

# *The Internationalists* as grand narrative: Key elements and dilemmata

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**Abstract:** In this contribution, the key elements of the book's progress narrative will be discussed. The focus will be set on the 'backbone' of the book, which consists of three ideas or elements: the periodisation decision (II), the claim of a specific conception of social change (III), and a specific understanding of international law (IV). In regard to each of those elements it will be asked how they are justified, what insights they provide and whether there are blind spots.

**Keywords:** history of international law; internationalists; new world order; old world order; peace pact

## I. Introduction: Theseus' passage

When young Theseus set sail for Crete to kill the Minotaur, the soon-to-be King of Athens was convinced that due to his courage and strength he would prevail. He would defeat the bloodthirsty creature and no Athenian boy or maiden would ever be sent to its labyrinth as human sacrifice anymore. On the passage to Crete, though, in a quiet moment, Theseus experienced strange doubts. What would happen after the killing? Would he find a way out of the labyrinth or become a prisoner of it himself, much like the Minotaur? Theseus did not find the answers. He passed over his disconcertment and headed for Crete.

A few days after I had finished reading Oona A Hathaway's and Scott J Shapiro's remarkable book *The Internationalists*, the myth of Theseus and the Minotaur came to my mind. *The Internationalists* is a brave book. It departs in a number of ways from conventional narratives and tells us in a self-confident and sometimes electrifying manner that the Peace Pact of 1928 was *the* crucial change in the architecture of international law – a turning point in world history. The outlawry of war was the decisive step for the better, the pivotal point between two main epochs of the modern age, the beginning of the transformation from the Old to the New World Order.

The Pact ‘remade’ the world, as the subtitle of the book puts it. International law sits, so to speak, in the driver’s seat of history. We, the community of international lawyers, become co-drivers.

In rare moments, though, the tone of the book changes. Doubts come to the surface. One reads, for example, that the study is also meant to be a reminder of what is ‘at stake’.<sup>1</sup> Another passage surprisingly explains that the world now stands at the brink of renouncing the ‘core commitment’ of the New World Order.<sup>2</sup> According to the authors, excessive reliance on the right to self-defence threatens to undermine the prohibition on war.<sup>3</sup> Such thoughts are difficult to square with the sweeping and self-confident progress narrative they are presenting in the rest of the book.

In this contribution, I will discuss the key elements of that narrative. I will concentrate on the ‘backbone’ of the book, which in my view consists of three ideas or elements: the periodisation decision (II), the claim of a specific conception of social change (III), and a specific understanding of international law (IV). I will ask in regard to each of those elements how they are justified, what insights they provide and whether there are blind spots. In my concluding remarks, I will come back to the doubts and what they might tell us (V).

I will have to neglect a lot. The authors are – to mention just one further aspect – masters in presenting the history of international law in a lively manner. Reading the book was not just interesting, it was exciting. I will not forget, for example, the manifesto of war written on behalf of Maximilian I of Hapsburg, where he explained that he had no choice but to go to war against France because the French King had demanded that Maximilian’s wife, Duchess Anne of Brittany, marry him. Neither will I forget how far, or low for that matter, US Secretary of State Frank Kellogg was willing to go in order to be awarded the Nobel Peace Prize, writing a letter to the Norwegian ambassador to prevent Salmon Levinson, an ‘internationalist’ portrayed in the book, from being considered for the Prize instead of him.

## II. Element I: Old and New World Order

### *History of international law: Radically opposed epochs*

*The Internationalists* cuts the time axis of the modern age since the 17th century into two *radically opposed* epochs. Each period has an ‘underlying

<sup>1</sup> OA Hathaway and SJ Shapiro, *The Internationalists: How A Radical Plan to Outlaw War Remade the World* (Simon & Schuster, New York, NY, 2017) 421.

<sup>2</sup> See (n 1) 421.

<sup>3</sup> Ibid 416.

logic' that remains 'constant'.<sup>4</sup> The era of the Old World Order, to begin with, was a 'bloody, brutal and unjust'<sup>5</sup> world in which waging war was not only lawful, but 'an instrument of justice'.<sup>6</sup> The privilege to use violence was the core principle. War was even regarded as 'civilized politics',<sup>7</sup> soldiers and sovereigns, who could not be punished for killing in wars, had a 'license to kill'.<sup>8</sup> That was the 'law of the world'.<sup>9</sup> The main participants of international law, the states, were based on war, too. The DNA of the state in the Old World Order was war (my words). Referring to the US historian Charles Tilly (1929–2008), the authors write that 'war made states, and vice versa' because, from the 17th century on, 'states began to operate a monopoly on violence'.<sup>10</sup> This era lasted until the conclusion of the Peace Pact in 1928 when war was outlawed. Although the Peace Pact did not abruptly do away with the Old World Order, it marked the beginning of its end.<sup>11</sup>

The New World Order, in contrast, is the 'photo negative' of the Old.<sup>12</sup> Its core rule is the prohibition on war that entered the world with the Peace Pact and finally was embodied by the United Nations.<sup>13</sup> The outlawry of war made its career in steps, the first of which being Henry Stimson's doctrine of non-recognition of conquests.<sup>14</sup> It was practised for the first time in the Manchuria crisis in 1931. Via this doctrine, the principle underlying the Pact found its way into the American–British Atlantic Charter of 1941 and from there into the Declaration of the United Nations of 1942, the 'global manifesto of the New World Order'.<sup>15</sup> In the era of the New World Order, annexations and conquests – that hitherto used to produce bigger and stronger states – are no longer lawful endeavours.<sup>16</sup> Small states are protected and do not have to fear being conquered. Interstate violence has become the exception. '[T]he light bramble of the New World Order', the authors write, cannot be compared to the 'deep and dark' 'woods of the Old World Order'.<sup>17</sup>

<sup>4</sup> Ibid 80.

<sup>5</sup> Ibid xxii.

<sup>6</sup> Ibid xv.

<sup>7</sup> Ibid xiv.

<sup>8</sup> Ibid 80.

<sup>9</sup> Ibid 61.

<sup>10</sup> Ibid 339.

<sup>11</sup> Ibid 335.

<sup>12</sup> Ibid 304.

<sup>13</sup> Ibid 213.

<sup>14</sup> Ibid 169.

<sup>15</sup> Ibid 191–2.

<sup>16</sup> Ibid 35, 346.

<sup>17</sup> Ibid 329.

*Argument: Practice of interstate war and conquest*

The periodisation decision – with the year 1928 being the pivotal point – is buttressed by empirical data. The authors have analysed 254 instances of territorial changes between 1816 and 2014, and they conclude that conquest has ‘nearly disappeared’ after the outlawry of war.<sup>18</sup> This claim is remarkable. Most people associate a series of disasters and tragedies with the years after 1928: international crises, conquests, the decline of the League of Nations and, of course, World War II. The authors argue, though, that most of the conquests after 1928 were of a merely temporary nature and finally reversed. They emphasise the importance of Stimson’s doctrine of non-recognition of conquests in this context. It was the first step in dismantling the Old World Order, Manchukuo, for example, was not permitted to accede to international conventions and to participate in commissions and associations. The impression that little changed immediately after 1928 is wrong, the authors write. Even though it took World War II to end conquest,<sup>19</sup> the crucial turn with respect to territorial changes happened after 1928. World War II destroyed more lives than World War I, but the transfer of territory caused by it was radically less.<sup>20</sup> World War I literally ‘remade’ and changed Europe, whereas World War II led only to ‘small shifts’ on the margins.<sup>21</sup>

It is important first to maintain that periodisation decisions are not questions of ‘right’ or ‘wrong’.<sup>22</sup> Periods and epochs are not facts, but intellectual tools that help us to organise our knowledge; hence they are just plausible or less convincing.<sup>23</sup> With respect to *The Internationalists*, the starting point of my discussion is that it presents us a classical progress narrative with a ‘bad’ first and a ‘good’ second period – tertium non datur.<sup>24</sup> Semantics is clear and strong: dark, violent, photo negative etc.

<sup>18</sup> Ibid 313.

<sup>19</sup> Ibid 315.

<sup>20</sup> Ibid 324.

<sup>21</sup> Ibid 324.

<sup>22</sup> I particularly like a metaphor suggested by the German historian Johann Gustav Droysen: that in history there are no epochs as there are ‘no lines on the equator’. When we build epochs we suggest concepts of thought which are attributed to empirical reality and which serve the aim of grasping it better, JG Droysen, *Texte zur Geschichtstheorie, Mit ungedruckten Materialien zur ‘Historik’* (Vandenhoeck & Ruprecht, Göttingen, 1972) 20.

<sup>23</sup> On implications of periodisation decisions in historiography of international law: O Diggelmann, ‘The Question of Periodization of the History of International Law’ in B Fassbender and A Peters (eds), *Oxford Handbook of the History of International Law* (Oxford University Press, Oxford, 2012) 997–1011.

<sup>24</sup> On progress narratives and the devices and premises they work with: T Altwicker and O Diggelmann, ‘How Is Progress Constructed in International Legal Scholarship?’ (2014) 25(2) *European Journal of International Law* 425–44.

The periodisation decision is justified by the discovery of new facts, with the emphasis on the later reversal of most conquests of the 1930s and only relatively small territorial changes in the aftermath of World War II. The way *The Internationalists* combines new knowledge with notorious facts, has in my view the merit of shedding new light on a number of important aspects of the interwar history.<sup>25</sup> The Stimson doctrine of non-recognition of conquests, for example, does not appear as a naïve attempt to develop a better practice before the big storm broke out, but as a brave and pioneering move towards a better state of affairs. Stimson becomes a co-architect of the new order, and the whole interwar period appears in a somewhat better light than in conventional narratives. That most conquests were later reversed, lends the post-Pact years a bit of a ‘coming of age’ character. Interestingly the perception of the United Nations changes, too. Its establishment is no longer the ‘Stunde Null’ of the era which we all live in. Rather, it appears as the completion of the outlawry project. On the whole, the suggested periodisation decision is surprising, but in my view not entirely counter-intuitive. It goes well with our intuition that it was the ‘*ius ad bellum*’ that separates the ‘now’ from the past. In the narrative of the book, the Peace Pact appears as the ‘counteract’ to this disturbing rule.

### *Critical topics: Ambiguities and continuities*

A critical consequence of the periodisation decision is, however, the way in which ambivalences are dealt with. Working with two radically opposed epochs produces incentives or even pressure to downplay ambiguities and to describe shades of grey as either black or white in order to increase the plausibility of the story. The portrayal of the League of Nations is, in my view, clearly a victim of this pressure. *The Internationalists* describes it in an entirely unambiguous language as ‘built on Old World Order principles’,<sup>26</sup> relying ‘on war’<sup>27</sup> and completely different from the United Nations which was a ‘fundamental departure’<sup>28</sup> from it. The authors do not attach any importance, for example, to the many efforts in the early post-World War I years to better protect peace and prevent war: by defining peace as a matter of concern ‘to the whole League’, with the mechanism of ‘cooling-off periods’, with disarmament negotiations in

<sup>25</sup> For understanding how periodisations ‘function’, it is important to know that new periodisations result not only from the discovery of new facts, but also from the reinterpretation of known ones.

<sup>26</sup> See (n 1) xvii.

<sup>27</sup> Ibid xvii.

<sup>28</sup> Ibid 196.

the framework of the League,<sup>29</sup> with arbitration treaty systems such as the Locarno Treaty, with the establishment of the Permanent Court of International Justice etc.<sup>30</sup> I do not, of course, claim that these efforts were successful – how could I? But what the *The Internationalists* claims about the League simply does not go together with the many effects of the cultural shock, which World War I caused (to which I will come back a bit later), with what was called the ‘spirit of Geneva’ and meant the beginning of a new, cooperative, and modern age, and with the ‘peace through law’ movement.<sup>31</sup> Connections and common ground between the League and the United Nations are downplayed: that the United Nations was given the same primary architecture with an assembly, a committee (Council/Security Council), and a secretariat, and that they both were organisations of collective security.<sup>32</sup> Of the differences, we are all aware, but the narrative of *The Internationalists* lacks ambiguity, there is no balancing with respect to the League, no evolutionary perspective.

Another critical unambiguity concerns the ‘DNA’ of the state. The state of the Old World Order is described as based on war: it is war’s product and in turn reproduces war.<sup>33</sup> That is not entirely wrong, of course. But nevertheless it omits so much that it comes close to being wrong. What is missing is the main reason for the modern territorial state’s coming into being in the early modern age and its long-term success as a way of organising political communities. Its rise was in many respects the result of the desperate need for peace during times of horrifying civil wars among the Christian confessions. The monopoly on violence of the state on a certain territory was an effective ‘tool’ to pacify large regions – the emphasis being on ‘monopoly’, not on ‘violence’. This was an important

<sup>29</sup> For efforts in the field armament limitation: A Webster, ‘Making Disarmament Work: The Implementation of the International Disarmament Provisions in the League of Nations Covenant, 1919–1925’ (2005) 16(3) *Diplomacy & Statecraft* 551–69.

<sup>30</sup> Also difficult to square with the reading of *The Internationalists* is art 19 of the Covenant, providing that the Assembly ‘may advise the reconsideration [...] of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world’.

<sup>31</sup> In the early years of the League, there was remarkable belief in the potential of ‘social engineering’ through law and the idea of ‘peace through law’ that was in the eyes of many embodied by the League. It had influentially been formulated by Immanuel Kant in his 1795 essay on ‘Perpetual Peace’ and taken up by the peace movements of the 19th century and associations such as the ‘Association de la paix par le droit’, founded in 1888 and active before, during, and after World War I.

<sup>32</sup> On the pre-history of 20th century collective security during World War I: MD Dubin, ‘Toward the Concept of Collective Security: The Bryce Group’s “Proposals for the Avoidance of War,” 1914–1917’ (1970) 24(2) *International Organization* 288–318.

<sup>33</sup> See (n 1) 339.

progress at the time, for it provided security. The modern state was the *solution* to civil wars fought in the name of God's truth, not their offspring in spirit.<sup>34</sup> A fundamental problem of *The Internationalists* is that it leaves all of this out. The narrative starts – and gains plausibility from this decision – with the state's 'right to wage war' under post-Westphalia conditions that indeed can be regarded as a co-cause of World War I.<sup>35</sup> In this respect, it was a disastrous concept. But even the 'ius ad bellum', as paradoxical as it may sound, at the time of its emergence was not as unambiguous as the authors assume. In a world of confessional passions, the right of the single state to wage war had the effect of 'disentangling' conflicts. As long as wars had constituted breaches of law, as was the case in the 16th century, they almost automatically got further states involved. After the Thirty Years War, the 'ius ad bellum' contributed to confining conflicts and helped to avoid another military conflagration in Europe.

Important continuities are downplayed in the book as well. Generally speaking, this typically is the case where discontinuity buttresses the narrative. The way the two world wars are portrayed is a good example. *The Internationalists* describes them as wars with different spirits: World War I as a 'Grotian War to right wrongs',<sup>36</sup> an Old World Order war, and World War II as an important step towards the New World Order, led by the Allies in the name of the new ideas. It is presented as a fight between representatives of the two world orders. The authors make the differences with respect to territorial changes, which were less comprehensive after World War II, the key element of their argument.<sup>37</sup> The idea is clear, but can the overall claim be sustained? Already World War I was, on the side of the Allies, led in the name of peace and law.<sup>38</sup> By attacking Belgium, Germany had broken a treaty of 1839 that had guaranteed the neutrality of the newly created Belgium. The territorial changes in Europe after World War I had a lot to do with the fact that three old multi-nation empires dissolved – Austria–Hungary, the Ottoman Empire and the Empire of the Russian Tsar – and new states emerged. Also, decolonisation was not

<sup>34</sup> On the emergence of international law out of medieval structures: O Diggelmann, 'Die Entstehung des modernen Völkerrechts in der frühen Neuzeit' in T Altwicker, F Cheneval and O Diggelmann (eds), *Völkerrechtsphilosophie der Frühaufklärung* (Mohr Siebeck, Tübingen, 2015) 1–25.

<sup>35</sup> International law as a co-cause of World War I: O Diggelmann, 'Beyond the Myth of a Non-relationship: International Law and World War I' (2017) 19(1) *Journal of the History of International Law* 93–120, 97–107.

<sup>36</sup> *Ibid* 104.

<sup>37</sup> *Ibid* 324.

<sup>38</sup> IV Hull, *A Scrap of Paper: Breaking and Making of International Law in the Great War* (Cornell University Press, Ithaca, NY, 2014) 1–3.

‘triggered’ by World War II. After World War I, Germany’s colonies and colonial protectorates became ‘mandates’ of the League of Nations, which opened at least a vague perspective of future statehood. Finally, the Soviet Union got territorial compensation for its particularly high losses and, with the new communist states in Middle and Eastern Europe, a ‘cordon sanitaire’. Both world wars are *the* instances of modern long-term industrialised interstate warfare, with immense costs and triggered by an amalgam of highly aggressive nationalism and social darwinist world-views.

I also see ‘forced’ discontinuity with respect to neutrality and neutrality law. *The Internationalists* diagnoses a fundamental change or even break in this field after 1928. There was a strict neutrality law before the conclusion of the Peace Pact, not even allowing for economic sanctions, and the possibility to impose economic sanctions after. Giving up the strict conception became, according to the authors, the second step in dismantling the Old World Order. In my view, this claim can hardly be sustained, mainly for two reasons: there already was a smaller break after World War I, and continuities were on the whole rather predominant. When the League of Nations was set up, obligations of neutral states were a heavily discussed topic. It was clear that the obligations arising from neutrality must be compatible with the aim of the League as they were stated in the preamble of the Covenant: cooperation and achieving peace. The League was an organisation for collective security, so what could be required from neutrals? It was decided that they were under an obligation to participate in economic sanctions against a peace breaker, but not in military ones. Switzerland became a neutral member in 1920 under these conditions. Switzerland would fully support economic sanctions, but could not be dragged into a war. Within the framework of the United Nations, the situation is not so different. There is an obligation to participate in economic and other non-military sanctions adopted under Chapter VII, but not to actively participate in military action. Non-UN members were not even obliged to participate in economic sanctions. Switzerland, for example, did not participate in the sanctions against apartheid South Africa in the late 1980s. In my view, the continuities in the field of neutrality were much bigger than *The Internationalists* suggests. It remained and still is a grey zone in many respects, legally and morally.

### III. Element II: Peace pact as cause of transformation

#### *Social change: Legal core principle as key agent*

What caused the epochal transformation from the Old to the New World Order? This evidently is another key topic of the book. In the social

sciences, explanations of transformations are called models (or conceptions) of 'social change'.<sup>39</sup> They give reasons why societies do not remain the same and develop in certain directions and not in others. *The Internationalists* suggests such a conception which is key for the sweep of the narrative. The subtitle of the book mentions it, promising to tell us how the 'plan to outlaw war' 'remade' the world. For the authors, the change of the core principle regarding use of violence between states was the driving force of change. They regard it as the main cause, even though they do not claim it was the only factor.

Formulations vary. The authors write, for example, that the Peace Pact 'sparked a series of events'<sup>40</sup> that led to the New World Order, and that the Pact 'began a cascade of events that would give birth to the modern global order'.<sup>41</sup> One can find stronger and weaker wording. 'Levinson's outlawry movement' led to a 'global revolution',<sup>42</sup> the Pact was the 'decisive'<sup>43</sup> break with the past and made the world 'far more peaceful',<sup>44</sup> and it was 'a – and overlooked – crucial trigger'.<sup>45</sup> Whatever the differences in detail, it is clear: the authors install the core rule with respect to interstate violence in the driver's seat of history. The model seems to explain the transformation of the *whole* order. This is a clearly implied key idea underlying the book. The authors write, for example, that outlawry of war has not only affected when and how often states go to war, but it has also changed 'how they relate to each other'<sup>46</sup> in times of peace. It has affected international relations in their totality, albeit not in every detail.

*Argument: No predominant other cause(s)*

The change conception is justified by dismissing other possible explanations. The argument can be summarised as follows: There were other factors, but they were not decisive and profited themselves from the Pact. They cannot explain the data that indicate that the crucial changes happened after 1928 – and not after 1945.<sup>47</sup> Outlawry of war is made the overarching cause.

<sup>39</sup> Classically, evolutionary, functionalist and conflict models are distinguished. For an introduction see, e.g., A Calinicos, *Making History: Agency, Structure, and Social Change in Social Theory* (2nd edn, Brill, Leiden and Boston, 2004).

<sup>40</sup> See (n 1) xviii.

<sup>41</sup> Ibid xv.

<sup>42</sup> Ibid 415.

<sup>43</sup> Ibid xiv.

<sup>44</sup> Ibid xiii.

<sup>45</sup> Ibid xviii.

<sup>46</sup> Ibid xviii.

<sup>47</sup> Ibid 332.

The authors briefly discuss, for example, the role of nuclear weapons. They write that they helped to keep the peace, but that the threat of a nuclear attack was never used for territorial aggrandisement.<sup>48</sup> Nuclear weapons could play a stabilising role only against a background where war was already being prohibited. With a similar argument, they dismiss the ‘spread of democracy’ as the driving force of change. It helped reduce interstate violence, because democratic leaders must justify their actions vis-à-vis the electorate, but the key fact was that conquest no longer ‘counted’ as a legitimate policy goal.<sup>49</sup> Again, outlawry of war appears as the main cause. A third factor discussed and dismissed is global trade. It undoubtedly contributed to peace, the authors write, but it was at least as much a consequence of the outlawry of war as a self-standing cause for peace.<sup>50</sup> Given the strategic role of the conception of social change in the narrative, the authors spend remarkably little energy on defending it. I presume that they assumed that the data – change with respect to conquests after 1928 – speak for themselves.

I see a certain merit in the emphasis on law’s transformative power. In social science, law is often described only as a result or product of other factors, which understates its potential as a self-standing factor. The law says what is to be regarded as normal, standard conduct and thereby influences how society develops. The authors point to the example of the Declaration of Independence that in their view sparked a series of events before its ideas finally were realised by the Constitution of 1787. For understanding *The Internationalists*, it is important to see that the authors want to organise their narrative around this idea taken from US history. They want to convince us that the Pact was in a similar way ‘crucial’, ‘decisive’ etc for the emergence of the New World Order. Of course, the authors are aware that ‘legal revolutions’ – as they call revolutions set in motion by law – do not end with the passing of the law, but begin with it. But they claim that law can be crucial and even decisive for social change. Whether the Pact really was the cause of the transformation, as the authors claim, is a different question.

### *Critical topics: Causalities, ‘law as agent’ claim*

‘Crucial trigger’ conceptions of social change tend to take favourable circumstances for a certain transformation for the cause itself. Developments after the triggering event appear as a mere unfolding of the initial idea, not

<sup>48</sup> Ibid 332.

<sup>49</sup> Ibid 332–3.

<sup>50</sup> Ibid 333.

as self-standing co-causes, and possibly only loose connections tend to become 'hard' causalities.

In *The Internationalists*, the key argument for the claim 'Pact as trigger' is data. The timely coincidence of the conclusion of the Peace Pact, on one side, and the reversal of most conquest after 1928 (even though later reversed), on the other, 'proves' that the change model is correct. The problem with this – at first sight not implausible – conclusion is that it omits something important. The conquests were reversed only, roughly, after the Axis Powers had lost the war. Hence it was a retroactive reversal. In *The Internationalists*, however, for the purpose of justifying the change model, no difference is made between immediate and retroactive reversal. Events and developments after 1928 thereby are subtly excluded as causes for the reversal.

Was the Pact really the crucial cause for the retroactive reversal? It could be, of course – but there are other possibilities. A more conventional and later competitor cause is 'simply' World War II. In the authors' 'crucial trigger' model, however, any step towards the New World Order after 1928 appears as mere unfolding of the Pact's idea. The Pact becomes the only possible 'ultimate' explanation, and the narrative thereby immunises itself against other possible explanations. By tautological argument, independent causes after 1928 are excluded: as the Pact was the 'crucial trigger', any development towards the New World Order after 1928 was mere unfolding of the Pact, and as developments after 1928 were mere unfolding of the Pact, the Pact was the crucial trigger. At one point the authors use the formulation that the Pact was 'a [...] crucial trigger' – which logically seems inconsistent to me, but telling in this context. Either an event is only 'an' important factor, if it is not the predominant one, or it is 'the' crucial factor and thereby 'the' trigger. I read the hybrid as an indication of doubts.

A further aspect I would like to shed some light on is the 'law as agent' claim as such. I already highlighted its merits. But there also is a critical side to it. The model assumes that law itself – here: the core rule with respect to interstate violence – can be regarded as the driving force behind societal transformations. As it is, however, not only a producer of effects, but as much a product of political, economic, social, and cultural factors, treating it as the key agent risks inappropriately downplaying the self-standing role these factors have. In the 'law as agent' model they are 'aggregated' to one big cause. In *The Internationalists* this seems a major problem to me. For the narrative though, it is crucial as it allows focusing on the drafting history of the Pact and its protagonists. The wider context, however, that 'triggered' the drafting process, is to a large extent omitted.

This leads me to a point where I fundamentally disagree with Hathaway and Shapiro's book. We cannot understand the interwar years without

highlighting the impact of World War I on Western society in general. The ‘Great War’ deeply changed the perception of war: in art (Dada movement), in literature (‘All Quiet on the Western Front’ by Erich Maria Remarque), in popular culture etc. Photographs of soldiers wearing gas masks that gave them the appearance of primeval creatures irreversibly damaged the idea of warfare as heroic human activity. Bravely attacking an enemy that uses machine guns and poison gas is as futile as it is stupid. The ‘post-heroic age’ began, as the German political scientist Herfried Münkler writes, and it essentially began with this war.<sup>51</sup> In industrialised wars, as opposed to short ‘old-style wars’ of the 19th century, the enemy typically is not even visible and losses are monstrous. World War I was an immense cultural shock for Western civilisation that triggered a complex interplay of cultural, political and legal developments that led, *inter alia*, to the League, the failed Geneva Protocol, the Locarno Treaties, the Peace Pact and, after World War II, to the UN Charter. I see the outlawry movement as no different from other efforts to preserve peace in the first years after World War I: as expressions of this cultural change.<sup>52</sup> The ‘law as agent’ claim may be appropriate in some instances, but it is too simple in this case. Its narrow lens leads to an overstatement of the role played by those who were part of the drafting process of the Peace Pact. This too narrow lens becomes palpable when the authors write that Salmon Levinson ‘had a simple but profound idea’, namely ‘that the real disease of the world is the legality and availability of war’.<sup>53</sup> Levinson’s contribution was important, of course, but the way the story is told dramatically understates the effects of the epochal cultural transformation in Western societies. And the enabling condition for telling the story this way is the ‘law as agent’ claim.

#### IV. Element III: International law as ‘complete system’

##### *Concept of international law: System operated by a core principle*

International law can be conceptualised in many ways: as composed of loosely connected regimes (regime theory), as a hierarchic or even

<sup>51</sup> H Münkler, *Kriegssplitter: Die Evolution der Gewalt im 20. und 21. Jahrhundert* (Rowohlt, Berlin, 2015) 143–256.

<sup>52</sup> On the revitalisation of international legal theory after the shock of World War I: O Diggelmann, ‘Zugänge zum Völkerrecht in Europa 1918–1939’ in N Dethloff, G Nolte and A Reinisch (eds), *Rückblick nach 100 Jahren und Ausblick – Migrationsbewegungen: Berichte der Deutschen Gesellschaft für Internationales Recht*, Bd. 49 (C.F. Müller, Heidelberg, 2018) 149–66.

<sup>53</sup> See (n 1) 108.

constitutionalised legal order (global constitutionalism), as a logically coherent system etc. And the way it is conceptualised evidently has important consequences for the role it can claim in historical narratives. A strong and homogeneous international legal order can better be installed as a self-standing agent than a fragmented international law.

*The Internationalists* regards international law as a ‘complete system’<sup>54</sup> whose rules ‘rise or fall together’.<sup>55</sup> The guiding idea is that it rests on a core principle – the rule concerning the lawfulness of interstate violence – that in principle shapes the rest. At least the key rules are imagined as derived from this core principle, they have a ‘necessary logical connection to one another’.<sup>56</sup> One reads, for example, that the Peace Pact ‘formed the background’ of rules and assumptions which ‘the rest of the new system operated’.<sup>57</sup> Some passages imply a very high degree of homogeneity of the system, tight connections between the centre and the periphery, whereas other formulations are weaker. What is always clear, however, is that the authors ‘think’ international law from the Archimedean point of a core rule.

The system claim is important for the narrative as a whole. It supports both the progress narrative (Element I) and the change conception (Element II). As regards the first, conceiving of international law as a coherent whole indirectly buttresses the claim of radically opposed epochs. When the law of an epoch is a ‘unit’, when it breathes the spirit of one core principle, then the law of the epoch with the opposite core principle is radically different. The conception of international law helps to describe the Old World Order as dark as possible, run by a ‘bad’ core principle, and the New World Order as the bright ‘photo negative’. The system conception also buttresses the change conception. The ‘Pact as trigger’ claim becomes more plausible when the core rule on the use of violence has the role of an operating principle of the whole legal order. The ‘international law as a system’ idea helps to make the ‘law as agent’ claim more plausible – installing the core principle in the driver’s seat.

### *Argument: Long-term evolution of international law*

*The Internationalists* argues that the ‘evolution’ of international law over the course of four centuries ‘teaches’ international law’s system character.<sup>58</sup> The argument essentially is: The role of the core principle is proved by

<sup>54</sup> Ibid 300.

<sup>55</sup> Ibid 421.

<sup>56</sup> Ibid 421–2.

<sup>57</sup> Ibid 335.

<sup>58</sup> Ibid 421.

historical analysis, by the history of ideas. In the era of the Old World Order, for example, the authors find close connections between what is nowadays the law on the use of force and the law of armed conflicts or international humanitarian law. There is the right of the sovereign to wage war and the 'complementary' immunity of the soldier to kill enemy soldiers, both of which being manifestations of 'a licence to kill' as the 'law of the world'.<sup>59</sup> The authors see a right to mass murder, 'morally monstrous',<sup>60</sup> at work, which is characteristic for the old 'might makes right' world.

The authors also highlight the connections between neutrality law and the privilege to use violence. The argument that economic sanctions by neutrals were prohibited in the Old World Order, as this protected the 'justice of war',<sup>61</sup> is repeated several times. Strict neutrality was in the interest of the 'might makes right' system, it protected against economic disruptions because of wars between other states. The intellectual authorities, to which *The Internationalists* refers to support the system claim, are Hugo Grotius and Hersch Lauterpacht. Grotius 'understood' that international law, in order to function, the authors write, 'must form a complete system'.<sup>62</sup> The legacy of Lauterpacht was 'nothing less than a system of rules embodying the idea that war is an illegitimate tool for establishing or enforcing legal rights'.<sup>63</sup> They elaborate on Lauterpacht's idea to derive international law from the new core principle of outlawry of war.

The conception has the merit of highlighting many side effects of the 'ius ad bellum'. The problem is not only this rule as such. The authors draw attention to how it poisoned other branches of international law and to what becomes possible when it is substituted by the 'good' core principle, outlawry of war. This impressively is illustrated when possible justifications for criminal liability of individuals before the Nuremberg Tribunal for waging aggressive wars are discussed in the book. There was no crime of aggression then, the 'ius ad bellum' had provided a disastrous immunity for those in power. If the core rule is read, however, 'like a constitutional principle', as Lauterpacht suggested, then outlawry of war could be understood as a removal of the legal protection that aggressors enjoyed when there was a 'right to wage war'.<sup>64</sup> The system conception opens up space for constructive new solutions to problems where no appropriate rule is available.

<sup>59</sup> Ibid 61.

<sup>60</sup> Ibid 63.

<sup>61</sup> Ibid 91.

<sup>62</sup> Ibid 300.

<sup>63</sup> Ibid 305.

<sup>64</sup> Ibid 253.

*Critical topics: Contradictions and complementarities*

The system claim's Achilles' heel is international law's heterogeneity. Formulas like 'licence to kill' or 'might makes right' imply a homogeneity international law never had and most likely never will have. The law of armed conflict, for example, always was to a considerable extent a bundle of rules to *minimise* the damage resulting from the 'right to wage war'. Increase of the law of armed conflict meant more constraints on warfare; it acted as a certain counterweight to the 'ius ad bellum' and had multi-purpose character. The 'system claim', however, downplays contradictions, internal tensions, and logical deficiencies. Analogous considerations apply to the way neutrality law and neutrality are discussed. The authors consequently look at them in light of the obstacles they created to impose sanctions in the Old World Order. Their claim is that neutrality law's prohibition on economic sanctions (the claim is debatable anyway) served the privilege to use violence. The authors suppose, however, too close ties between neutrality and the core rule.<sup>65</sup> For a number of small states it always was, more than anything else, an institution that simply helped them to survive, to avoid being dragged into conflicts between great powers. For them it was not an 'excuse',<sup>66</sup> as the authors write, but connected to self-preservation. From a Swiss perspective, things look different than from an American one. Economic profitability was an aspect of neutrality in the Old World Order, but rather a (critical) side effect than the essence.

The system conception also understates the persistently dominant role of particularly powerful States. Whatever the core principle is, from a sociological perspective the most powerful always had and still have a special role. International law consists both of highly developed and archaic elements or layers. If one wants to properly understand its functioning, it is crucial to be aware of this juxtaposition and partially even overlap of highly developed and archaic elements.<sup>67</sup> In international law, as in archaic legal orders, the most powerful are not only addressees of the rules, but they also have a crucial role with respect to law creation and law enforcement. The emergence of the continental shelf regime is a telling example. It became

<sup>65</sup> On the origins of neutrality as a legal concept: S Oeter, 'Ursprünge der Neutralität: Die Herausbildung des Instituts der Neutralität im Völkerrecht der frühen Neuzeit' (1988) 48 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 447–88.

<sup>66</sup> See (n 1) 91.

<sup>67</sup> On international law consisting of highly developed and archaic elements see my brief sketch (currently being further elaborated): O Diggelmann, 'Anmerkungen zu den Unschärfen des völkerrechtlichen Rechtsbegriffs' (2016) 26(3) *Schweizerische Zeitschrift für internationales und europäisches Recht* 381–90.

customary international law because the United States, beginning with the so-called ‘Truman Declaration’, claimed it *against existing customary law*. Economic stakes were high; the law was changed by its breach, notably in the era of the New World Order. The topic cannot be discussed in some length here, but my point should have been made clear. The system conception of international law – good when the core principle is good, bad when the core rule is bad – neglects persistent power realities. The intellectual authorities, to which *The Internationalists* refers to support the system claim, provide no help. Both depart from the *premise* that international law is a system. Hugo Grotius derived the system character from God’s reason and – through the ‘etiamsi’ idea – ultimately natural reason. Given God’s infinite power and reason, completeness can be assumed. One of Hersch Lauterpacht’s key ideas was that the principles of reason underlying international law provide reasonable solutions to any political problem. There is no ‘non liquet’ in his thinking after 1933.<sup>68</sup> System thinking, by its very nature, tends to downplay the connections between international law and power constellations.

## V. Conclusion: Past and present

*The Internationalists* tells a sweeping success story of two epochs of modern history of international law: of the brutal Old World Order and the far less violent New World Order, and of the Peace Pact as the crucial cause of change. Sweeping success stories, however, come at a price. The key decisions and ideas underlying the narrative relate to dilemmata and blind spots. The periodisation decision sheds new light on the Peace Pact and on many aspects of post-Pact interwar history, but it creates pressure to downplay the efforts to preserve peace in the first interwar years. It also understates important continuities between what the authors call the Old and the New World Order. The social change conception has the merit of highlighting the transformative power of a departure from ‘bad’ law, but it understates the self-standing role of non-legal factors in the epochal transformation between 1914 and 1945. It overstates the role of the Pact. The conception of international law as a ‘complete system’ finally highlights the many destructive side effects of the right to wage war, but it understates the heterogeneity of international law in both epochs. It is not interested in the contradictions, the tensions, the paradoxical. When I read the *The Internationalists*, the book drew me in. But I had the impression that the

<sup>68</sup> H Lauterpacht, *The Function of Law in the International Community* (Archon Books, Hamden, CT, 1966) 63–5.

wish to tell a good story was so strong that the narrative sometimes became a prison for the authors.

Why were they prepared to pay this price? Are progress narratives good for the scholarly image, in an academic culture in which sweeping theses pay better dividends than elsewhere? Or weren't they aware of the costs at all? Another explanation seems much more plausible to me. For this I would like to come back to the doubts mentioned in the Introduction. At first sight, I found them difficult to square with the self-confident account and tone of the book. But they probably are more closely connected than it seems at first sight. I tend to read the determined commitment to a sweeping progress history, with international law in the driver's seat, as response to more than understandable worries about what is currently going on. The authors name some of the problems: the half million dead in Syria; excessive reliance on the right to self-defence that threatens to undermine the core rule, the blunt annexation of Crimea etc. There is a chapter asking, 'Why Is There Still So Much Conflict?' The authors do their very best to protect their narrative. They call the Crimea the exception to the rule – the data confirm it – and argue with respect to current violence that the core rule only prohibits interstate war. Civil wars were not the topic of the Peace Pact. The point is that the book also wants to remind us what is 'at stake'. In this fundamental point I could not agree more with the authors. We need a good narrative of international law as much as we need a good international law. There is a passage in the book that reads as if it were taken from an inaugural address: 'It is better to live in a world where war is not a permissible mechanism [...]. It is better to live in world where conquest is not recognized [...]. It is better to live in a world where those who make war [...].'<sup>69</sup> We use the rhetorical device of anaphora when we want to make strong moral appeals.

A further concern may have played a role. Three out of four portrayed 'internationalists' are Americans. One, Hersch Lauterpacht, is British and an adviser to American politicians. The Peace Pact clearly was initiated in the United States, and about the UN Charter one reads sentences like this: 'A great President risked his life to make the agreement possible, and the agreement is, fundamentally, an American document – conceived by Americans, negotiated by Americans, and made possible by Americans.'<sup>70</sup> These are facts, one could say. One may, however, also ask whether such passages tell us more than that the authors obviously mainly write for an American readership. I am not sure. The book has been written in a country whose current role differs so much from the one it had in the decades

<sup>69</sup> See (n 1) 422.

<sup>70</sup> Ibid 213.

following World War I. The book describes an epochal struggle between ideas of European ‘interventionists’ (Hugo Grotius, Carl Schmitt), defending the bloody Old World Order, and ideas of mainly American ‘internationalists’, fighting for the much more peaceful New World Order. The authors take delight in making fun of President George W. Bush imposing ‘terriers and barriffs’ instead of ‘barriers and tariffs’ on steel imports. I heard their laughter when I was reading the passage, and I was smiling, too. The echo of their laughter, however, had also a bitter ring to my ear. How different were the times when ‘the internationalists’, American civil society, initiated the remaking of the world.

Grand narratives tell a lot about the present. How we organise our knowledge of the past, which topics we chose, which facts we treat as relevant, which explanations we accept and dismiss, depends to a large extent on our present, our values, our world-view, our fears. History is not written once and for all times. It is not only rewritten when new facts are discovered, but also when our perceptions, fears and world-views change, when we experience a need to reorientate ourselves.

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Theseus landed on the shores of Crete to execute his plan. Then something unexpected happened. He met Ariadne, daughter of King Minos of Crete, and in charge of the labyrinth. She fell in love with the beautiful man and wanted Theseus to live. She gave him a clew of thread that he would not get lost in the endless aisles and dead ends of the labyrinth. He killed the Minotaur, and with the help of the thread he found his way out. The scenario he had feared in a quiet moment during his passage did not materialise. His worries about the future though, as peripheral as then they may have seemed, were as much part of his story as the brave undertaking.