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Response to critics

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We'd like to thank the editors of *Global Constitutionalism* for organising a stimulating Agora symposium in Berlin this July to discuss our book *The Internationalists*, and especially for bringing together the extraordinary commentators who attended. We learned much from the workshop and from their written responses to our book.

Especially exciting about the workshop was the diversity of perspectives on offer. The respondents included philosophers, international lawyers, political scientists and historians. As is to be expected from such a diverse group, the reactions to our book are also quite varied. Given the range of concerns expressed and the limited space we were allotted, we cannot respond to each and every objection and comment made, as interesting and important as they are. We have decided instead to address some of the main concerns raised by the respondents.

The causal efficacy of international law

Unsurprisingly, a recurring theme in the articles is the question of the causal efficacy of international law.[1] Why do we think that the outlawry of war made a difference – indeed, as the subtitle of our book put it – remade the world? And what types of materials do we bring to bear in this analysis?

To see how the outlawry of war changed the international system, let's return to what we call the 'Old World Order', the system of legal rules that it was designed to upend. As we argue in Part I of *The Internationalists*, until 1928 states had the right to wage war in order to rectify wrongs done

[1] See, e.g., Geis, Barkawi and Diggelmann articles.

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to them. War, in other words, was the principle mechanism of rights enforcement. The right to intervene militarily could be asserted in any situation where a legal right had been violated and all peaceful channels had been explored and exhausted. Thus, the right of war existed not only in cases of self-defence, but to collect debts, to recover compensation for property damage and to resolve dynastic disputes and inheritance claims.

States not only had the right of war – they had many other rights as well. For example, states had the legal power of conquest. Since the function of war was to right wrongs, the point of conquest was to compensate the victim who had to wage war to recoup its damages. Likewise, soldiers and sovereigns could not be punished for murder that took place on the battlefield because their behaviour was legally protected. Similarly, neutral states were under a legal duty to stay out of the conflict. They were, therefore, prohibited from treating each side differently. The imposition of economic sanctions – the routine way in which states respond to aggression in the current day – was illegal before 1928. Finally, states not only had the right to wage war to enforce their rights but also to threaten to wage war – thereby sanctioning the behaviour that we now call 'gunboat diplomacy'.

As we show in Part II of our book – and what traditional accounts miss – this entire set of rights began to unravel almost immediately after the Pact entered into force in 1929. We offer extensive evidence of how the old system built on war transformed into a legal system in which war was not only illegal, but conquests and coerced agreements were no longer recognised, aggression was a crime, and economic sanctions were routine instruments of statecraft. In each of these cases, those who unravelled the old rules pointed to the Kellogg–Briand Pact as the justification for their actions. The outlawry of war wasn't merely a reason for the change – it was *their* reason for the change.

Consider the right of conquest. On 18 September 1931, Japan invaded Manchuria. How did the international community respond? On 8 January 1932, US Secretary of State Henry Stimson delivered simultaneous diplomatic notes to the governments of China and Japan stating: '[T]he American Government . . . does not intend to recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928.' According to the 'Stimson Doctrine', as the official US policy became to be known, conquest was no longer legal or legitimate. In a matter of weeks, the Stimson Doctrine was accepted by the League of Nations as well.

Thus, a little over two years after the Kellogg–Briand Pact was ratified, one of the most ancient rights of sovereignty – the right of conquest – was revoked. And the reason for the revocation was none other than the outlawry of war enacted through the instrument of the Kellogg–Briand Pact.

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Not only do we track the evolution of the rules of the international system to the Kellogg–Briand Pact. We show that the change in the law closely tracks a remarkable change in state behaviour. Returning to the case of conquest, we show that forcible transfers of territory, which were once very common, have become quite rare. States could expect to experience foreign conquest of some sort once in a human lifetime before 1928; now the data show that the average state can expect to be subject to conquest once in a *millennium*. In virtually all cases since 1928, territory acquired by force has reverted to the nation that originally held it. And what boundaries determine who held that territory? The borders that existed when the Paris Peace Pact was signed in 1928. We claim that the best explanation for this otherwise mysterious change in behaviour is that non-defensive war had become illegal and states had lost their right of conquest.

The causal mechanism

If we are right that the changes of the legal rules resulted in a change in state behaviours, how did it happen? What is the causal mechanism that would explain such a dramatic change?

Let's take a step back and distinguish between two ways in which the law might change behaviour: direct and indirect. A legal rule directly changes behaviour when the change is motivated by a sense of legal obligation. Someone might pay income tax because she feels morally obligated to do so. Had the tax laws not been in place, she would feel no such obligation to give a portion of her income to the government.

By contrast to direct guidance, law might indirectly guide. Suppose someone pays their taxes to avoid the penalty. The law would guide the taxpayer's conduct not out of sense of obligation, but out of self-interest.

When we consider how the change in the legal status of war affected state behaviour, we have three choices: the legal prohibition could have affected state behaviour directly, indirectly, or both. A state could have decided to recognise these new rules because they deemed those rules morally legitimate. They could have recognised them out of a sense of self-interest. Or they could have been motivated both by moral and prudential considerations.

Thus, when we ascribe causal efficacy to a change in the laws of war, we are not arguing that international law is directly guiding states. States need not be acting *out of a sense of legal obligation*. They might be complying because of the way in which the law has changed their incentives to behave.

Return to the case of conquest post-Stimson Doctrine. Law-abiding states might stop engaging in conquest because conquest is illegal. But others might stop engaging in conquest because, *given the change in the law*, conquest no longer pays. If the conquering state cannot get other states to recognise the

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spoils of war, because they accept the Stimson Doctrine, what would be the point of conquest? Law often guides conduct in this indirect fashion, by affecting the incentives for states to act one way rather than another.[2]

As we also make clear, the Pact did not achieve our modern world order immediately or on its own; instead, it anchored and started this fundamental transformation. It took time for states to adjust to the new normative and prudential environment. Nevertheless, the pace of change was pretty dramatic. The Old World Order – legally-sanctioned conquest and gunboat diplomacy, immunity to prosecution for aggression and illegality of economic sanctions – gave way to a New World Order – the non-recognition of conquest and gunboat diplomacy, the crime of aggression and the legality of economic sanctions – in the few short years between 1928 and 1945.[3] The rapidity of this regime transformation is very hard to explain from a more traditional realist perspective. But it makes perfect sense if one accords law causal efficacy.

Several commentators have offered alternative explanations: the spread of democracy, the advent of nuclear weapons, economic interdependence.[4] Unfortunately, none of these theories explain the nature of the shift we describe. How can the spread of democracy explain why economic sanctions suddenly became legal after 1928? How do nuclear weapons explain the invalidity of gunboat diplomacy when the legal change occurred in 1932, but nuclear weapons were invented in the 1940s? How can economic interdependence explain how conquest is not simply rare, but against the law? None of these factors account for why the Old World Order changed so rapidly into the New World Order after 1928.

To be sure, many of these factors have contributed to some of the phenomena we described in the book. It is very likely, for example, that nuclear weapons have decreased the frequency of war between nuclear powers. But these explanations are not rivals to our own. Indeed, they implicitly depend on ours as an essential premise.

Consider the Nuclear Peace hypothesis. By itself, it cannot explain why nuclear weapons have only been used for defensive, but never offensive, purposes. The United States has nuclear weapons, but Mexico does not. Why has the United States not conquered Mexico? To be sure, this seems an absurd suggestion – and that is precisely the point. To wage war for such purposes is unthinkable, but it was not always so. As we describe in

[2] See Follesdal, who presents an explanation in a similar vein, inspired by Machiavelli, whereby states are playing an assurance game and the outlawry of war helps move states from a less to more favourable equilibrium.

[3] This should help respond to Follesdal's trigger objection.

[4] Geis provides a good summary of the existing literature.

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Chapter Two of the *The Internationalists*, the United States went to war with Mexico in 1846 to collect unpaid debts. It conquered over 500,000 square miles of Mexican territory. Why has the United States not used its nuclear dominance to grow yet again? The answer, we claim, is the change in the law and the creation of institutions to enforce that change. Put simply, the decision to outlaw war is a basic assumption that all other explanations of the decline of war rely on but never make explicit.

How *new* is the New World Order?

Yet another question raised by the respondents is whether the New World Order is really all that new? Oliver Diggelmann, for example, suggests that the contrast we draw between the pre- and post-1928 eras 'understates important continuities between what the authors call the Old and the New World Order' and 'understates the heterogeneity of international law in both epochs'. He argues, too, that '[w]e cannot understand the interwar years without highlighting the impact of World War I on Western society in general'. After all, there were earlier efforts at securing peace, such as the Locarno treaties. And there was an international body that preceded the Kellogg–Briand Pact: the League of Nations, which even had its own short-lived court (inaptly dubbed the 'Permanent Court of International Law').

There is an element of truth in this critique. The book, as long as it is, has a limited project: it aims to show how the key structural elements of the international legal order changed. To show this structural change, the book draws a contrast between the Old and New World Orders in order to make a central claim: That the decision to outlaw war in 1928 was a transformative one and triggered a cascade of changes in the international legal order. Those changes, we argue, transformed not only the legal rules, but also state behaviour. As a result of the outlawry of war, conquest was less likely, those who engaged in illegal aggression could be (and were) criminally prosecuted, economic sanctions became a central tool of statecraft, and treaties brought about through coercion were no longer enforceable.

The changes on which the book focuses are crucial to understanding the legal order as it was and as it is, but of course there were elements of continuity across the Old and New World Orders. To begin with, there were several earlier efforts to eliminate war. The 1928 Kellogg–Briand Pact was certainly not the first. But while it was not the first effort at multilateral peace, it *was* the first to successfully outlaw war among nearly every state in the world. That, we argue, is the crucial difference – and therefore the one on which we focus. Moreover, World War I and the

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changes it brought about in the perception of war was not trivial – it was deeply consequential. Indeed, the story we tell about the outlawry of war in the Pact begins during World War I and is propelled at every step by peace activists driven by a commitment to prevent a terrible war like World War I from ever happening again. Indeed, we are in agreement with Professor Diggelmann on a key point: the usual story – that everything changed with World War II – misses the exceptional importance of World War I in giving rise to our current legal order.

The book also tells the story of the creation of the United Nations. But the effort to construct an international institutional framework to keep the peace was also not the first of its kind. Most obviously, there was its immediate precursor – the League of Nations, which was created in the wake of World War I. But the League differed from the United Nations in a key respect: It did not reject war. The League of Nations Covenant obligated member states to submit their disputes to the League – to an arbitral tribunal agreed to by the parties, the new Permanent Court of International Justice, or an 'enquiry' by the League Council – and then await their judgment. If the loser complied with the judgment, the winner could not go to war. But if the loser did not want to comply, the Covenant permitted it to resort to war, provided it waited three months. States that did not follow the rules could face sanctions determined by the Council – including the possibility of war.[5] Hence the Covenant postponed, but did not prohibit, war. It attempted to slow it down and substitute peaceful dispute resolution for war, but it ultimately allowed states to do what they had long done: wage war to enforce their rights as they saw them.

By contrast, Article 2(4) of United Nations Charter prohibits states from resorting to the 'threat or use of force' against another state. There are only three exceptions: self-defence under Article 51, authorisation of the use of force by a vote of the Security Council acting under Chapter VII, and host state consent. Article 2(4) of the Charter, we show, grew directly out of the commitment states had made in the 1928 Pact. Indeed, the entire post-World War II international legal order is best understood not as a reboot of the earlier League of Nations but as the fulfilment of the commitment and vision of the 1928 Pact.

Anna Geis, in her response, raises a related critique: 'why should we label an order that has now existed for more than 70 years still a ''new'' order'? This is a fair question. After all, a legal order that has lasted seven decades may not seem so new. But our claim is that many assume that the system that currently exists – which prohibits states from resorting

[5] The Covenant of the League of Nations (1924) arts 12, 13, 15 and 16.

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to war whenever they believe they have been wronged – is new in global historical terms. At least since the early 1600s, states claimed the legal right to wage war to secure their legal rights. That only changed when the nations of the world gathered to outlaw war in 1928. Viewed in the span of history, the rejection of the right to wage war to right wrongs is – relatively speaking – new.

There is a value, moreover, in reminding readers that the system in which we live is new. In the United States, in particular, there is a tendency to take the international legal order as a given – and to assume that it will always be essentially as it is. But that is an ahistorical perspective. By situating our current moment in the broader arc of history, we aim to show how the legal order in which we live came to be – as well as expose its key structural features. We encourage readers to understand that the international legal order changed relatively recently – and can therefore change again, and not necessarily for the better.

From the descriptive to the normative

Several of the comments respond to the normative claims at the very close of the book. In the concluding chapter, the book argues that, 'As the world stands on the brink of renouncing the core commitments of the New World Order, this book serves as a reminder of what is at stake.' (421). And it asserts that, 'it is better to live in the New World Order, with all its real, sometimes terrible drawbacks, than to go back to a system where war is legal or to a chaotic in between'. (422).

Tarak Barkawi is highly critical of the current legal order, which he views as a product of Western hegemony, and thus views a book that aims to explain and defend it as obviously suspect, and even morally compromised. The book acknowledges that the states that led the effort to outlaw war did not do so altruistically. It explains, 'Indeed, the Pact appealed to the West because it promised to secure and protect previous conquests, thus securing Western nations' place at the head of the international legal order indefinitely.' (159). It continues: 'The Peace Pact would protect this territory from reconquest, securing the vast empires at the moment they had begun to weaken—and competitors had begun to emerge.' (160). But we disagree with Barkawi's apparent claim that the impure motives of those who constructed the Pact automatically renders the legal order they created morally indefensible. As we show, the New World Order produced as a result of the Pact is one in which wars between states are exceedingly rare; conquest has been nearly eliminated; and states are required to resolve disputes without resorting to war. These achievements are, we argue, worth defending – even if the system remains deeply imperfect. Those

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imperfections are not, we argue, reasons to discard the system, but to work to continue to improve it.

Anna Geis offers a different critique. She asks, 'if ''we'' currently still live in the same ''type'' of world order that is depicted in the chapters of Part III of the book. This raises a more general epistemological point: Which type of world order *is* in existence right now?' She notes, moreover, that the 'use of military force by liberal democracies is rather noted in passing'. Paolo Palchetti offers a related concern: 'whether, and to what extent, the well-functioning of the UN peace-enforcement mechanism is important for preventing the system from developing new and broader exceptions to the rule on the use of force'. And Geir Ulfstein similarly notes, 'today we can ask not only whether USA is turning inwards, but also whether it is currently an active threat to international law'?

These observations raise an important point: The book describes a 'New World Order' that was set in motion in 1928. The third part of the book describes the key features of this new order – the availability of a crime of aggression, the near-elimination of state conquest (helping to produce a tripling in the number of sovereign states), the rise of what we call 'outcasting' as a tool for shaping state conduct as an alternative to war, and the elimination of gunboat diplomacy. But this New World Order depends on states' continuing commitment to its core principle: the illegality and illegitimacy of war. The comments point to the very real concern that this commitment may no longer be unshakeable.

The book was completed just after the surprising election of Donald Trump as President, and the conclusion of the book acknowledges that he had campaigned on an anti-Internationalist platform. The conclusion acknowledges the emerging threat to the legal order: 'As the world stands on the brink of renouncing the core commitments of the New World Order, this book serves as a reminder of what is at stake.' The nearly two years since those words were penned have only demonstrated that they were warranted. The Administration of President Trump has threatened to tear down the key institutions of the New World Order at every turn: President Trump has threatened to take a first strike against North Korea and threatened Iran – and even Venezuela – with military force. He apparently contemplated assassinating the President of Syria. He has started a trade war with China, promised to withdraw from NAFTA, and threatened to withdraw from the World Trade Organization. His National Security Adviser has declared the International Criminal Court a threat to 'American sovereignty and U.S. national security interests'.[6]

[6] John Bolton, 'Protecting American Constitutionalism and Sovereignty from International Threats' (10 September 2018).

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It is not clear that the New World Order as we wrote about it in *The Internationalists* can or will survive the current assault. Institutions that take decades to build can be torn down more quickly. And while President Trump poses an extreme threat, the erosion of the legal order predated him. As Anna Geis's and Paolo Palchetti's comments suggest, the United States and others had already begun eroding the commitment to the prohibition on the use of force. That happened, most notably, through a massive expansion of the self-defence exception over the course of decades. As we say in the book, 'Unfortunately, the growing reliance on self-defense as a justification for using force . . . threatens to make self-defense the exception that swallows the rule against war.' (416). So while President Trump poses an extreme threat to the legal order, it was fragile even before he was elected.

There is some reason for hope: President Trump has made many terrible promises, but so far carried through on relatively few of them. He is beginning to discover that trade wars are not, in fact, easy to win. Many companies that took the benefits of trade for granted are realising that Trump's attacks on international institutions may hurt their bottom line; and consumers are beginning to get an inkling that they cannot have a trade war and ever-falling prices too. A nation weary from war is not eager to begin another. And the mid-term elections may lead to control of one or both houses of Congress in Democratic hands, and thus place some limits on President Trump's worst impulses.

But for democratic forces to work, ordinary citizens need to understand why the legal order is as it is – and why it is worth defending. This is precisely the goal of the book. It seeks to show what the world looked like when war was legal – it was brutal, bloody, and deeply unjust. It shows how a group of unlikely revolutionaries, the Internationalists, worked over the course of decades to bring that world order to a close and inaugurate something new. And it shows that, for all its imperfections, the world order under which we have lived for the last seven decades is safer and more just as a result.

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