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Scott Shapiro
Yale Law School
Yale University, USA
<https://orcid.org/0000-0002-7258-2738>
scott.shapiro@yale.edu

Eli Kramer
Institute of Philosophy
University of Wrocław, Poland
<https://orcid.org/0000-0002-7535-030X>
eliorner.kramer@uwr.edu.pl

The War in Ukraine and the Threat of the Return of the Old-World Order

Scott Shapiro interviewed by Eli Kramer

Scott Shapiro is the Charles F. Southmayd Professor of Law and Professor of Philosophy at Yale Law School. His areas of interest include jurisprudence, international law, constitutional law, criminal law, and cybersecurity. He is the author of *Legality* (2011), *The Internationalists* (2017) (with Oona Hathaway), and editor of *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002) (with Jules Coleman). He earned B.A. and Ph.D. degrees in philosophy from Columbia University and a J.D. from Yale Law School. Shapiro is an editor of *Legal Theory* and the *Stanford Encyclopedia of Philosophy*. He is also the founding director of the Yale CyberSecurity Lab, which provides cutting-edge cybersecurity and information technology teaching facilities. His new book, *Fancy Bear Goes Phishing*, details the history and technology of Internet hacking (Farrar, Straus & Giroux in U.S., Penguin press in U.K., 2023).

EK: Thanks for talking with me today. Your book, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* is not only kind of groundbreaking in the way it changes how we think about the role of international law in the history and philosophy of culture, and some of our progressive success of not having disastrous violence shape us each generation, but it has only become more relevant since the war in Ukraine was launched. As a starting point for our conversation, can you summarize the main premise of the work?

SS: It's a story about the modern international order. Despite its imperfections, it needs to be defended now more than ever. The central argument of the book is that the origins of the modern international order can be traced to a specific date in history. Namely August 27th, 1928, when the great leaders of the world gathered in Paris to outlaw war. The treaty that was signed on that day is sometimes called the Kellogg-Briand Pact, the Peace Pact, or the Paris Peace Pact. Its actual formal designation was "The General Treaty for the Renunciation of War," basically saying it all was an attempt to outlaw war. Now, of course most people have never heard of it. It's amazing that basically all the countries in the world decide to outlaw war, which in itself is initially a strange thing to do, but then nobody knows about it.

It's funny, when my colleague Oona Hathaway (who I co-wrote the book with) or I previously taught about the Kellogg-Briand Pact, we used to make fun of it. To our astonishment, we learned that, before 1928, war was legal, and economic sanctions to stop war were illegal. After 1928, war became illegitimate and criminal, and now economic sanctions are a standard way in which international law is enforced around the world. We described this shift in the international legal order narratively through a cast of characters that we call "the internationalists," who played a crucial role in the outlaw of war movement. Some of these people we had heard of, like John Dewey, Hans Kelson, etc., but there were a lot of other people that we had never heard of, and we wanted to tell their story and the disagreements that they had with another group of people which we call "the interventionists," who thought that war was a legitimate means for settling disputes.

I think one of the reasons that people think that the idea of outlawing war seems so ridiculous is that most don't realize the vital role that war used to play in the international system (in the "Old World Order") from, I don't know, the beginning of time to 1928. War wasn't a breakdown of the system; war was the legitimate way in which states enforced their rights, and in 1928, the claim is that this order ended. There was a transformation period up through the end of the Second World War, at which time began the New World Order. So let me just go through very quickly what the Old World Order was like, problems of transformation, what the New World Order looks like, and then we can start talking about the influence.

The Russian invasion of Ukraine is the proper place to start. It is putting pressure on the New World Order and the ways in which the international community can respond. Russia wants to return to the schematic of what we call the Old World Order. The idea in the Old World Order is that any country has the right to use armed force as a last resort in order to right wrongs done to them, on the theory that there's no Supreme Court for the world to legislate international matters, so a sovereign would take matters into their own hands. But the point is not just that there was a privilege to use force, but that the surrounding rules depended on what grounded the care of it, the right to war. We can only understand how the system was put together when we see the connections between these various rights. For example, if you have the right to war, which is the right to take what you believe is yours, then the law has to give you the right to keep what you've taken. This leads to the legal right of conquest. It's not just that one state has forcibly seized territory, but the territory they forcibly seized under the claim of right over which they acquire sovereignty. Therefore, you have roughly a million square miles of what used to be Mexico becoming southwestern United States.

We also show in the book that the Mexican American War (1846–1848) was about Mexico owing the US several million dollars, and they couldn't work it out. If war is illegal, not only do you get conquest, but

you also get legal “gunboat diplomacy,” the idea being that if you can go to war and enforce your rights, you can threaten to go to war to enforce your rights. When Admiral Commodore Perry finished fighting in the Mexican American War, he then used his ships to go to Japan, enter Tokyo, and threatened to destroy the port unless they signed a treaty of friendship and commerce. That treaty was valid in the Old World Order, where all nations had an obligation to engage in commerce, and if Japan wasn’t going to satisfy their obligation, then the United States would force them to, so legally speaking, there could be no crime of aggression. When Kaiser Wilhelm II signed the Treaty of Versailles after World War I, nations refused to enforce it on the theory that the Kaiser had done nothing wrong. He might have done something, say, morally wrong, but not legally wrong. There was no crime of aggression.

Ultimately, if wars are legal, not only do you get conquest, “gunboat diplomacy,” and no crime of aggression, but states can’t favor either side in a war. So, choosing to support one side is in itself an act of war. Economic sanctions by neutrals on a belligerent were illegal before 1928. This is just, again, the Old World Order’s right to war. You have all these other rights that surround it, that make it, that give the system coherence and life. You see that war, again, is not one rule among many, but the rule states get to enforce their rights using force. They can burn buildings, they can kill people, they can take over seized land and claim authority. We claim that in 1928, when virtually the entire world signed this Kellogg-Briand Pact, which basically gets rid of the right of war, they renounce war as a way in which international controversies should be decided. On the one hand, this is a monumental thing to do. If the entire system depends on the right of war, and you take away the right of war, the whole system falls apart. And, in a way, they had this desire to get rid of the right of war, yet they had no idea how to replace it. This is the story that we tell, of the transformation from 1928–1945 as states try to figure out what happens if you’ve renounced war, but it has been the main technique that you’ve used to keep the system afloat.

If you don’t have a right to war, if you’ve outlawed war, then conquest is illegal, wars of aggression are crimes, “gunboat diplomacy” is no longer valid, and finally, sanctions are permitted in order to punish aggressors. This turns out to be a major change for the world. When Japan invades Manchuria in 1931, the Simpson Doctrine gets announced as saying, we don’t recognize conquest or coerced agreements. The League of Nations accepts that virtually immediately, so whereas before you had conquest, you have no conquest where you had “gunboat diplomacy,” and you have no “gunboat diplomacy.” You have getting rid of the laws of neutrality, meaning that neutral states are allowed to pick one side over another to help without it being an active war. As before you had a duty of impartiality, now you have no duty of impartiality. You have the right of impartiality. And then finally, of course, you have leaders being held responsible both in Nazi Germany, in the International Military tribunal in Nuremberg, and then Japan in the far East tribunal. The main accusation in both the Nuremberg trials and the Tokyo trials were that they broke the Kellogg-Briand Pact. As you see in the Nuremberg indictment, now there’s no immunity from prosecution. You have this very quick transformation where the rules really flip.

EK: Now that you have given us a little background on your critical research with Oona Hathaway, I want to begin our discussion by thinking about Russia’s historic role with and contestation of what you call the New World Order (where wars of conquest are illegal, aggression is a crime, coerced agreement via “gunboat diplomacy” is no longer acceptable, and sanctions are permitted by actors not engaged in a conflict). It seems that across the twentieth century, the USSR and then the Russian Federation have had ambivalence about full commitment to the New World Order (though the same perhaps could be said of the US during certain presidential administrations), e.g., from Stalin requiring veto power for all members of what become the UN security council, to the annexation of Crimea, and now to the invasion of Ukraine. Although Putin couches himself in the terms of

the New World Order, he also seems quite critical of it. How do you see the USSR's/Russian Federation's relationship with the New World Order having evolved over the last almost three quarters of a century?

SS: It's such a great question. First though, a disclaimer: I'm not a Soviet historian, so there's going to be limits to my expertise here. With that said, the Soviet Union, and then the Russian Federation, historically had a very ambivalent relationship with the New World Order. In part because at times there is a superpower in this New World Order, and sometimes there are weak states or almost non-existent states. Then, you have situations where there are revisionary powers, where they want to change things. One matter we don't hide in the book, in fact we talk about it a lot, is that the Kellogg-Briand impact was really good for the West for, especially, the two great Western empires; the American Empire and the British Empire; between the two, they owned up to 75% of all the mineral wealth in the world. By outlawing war, they froze borders in place, so you couldn't use war anymore to take minerals. Well, that's great if you have all the minerals. So, on the one hand, you could see how other countries think, "it's a lovely idea to outlaw war," but it's really in your own geostrategic interest. What's fascinating about the Soviet Union is that they were not recognized by the United States and many countries after the revolution in 1917, and they were not allowed to sign the Kellogg-Briand Pact. But the Soviet Union started their own pact. Interestingly enough, they signed the Litvinov protocol in 1929, so it's actually really quite fascinating that you have the Soviet Union not allowed to sign the Kellogg-Briand Pact, and yet, they create their own, Stalin kind of "anti-war"; he's anti-war because well, Russia lost the first war. Let's not forget that they lost World War I, which was one of the reasons for the revolution. The second thing is that the Soviet Union almost lost the war against Nazi Germany. They lost roughly 25 million people in it. It is historically the case that when Russian leaders lose wars, they lose their heads. From Stalin's perspective, they didn't want to get into wars because he was trying to rebuild a country that has been destroyed by two world wars, and then you get the advent of nuclear weapons, which gives a prudential guarantee that the United States and Soviet Union are not going to go to war. But one of the things that the Kellogg-Briand Pact doesn't deal with is proxy wars and civil wars, so you have the Soviet Union and United States engaged in various types of Low Level article 24 violations, not big enough to cause crises but enough for continued violence and tensions.

When the Soviet Union fell apart, it was a barely functioning state, and it got rebuilt. At a certain point, Putin started saying, not without any justification, that America and the West are just a bunch of hypocrites. "They criticize us, but they bomb Kosovo." "They invade Iraq without security council authorization." There's Abu Ghraib, there's Fallujah, and there's just some cases of outrageous behavior on the part of the West. Sometimes, they're tougher cases like Kosovo; although, I personally was and am against Security Council humanitarian intervention without Security Council authorization. Putin, having rebuilt the Russian state in his authoritarian image, is now a power and wants to aggrandize and at least uses this argument to his constituency. In the part of the world he's talking to, he says, "They just call it humanitarian intervention when they want to go to war. Secondly, they're waging an economic war against us. Thirdly, it's a proxy war with the West."

EK: It just strikes me that Putin wants to play "both sides." On one hand, he calls for a return to the Old World Order, where the Russian-Eurasian "fights the hypocritical West." And then, he calls his invasion of Ukraine purposefully, "a strategic military operation" to avoid the claim of carrying out a war of aggression. So, it just seems like an interesting position to be in, to have this kind of tension where he wants to hold a little bit of both at the same time.

SS: Absolutely.

EK: This will lead to the next question. There are of course serious questions as to whether the international community has been effective in denying Russia the benefits of being a member of the New World Order. It is not clear if they have the will or means to ultimately limit the Kremlin's ambitions for conquest. When your co-authored book was written in 2017, I think many of us shared your hope that although, "the outcasting of Russia may appear a failure," and although Putin had "doubled down by continuing to foment unrest and conflict in Eastern Ukraine," that "smart" Western sanctions would have a slow burning effect: "to avoid crashing the Russian economy – an implosion that would bring Europe down with it – and specifically hurt those who enabled the takeover of Crimea, reduce the size of the war prize, and threaten the overarching trajectory of the Russian economy."

In your view, why was the "slow burn" strategy ineffective at stopping the current invasion? Is it partially because, as some have claimed, Russia perceived that these limited sanctions were a sign of weakened international resolve that could be exploited? What lessons can be learned from this war about "smart sanctions"?

SS: This is something that Oona and I have thought a lot about and are currently writing on (though yet to publish), so let me take a little bit of a longer time to answer this question because I want to say what Oona and I think we've learned from this situation and what it suggests going forward. One of the stories that we tell in *The Internationalists*, which I didn't talk about during my initial presentation, is the relationship between war and trade, or between physical security and economic security. As I previously noted, before 1928 economic sanctions were illegal. After 1928, economic sanctions became legal as a way of enforcing the prohibition against war, but the outlawing of war as we describe it has this kind of virtuous effect on free trade and then free trade on the outlaw of war. Let me explain what I mean. Before 1928, if you go to war and if you win the war, you capture the property and the ability to tax and conscript those who you have conquered. This is a very significant way in which states acquire surplus, taking over another country to keep its stuff. The alternative is trade. Both are ways of generating surplus. If you get rid of conquest, then it turns out that there's only one way to generate surplus, which is trade. So if you have two sources of value and you take one away, you're left with one source of value. Free trade is a beneficiary of the outlaw of war because it becomes the only way in which to generate surplus. But then there's this feedback loop, which is that as there's trade, there's interconnection between different countries. If one of the countries violates the rules, then the interconnection becomes a source of power because you can break those connections, and that is what we call "outcasting," which you talked about before. The outlawry of war strengthens free trade, and free trade creates connections. Connections can be broken as a way of enforcing the outlawry of war. You get a kind of virtuous circle: the less war, the more trade; the more trade, the less war.

This "virtuous circle" has become a very big part of the liberal internationalist project, which lets us create economic connections throughout the world. This is what Montesquieu called "sweet commerce." The idea is that economic interests will keep states in line because they won't be able to afford to break relations with each other by going to war. This becomes the capitalist peace hypothesis, the so-called McDonald's "golden arches theory" of conflict prevention, according to which supposedly all countries that have McDonald's don't fight each other (which is false). Of course, Russia and Ukraine have McDonald's, and they fight each other, but there is still the general idea that we substitute "free" economic trade, the pursuit of economic self-interest, instead of having all-out war. Okay, great!

We then have another thing which turbocharges this new way of dealing with other states (that is not attacking them, only trading with them), which is the principle of non-discrimination: a very big part of global trade law and the World Trade Organization, according to which states are required to treat each other on equal terms for trading. If you give somebody a certain tariff, you have to give everyone that tariff. You can't discriminate on the basis of ideology or on geostrategic interests in terms of trade – if they're members of the

General Agreement on Trade and part of the World Trade Organization. So now with this turbocharged free trade, you have to trade with your enemies. If you trade with your enemies, you're less likely to go to war with them. Well, this is a great source of power, but it's also a great source of vulnerability.

What happened was that once you integrated with each other, forming for example, the European Union, you also traded with potential threats to the very order you created. The European Union relied for a long time on cheap energy from Russia. What happened was, the sources of power where the West had to cut connections, became sources of power for Russia by threatening to cut these economic relations, which are in the West's interests. Russia knew this, and they basically thought to themselves, "we're going to build these pipelines to give good rates for energy to Europe" and hold the global economy hostage. It was a good plan, except that the invasion of Ukraine is so clearly aggressive. It's in the heart of Europe and has been carried out so utterly barbarically that the West has decided to absorb the pain.

I think that what we hadn't appreciated was that free trade is not enough. What you need is secure trading: strategic trading relations, which are better for you. Ones which you can afford to cut, but the other side can't. That's one thing that the failure of those smart sanctions has shown: the importance of strategic decoupling and recoupling. The liberal internationalist idea of just substituting the pursuit of economic self-interest for war turns out to have problems, it actually doesn't work that way.

In addition to the economic security issue, there's also the information security issue. The idea of outcasting is that you want to put pain on residents so they exert political pressure on the regime in order to change their aggressive behavior. Unfortunately, if the state decides to cut off information to its population, it effectively neutralizes the way in which outcasting can be harnessed. This only works for so long because the world is so interconnected, and if the war goes badly, there has to be calls for mobilization, and if you mobilize people, you can't hide that.

So what's going to make a difference? As Oona and I tried to make clear when we talked about smart sanctions, the system is so absurdly young. For example, in the 1990s when America was imposing these brutal sanctions on Iraq, there were food shortages, and all the money that was supposed to be used for civilian aid got into the hands of the regime. It ended up punishing the people of Iraq who had already been harmed so badly by the Hussein regime, and it wasn't affecting him. The World community learned from this situation.

We are still learning how to deal with this Russia. For example, they thought they could use their 300 billion dollars in foreign reserves outside Russia during the war. And it turned out that actually, that's still subject to seizure and then probably confiscation to pay for their war of aggression. This is something that I don't think people would've thought was possible beforehand, freezing \$300 billion dollars of foreign assets of a nuclear power. But it was done. That's probably a smarter sanction at this point than going against the oligarchs, which didn't seem to have worked up until now. I want to emphasize that, instead of throwing up our hands and saying, "nothing works!," we just need to get smarter. Lots of things work, you just don't hear about the things that work, but what we really want to do is figure out how to make the system work better, given all the problems that the system has. That's what I would say in response.

EK: In *The Internationalists* you and Prof. Hathaway note:

Indeed, the greatest threat to the New World Order comes from those who wish to abandon this role and turn inward. Throughout the world, anti-internationalist sentiment is growing. In the United States, the bipartisan consensus in favor of global free trade that has held strong since the mid-1930s is collapsing. Donald Trump won the presidency on an anti-internationalist platform that promised to restrict the movement of goods and people across borders. (p. 419)

Looking back on the Trump presidency in 2023, how resilient was the New World Order to his populist-nationalist orientation? Has it been permanently damaged? And what about on the political left? Do you still see a “turn inward” there as well?

SS: It's a mixed picture. That said, it has been much better than I would've expected, and there are good things that have come out of a certain form of populism. One of them is a very strong anti-war sentiment. This is not a pro-internationalist sentiment, but it is an anti-war sentiment. Now there's a problem with the Ukraine situation, which is that very fine line between being anti-war and being pacifist. You can be of the view of which I am, that sometimes aggression is really bad, and the way to stop aggression is to protect the victims of it, to come to their rescue, and aid and reorient things. If Russia gets away with that in Ukraine, everyone else in the neighborhood becomes a target for them. I identify with the political left, and I have to say, I've been having these conversations with anti-war activists, and there's something of a reflexive anti-American attitude. I get it. Yet I worry about the thought here that if America's doing it, it must not be the right thing to do. There are dangers of course, that they do point out that need to be taken care of. I mean billions of dollars of machinery and ammunition are floating around Europe now. That's a real concern, and it needs to be dealt with, but I think there's a reflexive sense among Americans that the behavior of Russia is so, to use a bad word, uncivilized, barbaric, criminal, and monstrous that I think these considerations are less important to Americans. They generally support giving war material and funds to Ukraine, and insofar as Russia is a revisionary power in Europe, it's probably in the interests of Europe long term for a regime that fights like this to be ended. Now, “ended” doesn't mean invading; ending doesn't mean imposing sanctions to eliminate. I'm not advocating regime change, but were regime change the result of defending victims of aggression, that would be a good side effect.

EK: After the war, how should the international community respond to Russia's invasion? Should there be a case brought to the International Criminal Court not only for war crimes (as in Bucha) but for carrying out a war of aggression? I'm interested in both what you think will happen and should happen.

SS: It's criminal to start an aggressive war. It's also criminal to target civilians to use certain types of terrible weaponry. So what happened in Bucha is about as bad as it gets. There are also very clear violations of the laws for just war, *jus ad bellum*. I think there is a better case to be made for punishing the leaders rather than punishing those who engaged in the massacre at Bucha because even though it was a horrible massacre, unspeakable, how are we going to catch these people? How do we get documentation? War battlefields are bad crime scenes.

There have been war crimes throughout Ukraine, but the bigger crime here is the crime of war of aggression, which was planned at the top. It was executed by people who had very little understanding of what was going on, at least initially. If there are any trials, I'd like to see *ad bellum* trials. The problem is, how do you do it? I don't know the answer. And then there are very complicated questions. For example, who should hold the trial, the Ukrainian international community, something like an international military tribunal, the General Assembly, or the US? There are many models out there. There are a lot of hybrid tribunals. There's been a lot of experimentation in international criminal law, and again, I just want to emphasize how ridiculously young the system is. We're still working things out. It's terrible, and I cannot overemphasize how terrible the human costs associated with the Russian invasion have been. We need to figure out the means. We need to take it extremely seriously.

EK: To end the interview, I'll ask one last question. At this moment in the war, what other lessons do you think we need to learn for the future survival of the New World Order? What ones are most striking to you?

SS: Well, I think the biggest one, both theoretically and practically, is this thing I told you about. What is the relationship between physical security, economic security, and information security? All these things are intimately connected. How do we create, how do we decouple enough with strategic rivals so that we are not subject to extortion? How do we create situations where we can use extortion? This is what has been happening with China, the decoupling of tech. President Biden is just basically cutting off the microchip supply to China, which will have an enormous economic effect in the medium term. And how do we strengthen ties among people who either we ideologically agree with, or we can work with? I think that's why Brexit was just a disaster, and things like that ought to be, to the extent possible, reversed. We want connections, but we want the right kind of connections. What does that mean in terms of trade law? What does that mean in terms of the laws of war? What does that mean in terms of practice?



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