

# Interpretation

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*Inquiries* ***Interpretation, A Journal of Political Philosophy***  
Department of Political Science  
Baylor University  
1 Bear Place, 97276  
Waco, TX 76798

*email* [interpretation@baylor.edu](mailto:interpretation@baylor.edu)

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Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World*. New York: Simon and Shuster, 2017, 557 pp., \$30.00 (hardcover).

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RODRIGO CHACÓN

ITAM

*rodrigo.chacon@itam.mx*

“What kind of thing is the law of nations?” Yale Law School professors Oona A. Hathaway and Scott J. Shapiro provide a riveting answer to this question in a history of international law spanning four hundred years. The question was posed in 1857 by a Japanese dignitary trying to make sense of American gunboat diplomacy, specifically, of the terms by which Japan would henceforth be open to trade with the United States and other Western powers. The answer provided by the American consul at the time was a classic assertion of imperial power, supported by the force of Commodore Perry’s fleet. Among other concessions, Japan would open three ports to the United States where Americans could live under US law, subject only to American courts. Similar conditions had been imposed on China a decade earlier, as it was forced to legalize the import of opium and cede Hong Kong to the British in perpetuity. From Mexico to Macau and from Barbados to Bengal, this was the law of nations: states (often supporting trading companies) could legally coerce other states into signing treaties, ceding commercial and territorial rights.

What could be seen as war capitalism informed by old political realism is, according to Hathaway and Shapiro, rather something new. Western powers began to dominate the world on the basis of an emerging international law. The drive to conquest may have roots in human nature (in such motives as interests, fear, and honor) but its justification, and taming, is a matter of art, which (in the authors’ view) may transform human nature (115). It took the legal genius of Hugo Grotius to devise a system of laws that both controlled war (by exhaustively stating the grounds for just war) while also justifying

colonial expansion on the grounds of natural law—notably, on the principle of “sociability” (cf. 136). Indeed, it was that principle that compelled Japan to trade with the world, for, as the American consul Townsend Harris put it: “No nation has the right to refuse to hold intercourse with others” (136). Japan learned the lesson all too well. Having sent some of its brightest youth (and later foreign policy advisers) to study in Holland under a leading Grotius expert, Japan would force Korea, in 1876, to enter into trade relations—the first step of its brutal conquest of East Asia (143, 149).

The central thesis of *The Internationalists* is that all of this changed in 1928 with the signing of the General Treaty for Renunciation of War as an Instrument of National Policy, better known as the Kellogg-Briand Pact. Whereas in the “Old World Order,” as codified in the work of Grotius, “Might made Right,” this ceased to be the case in the “New World Order” born with the pact (319, 333). The old Roman maxim “If you want peace, prepare for war” gave way to its opposite: “If you want peace, prepare for peace” (xi). Though the birth of the New World of “global cooperation” built on “hundreds of thousands of international agreements” has been painfully slow and complex, its key principle is simple: aggressive war is no longer legal (305, 332, xvii–xviii). Deprived of its foundation in war, the edifice of the Old World Order has crumbled. States can no longer (legally) conquer other states; gunboat diplomacy has lost its legitimacy; and the main method of enforcement has become economic sanctions (xii, 304–5).

*The Internationalists* is divided in three parts, with the genesis of the pact (1919–1946) in the center, flanked by the “Old World Order” (ca. 1603–1899) and the “New World Order” (ca. 1946–2016). The central (and longest) part, titled “Transformations,” essentially rewrites the history of the twentieth-century quest to govern the world. Through meticulous archival research, the authors seek to establish that the backbone of the current international order, the United Nations, is an American creation. By this, they mean that the UN Charter was “conceived by Americans, negotiated by Americans, and made possible by Americans” (213). Not only was the first draft penned by James T. Shotwell (196), a professor of history at Columbia University; more importantly, its core premise—the renunciation of war as an instrument of national policy—was also conceived by the Americans who fought for the 1928 pact. This principle was then incorporated into the constitutions of Germany, Italy, and Japan (214). In short, no Kellogg-Briand Pact, no United Nations or lasting peace. The Paris Peace Pact, as the subtitle has it, “remade the world.”

On the surface, this is a narrative of the triumph of law over power politics. But this is not what the book seeks to show. What remade the world, according to the authors, were ideas, which created laws as well as power. Indeed, the central theoretical thesis of the book is that “*real power . . . does not exist in the absence of law. Law creates real power*” (422). This means that it is not—or not *only*—thanks to NATO, or to American hegemony, or to nuclear weapons that there has been no great-power conflict since 1945. We owe the long peace (at least in part) to a normative transformation that has, in effect, transformed human nature (332, cf. 115). Just as slavery, long considered “natural,” was outlawed, so we have outlawed war. What was previously justified as part of war (arson, rape, plunder, torture), and seen as “natural,” is now a crime (115). Only this seems to account for the remarkable fact that no state has ever used the threat of nuclear war to expand its territory (332).

The authors focus on two mechanisms that have led to a “far more peaceful” world (13). The first is sheer human ingenuity, buttressed by pragmatic and “idealistic” thinking (cf. 115, 213–14). The key organizing principle of the New World Order, according to Hathaway and Shapiro, is the World Trade Organization (preceded by the General Agreement on Tariffs and Trade signed in 1947) (378–79). Free trade has completely transformed our lived reality: the food we eat, the technology we use, the medicines we can buy (378). Yet, more importantly in geopolitical terms, the WTO has made possible a global order that does not depend on the threat of force. The power of the WTO rests on an institution developed a millennium ago in Iceland, namely, “outcasting” (373). Just as Iceland lived peacefully for centuries without an executive power (or an army, or a police force), relying on assemblies where delinquents could be ostracized (and eventually killed with impunity), so the WTO may exclude even the strongest powers from the gains of trade (372).

This has not prevented the current trade war between China and the United States; nor was the threat of sanctions sufficient to dissuade Putin from seizing Crimea in 2014. But these are exceptions. Indeed, Putin’s invasion was the first territorial conquest in decades (in the Old World Order, this was the norm: “roughly *eleven* Crimeas per year” [314]). What is more, almost every conquest that took place after 1928 has been reversed. Thus, for example, Japan gave up Manchuria and parts of China; Italy returned Ethiopia; and the Soviet Union lost the Baltic countries. As the authors’ quantitative analyses show, the amount of land seized in the 1930s that was later returned is striking indeed (317). And the principle is clear: states simply stopped recognizing illegal conquests soon after the Paris Peace Pact of 1928.

Once Might no longer made Right, states became free to focus on absolute (versus relative) gains: comparative advantage became the name of the game as international trade soared (343).

Institutional design—made possible by the legal revolution of 1928—was one mechanism that promoted peace. The other mechanism, which preceded it, was a battle of ideas. Perhaps the most fascinating part of the book narrates the struggle between towering jurists pleading the case for and against the New World Order. The leading minds were (respectively) Hersch Lauterpacht and Carl Schmitt, whose legal acumen clashed in the Nuremberg trials. As an adviser to US attorney general Robert Jackson, Lauterpacht provided the reasoning that authorized the Lend-Lease act of 1941, and thus the US retreat from neutrality, on the basis of the 1928 Peace Pact (247). Lauterpacht also advised Jackson in his role as chief prosecutor for the United States at Nuremberg. Lauterpacht argued that the 1928 pact had made the outbreak of war a concern of the entire world (239). If aggressive war is illegal, signatories to the pact could not remain neutral. Not only could they (legally) discriminate and impose sanctions on aggressors, but they could also (criminally) prosecute them, as the Nuremberg trials did (239, 249, 267, 270).

Lauterpacht's opponent in Nuremberg was Schmitt, who, in the summer of 1945, wrote a long memo to defend the German industrialist and war supporter Friedrich Flick (271). Though Flick was not prosecuted, Schmitt's memo was followed almost verbatim by Hermann Jahrreiss in his plea for the defense (286). Schmitt was emphatic that the "unspeakable crimes" of Hitler and his accomplices must be punished, without the need to invoke a positivistic norm. But war itself could not be criminalized (274). Since there is no definition of war, its criminalization would be an infinite project—namely, perpetual vigilance of the "enemies of all humanity" on a planetary scale; hence perpetual war.<sup>1</sup>

Though Schmitt's argument may have been prophetic of the post-9/11 escalation of violent conflict on a global scale—conflict fueled by infinite counterterrorism operations and ill-designed "wars" on drugs, for example—it was defeated on the plane of international law, which now considers aggressive war a crime. Schmitt was arrested in September 1945 by the Office of the Military Government of the United States (275). In captivity, he penned a remarkable eulogy of the Old World Order and its architects. Of Vitoria,

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<sup>1</sup> See Carl Schmitt, "The International Crime of the War of Aggression and the Principle '*Nullum crimen, nulla poena sine lege*'" (1945), in *Writings on War*, ed. and trans. Timothy Nunan (Cambridge: Polity, 2011), 156, cf. 154, 166.

Gentili, and Grotius, he wrote, “I love them. They belong to our camp.” Referring to Bodin and Hobbes, he went further: “These two figures from the religious civil wars became living, contemporary people to me. They are brothers to me and we became, transcending centuries, a family” (294, citing Schmitt’s unpublished manuscript “*Ius Publicum Europaeum*”).

It is a great irony of *The Internationalists* that it adopts Schmitt’s framework and premises to proclaim the defeat of Schmitt and his camp. In the book’s narrative, the thinkers of the *ius publicum europaeum* (Schmitt’s “family”) are “interventionists,” against whom a long line of thinkers and lawyers and professors—from Kant, Rousseau, and Lauterpacht to Samuel Levinson and James T. Shotwell—provide an “internationalist” alternative (96–97, 423). Yet, of course, the leading interventionist power has been the United States, whose role in “policing the system” through the kind of war that has been outlawed barely elicits a line of criticism from Hathaway and Shapiro (cf. 419). “Law creates *real* power,” according to the authors, but one must also say that sovereign power can suspend the law, as the proliferation of states of exception after 9/11 has shown. *The Internationalists* should be read as a powerful case for the view that laws, and ideas, have the power to shape the behavior of citizens and statesmen. The narrative around that case is, at best, a brilliant polemic, which seeks to defeat Schmitt at his own game.