

## RECENT BOOKS ON INTERNATIONAL LAW

EDITED BY RICHARD B. BILDER

### BOOK REVIEWS

*The Internationalists: How A Radical Plan to Outlaw War Remade the World.* By Oona A. Hathaway and Scott J. Shapiro. New York, New York: Simon and Schuster, 2017. Pp. xxii, 608. Index. \$30. doi:10.1017/ajil.2018.31

In the past year, heightened tensions between powerful nations, rising nationalism, threats of use of nuclear weapons, and acts of aggression have reappeared on the international stage. These events pose a real threat to the post-World War II rules-based international order that most people in the world today have grown up with, replete with the decline of wars between nations, the rise of international trade and the proliferation of global cooperation.<sup>1</sup> Yet the world was not always so. The generation that came of age between the two world wars remembers a time when war was commonplace and conquest by military prowess was the norm.

Enter a book about this bygone period that also speaks to our present circumstances. *The Internationalists: How a Radical Plan to Outlaw War Remade the World* is a voluminous work that captures the forgotten contributions made during the interwar period through the lens of international law. *The Internationalists* seeks to reinvigorate the importance of international law's past for today's general readership. The central thesis of the book is that the Paris Peace Pact of 1928—sandwiched between the Treaty of Versailles (1919) that brought an end to World War I and the United Nations Charter (1945)

that followed World War II—marked the moment when the old rules governing war and peace gave way to the new. This novel claim rests on the authors' analysis that the treaty variously known as the Kellogg-Briand Pact or The Paris Peace Pact of 1928 or, officially, the General Treaty for Renunciation of War as an Instrument of National Policy,<sup>2</sup> was the start of a new era that "should be" celebrated as the "beginning of the end of war between states" and as the "creation of a new international order" (p. xiii). At 424 pages, this weighty volume offers readers a detailed account of the past, weaving an array of subjects, including history, international relations, law, public opinion, biographies, and more, into a story that proves delightful to curious general readers as well as to the scholar of international law. Positively reviewed by the *New Yorker*, *Economist*, and *Foreign Times*, which noted that "[g]iven the state of the world, *The Internationalists* has come along at the right moment," the book has already earned its place as a serious and significant contribution to international law.<sup>3</sup>

The book's two authors, Oona A. Hathaway and Scott J. Shapiro, both professors at Yale

<sup>2</sup> Kellogg-Briand Pact (Treaty Providing for the Renunciation of War as an Instrument of National Policy), Aug. 27, 1928, 46 Stat. 2343, 94 LNTS 57.

<sup>3</sup> Louis Menand, *What Happens When War Is Outlawed*, *NEW YORKER* (Sept. 18, 2017), at <https://www.newyorker.com/magazine/2017/09/18/what-happens-when-war-is-outlawed>; *Blessed Are the Peacemongers: The Liberal Order of the Past 70 Years Is Under Threat*, *ECONOMIST* (Sept. 21, 2017), at <https://www.economist.com/news/books-and-arts/21729415-it-was-underpinned-movement-make-waging-aggressive-war-illegal-and>; Margaret MacMillan, *Law and Peace: The Internationalists by Oona Hathaway and Scott Shapiro*, *FOREIGN TIMES* (Sept. 1, 2017), at <https://www.ft.com/content/9e4191c6-8db5-11e7-9580-c651950d3672>.

<sup>1</sup> See, e.g., American Society of International Law, *International Law: 100 Ways It Shapes Our Lives* (2018 edition), at <https://www.asil.org/education/100Ways>.

Law School, are nationally recognized scholars. Hathaway, the Gerard C. and Bernice Latrobe Smith Professor of International Law who previously served as Special Counsel to the Department of Defense, is one of the top ten most-cited international law scholars.<sup>4</sup> Shapiro, who holds the Charles F. Southmayd Professor of Law and Professor of Philosophy at Yale Law School, has published widely on topics in jurisprudence, international law, and constitutional law.<sup>5</sup> Their joint expertise shines in the book where their voices, impressively, appear as one.

Upon first reading, *The Internationalists* offers a lesson in history. With its seventeen chapters organized into three parts, the authors take the reader on a complicated journey through war and peace, beginning with the rise of the famed Dutch jurist and legal scholar Hugo Grotius in the 1600s and ending with the rise of the formidable Islamic State in the 2010s. But it is within the historical triad of its structure that the book imparts its illuminating lessons. It also revives an old debate that pits a liberal view of a rules-based international order against a realist view that prioritizes the balance of power. Writing in the *New Yorker*, Louis Menand notes the tension, explaining that

an idealist is someone who believes that foreign policy should be based on universal principles, and that nations will agree to things like the outlawry of war because they perceive themselves as sharing a harmony of interests. War is bad for every nation; therefore, it is in the interests of all nations to renounce it.<sup>6</sup>

The *Economist* credits *The Internationalists*' relevance in a world where liberal internationalism is "now under attack from many sides."<sup>7</sup>

<sup>4</sup> Oona A. Hathaway, Yale Law School Professional Biography, at <https://law.yale.edu/oona-hathaway>. See Brian Leiter, *Top Ten Law Faculty (by Area) in Scholarly Impact, 2009–2013*, BRIAN LEITER'S LAW SCHOOL RANKINGS, at [http://www.leiterrankings.com/faculty/2014\\_scholarlyimpact.shtml](http://www.leiterrankings.com/faculty/2014_scholarlyimpact.shtml).

<sup>5</sup> Scott J. Shapiro, Yale Law School Professional Biography, at <https://law.yale.edu/scott-j-shapiro>.

<sup>6</sup> Menand, *supra* note 3.

<sup>7</sup> *Blessed Are the Peacemongers*, *supra* note 3.

In Part I—*Old World Order*—the authors invoke the contributions of Grotius, framing his idea that “[w]ar is a substitute for courts . . . because courts are the original substitutes for war” (p. 11) as the first step in the long journey toward upending the might-makes-right world order. Hathaway and Shapiro chart the Grotian influence on the “rights and duties of neutrality” (p. 90), namely “the ability to remain at peace and to trade with both sides of the conflict” (p. 92). Here we are reminded of Grotius’s interventionist tendencies as an advocate of just wars and how his views were invoked by rulers in 1914 as grounds for going to a war that would lead to “the terrible culmination of the Old World Order” (p. 98). Together, the many stories in this section call upon readers to recall an era of European history when war, not peace, was taken for granted. Herein, we glimpse the promise that ideas embedded in law began to have in transforming the norms and behavior of those who would wage war.

In Part II—*Transformation*—the book brings life to the horrors of World War I, reminding the reader that “war was still a perfectly legal response” at that time (p. 119). The book then turns to the historical events central to the authors’ thesis, that the pivot toward a new world order began in Paris on August 27, 1928. Here we learn of the unsung contributions of four men—Samuel Levinson, Philander C. Knox, James T. Shotwell, and Hersch Lauterpacht—the “Internationalists” of the book’s title, who spawned the Kellogg-Briand Pact, named after the French foreign minister who proposed an agreement to outlaw war and the U.S. secretary of state who accepted it—along with thirteen other nations.<sup>8</sup> These include the publication of American corporate attorney Samuel Levinson’s “The Legal Status of War” in a 1918 edition of the *New Republic* leading to a movement to outlaw war under the leadership of U.S. Senator Philander C. Knox from Pennsylvania; Canadian and Professor of History at Columbia University James T. Shotwell’s influential role in suggesting

<sup>8</sup> U.S. Dep’t of State, Office of the Historian, *The Kellogg-Briand Act, 1928*, at <https://history.state.gov/milestones/1921-1936/kellogg>.

that French Foreign Minister Aristide Briand agree to a bilateral treaty that would become the Pact; New York aristocrat turned “Diplomat’s Diplomat” (p. 186) Sumner Welles’s prominent influence in shaping President Roosevelt’s thinking about the post-war world order; and beloved international law professor Hersch Lauterpacht’s many contributions, including his work defining neutrality that then-U.S. Attorney General Robert Jackson would adopt in his 1941 speech calling for the outlawing of war (p. 247). The pages revive places where these four men meet, through ideas if not in person.

It would be only four years before Hitler came to power, in 1933. In this brief time, the meaning of and commitment to the Pact was severely tested. Just as history seems to find a promising respite from the decade of horrors before, the authors plunge us back into new threats to international law prohibiting war as told through the developments in and between China and Japan beginning in 1931. The authors assert that “the old world order comes to Asia” (p. 133). The League of Nations’ 1933 decision declaring that the territory Japan gained in its invasion of Manchuria should be returned to Chinese sovereignty, resulted in Japan’s withdrawal from the League.<sup>9</sup> The authors interpret these historical events to say that Japan erred in its understanding of the Kellogg-Briand Pact: “Past conquests would be protected, but future conquests would not” (p. 159). The result was that the vast empires that Britain and France obtained by conquest would stand, but Japan’s conquest of Manchuria would not enjoy the same legal status. Here, we should pause to question the full account. Should Japan, a relative newcomer to the law of nations and to the European traditions of treaty interpretation, be deemed “wrong in believing that ‘No War’ did not mean ‘No War’” (p. 158)?

Part II is as central to the message of this book as it is elusive. The contributions of the four Internationalists are swallowed up in a swirl of

other essential contributors of the interwar period. Examples include U.S. Secretary of State Henry Stimson’s doctrine of 1932 calling for the nonrecognition of territory acquired by force, President Franklin D. Roosevelt’s central role in navigating World War II and crafting the world order that would follow, and American Prosecutor Robert Jackson’s shaping of the charges of war crimes during the Nuremberg Trials. Perhaps most moving is the tale of Hans Kelsen, found in Chapter 11, and his professional insights that would change the course of international law amid personal persecution that has him flee first to Geneva and later to Berkeley, California. Kelsen’s former student, Hersch Lauterpacht, and his nemesis, Carl Schmitt, read as supporting actors to Kelsen’s starring role. An unexpected hero emerges in Harvard Law School Dean Roscoe Pound and his efforts to help Kelsen and his family escape from Europe during the war at a time when few others did.

By following a narrative approach to the interwar period, the authors necessarily tether important historical moments in international law to particular individuals. This enhances the book’s readability by rendering events of global importance on a human scale. But it comes at a cost by complicating their framing of Samuel Levinson, James Shotwell, Sumner Welles, and Hersch Lauterpacht as uniquely central to their 1928-based claim.

Part III—*New World Order*—attributes the era we enjoy today to the “end of conquest” (p. 309), while asking important questions about how armed conflict has changed its form and why it still persists. The book pivots away from pure reliance on history to justify the importance of the 1928 Paris Pact. It introduces empirical data on armed conflict drawn from the well-known and reputable Correlates of War (COW) data set<sup>10</sup> and, in doing so, enters into the current conversation about whether and why war is declining in the modern world. In Chapter 13, the authors discuss how the data

<sup>9</sup> Stewart Brown, *Japan Stuns the World, Withdraws from League*, UPI ARCHIVES (Feb. 24, 1933), at <https://www.upi.com/Archives/1933/02/24/Japan-stuns-world-withdraws-from-league/2231840119817>.

<sup>10</sup> Correlates of War Project, Data Sets, at <http://www.correlatesofwar.org/data-sets>.

supports their story and engage, albeit briefly, with similar literature by Steven Pinker.<sup>11</sup> A brief look at the footnotes to this chapter, found on pages 529–33, reveals additional scholars who have played a significant role in telling the story of war, and most recently, peace, through the COW data and other data sets, such as Paul Diehl and Gary Goertz’s work on the decline of territorial acquisition through military seizure after World War II.<sup>12</sup>

Here, more robust engagement with the discourse would have strengthened the authors’ claims. The authors only briefly mention Diehl, Goertz, and Alexandru Balas’s newest work, *The Puzzle of Peace*, which provides convincing empirical evidence and explanations for the increase of peace, defined positively, in the world, not just the absence of war.<sup>13</sup> Their book describes the WWI period as “characterized by a series of proclamations and agreements that rejected territorial conquest,”<sup>14</sup> specifically Article 10 of the League of Nations recognizing the principle of territorial integrity and the Kellogg-Briand Pact, and they identify how “the primary mechanism to sanction violations of the norm against conquest was not military action to roll back any gains, but rather not recognizing any territorial gain through military force.”<sup>15</sup> They rightly point out that the norm was not universally practiced, calling out how Britain and France recognized Italy’s territorial conquests in North Africa, before concluding

that there are multiple explanations for the rise of this norm: altruism, the decreasing economic value of territorial gain in the global trade economy world, and the increased cost of indigenous insurgencies.<sup>16</sup> *The Puzzle of Peace* presents the norm against conquest, precipitated by earlier norms prohibiting plunder, as a process evolving over years, not an event attributed to one point of time.<sup>17</sup>

The data provided by *The Puzzle of Peace* supports broader skepticism about the book’s reliance on the events of 1928 as the catalyst for the modern, rules-based international order. Hathaway and Shapiro note, for example, “[w]hat these accounts miss, however, is the decision to outlaw war in 1928” (p. 334). But others are less convinced. Writing for the *New York Times*, Max Boot finds that the “thesis, . . . backed up by many erudite, carefully footnoted pages, is not persuasive.”<sup>18</sup> *The Foreign Policy* review by Stephen M. Walt found that “the evidence Hathaway and Shapiro present does not come close to proving their case.”<sup>19</sup> As readers, we are left wondering at the authors’ underlying motivation for revitalizing 1928 and why it has been serially overlooked by historians and scholars until now.

The end of Chapter 14, discussing how there are more nations in the world today than before, also attributes the outlawing of war in 1928 as the reason, finding “it allowed smaller and weaker states to survive and even thrive” (p. 351) before discussing the costs of this change, such as “uncertain sovereignty” (p. 353), the situation in the South China Seas, the rise of South Sudan as the newest nation, and outcasting

<sup>11</sup> STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* (2011). See also JOSHUA GOLDSTEIN, *WINNING THE WAR ON WAR: THE DECLINE OF ARMED CONFLICT WORLDWIDE* (2011).

<sup>12</sup> In footnote 8 of Chapter 13, the authors cite Jaroslav Tir, Philip Schafer, Paul Diehl & Gary Goertz, *Territorial Changes, 1816–1996: Procedures and Data*, 16 *CONFLICT MGMT. & PEACE SCI.* 89 (1998).

<sup>13</sup> GARY GOERTZ, PAUL F. DIEHL & ALEXANDRU BALAS, *THE PUZZLE OF PEACE: THE EVOLUTION OF PEACE IN THE INTERNATIONAL SYSTEM* (2016). Hathaway and Shapiro cite this book in footnote 9 of Chapter 13 noting that this and other work “arrived at conclusions consistent with ours.”

<sup>14</sup> *Id.* at 108.

<sup>15</sup> *Id.* at 109.

<sup>16</sup> *Id.* at 111.

<sup>17</sup> *Id.* at 115 (“After World War II, conquest becomes extremely rare.”).

<sup>18</sup> Max Boot, *When the Governments of the World Agreed to Banish War*, N.Y. TIMES (Sept. 21, 2017), at <https://www.nytimes.com/2017/09/21/books/review/the-internationalists-ona-hathaway-scott-shapiro.html> (finding that “their book shows that there was a more gradual trend over the centuries to impose humanitarian restrictions on warfare”).

<sup>19</sup> Stephen M. Walt, *There’s Still No Reason to Think the Kellogg-Briand Pact Accomplished Anything*, FOR. POL’Y (Sept. 29, 2017), at <http://foreignpolicy.com/2017/09/29/theres-still-no-reason-to-think-the-kellogg-briand-pact-accomplished-anything>.

(p. 375, “when a group denies those who break its rules the benefits available to the rest of the group”). The book paints a picture of a 1928 map of the world as the start of a new international order where conquest by wars of aggression resulting in territorial spoils was a rare exception, no longer the rule. Hathaway and Shapiro go on to attribute this shift to states who “invest[ed] in the vision of the Internationalists, who fought to outlaw war through the Pact, and worked over the course of two decades to make the promise of the Pact a reality” (p. 331). In citing other historical moments—how the Revolutionary War gave rise to the Constitution and the Civil War resulted in the 13th, 14th, and 15th Amendments—the authors argue that “[l]egal revolutions do not end with the passing of a law. They begin with them.” (*id.*).

*The Internationalists* concludes on a hopeful note, impressing upon us the triumph, through international law, over the vulnerability of uncertain times. In a world focused on the future, this book asks us to remember the past, reminding us that “[i]f law shapes real power, and ideas shape the law, then we control our fate” (p. 423). The authors believe that the story of these four men should inspire all of us. Since none of these men were famous in their day, but through hard work and dedication they were able to make a difference, so, too, can we.

It is here that the book misses an opportunity to fully inspire all readers. *The Internationalists* offers a laudatory history of great men and four men in particular who all hail from Europe or North America. Hersch Lauterpacht, the London-based, Ukrainian-born jurist and scholar; Samuel Levinson, the lawyer from Chicago; Sumner Wells, the New York city aristocrat turned U.S. diplomat; and James Shotwell, the professor from Canada, did, indeed, contribute to making the idea of peace through outlawing war a reality, though it is Kellogg and Briand that get final recognition. However, by framing the story of 1928 around these four men, this book is less a history of international law than it is a history of a powerful few who shaped the rules that the world was to follow. In doing so, the book reaffirms a conventional approach to international legal history that many

scholars have critiqued as descriptively omissive and normatively problematic.<sup>20</sup> In neglecting a broader community of actors, the book misses an opportunity to recast international law for a new generation of readers as truly international and inclusive.

In this regard, the book, at times, glosses over topics involving race and racism where deeper engagement would have been warranted to achieve the book’s aim of offering an inspiring message for all.<sup>21</sup> On page 315, for example, the authors discuss their view that after 1928, territory gained by conquest “were not recognized by most states” (p. 315) thus, reaffirming the commitments undertaken in the Paris Peace Pact. They discuss how the United States and other Allied powers “vacated the land they had liberated from the Axis powers, transferring power to local governmental authorities” and that in the Old World Order “this was not how winners behaved” (p. 322). One finds but a brief mention of an exception, “Italy’s seizure of Ethiopia in 1935 did not spark the same condemnation” (as the Soviet Union’s seizure of Baltic States in 1940 and Japan’s invasion of

<sup>20</sup> See, e.g., MAKAU MUTUA, *HUMAN RIGHTS STANDARDS: HEGEMONY, LAW AND POLITICS* (2016); Adrien K. Wing, *Critical Race Feminism, in THEORIES OF RACE AND ETHNICITY: CONTEMPORARY DEBATES AND PERSPECTIVES* (Karim Murji & John Solomos eds., 2015); JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* (2012); HENRY RICHARDSON III, *THE ORIGINS OF AFRICAN AMERICAN INTEREST IN INTERNATIONAL LAW* (2008); José E. Alvarez, *Interliberal Law: Comment*, in Oona A. Hathaway & Harold H. Koh, *FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS* 103, 108 (2004) (“Liberal theorists have to work hard to convince people that they are really interested in what goes on within all types of regimes and not just within the regulatory bureaucracies of the transatlantic.”); ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005); BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003); DEREK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

<sup>21</sup> Author Oona Hathaway offers an engaged exploration of these topics in *Treaties’ End: The Past, Present and Future of International Lawmaking in the United States*, 117 *YALE L.J.* 1236 (2008).

Manchuria) (p. 319), noting that France and Britain recognized Italy's territorial gain while the United States did not.<sup>22</sup> The conclusion Hathaway and Shapiro reach is this: "Might still produced *military* victories. But it could no longer provide lasting *legal* victories" (p. 316).

However, the benefits of such a finding depend upon a particular perspective. The book only briefly mentions Europe's scramble for Africa by discussing how the norms set in motion in 1928 offered protection as "colonies no longer had to worry that they would be reconquered if they became independent" (p. 342) while omitting deeper engagement with how these very same norms would allow European nations to keep territories conquered by force during colonization with all the harms that accompanied such prowess.<sup>23</sup> Thus, an achievement that was lauded for the so-called civilized nations of the day served to perpetuate the horrors caused by colonialism against the millions of people throughout Africa, and elsewhere, for whom this norm did not apply. Furthermore, the end of conquest between nations during the interwar period did nothing to improve the plight of indigenous peoples within nations that were still subject to conquest, as governments continued to move indigenous peoples by force off of desirable land, or worse, committed acts amounting to genocide.<sup>24</sup> In its aim to celebrate a new world order, *The Internationalists* could have better acknowledged the harms and discrimination

that this order continues to impose on peoples throughout the world whose histories are not represented in the book.

In sum, *The Internationalists* offers a fresh telling of an old history. The book calls for a reinvestigation of the very purpose of international law and its power in our world. It richly weaves together valuable discourses connecting disparate fields of legal history, international law and international relations. Finally, it sparks a much-needed conversation about our collective future. *The Internationalists* asks us to appreciate how and why we benefit from a new world order and just how precarious the existence of such a world is. Here, the authors are at their most inspired and inspiring as they impart upon us their final lesson that "[w]e all bear responsibility for the world in which we live" and "[e]ach of us, even those far outside the halls of government, has the capacity to make a difference" (p. 423). In doing so, the authors model "how to make a book about international law sound interesting" (p. 430). They care deeply about law and the quest for peace in the world. Their book is a timely reminder that we all should do the same.

ANNA SPAIN BRADLEY  
University of Colorado Law School

<sup>22</sup> E.g., on pp. 172–174, the authors describe Emperor Haile Selassie charging Italy with aggression for its military invasion in 1934 and the League of Nation's reluctance to apply the policy of nonrecognition of territory acquired by conquest against Italy, describing the U.S. response as "lackluster" (p. 173) but saying nothing about the underlying racial animus behind these responses.

<sup>23</sup> E.g., p. 317 ("After a brief slowdown in the 1850s and 1860s, that number shot up to between 5.9 million and 8.8 million square kilometers a decade for the rest of the century—a good deal of it caused by the European scramble for Africa."); p. 342 ("During the scramble for Africa, for instance, local leaders frequently agreed to the creation of protectorates as a defensive move to prevent more aggressive assertions of authority.")

<sup>24</sup> For a comprehensive history and analysis see JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2d ed. 2004).

*Courts Without Borders: Law, Politics and U.S. Extraterritoriality.* By Tonya L. Putnam. Cambridge, U.K.: Cambridge University Press, 2016. Pp. xiii, 315. Index. \$99.99, £64.99.  
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Practitioners and scholars addressing issues of extraterritorial application of U.S. laws or regulations will find valuable insights in the study by Tonya Putnam, associate professor of political science at Columbia University, of *Courts Without Borders: Law, Politics and U.S. Extraterritoriality*. Drawing on her dual formation as a political scientist and legal scholar and based on her extensive research including innovative economic analysis