

Book Reviews/Comptes rendus



Oona A. Hathaway and Scott J. Shapiro, *The Internationalists. How a Radical Plan to Outlaw War Remade the World*. New York: Simon & Schuster, 2017, 608 pp., ISBN: 9781501109867, \$ 30.00.

The Internationalists, by Oona A. Hathaway and Scott J. Shapiro, starts from the premise that the importance of the Paris Peace Pact for the history and evolution of international law has somewhat been forgotten. On 27 August 1928, at the initiative of Aristide Briand and Frank Kellogg, sixty-three states gathered at the Quai D'Orsay in Paris to formally and officially renounce 'war as an instrument of national policy'. With this book, Hathaway and Shapiro explain that their aim is to restore this instrument to its rightful place in history, by resituating it within a broader intellectual history of international law and, more specifically, of rules relating to the prohibition of the use of force. Their claim is that, even though the 1928 Peace Pact has obviously not eradicated war, it constitutes a landmark moment, as it triggered the transition from an 'Old World Order' – in which states were free to wage war to settle their disputes – to a 'New World Order' – that prohibited resort to armed force. To make this point, the book is divided into three parts organised around the following periods: 1600s to 1914, 1919 to 1949, and 1949 to the present day.

Entitled the 'Old World Order', the first part seeks to trace the contours and logic of the legal regime on the use of armed force that prevailed before war was outlawed by the Briand-Kellogg Pact in 1928. It starts with Grotius (Chapter 1), tracing the origins of the Old World Order to his defence of the seizure of the *Santa Caterina* by the United Amsterdam Company as prize, which later inspired many of the principles of his famous *De Jure Belli Ac Pacis* (1625). Grotius' work is interestingly analysed as that of a corporate lawyer, who built on the theories of just war to defend the interest of his clients – trading companies and, later, the state. As a consequence of this 'result' or 'policy' oriented perspective, the Dutch lawyer created a system that willy-nilly legitimised war and conquest. In the absence of any other sanction mechanism to protect

one's right, force could be used to settle disputes. Whoever won the contest was considered as having had the law on its side from the start and gained a legal title to all the goods or lands it had seized in the process as reparation. As there was no superior control authority, however, states were free to decide for themselves whether they had suffered an injury, and whether this injury justified war. Might, in sum, made right (pp. 23–24). Chapter 2 serves to illustrate how this system was put in practice by states. Hathaway and Shapiro explain that, in an effort to distinguish themselves from 'criminals', states generally developed justification discourses for the use of force. Indeed, having collected around 400 war manifestos from the sixteenth century to the Second World War, the authors note how states systematically claimed a 'right' to use force. Frustratingly, however, out of these 400 war declarations, only some small excerpts of President Polk's war message in the context of the Mexican-American War (1846–1848) are textually reproduced. The authors use it as an illustration of how war manifestos acted as 'law suit complaints', and how, on the basis of these complaints, the United States were able to conquer and claim California as a compensation for unpaid debts.

To complete this picture of the 'Old World Order', the two last chapters of this first part of the book discuss the *jus in bello* (Chapter 3) and the laws of neutrality (Chapter 4). Concerning *jus in bello*, jumping from the American-Indian Wars to Napoleon Bonaparte, Hathaway and Shapiro insist on the fact that war gave a 'licence to kill' regardless of whether the war was just or unjust. Soldiers, moreover, were immune from prosecution even when they disregarded the rules of armed conflict. This, the authors argue, was because in a world in which war was not outlawed it was impossible to distinguish the aggressor from the victim. The idea is that, as long as war was a sovereign prerogative, states could freely grant themselves the right to kill by declaring a war. While the rules of *jus in bello* and international criminal law certainly have developed since then, the authors do not make it clear how this system genuinely differs from nowadays. The barrier set up to this 'licence to kill' by the establishment of the crime of aggression and by the outlawry of war is, in fact, rather formal and superficial. It does not fundamentally settle the issue of how to determine whose 'fault' a war is or was. Humanitarian law, likewise, continues to apply to all belligerents regardless of the legality or illegality of the contest, and combatants still enjoy a certain 'licence to kill' even though they might not be immune from all prosecution anymore. Chapter 4 turns to the law of neutrality, i.e. the rules that applied to the relations of non-belligerent nations *vis-à-vis* states that were at war with each other. Hathaway and Shapiro show how these rules fitted in, and were indeed a logical consequence of, the Old World Order. They explain that, in a world in which states could arrogate themselves the right to

use of force at any moment, the rules of neutrality were designed to limit as much as possible the disruptive effect of war on international trade and commerce. Although barred from giving actual military assistance (in which case they would themselves become a party to the conflict), states, in fact, remained free to *indiscriminately* trade with all the belligerents.

The second part of the book, entitled 'Transformation', roughly covers the interwar period. Chapter 5 turns to the adoption of the Covenant of the League of Nations and of the Briand-Kellogg Pact. It briefly describes the war prevention system set up by the Covenant, which mainly relied on mandatory arbitration. Because it did not completely rule out war as an option to settle international disputes should other means have failed, the Covenant was, however, a continuation of, rather than a break from, the Old World Order. The real turning point, Hathaway and Shapiro argue, was the 1928 Peace Pact which, for the first time, completely outlawed war. The 1924 Geneva Protocol, in fact, was never ratified, and the 1925 Locarno Treaties were merely regional agreements. The authors show how the Pact finds its root in the writings of Salmon Levinson, a corporate lawyer from Chicago committed to the pacifist cause. They also show how, initially conceived as a bilateral agreement between France and the United States, the Pact was pushed by American intellectuals on both sides of the Atlantic – by Levinson on the one side, and by James Shotwell on the other. Their claim, in sum, appears to be that the outlawry of war was a fundamentally new and American idea. Yet this argument is not fully convincing. The Geneva Protocol and the Locarno Treaties – which all outlawed war in their article 2 – not only preceded the Pact, but also established guarantee systems to ensure that this prohibition be respected. Likewise, the Non-Aggression Pacts signed by the USSR from the early 1920s onwards went a step further, as they forbade the 'use of force' more generally. Finally, the book makes no mention of the debates that surrounded the interpretation of the League of Nations Covenant. Already then, certain scholars claimed that war had been outlawed. Advocacy for the outlawry of war, in other words, was not Levinson's *domaine réservé*, and the Briand-Kellogg Pact was not necessarily as 'revolutionary' as the authors claim.

Starting with the invasion of Manchuria and the creation of the puppet state of Manchukuo by Japan, the next two chapters aim to analyse how the system of the Peace Pact reacted to its first 'great test'. Chapter 6 offers an overview of how Japan, once a closed insular empire, became familiarised with, adopted, and eventually mastered, the rules of the Old World Order. In 1931, in spite of signing the Pact, Tokyo had failed to understand that the law had changed, that war was now outlawed. It did not realise that stereotyped pleas of self-defence would not do the trick anymore. The League sided with China, and Japan left

the organisation. But, more importantly, the Manchurian crisis highlighted one of the major defects of the Pact: it lacked enforcement mechanisms. In Chapter 7, Hathaway and Shapiro explain how 'the Internationalists', with US Secretary Henry Stimson at the forefront, sought to fill this lacuna. They needed to elaborate a system that would allow sanctioning of recalcitrant states without using force. The collective use of force was, indeed, an absolute no-go for the US which feared being dragged into foreign conflicts against its will. The solution came under the form of the doctrine of non-recognition, according to which states will not recognise the result of a violation of law (*ex injuria jus non oritur*). The authors then proceed to explain how this marked the beginning of the end of conquest, and drastically affected the laws of neutrality. Because war was now illegal, a culprit could now be designated; states had a duty not to recognise territorial aggrandisement resulting from a violation of law and as trade could amount to such recognition, states could now discriminate between the belligerents.

Chapters 8 and 9 take a look at the negotiations of the United Nations Charter. The book emphasises the leadership role assumed by Under-Secretary Sumner Welles, an acquaintance of Eleanor Roosevelt born into the wealthy New York society. It retraces his, as well as a few others', lobbying efforts with President Roosevelt to convince him of the necessity of remoulding the international system by creating a new organisation that would learn from past mistakes. It comes back to the different projects submitted to Roosevelt and the United States' allies during the war explaining how these were meant to remedy the shortcomings of the interwar system. It also expounds the problems faced by the 'internationalists', especially the Russian demand for a veto right for all Security Council permanent members and request for individual representation of all the Soviet republics to the General Assembly. Roosevelt, Stalin and Churchill eventually found a compromise at Yalta, and the new Charter, which prohibited the use of force in general, was signed in San Francisco on 26 June 1945 by almost every existing nation. This moment, the authors claim, definitely ended the transition period from the Old to the New World Order (p. 213).

As a mirror to Chapter 3, the next three chapters close the second part of the book by turning to the Nuremberg trials and the criminalisation of aggressive war in the aftermath of the Second World War. The story told in these eighty pages relies on the figure of Carl Schmitt as a thread. Chapter 10 uses the arrest of Schmitt and his interrogation at Nuremberg in 1947 as an opening to tell the story of his rivalry with Hans Kelsen and, most importantly, his accession to the unofficial status of 'lawyer of the Third Reich'. This choice was made because Schmitt, a member of the Nazi party, was indeed an influential

lawyer in Germany, and was deeply wary of the movement for the outlawry of war. His fear was that it would mark the return of total warfare. When war is waged collectively, in the name of 'international order' and of 'humanity', its aim in fact is not the procurement of a definite political or geostrategic advantage anymore, but the annihilation of the enemy. Schmitt was one of the Pact's most virulent critics, and a firm opponent to the New World Order. The book suggests that he was also somehow 'responsible' for the outbreak of the Second World War. Chapter 11 comes back to the debate 'for or against' the creation of a tribunal to prosecute Nazi officials, but places its main focus on the problems that arose as a result of the principle of non-retroactivity for the crime of aggression. Hathaway and Shapiro expound the theories and solutions elaborated to get around this obstacle by various intellectuals and professors, especially Bohuslav Ečer, William Chanler and Hans Kelsen. Ečer's and Chanler's approach rested on the idea that the Briand-Kellogg Pact allowed distinction between the aggressor and the victim. The aggressors, they argued, could not be considered as lawful combatants and could thus be prosecuted under ordinary criminal law. The issue with this theory, however, was that it made the application of *jus in bello* dependent on *jus ad bellum*. Kelsen looked at the problem from another angle. He argued that the reason behind the *nullem crimen* principle was to avoid unfair surprise. Because war had been outlawed in 1928, the element of surprise was not present in casu. As a result, Third Reich officials could be prosecuted for aggression. Schmitt, obviously, was not convinced by these positions. The Pact, he claimed, had in no way the appearance of a criminal statute and had not actually changed *jus ad bellum*. If such had been the case, new sanction mechanisms would have replaced war and the law of armed conflict would have become discriminatory. Chapter 12 turns to the issue of non-retroactivity and of the crime of aggression as it was eventually addressed at Nuremberg. As expected, in fact, the defendants challenged the jurisdiction of the Tribunal on this basis. The authors give an account of the pleading of the different parties to the trial: the American prosecutor (Jackson) referred to Kelsen; the British prosecutor (Shawcross) to Ečer and Chanler; the defendants (represented by Jahrreis) to Schmitt. Even though none of the defendants were executed solely on that basis, the Tribunal did condemn some officials for waging aggressive war. The judges, however, did not use any of the theories presented before them during the hearings. To close the loop, the end of the chapter returns to the arrest of Schmitt, whom some wanted to see tried as a result of his legal and intellectual contribution to the consolidation of Nazi power and justification of Hitler's war of aggression. Charges did not hold, but the Nuremberg episode marked the end of the transition from the Old to the New World Order.

While Grotius is presented the father of the Old World Order, Hathaway and Shapiro identify Hersch Lauterpacht – who, they argue, set the foundations for ‘the era of global cooperation’ (p. 305) – as the father of the New World Order. The New World Order, they say, is the negative image of the pre-1928 era: conquest is illegal, aggression is a crime, gunboat diplomacy no longer exists and discriminatory sanctions between belligerents are permitted. To draw this ‘negative image’, the third and final part of the book is divided into four chapters. Chapter 13, first of all, seeks to illustrate the ‘end of conquest’ as a mode of acquiring new territory in modern international relations. Relying on statistics elaborated from the ‘Correlates of War’ dataset, the authors thus show how conquest went from being the rule in the nineteenth century to being the exception after 1928. Since 1928, in fact, none of the territorial changes obtained through force as a result of an aggressive war have been recognised. The authors’ claim, hence, is that this shift is rooted in the 1928 Peace Pact and the Stimson doctrine to which it incidentally gave rise. Of course, Hathaway and Shapiro admit that other factors – the movement towards decolonisation, the no longer profitable character of conquest, the rise of global free trade or the excesses resulting from Hitler’s policies of territorial aggrandisement – also played a role. They, however, do not discuss this broader socio-political context, maintaining that even these find their explanation in the Briand-Kellogg Pact. Another side effect of the Pact besides the end of conquest, the authors argue, is the fact that wars no longer create states (Chapter 14) but also that all states, no matter how small or weak, are protected from being absorbed by other bigger and more powerful nations (Chapter 15). This has surely led to a decline of international war, but has also unfortunately resulted in the correlative augmentation of internal conflicts. By protecting sovereignty, Hathaway and Shapiro write, international law allows the ‘survival of the weakest’, for failed states to subsist, and for ‘evil’ to take a hold of them (p. 369). Still, they insist, the prohibition of the use of force is the most fundamental rule of the international system, and the restrictive interpretation of the current *jus ad bellum* regime remains the best guarantee against international chaos. This is especially so considering that states have now developed new tools to ensure better respect for international obligations. Chapter 16 is thus devoted to the analysis of the practice of outcasting, which in international law, more specifically takes the form of the adoption of retorsions and countermeasures. From George W. Bush’s attempt to raise tariffs on steel imports to the Council of Europe’s threat to exclude Turkey from the organisation and the current sanctions adopted against Russia as a result of the annexation of Crimea, the authors give several examples to explain how these work and to illustrate their diversity. They nevertheless admit that the efficacy of such practices of

outcasting depends on the strength (political, economical, symbolic) of the actors involved. Chapter 17 closes the third part of the book by turning to the New World Order's 'biggest challenge': transnational Islamic terrorism. Hathaway and Shapiro retrace the intellectual history of radical Islam. Their aim is to show how the doctrine of jihad is to its very core built on the destruction of the New World Order: it advocates aggressive war and rejects the idea of separate co-existing entities. The New World Order must win this war, but to do so 'one must fight not simply with powerful weapons but with powerful ideas' (p. 414). Entitled the 'Work of Tomorrow', the book's conclusion is hence a call for renewed internationalism – of a similar nature as that which animated the advocates of the outlawry of war in the 1920s—at a time when international law's credibility is at a low. Ideas, the authors claim, have an impact and are what make international law (p. 423).

International lawyers with an interest in the history of the use of force will certainly find much valuable and interesting information in Oona Hathaway's and Scott Shapiro's *The Internationalists*. The authors' research efforts to excavate little known documents and to highlight the role of often overshadowed individuals in the intellectual history of international law must be commended. In this sense, one may argue the book offers an 'alternative' history of the prohibition of the use of force. At the same time, however, the story told by Hathaway and Shapiro is very classical. It relies on the same narratives of revolutionary shifts and of linear progress that underlies most of international law's traditional historiographies. Likewise, it offers a very Manichean vision of history in which the Old World Order is characterised by war and conquest while the New World Order is described as one based on peace and cooperation. Throughout the book it is thus repeated that before 1928 'might made right' and that after 1928 'might no longer made right'. While it may be true that states could resort to force more easily before the twentieth century it is misleading to say that 'might no longer makes right'. Power is as determinant as it used to be, even though force nowadays takes other, different, forms. This Manichaeism would not be overly problematic if it were limited to the characterisation of particular historical periods. But it is not; it extends to particular individuals (Schmitt vs. Kelsen, for example) and, more worryingly, to particular countries. One, in fact, cannot but be struck by the characterisation of some states – whether Japan and Germany in the interwar period, or Russia, China, Iran, Bashar Al-Assad's Syria and North Korea nowadays – as 'evil' (p. 369) and as opponents to a New World Order that the authors depict as objectively 'good', or at least 'better' (p. 422). By contrast, the US and its NATO allies are presented as the defenders of this New World Order (p. 419). In a way, Hathaway and Shapiro fall into the pitfall Schmitt precisely warned against:

an essentialisation of war, in which the enemy of the New World Order is an enemy of humanity. This ‘good vs. bad’ rhetoric is part of what makes the reader realise that international lawyers are probably not the primary targets of this book. Written in a context where Donald Trump was elected President of the United States, *The Internationalists* is a plea for international law and a defence of its importance and of its efficacy. It is a glorifying story of how the United States assumed a leading role in the outlawry of war, and should now stay committed to the system it created. Although Hathaway’s and Shapiro’s intention is laudable, the way it is done is debatable. One may, in fact, doubt whether the mystifying (and polarising) account carried by *The Internationalists* is the best manner to achieve that aim.

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