROUP, STARTING FROM SCRATCH IN KOSOVO: THE HONEYMOON IS OVER 9 (1999), available at http://www.crisisgroup.org/library/documents/report_archive/A400022_10121999.pdf.

254. See WAITING FOR UNMIK, *supra* note 221, at 3-5.

255. *Id.*

solving specific problems involving local participation in different ways.²⁵⁶ Such an approach privileged “results” over questions of legitimacy. Given the liberal model, this makes sense; in a world of liberal States, the basic functions of statehood are assumed and do not have to be created.

4. The Internationally Defined State: Foreign Norms and Local Facts

That policy decisions can and should be a result of international substate actor negotiations is crucial to Slaughter’s liberal model. To some extent, it would be impossible for that not to happen in Kosovo—an international operation had to govern the territory. However, Slaughter’s model included more than just an international web of decision-makers playing a role in the policy choices of each and every country; it also argued that international norms and examples play a large and increasing role in the political life of liberal states.²⁵⁷ Discussing the ways in which national courts borrow from each other despite the lack of binding precedential authority of foreign decisions, Slaughter noted “courts would interact with one another and with supranational tribunals in ways that would accommodate differences but acknowledge and reinforce common values.”²⁵⁸

Very little research has been done on the role of foreign norms in policy-making in Kosovo. One study, though, reveals that foreign values were crucial to policy decisions and that the structure of UNMIK facilitated these “value transfers,” even when the policy in question may not have been particularly well-suited for such importation.²⁵⁹

This study, done by Laura Palmer, examined the way UNMIK, and specifically Pillar III, led by OSCE, created hate speech laws.²⁶⁰ As part of its pillar, OSCE developed a Department of Media Affairs, which was given responsibility for regulating and supporting independent media and for developing a media standard, as well as power over frequencies and broadcast licenses in Kosovo.²⁶¹ OCSE would oversee the Media

256. *Id.* at 4-5.

257. *See, e.g.,* Slaughter, *supra* note 32, at 189.

258. *Id.*

259. *See* Palmer, *supra* note 5, at 185-86.

260. *See id.*

261. *See id.*; *see also* Steven Erlanger, *NATO Peacekeepers Plan a System of Controls for the News Media in Kosovo*, N.Y. TIMES, Aug. 16, 1999, at A8; Stacey Sullivan, *Restructuring the Media in Post-Conflict Societies: Four Perspectives: The Experience of Intergovernmental and Non-Governmental Organizations: A Background Paper for the Unesco World Press Day*

Regulatory Commission, which would administer codes of conduct for journalists, and a Media Monitoring Division, which would analyze the content of broadcasting.²⁶² This was seen as a way to limit ethnically based hate speech and incitements to violence through the media.

Broadly speaking, this is in line with European hate speech rules. Moreover, it directly and intentionally followed the ways in which the Allies regulated the press in post-war Germany.²⁶³ Palmer surveyed both European and U.S. court decisions and academic debate and found that a broad division existed. U.S. courts and academics favored less regulation and generally followed a “libertarian model” while Europeans support more governmental restrictions on free speech.²⁶⁴

OSCE responded to this debate with little consideration of conditions on the ground in Kosovo. The American media and international media watchdog groups responded to OSCE’s press oversight with derision, claiming that the way to respond to hate speech was to counter it with other speech and not to muzzle it.²⁶⁵ In response to this criticism, OSCE largely removed its press oversight rules, replacing them with a system of press self-regulation.²⁶⁶ After the passage of the new (and largely unimplemented rules), a Kosovar Albanian newspaper declared that a Serbian working for UNMIK was a former paramilitary for the Yugoslav government.²⁶⁷ Two weeks later, the official disappeared and was later found dead.²⁶⁸ In response to this, OSCE reintroduced press regulations along European lines.²⁶⁹ Palmer argued that transitional states, especially those riven with ethnic and political violence, require heavier oversight of speech than the mature American democracy does.²⁷⁰

Whether Palmer is correct is unimportant here. What is relevant is that the debate inside OSCE largely followed the lines of the debate among its member-states, the United States and European countries.²⁷¹ Thus, it is important to see that even though the ultimate decision relied on factual bases, international norms were accepted reasons for making

Conference in Geneva, 2 CARDOZO ONLINE J. CONFL. RESOL. 1, 26-40 (Monroe E. Price ed., 2001).

262. See Palmer, *supra* note 5, at 186.

263. See *id.* at 201.

264. See *id.* at 196, 201, 205.

265. See *id.* at 186.

266. See *id.* at 194.

267. See *id.*

268. See *id.*

269. See *id.* at 195-96.

270. See *id.* at 213.

271. See *id.* at 185-86, 194-96.

policy in Kosovo. While Realist scholars would expect states to make policy independently based on their interests, the liberal model expects and encourages foreign ideas about good policy to serve as examples for policy-making. OSCE's vacillations on hate speech regulation show that UNMIK internalized this idea.

5. Conclusion: The Fifth Trait

The structure of UNMIK represented the full acceptance by the international community (or at least the relevant decision-makers) of the idea of the state inherent in liberal international law. The question remains, though: why did these decision-makers decide that this model of state was one that could be used to build a government in Kosovo? The next Part of the Article attempts to answer this question by focusing on the fifth trait of the liberal state in the Liberal literature—its ability to recreate itself through substate governmental institution-to-institution links.

V. CONCLUSION: UNMIK, THE WORLD SOCIETY LITERATURE, AND THE CONSEQUENCES OF THE STRUCTURE OF IDEAS

The World Society literature has the potential for revolutionizing the study of international relations and international law because of its focus on solving problems that other major theories have not sought to examine. "We are trying to account for a world whose societies, organized as nation-states, are structurally similar in many unexpected dimensions and change in unexpectedly similar ways."²⁷² The empirical work done by World Society scholars has shown that, despite facing very different problems and housing citizenries with different opinions and tastes, nation-states look a great deal like one another in their administrative structure and policy choices. Their forceful explanation relies on sociological explanations—for example, the ways in which the leaders of states connect to one another, or the pressures on states to copy successful policies in other states.²⁷³ However, this does not capture the entirety of the reasons why certain ideas spread more quickly and powerfully among some states than others. Through a comparison of the findings of this Article and the work of Antony Anghie on the League of Nations trustee system and its ideological underpinnings,²⁷⁴ it is clear that

272. Meyer et al., *supra* note 16, at 145.

273. *See id.* at 145-46.

274. *See generally* Anghie, *supra* note 35.

the internal structure of ideas matters in determining whether ideas will be transferred abroad as well as the transmission mechanisms and pressures laid out in the World Society literature.

In order to understand why the structure of ideas remains important, even in this heavily sociological model, it is necessary to lay out the World Society model in full. The model is based on a whole range of empirical findings and then explanations drawn from contemporary sociological institutionalism.²⁷⁵ The model is best explained through an example used in a leading article:

If an unknown society were “discovered” on a previously unknown island, it is clear that many changes would occur. A government would soon form, looking something like a modern state with many of the usual ministries and agencies. Official recognition by other states and admission to the United Nations would ensue. The society would be analyzed as an economy, with standard types of data, organizations, and policies for domestic and international transactions. Its people would be formally recognized as citizens with many familiar rights, while certain categories of citizens—children, the elderly, the poor—would be granted special protection. Standard forms of discrimination, especially ethnic and gender based, would be discovered and decried. . . . Modern educational, medical, scientific and family law institutions would be developed. All this would happen more rapidly, and with greater penetration to the level of daily life . . . than at any earlier time because world models applicable to the island society are more highly codified and publicized than ever before. Moreover, world-society organizations devoted to educating and advising the islanders about the models’ importance and utility are more numerous and active than ever.²⁷⁶

This prediction—which World Society scholars argue can be made without any reference to the “history, culture, practices or traditions” of the hypothetical island—is based on an enormous empirical project.²⁷⁷

This project has tracked the diffusion of changes in the administrative form of the modern state and state policy decisions across countries and across time. “The central problem is how best to understand the state as an organizational actor—including the form, structure, and practices of states.”²⁷⁸ The findings are striking. Across very different areas of the world and over time, states exhibit a great deal of “isomorphism,” that is, they resemble each other to an extreme degree,

275. See Meyer et al., *supra* note 16, at 147, 151.

276. *Id.* at 145-46.

277. *Id.*

278. Goodman & Jinks, *supra* note 16, at 1757.

and when changes happen in policy, state policies across states vary together.²⁷⁹

This phenomenon cannot be explained just as the effect of Western imperialism, because rich countries are as statistically likely to adopt policies and institutions that began in poor countries as vice versa.²⁸⁰ Nor can it be explained by the fact that states have similar responsibilities: countries all over the world facing very different problems end up structuring themselves in the same way. In the language of sociology, the isomorphism is “decoupled” from the tasks at hand. “[S]tructural similarity does not reflect converging task demands, or, put differently, structure is not determined by function.”²⁸¹ The degree of replication and its lack of connection to democratic results or state needs or interests can produce shocking (and often comic) results. Landlocked nations structure their armed forces in the same way as islands, leaving their militaries with navies without water, and countries without any scientific establishment to speak of have science policy review boards to issue ethics reports and give guidance to non-existent scientists.²⁸² States implement record-keeping in similar ways, insert similar anti-discrimination and child protection clauses into their constitutions, engage in compulsory mass education with very similar curriculums, and create similar organizational structures, with ministries for the same basic topics common across nations.²⁸³ Even for more basic matters, isomorphism reigns:

279. *Id.* at 1758.

280. “First, although one would assume that poorer countries are more susceptible to such external coercion, the empirical studies discussed above show that norm adoption does not correlate with the economic wealth or development of countries.” Ryan Goodman & Derek Jinks, *How To Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 652 (2004).

281. Goodman & Jinks, *supra* note 16, at 1759.

282. *Id.* at 1766-67.

283. Though *supra* notes 23-30 gave a quick sample of the issues in which states have been found to feature isomorphism, the list is much longer. A 1997 article listed the following:

[C]onstitutional forms emphasizing both state power and individual rights, mass schooling systems organized around a fairly standard curriculum, rationalized economic and demographic record keeping and date systems, antinatalist population control policies intended to enhance national development, formally equalized female status and rights, expanded human rights in general, expansive environmental policies, development-oriented economic policy, universalistic welfare systems, standard definitions of disease and health care, and even some basic demographic variables.

Meyer et al., *supra* note 16, at 152-53 (citations omitted). See generally David John Frank et al., *What Counts as History: A Cross-National and Longitudinal Study of University Curricula*, 44 COMP. EDUC. REV. 29 (2000); John W. Meyer, *The Changing Cultural Content of World Society*, in STATE/CULTURE: STATE FORMATION AFTER THE CULTURAL TURN (George Steinmetz ed., 1999).

Nation states are remarkably uniform in defining their goals as the enhancement of collective progress (roughly gross domestic product [GDP] per capita) and individual rights and development (roughly citizen enhancement and equality). This occurs in constitutions . . . in general statement on national education . . . in depictions of the nation . . . in educational curricula . . . and in vast amounts of formal economic policy.²⁸⁴

Moreover, when changes occur, they happen across countries or, put mathematically, as this research almost always is, policy changes across nations feature a high degree of covariance.²⁸⁵

While states are, of course, different from one another, and a number of variants of the common state model exist, the sheer mass of the World Society research project makes clear that there is *some* force that causes states facing very different problems, embedded in very different cultures and having very different political systems to organize themselves in common ways and to pursue common policies.

The World Society scholars argue that states look like one another because they all partake of the same larger world culture.²⁸⁶ That is, states do not exist as independent variables with fixed and independent interests, but rather are defined by the relation to other states and world society and have interests that are created in world culture. The scholarship therefore focuses “on processes that produce or reconstruct the actors themselves.”²⁸⁷

There are three major processes by which World Society defines and fashions states in this model. The first is the “construction of identity and purpose” of states.²⁸⁸ World Society gets to decide what political body is a state through the process of recognition by other states and by admissions decisions to the United Nations and other international organizations.²⁸⁹ This requires copying the general forms of statehood, as it is defined internationally, and the renunciation of certain potential goals (most notably territorial expansion).²⁹⁰ This has a dramatic effect on policy. “Having committed themselves to the identity of the rationalizing state, appropriate policies follow—policies for national development, individual citizenship and rights, environmental

284. Meyer et al., *supra* note 16, at 153 (citations omitted).

285. *See id.* at 152, 157.

286. *Id.* at 157.

287. *See id.*

288. *Id.*

289. *See id.* at 158.

290. *See id.*

management, foreign relations.”²⁹¹ Moreover, this is an ongoing process. One can see WTO accession agreements in which well-established states like China must adapt their laws to incorporate generally accepted market practices as an example of this “construction of identity.”²⁹²

The second process is the “systematic maintenance of nation-state actor identity.”²⁹³ Aid (and a lack of sanctions) from international organizations and other states flows to states that embrace internationally common goals and that accept internationally defined policies.²⁹⁴

Finally, World Society scholars point to the “legitimation of subnational actors and practices” as another means by which policies and practices defined in world culture create state identity.²⁹⁵ Individuals or groups inside states interact with their counterparts internationally; they create common answers to problems and then push states to enact them.²⁹⁶ “Such connections produce many axes of mobilization for the implementation of world-cultural principles and help account for similarities in mobilization agendas and strategies in highly disparate countries.”²⁹⁷

This model creates a set of falsifiable predictions. Using tools ranging from regression analysis to the study of history, scholars can test whether the fact that a policy has been implemented in some countries makes it more likely that other countries will adopt it. As Ryan Goodman and Derek Jinks, the leading World Society scholars in legal academe, point out:

[O]ur approach is falsifiable in that it generates a range of concrete empirical predictions that allow for the adjudication between our approach and competing explanations. . . . The important point is that our approach avoids circularity problems by clearly differentiating, as an analytic matter, explanatory (institutions) and outcome variables (organizations).²⁹⁸

Moreover, it is different than the liberal discussion of international state policy-making, which focuses on relations between state institutions, rather than on the structural pressures on states as a whole and the ways individuals relating internationally create pressures on states to engage in isomorphism. Two questions remain, though: (1) what explains which

291. *Id.* at 159.

292. *Id.* at 158.

293. *Id.* at 159.

294. *Id.* at 159-60.

295. *Id.* at 160.

296. *See id.* at 161.

297. *Id.*

298. Goodman & Jinks, *supra* note 16, at 1781-82.

ideas diffuse and (2) what explains those instances when ideas do not diffuse.

In a recent paper, Goodman and Jinks focused on the second of these questions, exploring the ways in which different placement in the world system and different institutional design could lead to the quicker adaptation of human rights norms.²⁹⁹ Looking at variables like the conditions for joining organizations, the conditionality of aid and connections between leaders and substate actors to international society, they argue that human rights can best be protected in countries that do not protect them now through a process of inclusive membership in international organizations, which would lead to the acculturation of rogue states.³⁰⁰ This connects with much of the scholarship in other areas of the research project that focus on the extent of contacts and the role of institutions in creating these contacts as the dominant force in creating isomorphism.³⁰¹

This Article looked at the other side of the question; it focused on what types of ideas travel inside World Society and how they travel. It argued that within the structure of ideas, there are certain features that make them more or less likely to be transmitted through the process of world cultural change. Specifically, it argued that something about the disaggregated sovereignty model—the idea that institution-by-institution links could create a liberal state out of a nonliberal one—enabled it to become the theoretical underpinning for the structure of UNMIK. Without this claim, the model could be described as contingent, or reliant for its relevance on certain conditions. It argued that preexisting liberal states behaved in certain ways without expressing any belief about the ways in which nonliberal states (or nonstates) behaved.³⁰² With it, it became noncontingent, or universally applicable, claiming that any governed areas could become a liberal state through a process of substate government actors relating to one another.³⁰³

299. See generally Goodman & Jinks, *supra* note 280.

300. See *id.* at 628-29.

301. See, e.g., David John Frank et al., *Environmentalism as a Global Institution: Reply to Buttel*, 65 AM. SOC. REV. 122, 122 (2000).

302. See *id.* at 122-26.

303. The concept of dividing ideas between contingent and noncontingent ideas has many similarities with Noah Feldman's description of ideas as mobile or nonmobile (in his parlance, Islam and democracy are both mobile ideas). See NOAH FELDMAN, *AFTER JIHAD* 31-50 (2003). However, Feldman's terminology is not clear—or at least not clear enough—about what makes certain ideas mobile and others nonmobile for it to be useful for this Article.

Within the World Society model, it is easy to skip the step of discussing whether ideas that exist in world culture are considered to be universally applicable by the constituent parts of world culture. This is because most of the ideas studied by World Society scholars are not contingent—for example, Goodman and Jinks study human rights, which is, by definition, a universal concept—and because the World Society model is itself a universal model attempting to explain how all states in the world behave.

Not all ideas are similarly universal or noncontingent in states of the world. In his study of the League of Nations' Mandate System, Antony Anghie argued that previous attempts by an international organization were marked by a contingent conception of a state.³⁰⁴ Specifically, he claimed that the sovereignty of non-European nations that arose out of the Mandate System and the period of decolonialization had a radically different character than European sovereignty precisely because sovereignty, and hence the state as it existed in the minds of the relevant actors in world culture, was defined as European:

My argument, developed through an examination of the Mandate System, is that sovereignty did not extend without problem to the non-European world. Rather, sovereignty acquired a different form and character as it was transferred from the European to the non-European world. Non-European sovereignty is unique, and this article attempts to explore the character of this uniqueness and how it came into being. My further argument is that the history of non-European sovereignty cannot be separated from the larger history of sovereignty itself. Traditionally, international law asserts that there is one juridical version of sovereignty, implicitly European sovereignty, which applies to all states. This understanding is crucial to the maintenance of the fundamental premise of international law: that all states formally are sovereign and equal. My argument, by contrast, is that international law and institutions created two different models of sovereignty: European sovereignty and non-European sovereignty.³⁰⁵

That is, a fully sovereign state in the minds of the League of Nations and other important players, according to Anghie, could only be European. Anghie argued that the sovereignty of former trusteeships in a non-European context was qualitatively different than the sovereignty enjoyed by European states.³⁰⁶

304. See Anghie, *supra* note 35, at 520.

305. *Id.*

306. See *id.*

The difference, then, was in the idea itself. After World War I, according to Anghie, European culture had an idea of statehood that it did not think could be transferred to former colonies and other trustees. In 1999, world culture, as expressed through the decisions of the United Nations in structuring UNMIK, had an idea of state that it did think could be transferred and that it thought could be transferred in specific ways.³⁰⁷ While the way the League of Nations ran its Mandate System and the way the United Nations ran UNMIK were different, the difference in result cannot be explained exclusively by examining changes in the means of transmission. The level of willingness to transmit the ideas in their full form was different because the ideas themselves were different.

The World Society literature, with its heavy focus on sociological explanation, does not make room for this type of effect. Moreover, the possibility of contingent and noncontingent ideas raises many normative questions. While in the context of state-building we may be suspicious of contingent colonial-style ideas, other contingent ideas may make more sense. Decoupling of the sort discussed above can have negative effects for people in a large number of ways. After all, there is no particular reason why a landlocked state should have a navy or why states without many scientists should have science policy review boards. While Goodman and Jinks focus on engaging in institutional design to create more isomorphism when it comes to protecting human rights, there may be instances where we want to engage in institutional design to create less isomorphism in other contexts, either to avoid costly results like landlocked navies, or to privilege experimentalism.

Moreover, understanding the effect of the structure of ideas should put pressure on those members of world culture who create ideas. If it is understood (in fact, assumed) that ideas will transfer beyond their original context and reason for existing; solutions to specific problems in one country inevitably have externalities that are felt in other countries. Those that create and adopt ideas—ranging from scholars to officials in international organizations—ought to consider whether these are positive or negative externalities and if anything can be done to limit (or exacerbate) the effect of these externalities by changing the ideas themselves.

307. Anghie rejected that the idea of sovereignty had changed particularly and argued that modern development theory was a direct outgrowth of the Mandate System. *Id.* at 522. I clearly disagree.

The United Nations Mission in Kosovo is an extraordinary experiment in creating a state out of an ungoverned area. Its extraordinariness provides us with an opportunity to look at the state of our ideas, not only about nation-building, but about international law and policy-making generally. The onus lies on those that create ideas to fully understand its lessons.