

More than Meets the Eye - and Less

Comments on *The Internationalists*

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Abstract

These comments address three themes concerning Oona Hathaway's and Scott Shapiro's *The Internationalists* (Hathaway and Shapiro 2017), a great contribution to scholarship about international relations, international law and international legal theory. I first explore further some game theoretical themes, how the Peace Pact arguably contributed to avoid war by creating institutions – such as international courts – that helped stabilize an assurance game among states by providing trustworthy information and commitments, in turn influencing practices and beliefs concerning mutual non-aggression. Second, I suggest the the authors should not claim more than that the Peace Pact was *one* cause of the massive shift in reduced warfare. Further arguments are needed to show that this treaty was *the* trigger that 'began a cascade' Third, I suggest that the lessons for the future are limited, as we explore how to preserve and improve on the New World Order of the Pact, rather than backsliding into the Old World Order.

Keywords:

Assurance game, Internationalists, Peace Pact, war, world order

I. Introduction

Oona Hathaway's and Scott Shapiro's *The Internationalists* (Hathaway and Shapiro 2017) is a great contribution to scholarship about international relations, international law and international legal theory for several reasons. They present clearly argued, interesting and important theses about how the Peace Pact's prohibition of war transformed the international legal and political order. They lay out these arguments with great pedagogical skills, and combine analytical rigor with great writing style. They draw on an impressive range of sources for the arguments and the book's many

– appropriate – asides, with quotes from authorities ranging from Judith Shklar to Mel Brooks. Even the side stories contribute helpful background knowledge, and are intriguing in their own right: the authors offer knowledgeable and convincing accounts of the mindsets and concerns of historical figures of international law and politics, and on numerous related topics, including the various roles and circumstances of ‘natural law’ arguments and the shifting roles of state consent.

One of the many strengths of the book is the authors’ charitable interpretations of thinkers past, following J. S. Mill’s admonition, ‘A doctrine is not judged at all until it is judged in its best form.’ (Mill 1835 (1963): 52; cf. Rawls 2008: 105). The authors thereby situate and explain Grotius and others, in ways reminiscent of Quentin Skinner and the ‘Cambridge School’ of intellectual history (Skinner 1978a; Skinner 1978b; Skinner 1998). Reading others in their best light often requires attention to which problems they sought to address, and which alternatives appeared feasible to them, and which not, given their social, epistemic and ideological contexts. Skinner applied this approach to uncover a tradition of ‘neo-republican’ liberalism, as anti-domination – to avoid being subject to the arbitrary will of others (Skinner 1984). His arguments and this neo-republican tradition seem particularly relevant as background for understanding both the ‘Old World Order’ and important present disagreements among ‘neo-republicans’ concerning the legitimacy of the ‘New World Order’ – including the appropriate roles of international courts.

These comments address three themes:

First, I will explore further some game theoretical themes, of how outlawing of war led to profound changes in international relations even when the norm was breached. The Peace Pact arguably contributed to avoid war by creating institutions – such as international courts – that helped stabilize an assurance game among states by providing trustworthy information and commitments, in turn influencing practices and beliefs concerning mutual non-aggression.

Second, the authors at times claim that the Peace Pact was not only *a* cause of, but *the* cause of the massive shift in reduced warfare. Further arguments would be required to substantiate that this treaty not only was a necessary condition, but *the* trigger that ‘began a cascade’ (xv). Other factors might also have been necessary, and equally deserving of the label ‘triggers,’ – such as increased global interdependence, or democratization. The authors might best modify their claim.

Third, the authors claim not only to present a historical account, but also to draw lessons for the future. At a time when international norms and institutions are under severe pressure, such lessons are very welcome. However, there are reasons to be less optimistic than the authors about the extent of lessons we can draw from *The Internationalists* about how to preserve and improve on the New World Order of the Pact, rather than backsliding into the Old World Order.

II. The Impacts of outlawing of war

The authors claim modestly that the volume claims *that* ideas matter (xxi), but among its many contributions is to show in great detail *how* in several ways such ideas matter. Hathaway and Shapiro provide fascinating accounts of how the Pact contributed to reverse four rules, from the Old World Order to the New: –that conquest becomes illegal, aggression becomes a crime, coerced agreements are rejected, and sanctions become permitted (p 304). These effects are due to the wide ranging indirect impacts of the agreement itself - notwithstanding that the outlawing of war was not always complied with.

The Peace Pact was a necessary element, but the authors are careful to show that these broad effects are not only due to this agreement. The Pact was of course not sufficient, for the changes could only occur in intricate interaction with other factors. The pervasive effects are largely due to changes in states' expected payoffs, and establishing institutions that provide some public information about the actions and perceptions of other actors, an issue Paoletti explores in his contribution to this Agora. The agreement shifted states' expectations of other states' responses, which in turn subtly changed the patterns of behavior, combined with changes in the institutions. The range of effects are impressive, including

- Permissible threats
- What counts as collaboration/ neutrality
- What counts as murder
- Nonrecognition of territory acquired by conquest
- The new possibilities of boycotts, permissible economic sanctions, and other forms of 'countermeasures'

Reinterpreting the Roots of Realism

The ambitious claims of the book seem to contradict and challenge realist views that international law can effect little without reliable enforcement. The book also illustrates the impacts of 'constructivist' elements: Sanctions are not always required, since often '[s]tates can reach their goals only if others recognize the results of their actions' (422). Indeed, the book's argument is that the Pact prompted states to develop new preferences about what we may think of as 'social primary goods,' new stable patterns of rule governed practices that states jointly create and maintain, including 'title,' 'murder,' – and 'sovereignty' itself (Rawls 1999, Follesdal 2015b).

The authors' claims about the impact of the Pact might be further strengthened by yet another change it arguably wrought – as a fifth impact of the prohibition of aggression. In game theoretical terms, the Peace Pact may have helped ameliorate the aggressive relations among states, by confirming perceptions that at least some of them are engaged not in a prisoners' dilemma but in the less fortunate equilibrium of an assurance game (Jervis 1988). This interpretation finds resonance in an interpretation of the Ur-realist Machiavelli that challenges Realist interpretations about 'states' rational pursuit of their self interest.

Machiavelli's (1469-1527) 500-year-old *The Prince* (Machiavelli 1513 (1977)) and

The Internationalists may both benefit from each other's insights. A classical source in the realist tradition, *The Prince* shares with part of that tradition skepticism about the impact and value of international law. Machiavelli's main question in *The Prince* was how the Prince could maintain a monopoly of coercive authority over his 'state' - the territory he controlled - rather than be subjected to domination by the equally powerful states surrounding him. That is, the *interest of state* is to avoid becoming dependent on the arbitrary will of others. He notoriously appears to deny any constraints on the Prince's choice of means in pursuit of this interest: it is permissible to lie, break promises, and deceive when necessary to secure survival in the face of anarchy among sovereign princes – in violation of allegedly universal ethical standards (Chapter 15). Machiavelli thus explicitly denied *pacta sunt servanda*, foreshadowing later realist scholars. In short, promises should be broken when the interests of state so dictate: 'A wise lord cannot, nor ought he to, keep faith when such observance may be turned against him' (Machiavelli 1513 (1977), chap. 18; cf. Goldsmith and Posner 2005).

Several recent scholars have interpreted Machiavelli's focus on what 'princes' –governments - actually do, to express the 'offensive realist' preference to pursue their immediate interest in survival and indeed world domination, and attack each other preemptively. These preferences are due to the statesmen's insatiable human urge to dominate others—an *animus dominandi* (Morgenthau 1948 chap. 1; cf. Mearsheimer 1994; Mearsheimer 2001). On this account, Machiavelli analyses the conflict among princes as a 'prisoners' dilemma': Each will prefer to attack the other, either to achieve domination or as a second best to avoid succumbing to the other's preemptive attack. In this tradition, Posner, Yoo and Goldsmith maintain that treaties are agreed and complied with only when and insofar as they promote the prior interests of states (Posner and Yoo 2005, Goldsmith and Posner 2005). One implication of this perspective is that judges of international courts must not be independent, but controlled by the states that appoint them, if ICs are to induce compliance.

But another interpretation of Machiavelli's assumptions about states' preferences is more consistent with the texts - and allows and indeed may welcome a greater role for international law and international courts (Follesdal 2015a). In general, a few observations about an actor's behaviour underdetermines the actor's underlying preferences. In this case, actual aggression among states is not sufficient evidence that states have the preferences assumed by offensive realism. Indeed, the realist interpretation of Machiavelli does not even fit his stated claims about states' preferences. He does not rule out that individuals are motivated by any concern for others, for instance in the form of considerations of morality or justice. Why does he not exclude such other considerations?

The Prince is placed in a situation of uncertainty and anarchy, of a certain kind. Machiavelli grants that *it would be better if the Prince keeps promises* – but *only* when survival of the state is not at risk:

a wise lord cannot, nor ought he to, keep faith *when such observance may be*

turned against him, and when the reasons that caused him to pledge it exist no longer. If men were entirely good this precept would not hold, but because they are bad, and will not keep faith with you, you too are not bound to observe it with them.

and

The Prince must be prepared to vary his conduct as the winds of fortune and changing circumstances constrain him and [. . .] *not deviate from right conduct if possible, but be capable of entering upon the path of wrongdoing when this becomes necessary.* (Chapter 18, my emphasis)

The ruler must choose the least bad option *when others do not act as they ought.* Machiavelli grants that compliance with shared rules – including those required by justice or benevolence – is preferable, but *only if the Prince can be assured that others will do otherwise.* On this reading, princes are uncertain not about whether they are players in an offensive realist prisoners' dilemma, but rather they find themselves in a suboptimal aggression equilibrium of an assurance game among contingent compliers who would prefer to not go to war.

I submit that *The Internationalists* highlights several mechanisms, partially caused by the Pact, that provide information and assurance to states with such 'contingent complier' preferences, and that are crucial to maintain a stable equilibrium of non-aggression. These mechanisms confirm to some states that some other states also believe that they are in an assurance game. This information and other services wrought by institutions of the New World Order may help them reach and maintain a non-aggressive equilibrium. These achievements may occur even in the absence of a centralized authority with enforcement powers that would create new risks. The mechanisms the authors discuss may suffice: the various 'outcasting' mechanisms, public monitoring of non-aggression, and ways to credibly commit and otherwise affect other states' assumptions about own perceptions. International courts may serve several of these important tasks, as I discuss below.

To be clear, this argument is not an objection to the main claim of the authors, but rather a further example of the profound ways that the Pact may have been instrumental for a New World Order. Rather, I am suggesting that *The Internationalists* could have added a fifth important change that the Peace Pact brought to the international order. If this account is correct, the transformation is not only one from prisoners' dilemma to assurance game, but – at least for some states - *within* an assurance game, from one stable equilibrium of preemptive aggression to another of contingent cooperation. This shift may be relevant for other issues of international law than regulating aggression, and may help us identify further ways to promote certain kinds of international practices by means at our disposal short of coercion, such as authorities that can provide credible information and help states pre-commit.

III. The Peace Pact: *the trigger or one trigger?*

As other contributions to this Agora suggest (Barkawi; Diggelmann), one objection one might voice against *The Internationalists* concerns the claim the authors sometimes makes (xv), that the Pact was not only one of the key triggers, but *the* trigger of the New World Order. The figure used in the book (97 and 304) seems to support the authors' claim that there was *one and only one cause*, one black box, for the other changes the authors detail, such as the permissibility of gaining territory by conquest or imposing economic sanctions on a warring party. However, if the authors want to stand by such a 'Prime Trigger Claim' they must provide many further arguments. On the face of it such a claim seems implausible, and difficult to prove, since most events have multiple causes, and especially insofar as the profound effects they describe depend on several forms of complex interactions among several actors. It would be difficult even to identify the various other hypotheses about any *other* actions or trends that might serve as necessary conditions, and more challenging still to test them.

The authors succinctly sketch defenses against *some* such competing hypotheses (331-332), but this discussion is insufficient to support the Prime Trigger Claim. For instance, the authors claim regarding some other explanations – democracy or global trade – that 'While each of these changes likely played a role in creating and sustaining postwar peace, each leaves crucial aspects of the shift unexplained' (332). They go on to indicate some areas where the Pact seems necessary, e.g. why borders after WWII returned to those of the Peace Pact years. They also appear to hold that the Pact was why the Allies built global economic institutions (332). For these points to count fully as argument in favour of the Prime Trigger Claim we would need further information about the patterns of economic trade partners, evidence of the Allies' long term objectives, and alternative explanations of other historical trade regimes prior to the Peace Pact, as Diggelmann suggests in his thoughtful observations. We would also need to consider whether there are any events that might appear to challenge the Prime Trigger Claim – *if* indeed the authors want to maintain that strong claim.

I submit instead, in the spirit of Mill's admonition, that the better interpretation of the authors is the more modest, but still very interesting claim: the crucial, *necessary*, and complex roles of the Peace Pact.

IV. Lessons for the future?

The authors claim that the volume can yield lessons for how to preserve and improve on the New World Order of the Pact, rather than backsliding into the Old World Order. They claim that insights from *The Internationalists* can help us build new institutions that further reduce violence, whether labeled international war or not (432-33), and thus making the world even better. I submit that there are some reasons to be wary about the likelihood of large scale lessons, though some smaller lessons might be had.

Several of the important consequences the authors lay out in such convincing detail do not lend themselves to copying – precisely because of the detailed interconnections. Many of the benefits appear to be results of accident, if not force, rather than reflection and choice. A range of effects appears to depend on complex interdependence among several actors with their own motivations, and many would seem to be largely unplanned but happy consequences of the Pact, its ideas and practices. If this description is correct, it will be difficult to generalize lessons beyond ‘be lucky!’ for those who want to create an even Newer World Order, or for those who seek to maintain it during times of pushback or crisis. The authors therefore sound a little too optimistic when they mistakenly draw a conclusion from insufficient premises, that ‘If law shapes real power, and ideas shape the law, then we control our fate.’ (423)

Smaller, ‘local’ and more modest lessons might be identified. Here are three contributions to an incomplete list

The viability of changes to the rights of sovereign states

Several of the interesting arguments of the volume concern the causes and consequences of changing norms about what states may do: – what other states and other actors will recognize as collaboration, murder, permissibly acquired territory, and lawful economic sanctions. Several of these may be subsumed under forms of outcasting: exclusion from club membership and benefits, including ‘club goods’ in the stricter sense of inexhaustible and excludable goods. The authors seem correct that this is one hopeful message of the book, namely that

We can choose to recognize certain actions and not others. We can cooperate with those who follow the rules and outcast those who do not. And when the rules no longer work, we can change them. (423)

Some of the examples of outcasting may illustrate how institutions expand the scope of our political, legal and/or moral complicity by the practices we jointly maintain. The examples also show the possible but somewhat unpredictable impact of reforms to change some such norms, to make the global order somewhat more just. This may be helpful for actors who may seek to constrain the *transformations* of war that Tarak Barkawi, in his contribution to this Agora, argues is one of the unfortunate effects of the Peace Pact. Doing business with outcasts has long been recognized as morally problematic. Indeed, Immanuel Kant argued in effect for shunning and boycotts, that actors should disentangle themselves from certain immoral agents and systems of production – not primarily to remove evil from the world but to reduce responsibility for it (Kant 1964: 98; Hill 1979; Follesdal 2004). Thomas Pogge, Leif Wenar and others have argued for some changes to international law regarding ownership (Pogge 2005; Wenar 2016); specifically they argue that the ‘International resource principle’ should be changed so that states no longer recognize all governments’ power to dispose of the natural resources of a country, but only recognize that right in governments that satisfy some minimal human rights or democratic standards. Similarly, an improved ‘lender principle’ would make clear

that international loans to autocratic rulers would not be protected by international law. The latter could develop and strengthen the existing concept of 'odious debts' (Sack 1927; Howse 2007). The likelihood and effects of such changes are highly debatable – but the examples in *The Internationalists* show that some such legal changes have had important repercussions, sometimes clearly in the direction the Internationalists desired.

The roles of interactions – market and others - to reduce the temptation to war

The authors hold that the Allies worked for increased economic interaction to reduce likelihood of war (p 332) and as part of a New World Order. Whether this was their motivation is discussed much elsewhere. Such arguments have been made by several, with some empirical evidence of success – ranging from the pre-Peace Pact Kant, (Kant 1796) to the 'founding fathers' of the European Union who hoped that shared control over coal and steel, and market integration, would make war on the European continent 'unthinkable' (Schuman 1950).

Global *complex* interdependence entangles states in multiple relationships across several intertwined issue areas (Keohane and Nye 2001). Machiavelli's strategy to avoid domination by independence has often been replaced by attempts to avoid domination by securing *interdependence* in the sense of mutually beneficial dependence. Many states often recognize that they benefit from established relations ranging from markets to mutual protection arrangements to financial networks– benefits that will be lost by aggressive attacks that may trigger reactions. At least so we have thought. The likelihood of military attacks would allegedly be greatly reduced, though not removed, by mutually beneficial networks. Such interdependence thus reduces the risk that a state will be attacked, and knowledge of this reduces each state's preference for aggression even more.

At the same time, interacting states will have an increased need for peaceful resolution of conflicts, concerning how to interpret trade or investment agreements, etc. – a need for which international law and courts may be effective solutions.

Roles of international courts

The authors' account of Grotius' Old World Order helps underscore the intriguing roles of international courts – even when they lack enforcement powers (28). Wars might be considered to play the same role as courts in the sense that they settle disputes, albeit not 'authoritatively' in the same way as international courts do - when the latter are accepted as legitimate. Hathaway and Shapiro show not only how international courts bring states out of a certain kind of state of nature, but how international courts serve a wider range of tasks crucial for the transformation of the world order.

International courts help monitor compliance, specify and elaborate norms such as what are permissible killings in war vs what is murder, and can determine what is legitimately acquired territory, etc. Their interpretations and adjudication help stabilize expectations among states and other constituencies. And they may help

reduce risks of asymmetric information and deception. They can create and trigger myriad disincentives that enhance states' ability to credibly commit and hence reduce the risk of war (e.g. Fearon 1995, 380-82). Several of these contributions also make them crucial to maintain beneficial equilibria in assurance games. If they are trusted to be sufficiently impartial and competent, they can provide credible information, including interpretations (Guzman 2008). The authors show how the limited sanctions international courts control do not prevent them from making many of these contributions. The frames and historical backdrop the authors provide may fuel reflections about when may such international courts be possible and desirable for which issue areas – and when not.

The arguments of Hathaway and Shapiro may help identify the sorts of features international courts need in order to provide a better alternative than war, and to enjoy the requisite legitimate authority. The many tasks of international courts the authors help identify may thus guide design questions. The international courts must be sufficient independent and impartial among the parties to the dispute (*pace* Posner and Yoo 2005; cf. Helfer and Slaughter 2005) – *and* to foster the New World Order in several other ways. Yet such optimism must be tempered: International courts must be accountable to other bodies in ways that ensure that they remain part of the solution to real problems, and that reduce the risk that they become new sources of domination. Careful institutional design may help square this circle, though neo-republicans - and others – have different hopes and fears in this regard (Bellamy 2007; Bellamy 2014; Pettit 2000).

The arguments of *The Internationalists* may help indicate how the international order and international courts may be resilient against undue criticisms and pushbacks, whilst remaining responsive to calls for very necessary improvements. Such lessons may be especially pertinent today, when we again hear world leaders endorse Voltaire's mistaken assumption that "It is clear that one country can only gain if another country loses." (340).

The Internationalist helps us understand how far we have come, and may - perhaps - help us reduce the risks of backsliding. How we and the actors of the New World Order can best respond, is crucial.

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