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Silence of the Laws? Conceptions of International Relations and International Law in Hobbes, Kant, and Locke

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Silence of the Laws? Conceptions of International Relations and International Law in Hobbes, Kant, and Locke

MICHAEL W. DOYLE AND GEOFFREY S. CARLSON*

This Essay explains how the political theorists Hobbes, Kant, and Locke interpret the decision to go to war (jus ad bellum) and the manner in which the war is conducted (just in bello). It also considers the implications of the three theories for compliance with international law more generally. It concludes that although all three can lay claim to certain key features of modern international law, it is Locke who provides the most complete support for both the laws of war, in particular, and with international law, in general.

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I. INTRODUCTION

Inter armas silent leges? In international law war is traditionally seen as a unique condition. Insurance policies are overridden, property becomes liable to seizure and destruction, and civilians have

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lost some rights including, for example, habeas corpus and the right to a civilian trial, as when President Lincoln suspended it during the Civil War.\textsuperscript{1} In war, soldiers are given certain immunities, provided they obey the laws of war.\textsuperscript{2} With the rise of undeclared wars and ambiguous declared wars, whether and why this should be the case has become subject to debate. In this Essay, we would like to explore what international political theory can add to explaining the state of war and its implications for the legal character of the decision to begin a war (jus ad bellum) and the manner in which war is conducted (jus in bello) in light of the theories of Hobbes, Kant, and Locke. And taking advantage of the themes that attend this discussion, we take the analysis a step further and ask what the implications of these theories are for compliance with the laws of war and with international law more generally.

International political theory presents numerous visions of the state of war and peace,\textsuperscript{3} but we focus on three distinct ones. One, called Realist, inspired by Hobbes, portrays war as a condition natural to anarchy. "Out of civil states," Thomas Hobbes famously concluded, "there is always war of every one against every one."\textsuperscript{4} Lacking a global common sovereign, inter-state relations is thus a constant "state of war," whether actual or potential. Another, Liberal Republican, inspired by Kant, explores the pacifying effects of liberal principles and republican institutions on relations among liberal states. Amongst themselves, liberal republics can establish a reliable separate self-enforcing peace. A third, Liberal Legalism, inspired by Locke, bridges Hobbes and Kant. Unlike Hobbes, Locke portrays war as an act, a choice creating a specific condition. "Men living together according to reason," John Locke announced, "without a common Superior on Earth, with Authority to judge between them, is properly the State of Nature." But force, or a declared design of force upon the Person of another, where there is no common Superior on

\begin{footnotesize}
\textsuperscript{1} See United States v. Averette, 41 C.M.R 363 (1970) for discussion on military trials of civilians in time of war. Many constitutional law scholars now think that Congressional authorization is also needed to legalize a suspension during a time of rebellion or invasion. In current debates, time of war is being controversially expanded to cover the more ambiguous situations of "peace operations" and, for some, the "war on terror."

\textsuperscript{2} For good surveys of pre-UN Charter law see Arnold McNair, The Legal Meaning of War, and the Relation of War to Reprisals, 11 Transactions of the Grotius Soc'y 29 (1925), and for the post-UN Charter period, John A. Cohan, Legal War: When Does it Exist, and When Does it End?, 27 Hastings Int'l & Comp. L. Rev. 221 (2004).

\textsuperscript{3} Michael W. Doyle surveys Realist, Liberal, and Socialist theories of war and peace, intervention and nonintervention, and just and unjust distributions of international income in Ways of War and Peace (1997). Some of these remarks draw on arguments presented there.

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Earth to appeal for relief, *is the State of War.*\(^5\) Nonetheless, unlike Kant, Locke sees international peace as troubled; without authoritative international institutions (courts, etc.) rivalries can escalate into war.

While the two Liberals seem the more obvious foundations of international law, all three can lay claim to key features of the modern law of war and peace, while curiously upsetting modern international law conventions. Despite his rejection of the possibility of an international law of peace, Hobbes accepts the modern view of sovereign equality. Kant’s scope for the international rule of law while deep among liberal republics is also narrow, rejecting the prospect of a full state of law among nonrepublics and between republics and nonrepublics. And Locke, notwithstanding the fact that he laid the foundation for laws of peace and war, introduces more occasions for the just use of force.

Hobbes, Kant, and Locke share similar modern foundations in rational individualism, which makes their international law differences all the more interesting. Curiously, it is Locke that offers the most complete—indeed modern—understanding of compliance with international law in general and the laws of war in particular. Lockean international law is both a genuine condition affecting all states and yet is not a fully reliable political framework for order for any of them.

II. **COMPLIANCE WITH INTERNATIONAL LAW: CONCEPTS AND FRAMEWORK**

Louis Henkin articulated the single most famous statement on compliance with international law: Almost all states comply with almost all international law almost all of the time. But “almost all” might mean a compliance rate of less than 75%. So what is the significance of compliance? It is important to distinguish, as George Downs and colleagues have, between deep cooperation and shallow coordination as illustrated by the difference between accurately playing “hard” versus “easy music.”\(^6\) States engage in deep cooperation when they forego immediate material advantages or make costly changes in preferences in order to achieve the benefit of long run co-

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operation or avoid the costs of sanctions imposed by others. They engage in shallow coordination when they make minor changes to pursue current national preferences that are already clear and widely recognized.

Shallow and deep compliance seem to vary according to issues and scope. Stanley Hoffmann, for example, distinguished between three kinds of international law: First, the "law of political framework" identifies international actors and provides the basic rules of their interaction, such as sovereignty and nonaggression. Second, the "law of reciprocity" defines the rules of interstate relations in areas in which states have a mutual and lasting interest in cooperation, such as trade or investment law. And finally, the "law of community...[concerns] problems of a technical or scientific nature for which borders are irrelevant." Hoffmann believed that levels of contestation (and by implication compliance) would differ across these three types of law in any given international system. He further believed international systems—whether "moderate" or "revolutionary"—would differ in the overall levels of compliance. In his view, the law of political framework, which closely relates to the distribution of power, would be the most highly contested. By contrast, the law of reciprocity and even more fundamentally the law of community would elicit significant compliance because they involved mutual interests.

We want to identify two other dimensions of compliance that arise in the contemporary debate in international law and politics. The first dimension tracks indiscriminate versus discriminate compliance. This asks whether states comply equally with all states or selectively with states of a particular kind. The interesting exchanges between Anne-Marie Slaughter and José Alvarez—focusing on whether and to what extent liberal states differ in their creation of, enforcement of, and compliance with international law between themselves and liberal and non-liberal states—is perhaps the most salient scholarly debate concerning this issue. Second, compliance

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8. Id. at 233.
9. See Anne-Marie Burley, Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine, 92 COLUM. L. REV. 1907 (1992) (identifying a "zone of law" between liberal states and a "zone of politics" between liberal and non-liberal states in the context of U.S. court adjudications using states' domestic laws); Anne-Marie Slaughter, International Law in a World of Liberal States, 6 EUR. J. INT'L L. 503 (1995) (discussing processes, peculiar to inter-liberal state interactions, that will influence how international law operates between them) [hereinafter Slaughter, Liberal States]; Anne-Marie Slaughter, with a Comment from José E. Alvarez, A Liberal Theory of International Law, 94 AM. SOC'Y INT'L L. PROC. 240 (2000) (summarizing their respective positions on this issue); José E. Alvarez, Do
could be distinguished according to whether its scope was wide or narrow. That is, whether it covered many areas or subjects, from the law of force through trade and other regulation, or just a few. Hoffmann’s three levels overlap here, but in this dimension the focus is on the range of law-governed interdependence and on the difficulty of achieving cooperation.

III. INTERNATIONAL THEORY AND INTERNATIONAL LAW

A. Hobbesian Realism

Thomas Hobbes, the great seventeenth-century Realist philosopher, explained how insecurity and anarchy were inherently linked. Hobbes argued that states, like individuals prior to the formation of states, are basically similar, self-interested actors. They are driven by the competition for material goods, contests over prestige, and fear of conquest. The first motive leads to war when one state is considerably stronger and does not expect costly resistance to its predation; the second and third when power is more-or-less equal as neither state is likely to defer to the prestige of the other or know whether its power is sufficient to deter the other from attacking. Given the likely uncertainties about other states’ motivations, rational states rarely experience security. They may clash even when each thinks it is seeking security but, absent a Global Leviathan, cannot know whether the security of other states is compatible with its own. War then is a constant possibility in the international system.

The implications of Hobbesian Realism for international law are complex. On the one hand Hobbes famously declared the “covenants without the sword are but words.” The globe lacks an armed Global Leviathan and so international law would lack hierarchical enforcement. But that does not mean that law would have no role. Hobbes’s logic constitutes the legal foundation of both the doctrines of sovereign equality and the voluntary, positivistic character of modern, post-Westphalian international law. Making international agreements would be an equal right of each and every sovereign, and these agreements would have equal standing as law. But states’ self-


10. This view is identified with the writings of philosophers from fifth-century BCE Athenian general Thucydides to contemporary conservative thinkers Henry Kissinger and—at least before she became President Bush’s national security adviser—Condoleezza Rice.

11. HOBBES, supra note 5, at 129.
interests would still animate international law. So the law would not constrain self-interest, but perhaps refine it by clarifying ambiguity and thus solving coordination problems in which states have a mutual interest in compliance. For example, while sovereigns have promised and have clear incentives not to harm innocent subjects, foreign "innocents" (noncombatants) in war are not protected unless a specific covenant requiring protection has been negotiated, and it is likely for reasons of mutual advantage (the threat of retaliation) that state parties to the covenant will comply.

The jus ad bellum and the jus in bello reflect these Hobbesian limits. Hobbesians would expect that states would continue to go to war driven by the Hobbesian trinity of fear, advantage, and glory, unrestrained by any international law forbidding armed conflict. And much of the modern international law of war and peace reflected this logic. States retained the discretion to declare war (jus ad bellum), at least prior to the Covenant of the League of Nations, which required the recourse to peaceful settlement procedures before declaring war, and the Kellogg-Briand Pact, which outlawed the aggressive use of force. Humanitarian law (jus in bello) from the Hague agreements onwards restricted how war could be fought, protecting noncombatants and outlawing some needlessly cruel forms of warfare. But throughout most of the twentieth century, as a Hobbesian realist would predict, these restrictions were enforced primarily by the self-interested fear of immediate retaliation, or by victors over the vanquished as at Nuremberg and Tokyo, and in the ICTY and ICTR.

Reputation plays a limited role, constraining a self-interested and publicly declared defection from an alliance, for example, only when doing so would leave the defector so notorious as to be shunned by future alliance partners that it is likely to need for survival.

For a Hobbesian, the wider reach of international law would be limited by self-interest, unless coerced, but available to all states. The range of subjects ripe for legal agreement could in principle be either wide or narrow, depending on how interdependent the interests of potentially benefiting states were. Security interests would tend to constrain that cooperation, along with multipolar balances of power.

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13. Hobbes, supra note 5, at 324. Relatedly, subjects that rebel are of course liable to punishment; and so are their children even to the “third and fourth generation.” Id.

14. These are the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda.

15. Id. at 115.
Their greater uncertainty would limit international cooperation because differences in benefits, even if both do experience a pareto improvement, can be utilized to tilt the security balance. In contrast, bipolar balances allow for more interdependence, because the area of common benefit is larger when states are stably aligned against a common enemy. This produces more intra alliance coordination and cooperation of interests; but only within the larger alliances and under the shadow of each polar hegemon.  

States would be most likely to comply with international law in the Hobbesian world with respect to community issues where the common interests of states in, for example, aviation safety or the efficient delivery of the mails would prevail. These issues would be limited by national egoism and the degree to which material common interests overlap. Hobbes' conception of international law would also succeed in advancing reciprocal interests when retaliation was a clear means of enforcement, as it would be in simple prisoner's dilemma games when iterated over an uncertain future, as Robert Axelrod has argued. Thus trade negotiations under the World Trade Organization (WTO) enforced with the expectation that the retaliation would be authorized for violations bear the clear mark of Hobbesian rationality. So, too, would the negotiation of bilateral investment treaties, even ones that involved circumscribed delegations of sovereignty. But Hobbes is least likely to provide firm foundation for the law of the framework, the rules of sovereign political independence and territorial integrity. It is not that retaliation fails to enforce those rules, as it would among equal states. Rather, the rules would lack fundamental support or enforcement in protecting weak

16. For this argument with examples from international monetary relations, see Fred Hirsch, Michael W. Doyle & Edward Morse, Alternatives to Monetary Disorder (1977).


19. For example, when a WTO member state wins a case before the WTO Dispute Resolution Body, the method of enforcement granted to the state is the ability to impose countermeasures against the products of the breaching state that are "equivalent to the level of the nullification or impairment." Marrakesh Agreement Establishing the World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes art. 22(4), Apr. 15, 1994, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226.
states from strong ones.

The key message of Hobbesian Realism is that law is weak, but relevant. Any law that reflects the material, prestige, or security interests of a state would be complied with. Moreover, even when those interests dictate defection, states will be reluctant to acquire the reputation of faithlessness when they rely on cooperation for survival. 20

B. Kantian Liberalism

Immanuel Kant’s 1795 essay, “Perpetual Peace,” 21 offers a coherent explanation of two important trends in world politics: The tendencies of liberal states to be peace-prone among themselves and war-prone in their relations with nonliberal states. Kant’s theory held that a stable expectation of self-sustaining peace among states would be achieved once three conditions were met. He calls them the “definitive articles” of the hypothetical peace treaty he wants states to sign. We can rephrase them as:

1. Representative, republican government, which includes an elected legislative, separation of powers and the rule of law. Kant argued that together those institutional features lead to caution because the government is responsible to its citizens. This does not guarantee peace, but selects for popular wars.

2. A principled respect for human rights all human beings can claim. This should produce a commitment to respect the rights of fellow liberal republics because they represent free citizens who constrain their state and thus those states represent individuals’ rights who deserve our respect. It also produces a distrust of non-republics because if they cannot trust their own citizens to rule, why should we trust them? 22

3. Social and economic interdependence. Trade and social interaction generally engender a mix of conflict

20. HOBBS, supra note 5, at 115.
22. The individual subjects of autocracies, of course, do not lose their rights. It’s just that the autocrats cannot legitimately claim to speak for their subjects. Subjects retain basic human rights, such as the rights of noncombatants in war. The terror bombing of civilians—as in the bombings of Dresden, Tokyo, Hiroshima, and Nagasaki—constitute, in this view, violations of these rights and of liberal principles and demonstrate weaknesses of liberal models in these cases.
and cooperation. A foreign economic policy of free trade tends to produce material benefits superior to optimum tariffs (if other states will retaliate for tariffs, as they usually do). Liberalism produces additional material incentives to bolster cooperation because, among fellow liberals, economic interdependence should not be subject to security-motivated restrictions ("Trading with the Enemy" acts) and, consequently, will be more extensive, varied, and robust.

Kant suggested that each was necessary to secure a zone of peace among fellow liberals.\(^2\) The first principle specifies representative government responsible to the majority; the second and third specify the majority's ends and interests. Kantian Liberalism thus shapes foreign policy in democracies either because public opinion is liberal and demands it or the political elite has liberal values and implements it.

With regard to the jus ad bellum and the jus in bello, republics in Kant's view abide by the laws of war unless it is extremely costly. There should be next to no wars with fellow liberals, as the empirical record confirms. Although relations between liberals and nonliberals would be Hobbesian, there should be more restraint in the jus in bello, reflecting Kantian commitment to human rights. Indeed, ratification of humanitarian law by a "democracy" does enhance compliance, as compared with ratification by a non-democracy.\(^2\)

Kantian international law is discriminate compared to Hobbesian international law. There is special commitment to fellow republican states to respect human rights and cooperate economically. Because law will animate and regulate those obligations, creation of\(^2\) and compliance with those laws is embedded in the Definitive Articles. Professor Slaughter also hypothesizes higher levels of international law compliance among liberal states, resulting from, \textit{inter alia}, the denser networks of interactions between them and subsequent channeling of disputes into domestic courts—i.e. "vertical enforcement."\(^2\) Outside of the liberal peace, Kant shares some of Hobbes'
skepticism. He also thinks that immediate self-interest will govern relations, and that states will develop law outside the pacific union as they would if they were Hobbesians. The many instances of international law creation and compliance between liberal and nonliberal states that Professor Alvarez identifies provide examples of this. But in addition to sharing Hobbesian assumptions about the dangers of international relations outside the pacific union, Kantians have deep moral commitments to treating individuals as ends (i.e. respecting human rights) that shape the policies they adopt and the treaties they make.

Kantian international law is the most legalized regime, but only within the liberal peace. The framework of international law is secured by “Perpetual Peace,” itself a peace treaty. Its three definitive articles are legally binding obligations—most centrally the obligation to maintain peace respecting the territorial integrity and political independence of fellow liberal states. This is the deepest cooperation envisaged by the three theories, covering not just shared common interests and reciprocity reinforced by retaliation (as with Hobbes) but a legal framework (“constitution”) that defines members and their obligations. This is not global government (the Hobbesian route to peace). It is self-enforced international law, enforced by a mutual restraint and respect among liberal republics that is produced by the domestic institutions, and the interests and ideas of the citizenry those institutions reflect. And there is considerable evidence demonstrating that liberal states actually do abide non-aggression against fellow liberal states.

But within the pacific union where cooperation on peace is deep and complete, the range of subjects for legal agreement is narrowed by a continuing commitment to independence. In order to avoid the pacific union becoming tyrannical, exercising governing authority without representation over independent polities, Kant lim-

states, which include “peace”, “market economies”, and “a dense network of transnational transactions.” Id. at 509–14. But see Alvarez, Critique, supra note 10 (calling into question the consequences of these attributes).

27. See Alvarez, Critique, supra note 10.

28. This deep cooperation forms the basis for the “zone of law” that Burley—now Slaughter—identifies. See Burley, supra note 10, at 1918–19. (“This core of common values and institutions ensures that in most cases states can disagree with the specific policy choices embedded in each other’s national laws but nevertheless respect those laws as legitimate means to the same ultimate ends.”).

29. For the debate on the empirical tendency of democracies to remain at peace with each other see DEBATING THE DEMOCRATIC PEACE (Michael E. Brown, Sean M. Lynn-Jones & Steven E. Miller eds., 1996) that includes essays by Michael W. Doyle, Bruce Russett, and John Owen and critiques by Henry Farber, Joanne Gowa, David Spiro, and others. The debate is predominantly over the reasons for the tendency, not its existence.
its its scope to peace and hospitality (e.g. permitting free trade). Kantian republics would comply with community interests and these interests might well be broader than those envisaged by Leviathans simply because security-motivated restrictions would be absent. When it comes to the law of reciprocal cooperation, the liberal regime would be cross-pressured. It respects the law among liberals, but it also responds to representative politics, electoral coalitions, and whims. Thus, liberalism promotes the rule of law domestically and discounts long-run commitments in favor of interests of present coalitions.

These interpretations not only affirm the views of both Professor Alvarez and Professor Slaughter in their valuable exchange on the significance of liberal states for international law, but also recognize the common ground between them. With Professor Alvarez, we agree that international law shapes the relations of both Hobbesian Leviathans and Kantian republics when it comes to community and reciprocal interests. Moreover, although it will be relatively easy to identify which “engine” is driving law between states (based on their liberal or nonliberal character) predicting differences between the quality and character of those laws will be difficult because in community and reciprocal law Hobbesian self-interest can easily overlap with cross-pressured Kantian commitments. Indeed, sometimes the former may be more powerful than the latter. With Professor Slaughter we agree that liberal states are different, given their special commitments and political character. Thus, we should still be able to identify special avenues of law formation, cooperation, and compliance between liberal states, mostly importantly in framework law (the liberal peace itself) and becoming increasingly discernable within the fields of human rights and deep economic cooperation.

Liberal states are different first and most importantly because the framework law of sovereign independence is genuinely secure among them. The most significant effect that appears to follow from this is a particular form of transnational law. As noted above, it is

30. Kant believes that these limits are natural results of nations’ desires to retain their own cultural character, which will be embedded in, *inter alia*, languages, institutions, and ideals (see Perpetual Peace). But while Kant’s reasoning appears fundamentally sound, he may have underestimated the ability of people to find sufficient common ground that would result in a polity like the European Union, which has particularly strong supra-national governance law and institutions.


32. Thus, the “burden . . . to prove that a liberal/non-liberal distinction exists” will be difficult to satisfy. Alvarez, *Critique*, supra note 10, at 123.
not that transnational law does not exist among nonliberal states. But it appears so far to be only liberal republics that have formed genuine transnational political spaces. No common market has evolved into an integrated political and economic union other than the one among liberal European democracies. The common markets elsewhere have either collapsed (East Africa) or remained limited to trade preferences (the Andean and Central American and South East Asian associations). Not all liberals form economic unions, because the interdependence is not strong enough. Yet only liberals have succeeded in forming economic unions.

Second, liberals have a special affinity to compliance with human rights. In the era of Abu Ghraib, these clearly must be taken as far less than an iron law. Nonetheless, linkages between commitment and tendency toward compliance in human rights are special to democracies, according to various studies by Oona Hathaway. Liberal democracies are not only more likely to comply if they ratify but also less likely to ratify a treaty merely for reputational gain, irrespective of whether they plan to comply, because their reputations are more fixed.33

And, third, no Alien Tort claim34 cases have been successfully filed against another liberal government or government official35—although some plaintiffs have tried it against the United States, Israel, and Germany.36 These cases could not overcome obstacles such as the political question doctrine, a finding that the alleged activity did not breach the law of nations, and sovereign immunity.37

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33. Oona Hathaway, Do Human Rights Treaties Make a Difference?, 111 YALE L.J. 1935, 1999 ("[F]ull democracies appear to be more likely to comply with their human rights treaty obligations than the group of nations as a whole and more likely when they ratify treaties to have better practices than otherwise expected."). Similarly, Hathaway also finds that democratic countries are less likely to commit torture and more likely to join the Convention on Torture than nondemocratic countries. Moreover, ironically reflecting a respect for law and expectation that it will be enforced, democratic countries that do engage in torture are less likely to join the convention, unlike nondemocratic countries that are more likely to join the convention the more they torture. Oona Hathaway, The Promise and Limits of the International Law of Torture, in TORTURE: PHILOSOPHICAL, POLITICAL AND LEGAL PERSPECTIVES (Sanford Levinson ed., 2004).

34. The Alien Tort Claims Act (ATCA) provides that "[t]he District Courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.


36. See Hirsh v. State of Israel, 962 F. Supp. 377 (S.D.N.Y. 1997) (dismissing plaintiff's claim against Germany and Israel that the ATCA provided a basis for recovery of reparations they alleged were due to them under treaty).

37. The closest anyone seemed to come to a successful claim was Jama v. United States INS, 22 F. Supp. 2d 353 (D.N.J. 1998) where alien asylum-seekers sued the Immigra-
C. **Lockean Liberalism**

Like Kantian Liberalism, Lockean Liberalism focuses less on capabilities and more on intentions as embodied in institutions and legal/moral commitments. Locke explicitly analogizes the international system’s condition to that of equal, rational, and independent men in the state of nature. And like the Hobbesian Realist’s and Kantian Liberal’s natural state, it is anarchic. Locke differs in his emphasis on the natural rights of life, liberty, and property that all men are bound to respect even in the state of nature, creating a degree of mutual trust. These duties elevate the state of nature out of Hobbesian war and into a peace—albeit a troubled one fraught with “Inconveniences.” These Inconveniences are:

a. That bias and ignorance can cause war among well-meaning liberals, Locke warns us, is the first “Inconvenience” of the state of nature. Even though the laws of nature are clear, we will fail to reflect on their implications or be biased in their consideration in our own case.

b. That partiality, passion, and revenge can corrupt the adjudication of even clear law in one’s own interest, is the second. Negligence will make them remiss in the consideration of the others. Both will lack, therefore, adequate authority to make adjudication effective.

c. That weakness and fear will erode effective execution of the law is the third, Locke concludes. The power to enforce just judgments will thereby be absent.

Men in Locke’s state of nature create states to overcome inconvenience and protect their natural rights. But unlike Hobbes’ conception of the state of nature, people are not so terrified that they will submit to just any government; they must consent to civil society for it to be legitimate. They chose a form of government—democratic, oligarchical, or monarchic—and allocate functions among a supreme “legislature” and subordinate “executive” (administration and Naturalization Service (INS), INS officials, and INS contractors alleging they were detained under awful conditions and tortured. While dismissing the ATCA claims against the INS on sovereign immunity grounds, the court refused to dismiss the ATCA claims against the individual INS officials and allowed the case to reach summary judgment. But the Supreme Court’s decision in Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), came down before the case concluded, and the court then dismissed the ATCA claims against the INS officials saying the claims could not satisfy the Sosa standard for a breach of the law of nations. Jama v. United States INS, 343 F. Supp. 2d 338 (2004).

38. **LOCKE, supra** note 6, at 14, 95.
istrate) and a “federative” (foreign relations) powers. Individuals agree to obey the laws and cede the right to punish to the state, as long as the state protects the fundamental rights of individuals and abides by its constitution. And although the specific form of the state makes little difference to its legitimacy, Locke prefers and praises representative government. Any illegal exercise of force, whether within the state of nature or within a tyranny, creates a right to re-enter a state of war, a right to re-bellare.

The same natural rights and duties apply between Lockean states as between men. And it is these duties that lead just commonwealths to want to maintain peace with each other. Their public principles and their institutionalization of fundamental rights enable them to establish and signal reputations that encourage cooperation. Adhering to international law is a strategy for doing exactly that, and thus layers a positivist duty to abide by international law on top of states’ natural duties. But, unlike the Kantian republican peace, the signaling is unreliable. Natural partiality and the poorly institutionalized character of world politics can overcome their duties to try to resolve disputes peacefully, resulting in imprudent aggression and complaisance.

Thus, Locke’s international condition is an anarchic state of nature, a troubled peace fraught with Inconveniences that could deteriorate into war through the combined effects of bias, partiality, and the absence of a regular and objective system of adjudication and enforcement. That Locke—unlike Kant—is prepared to delegate foreign policy (“federative”) power to the executive alone might magnify such inconveniences by removing checks. But war must still be a clear act of aggression violating rights to life, liberty, or property or a stated declaration of intent to do so. All else is peace. And in peace, natural law—now, international law—should rule. In short, the foreign relations of liberal commonwealths differ from Realists’ only in that they remain constrained by the duty not to violate natural or international law. Rather than Rational Egoists, they are Legal Leviathans.

Lockean jus ad bellum and jus in bello reflect those distinc-
tive features of Lockean international law. Going to war is neither discretionary (Hobbes) nor precluded (inside Kant’s liberal peace). Instead, for a Lockean, just war is limited to self-defense, as in Articles 2(4) and 51 of the UN Charter against attacks on a state’s life, liberty, or property. One exception, however, to the non-use of forces (except in self-defense) involves cross-border enforcement of basic rights. In the original state of nature we all have the right to enforce our natural rights to life, liberty, and property against transgressors. So, too, in international law, Lockean states have rights derived from our own: political independence from our life and liberty, and territorial integrity from our property.

Aggressor states that violate natural rights make themselves targets of just wars (jus ad bellum) of defense and even conquest. Just conquerors have the right to punish transgressors (for murder, slavery, and theft) to deter future aggression and to exact just reparations. Transcending the traditional legal standards of sovereign immunity, Locke advocated what are now the modern standards of individual accountability—the post-Nuremberg principles of international criminal law. Indeed, Lockean standards are if anything more demanding. They apply to the crimes of war (jus in bello) and conquest, but also to infringements on property rights. The first two are punishable by death, latter by some lesser penalty. And the penalties apply to all those who have “assisted, concurred, or consented” in the act of war, which widens the “circle of responsibility” from conspirators to anyone who merely concurred. That means Nazi voters could be punished if the Nazi Party plan were known in 1933.

That said, Locke’s restrictions on just punishment are even more important for the modern conception of the right of self-determination and the jus in bello rights of noncombatants. Conquest, even just conquest, gives no title to territory. Territory is worth more than any due compensation and the people retain their right to self-government and self-determination. Moreover, no one who did not plan, assist, or concur can be harmed. He thus bars all collective punishment and explicitly excludes reprisals against women and children. Although property may be seized to exact reparations, property belonging to wives may not be. The rights of lega-
tees to subsistence thereby limits what reparations may be justly seized from a war criminal.\textsuperscript{45}

So while Locke provided a powerful foundation for the precepts of contemporary international humanitarian law, ambiguities in his principles illustrate a contemporary dilemma in it. Violation of natural law inflicted on anyone, anywhere in the original condition can be punished by anyone. We cede the right of punishment to the state. Can one state then punish the violations of natural law inflicted by another state on the second state’s own population? Is there a right of forcible “humanitarian intervention”?

Lockean “federative power” and “tacit consent” further complicate this question. Although violations should be punished, only the members of a Commonwealth have a right to rebel against their state. Short of rebellion we must presume tacit consent and tacit consent delegates the federative power to the state which would then have the right to call upon its citizens to defend itself from the foreign humanitarian intervention. Of course, the citizens who think their state has violated natural law have a right to refuse the call, and a foreign power could justly support them. But citizens holding different views would have a right and a duty to defend the state against the same foreign intervention.\textsuperscript{46} The “appeal to heaven” (i.e. war) would be made. Prudent sovereigns, we hope, would refrain from intervention until it was evident by a “long (and large) train of abuses” or mobilization of popular resistance that a just revolution was underway. And thus we see again why the international condition is full of Inconveniences.

Lockeanism’s implications for compliance in the context of international law are substantial. As it is for Hobbes, international law is universally applicable; but, as with Kant, it is embedded in the rights to life, liberty, and property. Rather than just immediate interest and retaliation, Lockean states have commitments and reputations that they want to maintain for human rights, property rights, and the rule of law. These reputations allow law to be more influential, encouraging cooperation even when immediate costs accrue.\textsuperscript{47}

\textsuperscript{45} Id. at 436–38, paras. 181–83.

\textsuperscript{46} In Kosovo, for example, the Albanian Kosovars welcomed NATO’s intervention; the Serbian Kosovars opposed.

\textsuperscript{47} See Andrew Guzman, \textit{A Compliance-Based Theory of International Law}, 90 CAL. L. REV. 1823 (2002). A commitment to the rule of law also makes compliance more likely in the expected reciprocity governing monetary commitments. Compliance with Article VIII of the IMF's Articles of Agreement, which spells out general obligations of members and prohibits restrictions of the making of payments and transfers for current international transactions, is enhanced by making a formal legal commitment when that commitment is made by states that measure high on their domestic rule of law (as would a Lockean state). Beth A. Simmons, \textit{International Law and State Behavior: Commitment and Compliance in Inter-
Lockean liberalism thus tends to deepen cooperation beyond immediate self-interest and fear of retaliation to provide foundations for a wider scope of legal commitments. At the same time, Lockean commitments to protecting human rights and punishing violations could make the international system’s foundations in sovereign equality more contested, rather than more stable, as Lockeans seek to enforce rights globally. And even though Lockeans engage indiscriminately with all states that are prepared to make legal commitments, their better foreign relations will be with similar rule-of-law states.

Judith Kelley recently took advantage of the advent of the International Criminal Court (ICC) to explore the reasons behind states’ compliance to treaties. Following the ICC’s creation, the United States sought to secure bilateral agreements with other nations pledging that they would not surrender U.S. personnel to the court, which essentially meant that the other country would refuse to honor its ICC treaty obligations vis-à-vis the United States. Using quantitative analysis, Kelley discovered a number of interesting patterns among nations in this context. First, states with a “high rule of law” were not especially likely to sign onto the ICC relative to “low rule of law” states. Yet if they had ratified the ICC treaty, the former were significantly more likely to decline to sign the bilateral agreements with the United States than the latter. Second, low rule of law states were actually more likely to sign the bilateral treaties with the U.S. if they had ratified the ICC than if they had not. And third, Kelley concludes that the states that refused to sign the U.S. bilateral agreements did so for one or two reasons: respect for the ICC itself and respect for their treaty compliance in general. In sum, a general respect for the rule of law impelled many states to rebuff U.S. requests.

49. See Rome Statute of the International Criminal Court art. 89(1), July 17, 1998, 2187 U.N.T.S. 90 (“States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.”).
50. Kelley uses two measurements to determine the “rule of law” in a state. First, she uses the International Country Risk Guide (PRS Group 2004) which measures “the peaceful implementation and use of adjudication through law and established institutions.” Kelley, supra note 49, at 578. Second, she uses the World Bank’s Worldwide Governance Research Indicators Dataset for 2002 which measures the “quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence.” Id. at 579 (quoting DANIEL KAUFFMANN, AART KRAAY & MASSIMO MASTRUZZI, GOVERNANCE MATTERS IV: GOVERNANCE INDICATORS FOR 1996–2004, World Bank, Draft, at 4 (2005)).
In a similar vein, Beth Simmons has analyzed commitment and compliance with international monetary law, specifically the obligations under Article VIII of the IMF Articles of Agreement.\textsuperscript{54} With respect to international commitments, Simmons argues that "governments are much more likely... to commit... [when] such a commitment would be credible, but that commitment is also conditioned on other countries' willingness to commit."\textsuperscript{55} And because the IMF agreement lacks any enforcement body, Simmons asserts that "the desire to avoid reputational costs is crucial" to explain compliance.\textsuperscript{56} That is, nations want to "send a costly signal to market actors" that they will maintain certain economic conditions, even when this "involve[s] domestic political costs."\textsuperscript{57} Compliance is especially enhanced when reinforced by high universal compliance, and especially influenced by high regional compliance patterns.\textsuperscript{58} But Simmons sharply distinguishes two explanatory variables: "democracy"\textsuperscript{59} and the "rule of law." While she finds that states with a high rating in the latter have correlatively high rates of compliance, Surprisingly for those who view the international behavior of democracies as somehow distinctive with respect to law and obligation, the more democratic the Article VIII country, the more likely it may have been... to place restrictions on current account. On the other hand, regimes that were based on clear principles of the rule of law were far more likely to comply with their commitments. This finding indicates that rules and popular pressures can and apparently sometimes do pull in opposite directions when it comes to international law. There is no reason to think, based on these findings, that democracy itself is a positive influence on the rule of law in international relations.\textsuperscript{60}

Kantian republics should qualify on both fronts, being com-

\textsuperscript{54} Specifically, Simmons analyzes nations' commitments to and compliance with obligations under Article VIII of the IMF Articles of Agreement. See Simmons, supra note 48; Beth A. Simmons, The Legalization of International Monetary Affairs, 54 INT'L ORG. 573 (2000).

\textsuperscript{55} Simmons, supra note 55, at 574.

\textsuperscript{56} Id.

\textsuperscript{57} Id. at 583.

\textsuperscript{58} Id. at 589.

\textsuperscript{59} Simmons functionalizes "democracy" by using numerical scores derived from POLITY III set data, which measures the existence of democratic institutions in each country, ranking "competitiveness of political participation, the openness and competitiveness of executive recruitment, and the level of constraints on the chief executive." Simmons, supra note 48, at 833.

\textsuperscript{60} Simmons, supra note 55, at 595–96.
mitted to both representative government and the rule of law, but not all democracies would clearly qualify.

IV. CONCLUSION

These comparisons are purely speculations, illustrated but not proven. Their significance lies only in the logical coherence between the literature on the laws of war and peace, the general compliance with international law, and the causal arguments of the international political theorists. Realist-inspired states in the balance of power, liberal states committed to life, liberty, and property, or liberal republics establishing a separate peace make real-world compromises and particularize the commitments and institutions that manage those commitments. But to the extent that the debates on law rest on the logics the theories develop, these observations are likely to have significance as frameworks for explaining compliance with international law.

Of Hobbes, Kant, and Locke, it is Locke who provides the firmest theoretical foundations for an international law open to all states that are willing to abide by it. Hobbes makes it clear that there are no states outside the zone of law, if we are prepared to include self-interested behavior as sufficient for lawful compliance. Locke adds a commitment to law for its own sake, by any state prepared to make the commitment. He includes both democratic and non-democratic states within the zone of law—to the extent they are prepared to respect life, liberty, and property. Locke overlooks the secure foundations of the Kantian republican peace, but in doing so, devises an international rule of law resting on sovereign equality.