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The Kellogg-Briand Pact: A Reappraisal

Julie M. Bunck* and Michael R. Fowler†

This Article reappraises the Pact of Paris, or Kellogg-Briand Treaty, of 1928. Kellogg-Briand stands as one of history's most universally scorned and criticized international agreements. Michael Fowler and Julie Bunck examine its background, how the treaty took shape, and its ultimate results, and argue in favor of a more balanced appraisal. Although Kellogg-Briand plainly failed to stop wars from breaking out and was marked by serious institutional and procedural defects, it stood as an important early venture in multilateralism. It formed a significant part of the legal basis for the post-World War II prosecutions of German and Japanese leaders for having waged aggressive war. It helped to bring about new attitudes toward intervention by third parties in others' disputes. Most importantly, rather than war being the legitimate prerogative of sovereigns, freely relied upon to settle disputes and launched at the complete discretion of those in charge of a state's government, international law evolved to circumscribe the use of armed force with legal restrictions. The forcible acquisition of territory by conquest became illegitimate and individual criminal liability might attach to those who pursued it. In criminalizing war, Kellogg-Briand played a role in the development of a new norm of behavior in international relations, a norm that continues to play a role in our current international order.

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* Professor of Political Science, Department of Political Science, and Distinguished Honors Professor, University of Louisville. Ph.D., University of Virginia (1988); M.A., Indiana University (1983); B.A. Kansas State University (1982).

† Professor of Political Science, Department of Political Science, University of Louisville. J.D., Harvard Law School (1986); M.A. University of Virginia (1985); B.A. Dartmouth College (1982).

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I. INTRODUCTION

Few, if any, international agreements have been so universally scorned as the Pact of Paris (1928), better known in the United States as the Kellogg-Briand Pact and sometimes also referred to as the General Treaty for the Renunciation of War.¹ In August 1928, representatives of fifteen countries, including the United States, France, Great Britain, Germany, Japan, and Italy, signed Kellogg-Briand,² named after the two diplomats who had conceived the effort—French Minister for Foreign Affairs Aristide Briand and U.S. Secretary of State Frank Kellogg. In short order, more than sixty governments joined the Pact.³ The most recent signatories were Barbados (1971), Antilles and Aruba (1986), Dominica (1988), and Bosnia and Herzegovina (1994).⁴

Prior to Kellogg-Briand, war had been considered lawful: a foreign policy decision, not a violation of international law.⁵ At the time, the chief

1. Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 (1929) [hereinafter Kellogg-Briand].

2. The other original signatories, referred to as the High Contracting Parties, were Australia, Belgium, Canada, Czechoslovakia, India, Ireland, New Zealand, Poland, and South Africa. See Treaty for the Renunciation of War, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 (1933).

3. OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD*, at xii (2017).

4. *Id.*

5. A 1904 text stated that international law could not “impart the character of a penalty to war, when it is powerless to enforce its decisions.” The authors continued:

International law has consequently no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation. Hence both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights.

purpose of the laws of war, according to U.S. Secretary of State Henry Stimson, “was to produce oases of safety for life and property in a world which still recognized and legalized the destruction of human life and property as one of the regular methods for the settlement of international controversies.”⁶

Joseph Conrad once suggested, “What all men are really after is some form, or perhaps only some formula, of peace.”⁷ The Kellogg-Briand Treaty featured a formula with only two operative articles, containing language called “simple in the extreme.”⁸

Article I⁹

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another.

Article II¹⁰

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Kellogg observed: “The treaty is a simple and plain declaration and agreement. It is not cumbered with reservations and conditions stipulating when a nation might be justified in going to war.”¹¹

Typically, treaties declare their duration as well as steps a state may take to withdraw.¹² On account of its particular subject-matter, Kellogg-Briand does not specify a termination date, nor does it contain any denunciation provision.¹³ It is thus “an extremely rare modern instance of

WILLIAM EDWARD HALL & J.B. ATLEY, A TREATISE ON INTERNATIONAL LAW 61 (J.B. Atley ed., 5th ed. 1904).

6. Henry L. Stimson, *The Pact of Paris: Three Years of Development*, 11 FOREIGN AFF., at viii (1932). For the fascinating background to this article, see David C. Deboe, *Secretary Stimson and the Kellogg-Briand Pact*, in ESSAYS ON AMERICAN FOREIGN POLICY 31, 36-43 (Margaret F. Morris & Sandra L. Myres eds., 1974).

7. MARIAN C. MCKENNA, BORAH 237 (1961).

8. DEXTER PERKINS, AMERICA’S QUEST FOR PEACE 34-35 (1962).

9. Kellogg-Briand, *supra* note 1, art. 1.

10. *Id.* art. 2.

11. Frank Kellogg, *Provisions of the Treaty Explained*, 7 CONG. DIG. 338 (1928).

12. See GERHARD VON GLAHN & JAMES L. TAULBEE, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 581 (10th ed. 2013); DAVID HUNTER MILLER, THE PEACE PACT OF PARIS 147 (1928).

13. VON GLAHN & TAULBEE, *supra* note 12, at 581.

a perpetual agreement.”¹⁴ David Hunter Miller noted, “The promise of each [party] made to all the others runs in perpetuity, unless there is unanimous consent to termination or limitation or revision.”¹⁵

On multiple occasions prior to Kellogg-Briand, people argued that war should be unlawful.¹⁶ For instance, in 1905 William James wrote, “I look forward to a future when acts of war shall be formally outlawed among civilized people.”¹⁷ In 1913, after dedicating the Peace Palace at the Hague, industrialist and philanthropist Andrew Carnegie called “the killing of man by man, the greatest of all crimes.”¹⁸

Then, the Treaty of Versailles declared in Article 227 that “[t]he Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties,” and stated that “[a] special tribunal will be constituted to try the accused.”¹⁹ When the German delegation protested, the Allies responded by calling World War I “the greatest crime against humanity and the freedom of peoples that any nation calling itself civilized, has ever consciously committed . . . a crime deliberately against the life and liberties of the people of Europe.”²⁰ Ultimately, however, Kaiser Wilhelm never went to trial on these charges since the Netherlands, where he had fled after abdicating, refused to turn him over for trial.²¹ Nevertheless, the thesis that waging war had become an unlawful criminal exercise had been declared, and the prospect of trying leaders for breaking the peace appeared to be a real possibility.

Kellogg-Briand was thus highly innovative in marking the first time that a wide array of governments joined in a treaty condemning war as a foreign policy tool.²² Although the provisions never use such terms as

14. *Id.*

15. MILLER, *supra* note 12, at 147.

16. WILLIAM JAMES, THE HEART OF WILLIAM JAMES 310 (Robert Richardson ed., 2010).

17. *Id.*

18. ROBERT H. FERRELL, PEACE IN THEIR TIME: THE ORIGINS OF THE KELLOGG-BRIAND PACT 7 n.14 (1952).

19. LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 5, 6 (3d ed. 2008).

20. *Id.* at 6.

21. In noting that Kaiser Wilhelm had been charged with an offense against “international morality” and the “sanctity of treaties,” Hathaway and Shapiro pointed out that the charge was not for a “legal violation.” They concluded that the glaring legal impropriety of the Treaty of Versailles in this respect kept the Dutch from releasing him to the Allies. HATHAWAY & SHAPIRO, *supra* note 3, at 252.

22. The idea of war being an instrument of national policy may be traced to Carl von Clausewitz and his opus *On War*. He titled a subsection of that work “War as an Instrument of Policy.” CARL VON CLAUSEWITZ, ON WAR 401 (Anatol Rapoport ed., 1968).

crime, criminal, or outlaw, people presumed that its content had made war illegal in all cases other than self-defense.²³

A. *Criticisms of Kellogg-Briand*

The vast majority of the literature on international affairs has contemptuously dismissed Kellogg-Briand,²⁴ though critics have differed on whether the treaty “was merely meaningless or genuinely injurious to the cause of peace.”²⁵ E.H. Carr called it one of the “purely utopian projects,”²⁶ and Jerald Combs referred to “this emotional paean to peace.”²⁷ Hans Morgenthau criticized it as “the wrong way of thinking about foreign policy.”²⁸ Kenneth W. Thompson critiqued Kellogg-Briand as “diplomatic make-believe that sought for peace in pious sentiments.”²⁹ Thomas Bailey wrote:

The Kellogg-Briand Pact proved to be a monument to illusion. It was not only delusive but dangerous, for it further lulled the public . . . into a false sense of security. Instead of outlawing wars, the treaty merely outlawed the declarations of wars. Nations thereafter, always fighting defensively of course, tended to become involved in ‘incidents,’ not wars.³⁰

Various leaders and diplomats joined the disapproving chorus. Senator Henry Cabot Lodge declared, “[R]enouncing war by governmental fiat seems inherently absurd.”³¹ Benito Mussolini termed

23. HATHAWAY & SHAPIRO, *supra* note 3, at 253.

24. Daniel Drezner of the Fletcher School of Law and Diplomacy remarked, “I’ve honestly never seen that treaty talked about favorably.” *Id.* at xiii.

25. L. Ethan Ellis, *Frank B. Kellogg*, in AN UNCERTAIN TRADITION: AMERICAN SECRETARIES OF STATE IN THE TWENTIETH CENTURY 165-66 (Norman A. Graebner ed., 1961) [hereinafter Ellis, *Frank B. Kellogg*].

26. E.H. CARR, THE TWENTY YEARS’ CRISIS, 1919-1939, at 28 (1964).

27. JERALD A. COMBS, THE HISTORY OF AMERICAN FOREIGN POLICY FROM 1895, at 132 (4th ed. 2012).

28. HANS MORGENTHAU, POLITICS IN THE TWENTIETH CENTURY 410 (unabridged ed., 1962).

29. KENNETH W. THOMPSON, POLITICAL REALISM AND THE CRISIS OF WORLD POLITICS: AN AMERICAN APPROACH TO FOREIGN POLICY 98 (1960).

30. THOMAS A. BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE 650 (10th ed., 1980).

31. Henry Cabot Lodge, *The Meaning of the Kellogg Treaty*, in IDEAS AND DIPLOMACY: READINGS IN THE INTELLECTUAL TRADITION OF AMERICAN FOREIGN POLICY 524, 530 (Norman A. Graebner ed., 1964).

Kellogg-Briand “reciprocal leg-pulling.”³² George Kennan described it as “childish, just childish.”³³ Henry Kissinger labeled it “meaningless.”³⁴

The scope of the Kellogg-Briand Pact was in one sense quite broad, but in another rather sketchy and limited. Certainly, its two short articles left many issues unexplored. Did the treaty’s terms prohibit going to war to enforce legal rights?³⁵ What if a state used military force but did not call it “war”? What if a government claimed its actions did not rise to the level of “war,” as in a reprisal? The words of the treaty do not definitively settle any such matters.

Shortly after its passage, one scholar asked: did forbidding war as a means of *national* policy permit it as a means of *international* policy, or “as a means of asserting a religious dogma, a philosophy of life, or . . . of crushing the Soviet Union?”³⁶ Another contemporary observer noted: “The word ‘policy’ suggests a settled rule of conduct. May war then be waged as an *exception* to the rule, when it is not an instrument of policy?”³⁷ In 1928 the Foreign Policy Association questioned whether article 2, in declaring that either side in a dispute shall never seek to settle disputes except by peaceful means, created any positive obligation to settle disputes at all.³⁸

Kellogg-Briand contained no sanctions for its violation,³⁹ much less any institutions to support it or procedures for determining if its terms had been broken.⁴⁰ The Pact provided international society with legal

32. J.O.P. Bland, *The Way of Peace*, in SELECTED ARTICLES ON THE PACT OF PARIS 262 (James Thayer Gerould ed., 1929).

33. HATHAWAY & SHAPIRO, *supra* note 3, at xii.

34. Kissinger continued: “The ineffectual Kellogg-Briand Pact of 1928, by which nations renounced war as a means of policy, showed the limits of exclusively legal restraints.” HENRY KISSINGER, *DIPLOMACY* 280, 808-09 (1994).

35. MARY ELLEN O’CONNELL, *INTERNATIONAL LAW AND THE USE OF FORCE* 132 (2005). In Senate debate, Senator Borah argued “that every nation reserved the right to employ force to protect its nationals when their lives might be endangered in foreign lands.” Philip Marshall Brown, *The Interpretation of the General Pact for the Renunciation of War*, 23 AM. J. INT’L L. 374, 375 (1929).

36. HANS WEHBERG, *THE OUTLAWRY OF WAR: A SERIES OF LECTURES DELIVERED BEFORE THE ACADEMY OF INTERNATIONAL LAW AT THE HAGUE AND IN THE INSTITUT UNIVERSITAIRE DE HAUTES ETUDES INTERNATIONALES AT GENEVA* 76 (Edwin H. Zeydel trans., 1931).

37. Oscar T. Crosby, *The Paris Pact*, reprinted in SELECTED ARTICLES ON THE PACT OF PARIS, *supra* note 32, at 206.

38. Foreign Policy Ass’n Info. Serv., *The Antiwar Pact: What Wars Are Actually Prohibited*, reprinted in SELECTED ARTICLES ON THE PACT OF PARIS, *supra* note 32, at 169.

39. U.S. senators were concerned that any enforcement term in Kellogg-Briand would commit the United States to military action; hence, “Borah was proud of the fact that it carried no obligation to apply sanctions.” MCKENNA, *supra* note 7, at 248.

40. VON GLAHN & TAULBEE, *supra* note 12, at 581.

provisions, but no way to enforce them.⁴¹ Kellogg-Briand utterly failed to lay out how international relations, in which the use of force had featured so prominently in the past, might be transformed to enable its principles to be followed.⁴² Oona Hathaway and Scott Shapiro argued,

The problem with the Peace Pact was that it was purely destructive. By outlawing war, states renounced the principal means they had for resolving their disputes. They demolished the existing system, which had allowed states to right wrongs with force, but they failed to replace it with a new system.⁴³

Instead, Kellogg-Briand's proponents spoke, sometimes vaguely or hopefully, of international public opinion working to halt conflict.⁴⁴ Frank Kellogg, himself, observed: "If the people are minded that there shall be no war, there will not be."⁴⁵ Senator William Borah likewise proclaimed, "There is not a government on the face of the earth strong enough to declare and carry on war against the aroused and sustained public opinion of the people."⁴⁶

The notion that public opinion, rather than the configuration of power, might suffice to keep the peace very much reflected popular thought in the interwar period. E.H. Carr noted "the glaring and dangerous defect of nearly all thinking, both academic and popular, about international politics in English-speaking countries from 1919 to 1939—the almost total neglect of the factor of power."⁴⁷

The conventional wisdom thus views Kellogg-Briand as a simple-minded, idealistic effort to outlaw war.⁴⁸ Clearly, the conflicts of the 1930s proceeded without regard for its terms. Japan used armed force in China in 1931 and again on a broader scale in 1937, while Italy attacked Ethiopia in 1935, "the one thinly disguised as a police operation, the other, still more thinly, as a defensive war."⁴⁹ Then, of course, Germany's attack on

41. *Id.* at 581.

42. *Id.* at 581-82.

43. HATHAWAY & SHAPIRO, *supra* note 3, at xvi.

44. RAYMOND J. SONTAG, *A BROKEN WORLD 1919-1939*, at 176 (1971). For a specific example, see Stimson, *supra* note 6, at xii-xiii, and see also James Shotwell, *A Historical Commentary*, in *SELECTED ARTICLES ON THE PACT OF PARIS*, *supra* note 32, at 135.

45. Frank B. Kellogg, *The Settlement of International Controversies by Pacific Means, Address at the World Alliance for International Friendship (Nov. 11, 1928)*, in *SELECTED ARTICLES ON THE PACT OF PARIS*, *supra* note 32, at 117.

46. William E. Borah, *Public Opinion Outlaws War*, in *IDEAS AND DIPLOMACY: READINGS IN THE INTELLECTUAL TRADITION OF AMERICAN FOREIGN POLICY*, *supra* note 31, at 520-21.

47. CARR, *supra* note 26, at vii.

48. E.H. CARR, *INTERNATIONAL RELATIONS BETWEEN THE TWO WORLD WARS, (1919-1939)*, at 118-20 (1948).

49. *Id.* at 119.

Poland in 1939 climaxed the rising international violence of the 1930s, leading to the outbreak of world war.

Indeed, Kellogg-Briand seemed to fail dismally in accomplishing its central purpose, since history's most sweeping and destructive conflict broke out one decade after the Pact came into force. And virtually all of the Kellogg signatories became World War II belligerents.⁵⁰ This silenced and disillusioned the treaty's proponents.⁵¹ Arnold Toynbee summarized:

The Kellogg-Briand Pact . . . was . . . a brief afterglow of Wilsonian optimism on the darkening horizon of European politics . . . Calling for the renunciation of aggressive war, but without establishing means of enforcement, the Kellogg-Briand Pact . . . stands as an ironic preface to the supervening decades of blood and steel, the 1930's and 1940's.⁵²

B. *Reappraising the Treaty*

Winston Churchill once noted, "History with its flickering lamp stumbles along the trail of the past, trying to reconstruct its scenes . . ."⁵³ He observed, "In one phase men seem to have been right, in another they seem to have been wrong. Then again, a few years later, when the perspective of time has lengthened, all stands in a different setting. There is new proportion. There is another scale of values."⁵⁴

As the ninetieth anniversary of the treaty's signing passes by, we see the moment as ripe to go back and carefully review the Kellogg-Briand Pact, taking advantage of the perspective offered by the intervening decades. As Churchill suggested, on occasion, the passage of time enables one to view matters in a different light.⁵⁵ To see what a reappraisal of Kellogg-Briand might suggest, we organize this Article around the following questions.

- Why did the governments of France and the United States sponsor this treaty? What foreign policy considerations did the governments have in mind, and what political pressures affected the initiative?

50. *The Kellogg-Briand Pact, 1928*, OFF. HISTORIAN, <https://history.state.gov/milestones/1921-1936/kellogg> (last visited Feb. 4, 2019).

51. Arnold Toynbee, *Commentary*, in MAJOR PEACE TREATIES OF MODERN HISTORY: 1648-1967, at 1232 (Fred Israel ed., 1967).

52. *Id.*

53. KENNETH W. THOMPSON, WINSTON CHURCHILL'S WORLD VIEW: STATESMANSHIP AND POWER 106 (1983).

54. *Id.*

55. *Id.*

- Who were Aristide Briand and Frank Kellogg, and is it fair to dismiss the underlying motivations for the Kellogg-Briand Pact as completely naive, idealistic, and utopian?
- How exactly did the treaty take shape? Did the governments involved qualify their acceptance of the treaty's commitments?
- During its ninety years of existence, has Kellogg-Briand been an unalloyed failure, or has it had any notable consequences?

II. THE BACKGROUND TO THE KELLOGG-BRIAND TREATY

A. *The Link to World War I*

Plainly, the Pact of Paris sprang directly from the vast destruction of World War I, which had been popularly called “the war to end war.”⁵⁶ In announcing to Congress the armistice that halted the fighting, Woodrow Wilson declared: “It is not now possible to assess the consequences of this great consummation. We know only that this tragical war, whose consuming flames swept from one nation to another until all the world was on fire, is at an end”⁵⁷ At much the same time, Prime Minister David Lloyd George addressed the House of Commons with the words: “I hope we may say that thus, this fateful morning, came to an end all wars.”⁵⁸

One source calculated that one life had been lost for every ten seconds of the war's duration.⁵⁹ From France alone, 1.4 million soldiers had been killed;⁶⁰ that casualty figure accounts for roughly one half of all French men between the ages of twenty and thirty-two when the war had started.⁶¹

Wholly apart from the extensive property destruction, the staggering war debts, and the sweeping economic disruption caused by more than four years of total war, the towering human toll was sobering. Paul Kennedy observed:

Around 8 million men were killed in actual fighting, with another 7 million permanently disabled and a further 15 million “more or less seriously wounded”—the vast majority of these being in the prime of their productive life. In addition, Europe *excluding* Russia probably lost over 5 million

56. Stimson, *supra* note 6, at ix.

57. FERRELL, *supra* note 18, at 2.

58. *Id.* at 3.

59. *Id.* at 42.

60. ELIZABETH GREENHALGH, *THE FRENCH ARMY AND THE FIRST WORLD WAR*, at xi (2014) (the statistic includes colonial troops and foreign volunteers fighting for France).

61. ADAM HOCHSCHILD, *TO END ALL WARS: A STORY OF LOYALTY AND REBELLION, 1914-1918*, at xiv (2011).

civilian casualties through . . . “war-induced causes”—“disease, famine and privation consequent upon the war . . . ; the Russian total, compounded by the heavy losses in the civil war, was much larger. . . . Finally, even as the major battles ground to a halt, fighting and massacres occurred during the postwar border conflicts in, for example, eastern Europe, Armenia, and Poland; and none of these war-weakened regions escaped the dreadful influenza epidemic of 1918-1919, which carried off further millions. Thus, the final casualty list for this period might have been as much as 60 million people⁶²

And, Kennedy concluded: “There is no known way of measuring the personal anguish and the psychological shocks involved in such a human catastrophe, but it is easy to see why the participants—statesmen as well as peasants—were so deeply affected.”⁶³

What made World War I even more difficult to bear was the belief of various commentators and such statesmen as Sir Edward Grey, British Foreign Minister in 1914, that the conflict had been a terrible accident.⁶⁴ In 1920 Arthur Sweetser, a distinguished international civil servant, recounted Grey’s words: “[T]he war came into being largely by default, because the forces of negotiation and peaceful settlement marshalled against it suddenly collapsed under the unprecedented pressure and allowed all the rest of the world to cave in behind them.” He then concluded, “[T]he world in 1914 got itself into a blind alley where all doors were closed except that to war.”⁶⁵ Sweetser went on to observe:

The catastrophe began without a single conference. The nations were plunged into war by a handful of telegrams which in their portentous official phraseology are even today not fully understood. One false step led to another until the vicious circle was complete. No meeting ground was available, no obligation for discussion existent. The madmen who had worked for war could generate it without a pretence of discussion, without the simple human act of meeting their opponents face to face, without asking yea or nay of their peoples.⁶⁶

And, he concluded: “States had grown and grown in power, each a law unto itself, each in all its national pride scornful of the others, yet all

62. D.H. ALDCROFT, FROM VERSAILLES TO WALL STREET 1919-1929, at 13 (1977); *see also* PAUL KENNEDY, THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000, at 278 (1987).

63. KENNEDY, *supra* note 62, at 278-79.

64. Stephen K. Valone, “*There Must Be Some Misunderstanding*”: Sir Edward Grey’s *Diplomacy of August 1, 1914*, 27 J. BRIT. STUD. 405, 406 (1988).

65. ARTHUR SWEETSER, THE LEAGUE OF NATIONS AT WORK 5 (1920).

66. *Id.* at 8-9.

crossing and recrossing each other until an almost hopeless tangle was created.”⁶⁷

B. Peace as a Foreign Policy Goal

Given the prior unprecedented global destruction, many assumed that the only interests served by a general war were those “of munitions makers and other ‘profiteers.’”⁶⁸ The leaders of Great Powers during the interwar period frequently declared peace to be their paramount foreign policy goal.⁶⁹ For the French, Aristide Briand stated that “[p]eace must prevail, must come before all,”⁷⁰ and “peace comes even before justice,”⁷¹ while for the British, Anthony Eden wrote, “The maintenance of peace is the first objective of British foreign policy.”⁷² Soviet foreign minister Georgy Vasilyevich Chicherin claimed, “The principal aim of the international policy of the Soviet Union is the preservation of peace,”⁷³ while Japanese diplomat Yosuke Matsuoka argued, “The object of Japan, despite propaganda to the contrary, is peace.”⁷⁴ Even Adolf Hitler, in a 1937 speech to the German Reichstag, declared, “Peace is our dearest treasure.”⁷⁵

In the postwar period, different peoples, governments, and political parties responded to the mass slaughter as well as the use of such new weapons as machine guns, poisonous gas, and fighter planes. Modern warfare had become so horrible that people felt that leaders needed to be working to prevent it, constantly, conscientiously, and actively. In the United States, during the debates over American membership in the League of Nations, Senator Lodge laid out the essence of the Republican Party position in a private letter to fellow Republican Senator Albert Beveridge.⁷⁶ He wrote that Republicans should not admit that the League was a good thing, but rather “[t]he purpose of the League—that is, the preservation of world peace—we are all anxious to see.”⁷⁷

67. *Id.* at 9-10.

68. SONTAG, *supra* note 44, at 176.

69. CARR, *supra* note 26, at 52.

70. *See id.* at 52 n.1.

71. *See id.* at 73.

72. *See id.* at 52 n.1.

73. *See id.*

74. *See id.*

75. *See id.*

76. FERRELL, *supra* note 18, at 39.

77. *Id.*

The desire for peace, however, while readily declared and politically popular, was not so deeply rooted as the rhetoric might lead one to believe. In 1915 Vladimir Lenin observed, cynically: "Absolutely everybody is in favour of peace in general . . . including [General Horatio] Kitchener, [Marshal Joseph] Joffre, [Field Marshall Paul von] Hindenburg, and Nicholas the Bloody [Tsar Nicholas II] . . ." ⁷⁸

Furthermore, while the common public sentiment in the English-speaking world was that armed conflict profited only arms manufacturers, other people held different views. Carr wrote:

The argument did not seem particularly convincing to Germans, who had profited largely from the wars of 1866 and 1870, and attributed their more recent sufferings, not to the war of 1914, but to the fact that they had lost it; or to Italians, who blamed not the war, but the treachery of allies who defrauded them in the peace settlement; or to Poles or Czecho-Slovaks who, far from deploring the war, owed their national existence to it; or to Frenchmen, who could not unreservedly regret a war which had restored Alsace-Lorraine to France; or to people of different nationalities who remembered profitable wars waged by Great Britain and the United States in the past. ⁷⁹

Naturally enough, governments that aspired to revise the international status quo in their favor did not view war and peace in the same terms as those who saw the post-World War I status quo in a positive light and whose supreme foreign policy goal was to maintain it. Even James Shotwell, a leader of the movement to outlaw war, conceded: "[W]ar has been waged against injustices that could not otherwise be rooted out, and to prevent a static world with injustice consecrated in it." ⁸⁰

Confronted with a general consensus favoring peace, one that only partially obscured the reality of different national perceptions and interests, the grand puzzle for the interwar period was how exactly to prevent another world war from occurring? The Covenant of the League of Nations had not attempted to make war criminal or illegal. However, as two scholars noted, "[T]he League did promote the idea that resort to force ought to be seriously limited—that war as an instrument of unilateral policy no longer had legitimacy." ⁸¹

This was the context in which some suggested that law be injected further into foreign policymaking. In the United States much of the early

78. CARR, *supra* note 26, at 52.

79. *Id.* at 51-52.

80. Shotwell, *supra* note 44, at 146.

81. VON GLAHN & TAULBEE, *supra* note 14, at 38.

twentieth century had been marked by periodic efforts to expand the use of international arbitration, something favored by the administrations of Teddy Roosevelt, William Taft, and Calvin Coolidge, though restrained by the often strict reservations imposed by the U.S. Senate.⁸² Then, for the Wilson administration, Secretary of State William Jennings Bryan had negotiated a series of conciliation, or “cooling-off,” treaties in which the parties agreed not to go to war pending receipt of a commission’s investigation of an international dispute.⁸³ One possible next step might be to explore outlawing acts of aggression. Could the dictates of international law, by formally proscribing war, help international society to prevent at least some wars from occurring?

C. *Frank Kellogg and Aristide Briand*

Our inquiry brings us next to Frank Kellogg and Aristide Briand. Who were these diplomats, and how did they come to be involved in this treaty?

Frank Billings Kellogg started his professional life in Minnesota.⁸⁴ Admitted to the bar in 1877, he served for a total of nearly a decade, first as city attorney of Rochester, Minnesota, and later as Olmsted County attorney.⁸⁵ In 1887 he established a law practice in St. Paul, eventually being named special government counsel in antitrust prosecutions.⁸⁶ During the Theodore Roosevelt administration Kellogg came to public notice as a “trust-buster,” prosecuting Standard Oil Company.⁸⁷ After later representing various corporate clients,⁸⁸ he gained such national prominence as to be named President of the American Bar Association in 1912-1913.⁸⁹

Frank Kellogg also moved into Republican politics with a position on the Republican National Committee from 1904 to 1912.⁹⁰ Five years later, he entered the U.S. Senate, serving on the Foreign Relations Committee.⁹¹ In the 1920 debates over possible American membership in

82. PERKINS, *supra* note 8, at 21-23; *see also* JULIUS W. PRATT, A HISTORY OF UNITED STATES FOREIGN POLICY 302 & n.10 (3d ed. 1972).

83. PERKINS, *supra* note 8, at 29.

84. DEP’T OF STATE, THE SECRETARIES OF STATE: PORTRAITS AND BIOGRAPHICAL SKETCHES 91 (1978).

85. *Id.*

86. *Id.*

87. FERRELL, *supra* note 18, at 80.

88. *Id.*

89. DEP’T OF STATE, *supra* note 84.

90. *Id.*

91. *Id.*

the League of Nations, Senator Kellogg was not one of the hard-liners, known as “irreconcilables,” but instead joined the group of Republican senators endorsing membership with reservations.⁹²

After losing his reelection bid, Kellogg gained further international expertise. A delegate to the 1923 Pan-American Conference, he was later appointed U.S. Ambassador to Great Britain, serving there for two years before President Calvin Coolidge selected him to be Secretary of State in 1925.⁹³ He accepted that position on his sixty-eighth birthday.⁹⁴ Frank Kellogg has been described as “slight (five feet six inches), inclined to stoutness, snowy-haired, and afflicted with a tremor of hands and head, as well as one artificial eye. He possessed a temper which flared in sudden violence and as quickly subsided.”⁹⁵

Undoubtedly, Frank Kellogg’s most notable work as Secretary of State was to fashion Kellogg-Briand, for which in 1930 he received the Nobel Peace Prize.⁹⁶ In a 1930 *New York Times* interview, Kellogg underscored his core views on American foreign policy: “Anything which threatens war in the world touches the United States. Isolation is no longer possible.”⁹⁷ He then continued: “It is said that disputes between nations in which we have no interest are none of our business and we should keep our hands off; but a dispute which threatens war is the business of every nation to settle.”⁹⁸

Other than Kellogg-Briand, however, the Secretary of State’s list of accomplishments in office was limited. This was a challenging time to serve in the State Department, however, since “Coolidge had neither any knowledge of nor any concern for foreign affairs beyond the bare obligations inherent in his office. His autobiography, for example, contains no mention of foreign relations.”⁹⁹ Otherwise, Kellogg’s biographer, L. Ethan Ellis, characterized his other significant foreign policies as inching “inter-American relations toward a sounder base” and restoring China’s tariff autonomy, concluding that “[t]he result was a workmanlike but unimpressive Secretaryship; the shop was kept running,

92. WARREN F. KUEHL & LYNNE K. DUNN, *KEEPING THE COVENANT: AMERICAN INTERNATIONALISTS AND THE LEAGUE OF NATIONS, 1920-1939*, at 3 (1997).

93. L. ETHAN ELLIS, *FRANK B. KELLOGG AND AMERICAN FOREIGN RELATIONS* 7 (1974).

94. *Id.*

95. *Id.* at 7.

96. For Kellogg’s campaign to win the Nobel Prize, while undermining the candidacy of rival Salmon Levinson, see HATHAWAY & SHAPIRO, *supra* note 3, at 129-30.

97. DEANE HELLER & DAVID HELLER, *PATHS OF DIPLOMACY: AMERICA’S SECRETARIES OF STATE* 124 (1967).

98. *Id.*

99. Ellis, *Frank B. Kellogg*, *supra* note 25, at 151.

but few new goods were put on the shelves.”¹⁰⁰ After leaving the U.S. government, Kellogg was eventually appointed a judge on the first World Court, the Permanent Court of International Justice, where he served until poor health caused him to resign in 1935, a year before he died.¹⁰¹

As for Aristide Briand, to Henry Kissinger he stood as “a classic political leader of the Third Republic.”¹⁰² Kissinger went on: “Starting his career as a left-wing firebrand, he became a fixture in French Cabinets—occasionally as prime minister but more frequently as foreign minister (he served fourteen governments in that capacity).”¹⁰³ In calling Briand “a most striking personality,” “a consummate politician,” and a “charming, brilliant, capable, experienced, realistic old gentleman” who had already served as French Premier nine times, Robert Ferrell wrote: “Briand could conduct the most difficult of political negotiations with flawless perfection. He achieved, moreover, a great popular following . . . as a superb orator.”¹⁰⁴ British statesmen Austen Chamberlain, who found Briand “incorrigibly witty,” described him as follows: “A heavy drooping moustache half hid a slightly crooked, full-lipped mouth, whose ugliness was redeemed by an enchanting smile that matched well the bright eyes dancing with an often slightly malicious wit.”¹⁰⁵

By 1928 Aristide Briand was best known for his work on the Treaty of Mutual Guarantee, or Locarno Pact.¹⁰⁶ This treaty, signed at Locarno, Switzerland, guaranteed against aggression certain of the borders of Belgium, France, and Germany, with Britain and Italy serving as guarantors.¹⁰⁷ Article 2 stated: “Germany and Belgium, and also Germany and France, mutually undertake that they will in no case attack or invade each other or resort to war against each other.”¹⁰⁸

At the time, many hailed the “Spirit of Locarno” and saw the treaty as an important step toward a peaceful future Europe. The three leaders who negotiated the pact—Briand of France, Chamberlain of Britain, and Gustav Stresemann of Germany—were each awarded the Noble Peace

100. *Id.* at 149.

101. DEP’T OF STATE, *supra* note 84.

102. KISSINGER, *supra* note 34, at 277.

103. *Id.*

104. FERRELL, *supra* note 18, at 62-63.

105. *Id.*

106. 2 MARSHALL CAVENDISH CORP., HISTORY OF WORLD WAR I: VICTORY AND DEFEAT 1917-1918, at 554 (2002).

107. Jonathan Wright, *Locarno: A Democratic Peace?*, 36 REV. INT’L STUD. 391, 397 (2010).

108. Treaty of Mutual Guarantee Between Germany, Belgium, France, Great Britain and Italy, Oct. 16, 1925, 54 L.N.T.S. 289.

Prize.¹⁰⁹ On the one hand, Locarno included a practical dimension, the purpose of having guarantors was to enforce its terms, something Kellogg-Briand notably lacked.¹¹⁰ On the other hand, Locarno appears ominous since Germany, while agreeing to join the League of Nations, had pointedly refused to accept its eastern border with Poland, as opposed to its western boundaries with France and Belgium.¹¹¹ Kissinger has thus argued that Locarno did not mark the dawn of a new world order so much as it “defined the next battlefield.”¹¹²

In this context what Aristide Briand most feared was a resurgence of German militarism, followed eventually by aggression against France. E.H. Carr interpreted Briand’s rhetoric in favor of peace as follows: “In 1928 Briand was fearful of attempts made in the name of justice to disturb a peace settlement favourable to France; and he had no . . . difficulty . . . in finding the moral phraseology which fitted his policy.”¹¹³

D. French Foreign Policy Under Briand

Among other post-war French statesmen, Aristide Briand confronted Germany’s real potential power (“with a population twice as great and with larger economic potentialities”)¹¹⁴ by looking to collect as many allies for France as possible. Revolution in Russia had so altered political power there as to make highly questionable the reliability of that former French ally. The French thus found supremely important the prospect of so-called “guarantee alliances” with Britain and the United States.¹¹⁵ Such a treaty with Britain was signed and ratified; however, the British ratification stipulated that it would not go into effect until the American alliance had been ratified as well.¹¹⁶ And, ultimately, the U.S. Senate proved unwilling to give its assent to a treaty guaranteeing French security.¹¹⁷

The French then looked to ally with smaller countries, signing a secret military alliance with Belgium in 1920, another with Poland (though styled an “*accord politique*”) in 1921, and still another, a Treaty

109. KISSINGER, *supra* note 34, at 274.

110. *Id.*

111. *Id.*

112. *Id.*

113. CARR, *supra* note 26, at 73.

114. James Thayer Gerould, *Introduction to SELECTED ARTICLES ON THE PACT OF PARIS*, *supra* note 32, at 3.

115. FERRELL, *supra* note 18, at 53.

116. *Id.* at 53-54.

117. *Id.*

of Alliance and Friendship, with Czechoslovakia in 1924.¹¹⁸ Then, as part of the 1925 Locarno Pact, two treaties of mutual guarantee were signed: between France and Poland and France and Czechoslovakia.¹¹⁹ The following year came a Treaty of Friendship with Romania in which both countries agreed “that they will in no case attack or invade each other or resort to war against each other,” while undertaking to settle by peaceful means all questions that may arise between them.¹²⁰ This was followed by a nearly identical pact with Yugoslavia.¹²¹

The U.S. government complicated interwar Franco-American relations by continually pressuring France to repay the outstanding debts owed on World War I loans.¹²² In the national security realm, Aristide Briand was gravely concerned that the United States might one day again follow the pattern established in World War I: that is, declare its neutrality and stay out of the fighting in a general war, at least at the outset. In particular, he hoped to “deter the United States from clashing with France and its League allies if they applied sanctions against an aggressor.”¹²³ Briand knew full well that American political leaders were very unlikely to agree to a formal military alliance with France. However, less than a decade after the conclusion of the Great War, peace was overwhelmingly popular across America, and a U.S. presidential election was fast approaching in 1928.¹²⁴ Consequently, pressure might be applied successfully toward some lesser foreign policy objective that would nonetheless link together the United States and France more closely.

To discuss Franco-American relations, Aristide Briand met in Paris in 1926 with Dr. Nicholas Murray Butler, President of Columbia University, and then the next year with Columbia Professor Shotwell.¹²⁵ James Shotwell had been director of research at the Carnegie Endowment of International Peace and had attended the Paris Peace Conference after World War I, serving as historian of the American delegation in Paris.¹²⁶ He suggested to Briand that a bilateral arrangement be negotiated between the United States and France renouncing war between the two countries,¹²⁷

118. *Id.* at 56-60.

119. *Id.* at 61.

120. *Id.* at 64.

121. *Id.*

122. ELLIS, *supra* note 93, at 194.

123. COMBS, *supra* note 27, at 131.

124. SONTAG, *supra* note 44, at 134.

125. FERRELL, *supra* note 18, at 67.

126. *Id.* at 22, 23 n.23a.

127. HELLER & HELLER, *supra* note 97, at 123.

which was, after all, just what France had already done with Romania and Yugoslavia.¹²⁸ Briand took to the idea, perhaps seeing it as a way to come to a variety of alliance sometimes termed informal, backhanded, or negative,¹²⁹ that is, something less than an explicit agreement to cooperate militarily.

III. A TREATY TAKES SHAPE

A. *The Proposal of a Bilateral Agreement*

On April 6, 1927, timed to coincide with the tenth anniversary of the U.S. declaration of war against Germany in World War I,¹³⁰ Aristide Briand released a statement to the Associated Press.¹³¹ The *démarche* proposed that the United States and France, “two great democratic nations,” serve as an example to other peoples by agreeing not to go to war against each other.¹³² In the public message, addressed to the American people, printed in American newspapers, and actually drafted by Professor Shotwell,¹³³ Briand declared:

France would be ready publicly to subscribe, with the United States, to any mutual engagement tending, as between those two countries, to ‘outlaw war,’ to use an American expression. The renunciation of war as an instrument of national policy is a conception already familiar to the signatories of the Covenant of the League of Nations and of the Treaties of Locarno. . . . [T]wo great friendly nations, equally devoted to the cause of peace, would give the world the best illustrations of this truth, that the accomplishment most immediately to be attained is not so much disarmament as the practice of peace.¹³⁴

For several weeks neither American officials nor private citizens responded to Briand’s proposal. Since the State Department received no immediate follow-up communication, the U.S. government “appeared to consider the Briand message simply as an expression of friendship.”¹³⁵ However, in an April 25 letter to the editor of the *New York Times*, President Butler of Columbia University urged the U.S. government to respond positively to Briand’s suggestion, arguing: “M. Briand’s mind is

128. *Id.* at 124.

129. *Id.*; see also ELLIS, *supra* note 93, at 194.

130. NORMAN A. GRAEBNER ET AL., A HISTORY OF THE AMERICAN PEOPLE 736 (2d ed. 1975).

131. MILLER, *supra* note 12, at 155.

132. *Id.* at 155, 157.

133. PRATT, *supra* note 82, at 303.

134. FERRELL, *supra* note 18, at 70-71.

135. MILLER, *supra* note 12, at 8.

thoroughly practical. . . . All that he asks is that the people of the United States shall take their own way to express the fact that in no case will they employ war to enforce their policies with reference to France.”¹³⁶ The *Times* itself then editorialized that while “outlawing war universally would be difficult, . . . outlawing one war at a time—war between France and the United States—would be a step forward.”¹³⁷

Nevertheless, still miffed at Briand’s having announced the proposal publicly rather than utilizing diplomatic channels, the Coolidge administration did not respond officially to the French Foreign Minister for more than six months.¹³⁸ Secretary Kellogg, Henry Kissinger later wryly observed, “did not quite know how to respond to a document which renounced what no one feared and offered what everyone took for granted.”¹³⁹ The Coolidge administration wanted to have a free hand to respond to future European crises or to choose to stand apart from them, and it feared that Briand’s proposal would entangle the country with France and its interests.¹⁴⁰

However, pressures were building on the Coolidge administration, and in June 1927 the State Department declared, “Secretary Kellogg would be very glad to discuss anything that looked toward preservation of international peace.”¹⁴¹ Privately, in another delaying tactic, Kellogg cabled the U.S. Ambassador to France, instructing him to tell Briand that the United States preferred to initiate a round of informal diplomatic conversations with the French Ambassador, once he returned to Washington, D.C.¹⁴² Later that month, however, the French responded that their ambassador would not reach Washington until August.¹⁴³ Consequently, they transmitted to the Americans a “Draft Pact of Perpetual Friendship . . .,” proposing that the French and American people “condemn recourse to war and renounce it, respectively, as an instrument of their national policy towards each other,” while agreeing to settle disputes or conflicts by pacific means.¹⁴⁴

136. WEHBERG, *supra* note 36, at 64.

137. FERRELL, *supra* note 18, at 75.

138. MILLER, *supra* note 12, at 13.

139. KISSINGER, *supra* note 34, at 280.

140. FERRELL, *supra* note 18, at 242.

141. *Id.* at 92.

142. *Id.* at 94.

143. *Id.* at 95-96.

144. MILLER, *supra* note 12, at 161.

B. Pressures on the Coolidge Administration

David Hunter Miller, a State Department official from 1929 to 1944, argued “that for seven years after 1920 no constructive proposal had been made by the United States regarding world politics generally.”¹⁴⁵ Furthermore, Senate rejection of American membership in the League of Nations, combined with stalled disarmament proceedings, had energized peace activists across the United States.¹⁴⁶

Many, inside and outside the peace movements, viewed arms control as one important dimension of limiting future warfare.¹⁴⁷ However, while steps had been taken at the Washington Naval Disarmament Conference of 1921-22,¹⁴⁸ progress had then lagged. In 1924 the British had refused to sign the Geneva Protocol. Called “the darling of French diplomacy, the hope of all French statesmen,”¹⁴⁹ this initiative had aimed to prohibit war in Europe. The problem had different faces: Germany wanted France and Britain to disarm in accordance with undertakings in the Versailles Treaty.¹⁵⁰ Anglo-French rivalry further complicated matters: “the British wished to disarm the French Army, and the French countered by requesting the disarmament of the Royal Navy.”¹⁵¹ Then, in 1927 the Naval Disarmament Conference in Geneva also failed to produce agreement. France refused to attend, and the British and American governments disagreed over the size of cruisers.¹⁵²

The multitude of peace groups included the American Friends Service Committee, the Friends General Conference, the Peace Association of Friends in America, the Catholic Association for International Peace, and the oddly titled American Committee for the Outlawry of War.¹⁵³ These groups as well as other peace activists were closely watching developments in international affairs. And, while the

145. *Id.* at 15 n.1, 16.

146. *Id.*

147. “[T]he Allies had justified German disarmament under the Versailles treaty as merely the first step in a general, all-around disarmament of the nations.” FERRELL, *supra* note 18, at 49.

148. *Id.* at 43.

149. *Id.* at 47.

150. Ferrell wrote: “The preamble to Part V of the Versailles Treaty declared that Germany undertook to disarm ‘in order to render possible the initiation of a general limitation of the armaments of all nations.’” *Id.* at 49 n.24.

151. *Id.* at 50.

152. The American view was that, while the British claimed to favor parity between the U.S. and British fleets, their preference for smaller cruisers was a way to maintain their actual superiority since such smaller vessels could take advantage of the many British naval bases scattered around the world. *Id.* at 110; *see also* O’CONNELL, *supra* note 35, at 131.

153. FERRELL, *supra* note 18, at 232.

American peace movement contained many rifts, the French proposal worked to unify various organizations in order to exert pressure more effectively on the U.S. government.¹⁵⁴

Among all the peace activity, the work of Chicago lawyer, Salmon Levinson, stands out.¹⁵⁵ In 1917 he had written, “We should have, not as now, laws *of* war, but laws *against* war; just as there are no laws *of* murder or *of* poisoning, but laws against them.”¹⁵⁶ Levinson’s plan was to outlaw war, and it was, in the words of Oona Hathaway and Scott Shapiro, “unlike any other peace plan then under discussion.”¹⁵⁷ They continued:

All the plans to date—proposals for disarmament, the League of Nations, and countless variations—assumed the legality of war. They varied only in the ways in which they sought to direct its use, their designers working to shape institutions and incentives to make recourse to war as rare as possible. [They] . . . had not even thought to question the legality of war. It took someone new to international law and politics to propose an idea directly at odds with the international system.¹⁵⁸

Levinson campaigned tirelessly to make war criminal, working especially hard to persuade President Butler of Columbia, Senator William Borah, philosopher John Dewey, and then the Coolidge administration.¹⁵⁹ And, in 1923, 1926, and 1927, Borah introduced in the U.S. Senate motions to outlaw war,¹⁶⁰ though none passed.

Indeed, the peace campaigns failed to sway various notable critics. Spanish writer and diplomat, Salvador de Madariaga, nominated for the Nobel Prize eleven times, wrote: “The outlawry-of-war doctrine is the best-meaning red herring that ever navigated the waters of international thought and politics”¹⁶¹ Winston Churchill told Parliament: “I am looking for peace. I am looking for a way to stop war, but you will not stop it by pious sentiments and appeals. You will only stop it by practical

154. *Id.* at 99.

155. *See generally id.* at 31-51, 99-104; HATHAWAY & SHAPIRO, *supra* note 3, at 106-15.

156. HATHAWAY & SHAPIRO, *supra* note 3, at 108.

157. *Id.* at 109.

158. *Id.* at 109-10.

159. HATHAWAY & SHAPIRO, *supra* note 3, at 112-21; ROBERT JAMES MADDOX, WILLIAM E. BORAH AND AMERICAN FOREIGN POLICY 136-72 (1969); MCKENNA, *supra* note 7, at 237-42.

160. WEHBERG, *supra* note 36, at 18. One stated: “Resolved . . . that war between nations should be outlawed as an institution or means for the settlement of international controversies by making it a public crime under the law of nations” MCKENNA, *supra* note 7, at 239.

161. SALVADOR DE MADARIAGA, DISARMAMENT 281-82 (1929); *Nomination Archive*, NOBEL PRIZE, https://www.nobelprize.org/nomination/redirector/?redir=archive/show_people.php&id=12042 (last visited Feb 21, 2019);.

arrangements.”¹⁶² Former Secretary of State Robert Lansing declared, “One may agree that war is an evil and contrary to the highest ideals of modern thought, but under existing conditions to attempt to abolish it by proclaiming it illegal is utterly futile.”¹⁶³ He concluded: “No man or woman possessing even average intellect will listen seriously to the words, ‘Outlaw War.’”¹⁶⁴

For his part, privately, Secretary Kellogg swore at the “god-damned pacifists,” using intermediaries to try to persuade them to alleviate their pressure on the government.¹⁶⁵ But, as November elections approached, the Coolidge administration was feeling a political need to respond to the proposed bilateral treaty with France. Mary Ellen O’Connell wrote, “Led by such prominent peace and social justice activists as Jane Addams, who, as the first president of the Women’s International League for Peace and Freedom, won the Nobel Peace Prize in 1919, pressure was put on the U.S. government to do something tangible for the cause of peace.”¹⁶⁶ Leading newspapers enthusiastically covered the issue, and Addams eventually “presented the President a petition with 30,000 signatures encouraging him to take the initiative.”¹⁶⁷

Pressure was building internationally as well. Starting in 1925, the League of Nations took up the issue of outlawing war, with Member States debating at the Sixth Assembly whether “offensive warfare *constitutes* an international crime” or “*should constitute* an international crime,” concluding “that, according to the Covenant of the League of Nations, every offensive war is unfortunately not an international crime and that it is necessary to fill this gap.”¹⁶⁸

Thereafter, in 1927 the Eighth Assembly of the League examined the issue again.¹⁶⁹ And the government of Poland introduced a resolution aimed at prohibiting all wars of aggression and insisting that pacific means be used to settle disputes.¹⁷⁰ Ultimately, the League declared: “[A]ll wars

162. MICHAEL FOWLER, WINSTON S. CHURCHILL: PHILOSOPHER AND STATESMAN 10 (1985).

163. Robert E. Lansing, *The Fallacy of the ‘Outlaw War,’* in IDEAS AND DIPLOMACY: READINGS IN THE INTELLECTUAL TRADITION OF AMERICAN FOREIGN POLICY, *supra* note 31, at 519.

164. *Id.* at 520.

165. ROBERT H. FERRELL, AMERICAN DIPLOMACY: THE TWENTIETH CENTURY 167 (1988) [hereinafter FERRELL, AMERICAN DIPLOMACY: THE TWENTIETH CENTURY (1988)]; *see also* FERRELL, *supra* note 18, at 81.

166. O’CONNELL, *supra* note 35, at 131.

167. GRAEBNER ET AL., *supra* note 130, at 736.

168. WEHBERG, *supra* note 36, at 41-42.

169. *Id.* at 42.

170. *Id.* at 44.

of aggression are, and shall always be, prohibited.”¹⁷¹ Then, in early 1928, at the behest of the Mexican delegation, the Sixth Pan-American Conference adopted a resolution declaring: “The war of aggression constitutes a crime against the human species—[a]ll aggression is considered illicit and as such is declared prohibited.”¹⁷² In neither case, however, were military or economic sanctions formulated.

All of this domestic and international activity, especially the League of Nations resolution, “sent President Coolidge and Kellogg, in search of some antiwar formula that would mollify both Briand and the American peace advocates.”¹⁷³ In December 1927 Coolidge assured Jane Addams, then leading a delegation to the White House, “that strong efforts would take place to obtain the adoption of a treaty between the United States and France outlawing war between the two nations.”¹⁷⁴

Indeed, the U.S. government began to take steps aligned with the anti-war movement. Since the prior arbitration agreement with France had expired, the two countries signed a new version in early 1928 with a preamble reading in part:

Eager by their example not only to demonstrate their condemnation of war as an instrument of national policy in their mutual relations, but also to hasten the time when the perfection of international arrangements for the pacific settlement of international disputes shall have eliminated forever the possibility of war among any of the Powers of the World.¹⁷⁵

Later in 1928 the United States signed arbitration agreements with Italy and Germany containing the same preamble.¹⁷⁶

C. *The Idea of a Multilateral Treaty*

In fact, within U.S. government circles a possible route forward had already presented itself. In May 1927 Senator Borah, then chair of the Senate Foreign Relations Committee and a man with the ear of Secretary

171. *Id.*

172. *Id.* at 68-72.

173. GRAEBNER ET AL., *supra* note 130, at 736.

174. FERRELL, *supra* note 18, at 119.

175. WEHBERG, *supra* note 36, at 67. In a 1928 Council on Foreign Relations speech, Kellogg noted with respect to this treaty: “[A] preamble is not a binding part of a treaty.” But, he said, such “a formal expression” is “very helpful since it publicly defines the positions of the two governments in a matter the importance of which is hard to exaggerate.” Frank B. Kellogg, *The War Prevention Policy of the United States, Address at the Council on Foreign Relations (Mar. 15, 1928)*, in *SELECTED ARTICLES ON THE PACT OF PARIS*, *supra* note 32, at 101. For the State Department view during the Kellogg-Briand negotiations as to whether a preamble is legally binding, see FERRELL, *supra* note 18, at 134 n.7.

176. WEHBERG, *supra* note 36, at 67.

Kellogg,¹⁷⁷ had suggested in a speech that the proposed pact with France be broadened to include other governments.¹⁷⁸ He reiterated this view the following month in a closed session of the Senate Foreign Relations Committee.¹⁷⁹ Some senators, in the words of George Moses of New Hampshire, wanted “to get rid of the damned thing” and felt “France would never consent to outlaw war with Germany.”¹⁸⁰ Furthermore, broadening the treaty’s scope was seen as advantageous by those who wanted to retain freedom of action since, as Ferrell noted, “There is a well-known and justly admired axiom of diplomacy to the effect that the more signatories to an agreement the less binding it becomes”¹⁸¹

Upon receiving Briand’s proposed bilateral agreement in June 1927, the State Department, via its Division of Western European Affairs, prepared an official memorandum that stated: “The vague wording and lack of precision in the draft seems . . . intended to give the effect of a kind of perpetual alliance between the United States and France, which would certainly serve to disturb the other great European Powers—England, Germany and Italy.”¹⁸² It continued: “This . . . would make the neutral position of the United States during any European war in which France might be engaged extremely difficult, since France might deem it necessary to infringe upon our rights as a neutral under this guaranty of non-aggression.”¹⁸³ In recommending that the subject be held in abeyance for the moment, the memorandum suggested that, when negotiations did occur, the United States could argue that relations with France were already guaranteed via the existing Bryan Treaty, providing for conciliation and cooling-off before any use of armed force between the countries.¹⁸⁴ And, it concluded: “[I]f any step further than this were required, it should be in the form of a universal undertaking not to resort to war, to which the United States would at any time be most happy to become a party.”¹⁸⁵

After having stalled for half a year, Secretary Kellogg on December 28, 1927, sent a diplomatic note to France, via the French Ambassador,

177. See MCKENNA, *supra* note 7, at 242-44; Ellis, *Frank B. Kellogg*, *supra* note 25, at 155-56. Perkins concluded that Kellogg “stood in mortal fear of Borah.” PERKINS, *supra* note 8, at 34.

178. See ELLIS, *supra* note 93, at 197-99; see also MADDOX, *supra* note 159, at 174; Ellis, *Frank B. Kellogg*, *supra* note 25, at 164; FERRELL, *supra* note 18, at 129-30.

179. FERRELL, *supra* note 18, at 138-39.

180. MCKENNA, *supra* note 7, at 244.

181. FERRELL, *AMERICAN DIPLOMACY: THE TWENTIETH CENTURY* (1988), *supra* note 165.

182. FERRELL, *supra* note 18, at 106.

183. *Id.*

184. *Id.*

185. *Id.* at 106-07.

making a counterproposal: that the two countries sponsor a multilateral treaty “joining in an effort to obtain the adherence of all of the principal Powers of the world to a declaration renouncing war as an instrument of national policy.”¹⁸⁶ Ferrell later noted:

There was enormous glee in the State Department. Kellogg’s able assistant secretary of state, William R. Castle, who had been behind the widening of the original French proposal, wrote privately in his diary that the trick had been turned, that Briand was now out on a limb, that the foreign minister was caught with cold feet which were going to be positively frozen when the State Department drove him out in the open.¹⁸⁷

In the ensuing communications with France, Secretary Kellogg made clear that states reserved the right of self-defense.¹⁸⁸ A 1928 U.S. diplomatic note read: “Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense.”¹⁸⁹ The French response reiterated: “Nothing in the new treaty restrains or compromises in any manner whatsoever the right of self-defense. Each nation in this respect will always remain free to defend its territory against attack or invasion; it alone is competent to decide whether circumstances require recourse to war in self-defense.”¹⁹⁰

Even as Secretary Kellogg was publicly touting the treaty as an “unconditional agreement not to go to war,”¹⁹¹ these broad self-defense statements carved quite a sizeable loophole in the proposed treaty, since governments had long claimed that they engaged in armed conflict “in response to threatened danger.”¹⁹² In 1928 international lawyer Charles Fenwick observed, “Resistance to direct attack is one thing; resistance to indirect menace of attack quite another.”¹⁹³ The self-defense statements were eventually questioned on legal grounds as well. In 1933 Hersh Lauterpacht “declared that a claim that self-defense was not subject to

186. *Id.* at 144-45.

187. FERRELL, *AMERICAN DIPLOMACY: THE TWENTIETH CENTURY* (1988), *supra* note 165.

188. SONTAG, *supra* note 44, at 134.

189. MILLER, *supra* note 12, at 213-14.

190. *Id.* at 224.

191. 72 CONG. REC. 6423 (Apr. 3, 1930) (statement of SEC. KELLOGG).

192. PERKINS, *supra* note 8, at 35 (“Self-defense had been from time immemorial one of the diplomatic formulas used to justify war. It seemed certain to many persons that it might so be used again”).

193. C.G. Fenwick, *War as an Instrument of National Policy*, 22 AM. J. INT’L L. 826, 827 (1928).

objective evaluation could not be accepted in law.”¹⁹⁴ He wrote: “Such a claim is self-contradictory inasmuch as it purports to be based on legal right and at the same time, disassociates itself from regulation and evaluation of the law.”¹⁹⁵

As a political matter, although American reassurances concerning self-defense did speak to certain of France’s vital interests, the French now turned unenthusiastic. They had assessed the chances of future war with the United States as quite remote, but the French had a range of preexisting commitments, bilateral and multilateral, that might very well require the use of force, whether via treaty obligations or within the League’s collective-security framework.¹⁹⁶ The Locarno Pact as well as the treaties of alliance with Eastern European countries required the signatories to protect each other with armed force.¹⁹⁷ To the French, a multilateral statement outlawing war initially seemed not merely to be a diversion, but perhaps even to undermine, their central diplomatic task of gathering up as many allies as possible to gird their defenses against Germany.¹⁹⁸

However, even as Briand tried to “drop the whole business of an anti-war pact,”¹⁹⁹ both public and internal pressures built on the French government, just as they had on the American. Patrick Cohrs has noted that Briand and the French were now pulled in two opposing directions.²⁰⁰ They were centrally concerned about not undercutting their alliances with those key Eastern European states, Poland and Czechoslovakia. Nor did Briand want to weaken the collective-security provisions of the League of Nations. However, to add provisions to the draft defining aggression or delineating aggressive wars would likely alienate the Americans. As Cohrs put it, Briand “could not afford to insist too adamantly on French terms if he wanted to rescue any prospects of drawing the United States closer to France. The French foreign minister had to rescue what he could, also in relations with his Locarno partners, while trying to save face.”²⁰¹

194. Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT’L L. 259, 261 (1989); see also HERSH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 179-80 (1933).

195. Schachter, *supra* note 194; see also LAUTERPACHT, *supra* note 194.

196. G.M. GATHORNE-HARDY, *A SHORT HISTORY OF INTERNATIONAL AFFAIRS 1920-1939*, at 170 (3d ed. 1942).

197. HATHAWAY & SHAPIRO, *supra* note 3, at 125.

198. MADDOX, *supra* note 159, at 178.

199. FERRELL, *AMERICAN DIPLOMACY: THE TWENTIETH CENTURY* (1988), *supra* note 165.

200. See PATRICK O. COHRS, *THE UNFINISHED PEACE AFTER WORLD WAR I: AMERICA, BRITAIN AND THE STABILISATION OF EUROPE, 1919-1932*, at 462 (2006).

201. *Id.*

This was the context when, in another 1928 diplomatic note, Secretary Kellogg argued to France that, as one scholar put it, “if she could sign a bilateral treaty renouncing war, she could just as well sign a multilateral treaty.”²⁰² And then, exacting some diplomatic revenge, Kellogg continued to embarrass Briand by inviting other governments to join in outlawing war.²⁰³ Furthermore, Senator Borah floated the reassuring suggestion that “a resort to war by any of the signatories automatically would release the others from the pact; they would be free to take whatever action they wished.”²⁰⁴ Thus, for instance, should Germany violate Kellogg-Briand by invading Belgium again, France would be released from its obligations under the treaty and could come to the assistance of the Belgian government under the terms of their alliance.²⁰⁵

Finally, in April 1928, Aristide Briand agreed that the United States could move forward to see what other major powers might think of a multilateral proposal to make war illegal.²⁰⁶ Briand’s interest was served in tying “the United States into the peace machinery, albeit on a less exclusive pattern than he had projected.”²⁰⁷ Secretary Kellogg thus issued a circular note to Germany, Great Britain, Italy, and Japan to join the Franco-American anti-war discussions. It included a new draft treaty, with the two substantive articles drawn from Briand’s original proposal, though written now as a multilateral undertaking, not a bilateral one.²⁰⁸

Another round of diplomatic communications followed, complicated by the circulation of a new French draft²⁰⁹ and replete with the expression of further explanations and understandings. The French draft underscored the right of self-defense and acknowledged its possible commitments under the Covenant of the League of Nations and other previous treaty obligations.²¹⁰ Secretary Kellogg immediately rejected it, calling the

202. MCKENNA, *supra* note 7, at 245. For analysis and text of the American Note of February 27, 1928, see MILLER, *supra* note 12, at 33-37, 174-76.

203. FERRELL, *AMERICAN DIPLOMACY: THE TWENTIETH CENTURY* (1988), *supra* note 165.

204. MADDOX, *supra* note 159, at 178. This provision regarding release from the Treaty’s obligations found its way into the Preamble. MILLER, *supra* note 12, at 97.

205. MCKENNA, *supra* note 7, at 245.

206. Ellis, *Frank B. Kellogg*, *supra* note 25, at 164-65.

207. *Id.*

208. GATHORNE-HARDY, *supra* note 196, at 171.

209. Travaux—Preparatoires for the Peace Pact of Paris (The Kellogg-Briand Pact), 1928 1 FOREIGN RELATIONS OF THE UNITED STATES 32 (1942), *reprinted in* CHRISTOPHER L. BLAKESLEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS* 1063-64 (5th ed. 2001).

210. FERRELL, *supra* note 18, at 169.

French draft “wholly unacceptable” for emphasizing war, not peace, and seeming to justify the use of armed force, not renounce it.²¹¹

As for its own qualifications, the U.S. government was concerned that adhering to the Monroe Doctrine might require use of force, and, from the U.S. perspective the Doctrine was a matter of self-defense, yet was not a matter of “purely national policy.”²¹² Eventually, as the U.S. Senate considered whether or not to approve Kellogg-Briand, the Foreign Relations Committee declared: “The United States regards the Monroe Doctrine as part of its national security and defense. Under the right of defense allowed by the treaty must necessarily be included the right to maintain the Monroe Doctrine”²¹³ Perkins observed: “Since the Doctrine had never been rigidly defined, this was an assertion of very considerable latitude in construing the pact.”²¹⁴

In further diplomatic correspondence Great Britain expressed an even broader statement: “[T]here are certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety.”²¹⁵ The British continued: “His Majesty’s Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defence.”²¹⁶ This even more expansive qualification was never limited by any specifics. Some assumed it to apply to Egypt and its Suez Canal and the Persian Gulf, whose security the British saw as key to their economy and national security,²¹⁷ yet others thought it might cover Afghanistan, Gibraltar, or Asia.²¹⁸ Quincy Wright offered the most narrow reading: “Great Britain made no claim of a general right to act in these ‘regions,’ but only to protect them as a measure of defense.”²¹⁹

211. BLAKESLEY ET AL., *supra* note 209, at 1064.

212. WEHBERG, *supra* note 36, at 85 & n.2.

213. PERKINS, *supra* note 8, at 37.

214. *Id.* at 37.

215. See MILLER, *supra* note 12, at 198.

216. *Id.* at 198-99. For scholarship shedding light on the British concerns and internal discussions regarding Kellogg-Briand, see COHRS, *supra* note 200, at 456-60.

217. MILLER, *supra* note 12, at 68-69, 117.

218. Edwin M. Borchard, *The Pact of Paris—A Study of the Briand-Kellogg Treaty*, by David Hunter Miller, 23 AM. J. INT’L L. 487, 488 (1929).

219. Quincy Wright, *The Meaning of the Pact of Paris*, 27 AM. J. INT’L L. 39, 49 (1933). He went on to argue that Great Britain “would have to prove through an appropriate international procedure, in case she took violent action in such regions, that there was a real necessity for defensive action and that the region was one which under international law or treaties she was entitled to defend.” *Id.*

None of these and other such government communications were phrased as a formal reservation to the Kellogg-Briand Treaty, expressly accepted by the High Contracting Parties. Nonetheless, they acted to water down what the parties had agreed to. Since treaties are to be interpreted in light of the negotiators' intent, David Hunter Miller concluded:

The explanations and statements of the Parties are as much a part of the meaning of the agreement among them as is the text of any one of the Articles of the Treaty proper. . . . Whether it be called explanation or interpretation or qualification or reservation, everything that the Parties themselves agreed that the Treaty means, it does mean.²²⁰

In sum, then, these various understandings of the treaty's terms, circulated among the High Contracting Parties, dramatically narrowed the scope of the broad language in articles one and two. States could resort to war in self-defense, including "as an instrument of collective action to restrain an aggressor."²²¹ The signatories did not prohibit "resort to war between a party to the treaty and a country not party to the treaty. The pact, furthermore, did not prohibit the resort to war against a country that had violated the treaty's provisions."²²² And the French had carved out an exception for their alliances, the Americans for the Monroe Doctrine, and the British for imperial responsibilities.²²³

So, apart from avoiding a defensive alliance with France, while placating American peace advocates, but still limiting and qualifying the country's international commitments, especially with respect to the pressures to do more to ensure European security, what else was there to attract a doctrinaire Republican foreign policymaker in the late 1920s, such as Frank Kellogg, to an agreement along the lines of the Pact of Paris? Sensitive to business and financial interests, American conservatives in that day favored gaining repayment of international debts, while employing arbitration wherever appropriate and coming to peaceful resolutions of international disputes, all as a favored route toward gradual, incremental modification of the international status quo.²²⁴ Kellogg had also identified "an ever more pronounced European resentment against the

220. See MILLER, *supra* note 12, at 95-96 (1928); see also Edwin M. Borchard, *The Multilateral Treaty for the Renunciation of War*, 23 AM. J. INT'L L. 116, 116-17 (1929); Philip Marshall Brown, *The Interpretation of the General Pact for the Renunciation of War*, 23 AM. J. INT'L L. 374, 375-76 (1929).

221. VON GLAHN & TAULBEE, *supra* note 12, at 581.

222. *Id.*

223. COHRS, *supra* note 200, at 460, 462.

224. See *id.* at 453.

new world power, stemming from America's economic superiority yet also from the lack of political U.S. engagement in Europe."²²⁵ In July 1928, Secretary Kellogg, quite concerned at growing levels of European bitterness against the United States, reported his belief that this state of affairs "would be made immeasurably worse" if Congress were to reject the Pact of Paris.²²⁶ We can thus see multiple reasons for Frank Kellogg and the Republican Party to advocate in favor of the Kellogg-Briand Treaty.

D. The Treaty Comes into Force

On August 27, 1928, representatives of the fifteen High Contracting Parties met at the Quai d'Orsay to sign the Pact of Paris.²²⁷ In the United States the treaty then gained Senate approval by an overwhelming margin and was ratified on January 17, 1929.²²⁸ The treaty entered into force on July 24, 1929, after the Japanese ambassador deposited at the U.S. State Department his country's instrument of ratification.²²⁹

Once the fifteen High Contracting Parties had signed the treaty, virtually all other countries were immediately invited to adhere as well in order to make the treaty worldwide in scope.²³⁰ And quite a number opted to join.²³¹ For instance, in February 1929 the Soviet Union, Poland, and Rumania signed, as did the Baltic states of Latvia and Estonia, with Lithuania following suit shortly thereafter.²³² A handful of others opted out of joining the pact, including Argentina, Bolivia, Brazil, El Salvador, and Uruguay.²³³ Brazil had already incorporated the outlawing of war in its own constitution; Argentina objected to the United States using Kellogg-Briand to reassert the Monroe Doctrine,²³⁴ which, via the

225. *Id.* at 451.

226. *Id.*

227. WEHBERG, *supra* note 36, at 78.

228. Kellogg-Briand, *supra* note 1.

229. WEHBERG, *supra* note 36, at 79.

230. Gerould, *supra* note 114, at 14; *see also* MILLER, *supra* note 12, at 113. A handful of countries, deemed too small or insignificant in world affairs, were not invited to join Kellogg-Briand—Andorra, Monaco, Liechtenstein, and San Marino, and, curiously, Morocco. ROBERT H. FERRELL, AMERICAN DIPLOMACY: A HISTORY 515 (3d ed. 1975) [hereinafter FERRELL, AMERICAN DIPLOMACY: A HISTORY (1975)].

231. WEHBERG, *supra* note 36, at 79-80.

232. FERRELL, AMERICAN DIPLOMACY: TWENTIETH CENTURY (1988), *supra* note 165, at 172.

233. FERRELL, AMERICAN DIPLOMACY: A HISTORY (1975), *supra* note 230, at 515.

234. *See* WEHBERG, *supra* note 36, at 80; CARR, *supra* note 48, at 119.

Roosevelt Corollary, had taken on a repellent form to many in Latin America.²³⁵

Great enthusiasm by peace advocates marked the treaty's entry into force. And Frank Kellogg became especially "enamored to the new multinational proposal, originally conceived only to counter Briand, and began to believe that such a pledge against war by the nations of the world would help to prevent future wars."²³⁶ Ultimately, a broad array of American politicians saw little harm in declaring principles that made aggressive war illegal, while promoting peace. From today's perspective, the lack of institutions and processes for enforcing the treaty's terms appears glaring. At the time, however, many people around the world seemed willing to overlook this crucial flaw. For instance, Senator Robert Wagner of New York called the treaty "a great and lasting crystallization of the human will to peace."²³⁷

Neither Secretary Kellogg nor Senator Borah would permit the Senate to add reservations; however, the Senate Foreign Relations Committee report on the treaty explained the U.S. position.²³⁸ Then, in the U.S. Senate with eighty-five senators in favor, Kellogg-Briand rode a groundswell of public support to come within a single vote of being approved unanimously.²³⁹

It was also the case, however, that during its passage Kellogg-Briand brought contrasting impulses to the fore in American politics. Immediately after the Senate approved Kellogg-Briand, it turned to a bill appropriating \$274 million to build battleships, suggesting a healthy skepticism among American politicians as to the likely consequences of signing a legal agreement outlawing war.²⁴⁰ Ferrell concluded,

As debate . . . proceeded it became evident that the Senate was not in reality hostile to the Kellogg pact, but rather that some of the senators . . . so long as they eventually cast their votes in favor of the treaty saw no harm in offering sharp questions or disparaging comments. It was also clear that

235. CECIL V. CRABB, JR., *THE DOCTRINES OF AMERICAN FOREIGN POLICY: THEIR MEANING, ROLE, AND FUTURE* 40 (1982).

236. FERRELL, *AMERICAN DIPLOMACY: THE TWENTIETH CENTURY* (1988), *supra* note 165, at 167.

237. GRAEBNER ET AL., *supra* note 130, at 737.

238. MCKENNA, *supra* note 7, at 245-46.

239. THOMAS P. BROCKWAY, *BASIC DOCUMENTS IN UNITED STATES FOREIGN POLICY* 82 (rev. ed. 1968). The one Senator voting against was James Blaine of Wisconsin, and he was then defeated in a 1932 reelection bid. HATHAWAY & SHAPIRO, *supra* note 3, at 129, 475 n.164.

240. FERRELL, *supra* note 18, at 240 n.2.

many senators, although favoring the treaty, considered it of questionable value.²⁴¹

In particular, after declaring that he would vote in favor of the pact, Senator Carter Glass of Virginia added,

I am not willing that anybody in Virginia shall think that I am simple enough to suppose that [Kellogg-Briand] is worth a postage stamp in the direction of accomplishing permanent peace. I think we are about to renounce something as a national policy which no nation on earth for 150 years has ever proclaimed as a national policy.²⁴²

Before announcing that he, too, would vote in favor of the Pact, Senator William Bruce of Maryland declared that “this anemic peace pact . . . is about as effective to keep down war as a carpet would be to smother an earthquake.”²⁴³ Senator Hiram Johnson of California followed suit, voting in favor but adding “he did not want to be considered as under the delusion that it would cure war.”²⁴⁴ Indeed, Johnson closed Senate debate over Kellogg-Briand by reading the following lines from French poet François Villon, suggesting his own real reservations about the treaty’s worth:

To Messur Noel, named the neat
By those who love him, I bequeath
A helmless ship, a houseless street
A wordless book, a swordless sheath
An hourless clock, a leafless wreath
A bell sans tongue, a saw sans teeth,
A bed sans sheet, a board sans meat,
To make his nothingness complete.²⁴⁵

Still, since across the United States the Pact enjoyed extensive popular support, for a time the Coolidge administration basked in adulation. As Ferrell wrote, “In the year 1928 there was rejoicing that the United States, once more, had put its weight on the scales for righteousness. Few Americans understood the politiqué that lay behind the Kellogg-Briand Pact. If they had they would be sorely disappointed.”²⁴⁶

241. *Id.* at 247.

242. PERKINS, *supra* note 8, at 37.

243. FERRELL, *supra* note 18, at 243.

244. Ellis, *Frank B. Kellogg*, *supra* note 25, at 166.

245. *Id.*

246. FERRELL, *AMERICAN DIPLOMACY: THE TWENTIETH CENTURY* (1988), *supra* note 165, at 169.

IV. THE RESULTS OF THE KELLOGG-BRIAND PACT

In July 1928 Sir Austen Chamberlain remarked to Parliament of the Kellogg-Briand Treaty: “It may mean much, very much for the peace of the world. It may mean not much, even very little.”²⁴⁷ Let us turn then to the pros and cons of the treaty, starting with its drawbacks.

A. *The Rhetoric of Kellogg-Briand*

At the signing of the Peace Pact, both Frank Kellogg and Aristide Briand made rather modest observations. In receiving the media at the U.S. Embassy in Paris prior to signing the Pact, Kellogg observed: “I am here simply to sign a treaty which I hope, and I know all nations of the world hope, will be a forward step in the interest of world peace.”²⁴⁸ In his speech to the diplomats gathered to sign the Pact, Briand declared not that war would henceforth be ended, but that “war as a means of arbitrary and selfish action [shall] no longer be deemed lawful.”²⁴⁹ He went on: “Peace is proclaimed. That is well; that is much; but it still remains necessary to organize it.”²⁵⁰ And, Briand also noted, the treaty stood as a “beginning, not an end.”²⁵¹

However, a great deal of political overstatement also accompanied passage of the Peace Pact. Indeed, the virtues of the treaty were oversold, effusively, to the public.²⁵² When reality failed to live up to the enthused acclamation, the treaty’s reputation suffered badly.²⁵³ The cardinal failing of the Kellogg-Briand Pact was in raising unrealizable public hopes that legal fiat had succeeded in ending war.²⁵⁴ In Great Britain the Marquess of Reading told the House of Lords in May 1928: “War . . . shall no longer figure in the Diplomatic Notes which may pass between nations. No implication will be raised in any Notes of threats of war. All that is to disappear entirely.”²⁵⁵ Senator Arthur Capper of Kansas called the treaty “the greatest turning point in the history of nations.”²⁵⁶ James Shotwell

247. FERRELL, *supra* note 18, at 205. Note that this definitive work on the Kellogg-Briand Treaty does not consider the Pact’s consequences as “an extremely interesting portion of history which perhaps can be dealt with in another work.” *Id.* at 265.

248. *Id.* at 213.

249. MILLER, *supra* note 12, at 4.

250. FERRELL, *supra* note 18, at 218.

251. Deboe, *supra* note 6, at 34.

252. FERRELL, *supra* note 18, at 236.

253. *Id.* at 243.

254. *Id.* at 236.

255. MILLER, *supra* note 12, at 129.

256. FERRELL, *supra* note 18, at 236.

likewise wrote: "We stand at one of the great turning points of human history; a turning point which may take generations . . . but a turning point, nevertheless, for it involves a reevaluation of international relations."²⁵⁷

In August 1928 President Calvin Coolidge gave a speech, arguing:

Had an agreement of this kind been in existence in 1914, there is every reason to suppose that it would have saved the situation and delivered the world from all the misery which was inflicted by the great war. . . . It holds a greater hope for peaceful relations than was ever before given to the world. If those who are involved in it, having started it will finish it, its provisions will prove one of the greatest blessings ever bestowed upon humanity.²⁵⁸

The following December Coolidge went before the U.S. Congress and again enthused: "Observance of this Covenant . . . promises more for the peace of the world than any other agreement ever negotiated."²⁵⁹

Those who relied on Kellogg-Briand to end war not only deluded themselves, but may have inadvertently contributed to the ineffectual responses to blatant aggression at the outset of World War II.²⁶⁰ Senator Henry Cabot Lodge wrote of the "sense of false security" the treaty created.²⁶¹ A "paper peace" could be dangerous in leading "people to think they no longer needed to be militarily armed."²⁶² Plainly, outlawing war in a treaty was not going to stop armed conflict from breaking out. As Robert W. Tucker put it, "[W]ar cannot be exorcized by the conclusion of multilateral treaties solemnly invoking that purpose"²⁶³

Yet, it should also be acknowledged that ongoing criminal conduct in the face of criminal laws proscribing it is not such a singular phenomenon. In the domestic context laws against murder do not stop murders from occurring either. Domestic criminal law, with its sanctions of severe penalties for convicted murderers, does seem likely to deter some potential killings. Whether the dictates of the Kellogg-Briand alone deterred particular leaders from using armed force against one another is highly questionable. Nevertheless, it is true that interstate war—as

257. Shotwell, *supra* note 44, at 134.

258. FERRELL, *supra* note 18, at 208.

259. KISSINGER, *supra* note 34, at 374.

260. MORGENTHAU, *supra* note 28, at 286-87.

261. Henry Cabot Lodge, *The Kellogg-Briand Peace Pact: A Contemporary Criticism, 1928-29*, in IDEAS AND DIPLOMACY: READINGS IN THE INTELLECTUAL TRADITION OF AMERICAN FOREIGN POLICY, *supra* note 31, at 530.

262. 3 AKIRA IRIYE, THE CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS: THE GLOBALIZING OF AMERICA, 1913-1945, at 83-84 (1993).

263. ROBERT W. TUCKER, THE JUST WAR: A STUDY IN CONTEMPORARY AMERICAN DOCTRINE 68 (1960).

opposed to civil wars and other internal conflict—has diminished considerably in the decades since the treaty was passed.²⁶⁴

In *The Internationalists*, their recent book on the Kellogg-Briand Pact, Yale law professors Oona Hathaway and Scott Shapiro chose as a subtitle: *How a Radical Plan to Outlaw War Remade the World*.²⁶⁵ Hathaway and Shapiro argued, “[T]he transformation to a world in which conquest is exceptional was set in motion by the Peace Pact of 1928.”²⁶⁶ In explaining the decline in interstate conflict by pointing to such factors as “the invention of nuclear weapons, the spread of democracy, the rise of global trade,” political scientists have overlooked the consequences of making war illegal.²⁶⁷ Hathaway and Shapiro contended, “[T]he reversal of nearly all the post-Pact conquests at the end of the Second World War established that states could take the territory of other states, but they could not benefit from it if they did. And they would never be entirely secure in their ownership.”²⁶⁸ Consequently, they see Kellogg-Briand as marking “the replacement of one international order with another.”²⁶⁹

In our view, to argue that Kellogg-Briand remade the world or replaced one world order with another, goes too far. The twentieth century was marked by many more weighty developments in international affairs that far overshadowed the statements found in Kellogg-Briand, which, as we have shown, left many questions unanswered and which many of the signatories immediately qualified in important ways. Thus, we see the overblown rhetoric, which has attached itself to Kellogg-Briand for decades, as a largely negative aspect of the treaty.

B. *The State Signatories*

Nevertheless, that the Kellogg-Briand Treaty can be validly criticized does not make it, in Kissinger’s terms, “meaningless.” Over the last century multilateral endeavors in foreign policy have been increasingly relied upon and celebrated. Indeed, they became commonplace. Multilateralism has become comfortable and reassuring, while unilateral

264. See the data collected in HATHAWAY & SHAPIRO, *supra* note 3, at 309-14. See generally JOSHUA S. GOLDSTEIN, *WINNING THE WAR ON WAR: THE DECLINE OF ARMED CONFLICT WORLDWIDE* (2011).

265. HATHAWAY & SHAPIRO, *supra* note 3.

266. *Id.* at 330.

267. *Id.* at 334.

268. *Id.* at 334-35.

269. *Id.* at xiii.

foreign policies have come to be routinely regarded as suspect or even alarming.²⁷⁰ Inis Claude wrote,

[T]he characteristic and predominant approach of our generation to international affairs stresses collectivization—of defense, of enforcement action, of legitimization, of neutralization, of mediation, of diplomacy, of economic assistance, of sovereignty. Multilateralism as a mode of action is very much with us; multilateralism as an intellectual preoccupation is even more with us.²⁷¹

Here, it is well worth noting that Kellogg-Briand was a highly significant initial multilateral undertaking, particularly since its goal was universal membership and world-wide application.²⁷² Within four months of the signing of the treaty, Frank Kellogg wrote: “This is the first time in history when any treaty has received the approval of so many nations of the world.”²⁷³ Indeed, in noting that sixty-five states soon signed the Kellogg-Briand treaty (“a number exceeding by seven the current membership of the League of Nations”), E.H. Carr went on to observe: “Imperfect though it was, the Pact of Paris was a considerable land-mark. It was the first political agreement in history of almost universal scope.”²⁷⁴

Another notable development in twentieth-century international relations involved communist states—first the Soviet Union, then the People’s Republic of China and others—moving into regular diplomatic interactions within the international system. Here, it is noteworthy that the Soviet Union signed Kellogg-Briand, and did so at a time when neither the British nor the U.S. government had established diplomatic relations with Moscow.²⁷⁵ In the 1920s, it has been observed, “the Soviet Union clearly stood outside the generally accepted postwar peace structure . . . engaging in anticapitalist, anti-imperialistic activities through the Communist parties of other countries, and through the nationalistic movements in the colonial areas.”²⁷⁶ Akira Iriye thus declared: “By signing the Kellogg-Briand Pact, the Soviet Union could be said to have joined the world community at long last.”²⁷⁷

270. INIS L. CLAUDE, JR., *STATES AND THE GLOBAL SYSTEM: POLITICS, LAW AND ORGANIZATION* 134 (1988).

271. *Id.*

272. Frank B. Kellogg, *The French Draft of the Multilateral Treaty for the Renunciation of War, Address at the American Society of International Law (Apr. 28, 1928)*, in *SELECTED ARTICLES ON THE PACT OF PARIS*, *supra* note 32, at 115.

273. Kellogg, *supra* note 11, at 338.

274. CARR, *supra* note 48, at 119.

275. MILLER, *supra* note 15, at 93.

276. IRIYE, *supra* note 262, at 85.

277. *Id.* at 84. He further explained:

C. *War as a Crime*

Turn next to the development of the international laws of armed conflict. Quincy Wright once observed, “There cannot be an aggressor in the legal sense unless there is an antecedent obligation not to resort to force.”²⁷⁸ Here again, Kellogg-Briand played a meaningful role. Henceforth, war was not to be considered “a normal and legitimate method of settling disputes.”²⁷⁹ James Shotwell put it like this: “War is no longer the free prerogative of sovereign states. That is the great meaning of this treaty.”²⁸⁰

For generations war had been considered the prerogative of sovereigns. It could be undertaken freely at the sole discretion of a ruler or government “as a means to redress grievances, real or imagined,”²⁸¹ or when it seemed to offer some other advantage to the state.²⁸² Thus, during the American Civil War, when Francis Lieber drew up for President Abraham Lincoln “Instructions for the Government of Armies of the United States in the Field,” he wrote in Article 30: “Ever since the formation and coexistence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged . . . to be . . . the means to obtain great ends of state, or to consist in defence against wrong.”²⁸³

In the years before World War I, statesmen and military leaders still frequently glorified war. In a private letter in 1897 Teddy Roosevelt observed, “I should welcome almost any war for I think this country needs one,” and in a lecture at the Naval War College he publicly declared: “All the great masterful races have been fighting races.”²⁸⁴ Helmuth von Moltke, chief of the German General Staff from 1906 to 1914, cautioned:

[T]he Soviets were now less intent on revolutionizing the globe than in consolidating their gains and stabilizing their foreign relations. That was in essence what Joseph Stalin implied when he began talking about “socialism in one country.” Rather than trying to turn all countries in the direction of socialism—a strategy still being advocated by Leon Trotsky, Stalin’s arch rival in the struggle for power after Lenin’s death in 1924—Russia would be content with its own survival as the sole socialist state.

Id. at 87.

278. QUINCY WRIGHT, *A STUDY OF WAR* 184 (abridged ed. 1964).

279. CARR, *supra* note 48, at 119-20.

280. Shotwell, *supra* note 44, at 142.

281. Gerould, *supra* note 114, at 1.

282. MALCOLM N. SHAW QC, *INTERNATIONAL LAW* 813 (7th ed. 2014).

283. See Instructions for the Government of Armies of the United States in the Field, U.S., Apr. 24, 1863.

284. H.W. BRANDS, *BOUND TO EMPIRE: THE UNITED STATES AND THE PHILIPPINES* 15 (1992).

“War is an element in the order of the world ordained by God. In it the noblest virtues of mankind are developed Without war the world would stagnate and lose itself in materialism.”²⁸⁵

After the vast destruction of World War I, however, using war simply to gain a state’s foreign policy objectives, whatever they might be and at the complete discretion of a government’s leaders, seemed to many to be callous. As Henry Stimson put it, “[T]he world simply could not go on recognizing war, with its constantly growing destructiveness, as one of the normal instrumentalities of human life.”²⁸⁶

In sharp contrast to this prior “discretionist” perspective, Kellogg-Briand played a pivotal role in establishing the legal principle that those who plot a war of aggression commit a crime. Stimson elaborated: “Hereafter when two nations engage in armed conflict either one or both of them must be wrongdoers—violators of the general treaty. We no longer draw a circle about them and treat them with the punctilios of the duelist’s code. Instead we denounce them as lawbreakers.”²⁸⁷

Kellogg-Briand sought to articulate a new norm that did, in fact, differ from past conventional wisdom. The right to go to war—once considered, in the words of one scholar, as “the very citadel of sovereignty”²⁸⁸—was now to be hedged about with significant legal restrictions. Dexter Perkins observed,

The treaty undoubtedly expressed the strong moral aversion of the peoples of the world to war; no government dared to do less than give it lip service. . . . [I]t stamped [war] with an immoral character; and it forms an important step . . . in the development of the view that a nation which willfully breaks the peace must not expect to be dealt with on the same terms as a nation which is clearly and obviously the victim of aggression.²⁸⁹

Perkins concluded, “[T]he Paris pact prepared the way for new norms of conduct in international relations.”²⁹⁰ E.H. Carr declared: “The term ‘outlawry of war’ . . . implied the existence of a universal, unwritten law against which war was declared to be an offence. . . . [T]he conception . . . struck root in the political thought of the world.”²⁹¹

285. Foreign Policy Ass’n Info. Serv., *supra* note 38, at 176.

286. Stimson, *supra* note 6, at x.

287. *Id.*

288. GILBERT MURRAY, FROM THE LEAGUE TO U.N. 78 (1948).

289. PERKINS, *supra* note 8, at 39-40.

290. *Id.*; see also GATHORNE-HARDY, *supra* note 196, at 170 (“As a gesture indicative of a new ethical attitude to war, [the signing of Kellogg-Briand] . . . is undeniably impressive.”).

291. CARR, *supra* note 48, at 120.

Kellogg-Briand thus took a significant step toward a different conception of war, one that focused on whether a conflict was legal or illegal. It worked toward popularizing a new and simple, if not simplistic, categorization of war, which came to be seen as “either a criminal breach of the peace, an act of self-defense, or an act of international police.”²⁹² In this way Kellogg-Briand helped to provide governments with a legal basis for appraising conflicts and favoring one side over another, depending on which one had violated its treaty obligations. When a state at war is found to be an aggressor, then “third states may discriminate in favor of its innocent victim engaged in defense.”²⁹³ Thus, by 1940 the U.S. government had denounced Germany and Italy as aggressors and on that basis had justified its own discriminatory acts in favor of Great Britain.²⁹⁴

A closely related subject involved the doctrine of nonrecognition in which

a factual situation will not be recognized because of strong reservations as to the morality or legality of the actions that have been adopted in order to bring about the factual situation. It is a doctrine that has also been reinforced by the principle that legal rights cannot derive from an illegal situation (*ex injuria jus non oritur*).²⁹⁵

Issues of nonrecognition, prompted by U.S. policy, arose in the 1930s, motivated, in part, by the treaty obligations that states had assumed under the terms of Kellogg-Briand.²⁹⁶

Thus, after the 1931 Japanese invasion of Manchuria, the U.S. government first “urged China and Japan to resolve their differences by negotiation.”²⁹⁷ When this course of action proved fruitless and Japan seemed to be consolidating its territorial gains, the U.S. government tried to prod the League of Nations toward action.²⁹⁸ Over Japanese objections, the United States sent an official, but nonvoting, observer to take part in League deliberations and promised “that the United States would act

292. WRIGHT, *supra* note 278, at 181.

293. *Id.* at 16. Wright went on to note: “An international agency found Japan an aggressor in its hostilities against China (1931, 1937) and the United States (1941); Italy against Ethiopia (1935); Russia against Finland (1939) and Hungary (1956); North Korea and China against South Korea (1950); and Germany against Poland (1939), the Netherlands (1940), and Norway (1940).”

294. *Id.* at 185.

295. SHAW, *supra* note 282, at 338.

296. Kellogg-Briand, *supra* note 1.

297. CRABB, *supra* note 235, at 78.

298. *The Mukden Incident of 1931 and the Stimson Doctrine*, OFF. HISTORIAN, <https://history.state.gov/milestones/1921-1936/mukden-incident> (last visited Feb. 15, 2019).

independently to support and reinforce whatever decisions the League made regarding the Manchurian question."²⁹⁹

Once it had become clear that the League could not agree on any decisive or effective response to events in Manchuria, Secretary Stimson sent diplomatic notes to China and Japan declaring that the United States would not recognize Japanese territorial gains in China.³⁰⁰ Cecil Crabb later observed:

Several months after the issuance of the Stimson Doctrine, a State Department official said that it had derived in large part from President Hoover's insistence that Japan honor the provisions of the Pact of Paris, outlawing war as an instrument of national policy. The Hoover-Stimson non-recognition policy stated in effect that nations must adhere to their international legal obligations; when they fail to do so, their actions possess no legal validity or legitimacy.³⁰¹

In past eras states often gained territory by conquering and annexing it. However, since 1929 and Kellogg-Briand's renunciation of war, international society has not generally recognized legal title to territory passing to a victorious state after a war. Third parties ought not, and have not, recognized such annexations.³⁰² Again, passage of Kellogg-Briand was a key step in that evolution of international law principles such that forcible acquisition of territory became illegal.³⁰³

In the sphere of international organization, the U.N. founders also drew directly on Kellogg-Briand thinking. During World War II the State Department via its Special Subcommittee on International Organization started the American planning process for a new global organization. One Subcommittee member was Professor Shotwell, who had played such a major role in orchestrating and drafting Kellogg-Briand.³⁰⁴ His plan was to "write the Pact into a new treaty—and then build an enforcement structure around it."³⁰⁵ Article 2 of Kellogg-Briand is thus echoed in Article 2(3) of the U.N. Charter: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."³⁰⁶

299. CRABB, *supra* note 235, at 79.

300. *The Mukden Incident of 1931 and the Stimson Doctrine*, *supra* note 298.

301. CRABB, *supra* note 235, at 81.

302. GREEN, *supra* note 19, at 105.

303. LAW AND POLITICS IN THE WORLD COMMUNITY 333 (George A. Lipsky ed., 1953).

304. Harold Josephson, *Sondra R. Herman, James T. Shotwell and the Rise of Internationalism in America*, 67 PAC. NW. Q. 176 (Oct. 1976).

305. HATHAWAY & SHAPIRO, *supra* note 3, at 195.

306. U.N. CHARTER art. 2(3).

Article 2(4) hearkens back to Kellogg-Briand as well: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”³⁰⁷ The Charter thus “built on Kellogg-Briand,” broadening its terms “to include a ban on aggression below the threshold of ‘war’ and also banned ‘the threat’ of aggressive use of force.”³⁰⁸

What we would especially emphasize, however, is that Kellogg-Briand was not the sole international instrument working as a predicate to the Charter’s use-of-force provisions. The Versailles Treaty, the Covenant of the League of Nations, and the Locarno Pact, among others, all prohibited particular uses of force.³⁰⁹ Still, we concede, Kellogg-Briand has a claim to being the most consequential of these prior treaties in this respect.

D. *Post-World War II Prosecutions*

One important function of law is to identify antisocial behavior and provide a process for dealing with it. Once again, Kellogg-Briand had an impact that must be taken into account in any fair reappraisal of the treaty. Proponents of outlawing war, such as Senator Borah, had argued not only that war should be considered a crime but that “those who foment war” should be “criminally liable.”³¹⁰ After World War II, despite the fact that the provisions of the Pact of Paris do not explicitly refer to criminality,³¹¹ and despite the fact that neither Kellogg nor Briand seem ever to have envisioned that their treaty would be applied to individual defendants,³¹² the Kellogg-Briand treaty was construed as providing a legal basis for the individual charges of waging aggressive war that were brought against the German and Japanese leaders.³¹³

307. *Id.* art. 2(4).

308. John Norton Moore, *Jus ad Bellum Before the International Court of Justice*, 52 VA. J. INT’L L. 903, 911 (2012).

309. ARNOLD WOLFERS, *BRITAIN AND FRANCE BETWEEN TWO WARS: CONFLICTING STRATEGIES OF PEACE FROM VERSAILLES TO WORLD WAR II*, at 355 (1966).

310. Borah, *supra* note 46, at 522.

311. GREEN, *supra* note 19, at 10.

312. FERRELL, *AMERICAN DIPLOMACY: THE TWENTIETH CENTURY* (1988), *supra* note 165, at 245. David Bosco likewise noted that Kellogg-Briand “included no enforcement provisions and not even a hint that waging aggressive war would lead to individual criminal liability.” DAVID BOSCO, *ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS* 27 (2014).

313. See Joseph E. Mayk, *Crimes Against Peace: An Analysis of the Nuremberg Prohibition on Planning and Waging Aggressive War and Its Applicability to the Gulf War*, 24 RUTGERS L.J.,

The International Military Tribunal (IMT) in Nuremberg charged the German defendants with committing crimes against the peace and planning, initiating, and waging wars of aggression as well as war crimes and crimes against humanity. War that breached a treaty was criminal.³¹⁴ In laying out the Tribunal's jurisdiction, the Charter in Article 6(a) defined "crimes against the peace" in terms of "planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing."³¹⁵

Prior to the IMT proceedings, whether initiating aggressive war qualified as an international crime, either under treaties or customary international law, was an unresolved question. Defense lawyers for the German defendants indicted on that count thus raised an *ex post facto* defense.³¹⁶ The Tribunal later recounted:

It was submitted that *ex post facto* punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.³¹⁷

However, the Nuremberg Tribunal rejected this defense, writing in its Final Judgment:

To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances, the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the Government of Germany, the defendants, or some at least some of them must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression.³¹⁸

253, 268 (1992). Benjamin Schiff observed of the Nuremberg trials: "The Hague Conventions provided the basis for definition of war crimes; the Kellogg-Briand Pact, for crimes against the peace." BENJAMIN N. SCHIFF, BUILDING THE INTERNATIONAL CRIMINAL COURT 24 (2008).

314. GREEN, *supra* note 19, at 16.

315. See NUREMBERG TRIAL AND INTERNATIONAL LAW 103 (George Ginsburgs & V.N. Kudriavtsev eds., 1990).

316. CHARLES G. FENWICK, CASES ON INTERNATIONAL LAW 845-46 (2d ed. 1951).

317. *Id.*

318. OFFICE OF U.S. CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION 49 (1947).

Kellogg-Briand had a central place in the Tribunal's reasoning.³¹⁹ Indeed, the treaty stood at the time as the most authoritative statement of what constituted illegal war-making. The Tribunal declared in its judgment: "[I]n the opinion of the Tribunal this [Kellogg-Briand] Pact was violated by Germany in all cases of aggressive war charged in the Indictment." Shortly thereafter, the IMT observed: "The Tribunal does not find it necessary to consider any of the other treaties referred to in the Appendix"³²⁰

After noting that the treaty was binding on Germany, Japan, and Italy, the Nuremberg Tribunal declared: "The nations who signed the Pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact."³²¹ And, the Tribunal concluded:

[T]he solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact.³²²

Ultimately, of twenty-two total indictments under Count 1 "Conspiracy to Wage Wars of Aggression" and Count 2 "Crimes Against the Peace", i.e., initiating or waging wars of aggression, the prosecution at Nuremberg gained twenty-one convictions, of thirty-nine total indictments.³²³ Of the twelve Nazis sentenced to death by the International Military Tribunal at Nuremberg, ten of them had been convicted on Count 1, Count 2, or both.³²⁴

The Allied countries proceeded in much the same way in trying Japanese military and political leaders. As Benjamin Schiff noted, "The formula was similar for trials of Japanese war crimes suspects at the International Military Tribunal for the Far East, commonly known as the Tokyo Tribunal, which prosecuted crimes against peace, war crimes, and

319. See O'CONNELL, *supra* note 35, 137.

320. Trial of the Major War Criminals Before the International Military Tribunal, *reprinted in* O'CONNELL, *supra* note 35, at 134-38.

321. FENWICK, *supra* note 316.

322. *Id.*

323. Roger S. Clark, *Nuremberg and the Crimes Against Peace*, 6 WASH. U. GLOBAL STUD. L. REV. 527, 544 (2007).

324. *Id.*

crimes against humanity.”³²⁵ The Tokyo Tribunal expressly adopted the words of the Nuremberg Judgment concerning the criminal breach of the Pact of Paris as carrying personal liability, adding the comment: “[W]ith the foregoing opinion of the Nuremberg tribunal and the reasoning by which they are reached the Tribunal is in complete accord.”³²⁶ And, the chief prosecutor at Tokyo, Joseph Keenan, constantly reminded the court throughout the trials that Japan had violated Kellogg-Briand.³²⁷

Although various aspects of the Nuremberg and Tokyo proceedings have been criticized as imposing a “victor’s justice” on the defeated states,³²⁸ prosecuting World War II leaders for engaging in aggressive war has been broadly accepted. As Leslie Green concluded: “[T]here can be no doubt that the community of nations accepts the view that the [Nuremberg] Tribunal in its Judgment correctly defined wars of aggression and in breach of the Pact of Paris as criminal, carrying personal liability.”³²⁹ One might also note that international law has evolved such that “[t]here is today a long list of acts that an individual can commit as a breach of international obligations.”³³⁰ The post-World War II prosecutions, resting on the legal foundation of Kellogg-Briand, were an important step in that evolutionary process.

E. *The New Interventionism*

What exactly a government should do about other people’s wars, if anything, has long been a notable issue in international relations.³³¹ One option, often a preferred one in past eras, was not to become involved at all, that is, to keep one’s distance and not engage in the problems of others.³³²

The signing of the Kellogg-Briand Treaty was an important statement about other people’s wars. Former Secretary of State Elihu Root, when serving as President of the American Society of International Law in 1915, once noted of domestic criminal law:

325. SCHIFF, *supra* note 313, at 25.

326. GREEN, *supra* note 19, at 16-17.

327. TIM MAGA, JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS 82 (2001).

328. *See, e.g.*, DANILO ZOLO, VICTOR’S JUSTICE: FROM NUREMBERG TO BAGHDAD (2009).

329. GREEN, *supra* note 19, at 16.

330. DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 76 (2001).

331. *See Part II What to Do About Other People’s Wars*, in 4 INIS L. CLAUDE, JR., AMERICAN APPROACHES TO WORLD AFFAIRS: THE CREDIBILITY OF INSTITUTIONS, POLICIES, LEADERSHIP 21-47 (1986).

332. *Id.* at 22.

If . . . a man be robbed or assaulted, the injury is deemed not to be done to him alone, but to every member of the state by the breaking of the law against robbery or against violence. Every citizen is deemed to be injured by the breach of the law because the law is his protection, and if the law be violated with impunity, his protection will disappear Up to this time breaches of international law have been treated . . . as if they concerned nobody except the particular nation upon which the injury was inflicted and the nation inflicting it. There has been no general recognition of the right of other nations to object.³³³

The Kellogg-Briand Treaty helped to change this state of affairs. Quincy Wright noted of it and the League of Nations Covenant: “Wars of aggression under these instruments are no longer moral offenses against the victim alone, but legal offenses against every state party to these multilateral treaties.”³³⁴ While Kellogg-Briand imposed no duty on any signatory to take action when its terms were violated, it granted signatories the *right* to take suitable measures to redress the injury, whether via diplomatic pressure, blockade, embargo, or war.³³⁵

Three years after ratification of the Pact of Paris, Secretary of State Henry Stimson considered the changes wrought by Kellogg-Briand. He observed:

Under the former concepts of international law when a conflict occurred, it was usually deemed the concern only of the parties to the conflict. . . . The direct individual interest which every nation has in preventing a war had not yet been fully realized, nor had that interest been given legal recognition. But now under the covenants of the Briand-Kellogg Pact such a conflict becomes of legal concern to everybody connected with the Treaty. . . . As was said by M. Briand, quoting the words of President Coolidge: ‘An act of war in any part of the world is an act that injures the interests of my country.’³³⁶

Here is another aspect of international relations in which drastic changes have occurred over the past century. Inis L. Claude, Jr. noted, “We are seeing the near-total eclipse of the standard doctrine of nonintervention, with its distinction between the realms of domestic sovereignty and international jurisdiction.”³³⁷ Claude traced the beginning

333. Quincy Wright, *Neutrality and Neutral Rights Following the Pact of Paris for the Renunciation of War*, 24 PROC. AM. SOC’Y INT’L L. 79, 81 (1930).

334. *Id.*

335. *Id.* at 81-82.

336. Stimson, *supra* note 6, at xiv.

337. Inis L. Claude, Jr., *The United States and Changing Approaches to National Security and World Order*, XLVIII NAVAL WAR C. REV. 46, 48 (1995).

of the decline of domestic jurisdiction to the 1923 declaration by the Permanent Court of International Justice of a “movable fence”: “holding that the line between domestic and international jurisdiction shifts to enlarge the latter and diminish the former whenever states make a particular matter the subject of treaty provisions.”³³⁸ With the Kellogg-Briand treaty six years later, armed conflicts that had typically been viewed as simply the business of the particular states squaring off against one another frequently came to be seen as the active concern of international society.

The increasing destructiveness of modern warfare helped to bring about the change. So, too, did the view that the world had become much more interconnected—a fact brought into sharp relief by the experience of World War I. In the early twentieth century leaders often remarked upon the new level of interdependence in international affairs. For instance, in his 1902 State of the Union message to Congress, President Teddy Roosevelt declared: “More and more the increasing interdependence and complexity of international political and economic relations render it incumbent on all civilized and orderly powers to insist on the proper policing of the world.”³³⁹ In 1932 Secretary of State Henry Stimson noted that, during the century before World War I, “[c]ommunities and nations became less self-contained and more interdependent.”³⁴⁰

In this regard, the role of the Kellogg-Briand Pact was to work toward bringing outside parties to see themselves as justified in intervening in the quarrels, disputes, and conflicts of others. Indeed, this process has accelerated more recently. As Claude put it,

The much discussed intensification of interdependence in our time carries with it the implication that intervention is legitimate; if what goes on inside a certain state affects everybody, then it must be everybody’s business—and, if it is everybody’s business, then everybody must be entitled to deal with it. The old notion of national privacy is being overtaken by the concept of the international public interest.³⁴¹

Once again, the Kellogg-Briand treaty played a significant role in this transformation.

338. *Id.*

339. THEODORE ROOSEVELT, STATE OF THE UNION ADDRESSES 52 (Outlook Verlag 2018).

340. Stimson, *supra* note 6, at viii.

341. INIS L. CLAUDE, JR., *Moral Dilemmas in International Relations*, in 28 THE VIRGINIA PAPERS ON THE PRESIDENCY 113, 121 (Kenneth W. Thompson ed., 1994).

V. CONCLUSION

Let us return, then, to the questions posed at the outset. In 1927 Aristide Briand and the French government initiated discussions of a possible treaty with the United States to bolster the French alliance network against Germany. Briand thought that renouncing war between the two states might be a way to surmount isolationist tendencies in America and come to a useful understanding. For their part, Frank Kellogg and the U.S. government feared that a bilateral U.S.-French treaty would be a matter of concern to other European states and might restrict American freedom of action in a future conflict. Kellogg thus proposed a multilateral treaty condemning war. Initially, this seems primarily an effort to parry Briand's diplomatic initiative, but over time Kellogg came to see it as a potentially valuable step forward in international affairs. Domestic political considerations, especially the soaring popularity of peace groups, spurred on the drafting of a U.S. counterproposal.

Aristide Briand and Frank Kellogg were veteran politicians and diplomats. Their underlying motivations were more tangled and complicated than is often assumed and encompassed positioning their parties to win elections and positioning their governments to contend with future national security matters. This is what led Robert Ferrell to write: "A dull topic for discussion, the Kellogg Pact: so it might seem if superficially considered. Actually, it marked some of the shrewdest diplomacy one can discover in international relations in the twentieth century."³⁴²

While the Kellogg-Briand treaty was very much oversold to the public as a harbinger of the end of all war, Briand and Kellogg spoke of the Pact in considerably more realistic terms, as a beginning or a possible step forward. Furthermore, as the treaty took shape, its two short and simple operative articles were qualified in very significant respects. In condemning recourse to war, the parties nonetheless widely recognized the utility, indeed, the vital necessity, of a self-defense exception. Moreover, the parties acknowledged the position of vital national interests, for instance, allowing for armed conflict by the United States as it adhered to the terms of the Monroe Doctrine.

With the passage of time, to call Kellogg-Briand meaningless, or in Senator Joseph Ball's terms "an empty gesture,"³⁴³ seems overstated. It is true that, in pointing to the inability of the treaty to stop war, the critics are

342. FERRELL, *AMERICAN DIPLOMACY: A HISTORY* (1975), *supra* note 230, at 515.

343. 90 CONG. REC. 7881, 7921 (1944).

right on target. In this case legal principles had been developed far in advance of capable institutions or procedures to enforce them. However, far from being a "dead letter," the treaty remained significant for various reasons. As a popular, early multilateral undertaking, Kellogg-Briand established the obligation that states should not resort to force to settle their disputes. The influence of the Pact of Paris was one dimension of the trend in which armed hostilities might be thought of as everyone's business or international society's business, something that provided a justification for states to intervene in the disputes of others. And governments now had the necessary antecedent legal basis that could help them to appraise conflicts and determine which side stood as the aggressor.

Thus, after the war, when German and Japanese political and military figures were prosecuted for waging aggressive war, Kellogg-Briand was cited as establishing the important legal principle that launching such a war is illegal. The forcible acquisition of territory by conquest was not only now illegitimate, but individual criminal liability might attach to those who pursued it. By working to criminalize war, the Kellogg-Briand Treaty was one step toward a new norm of behavior, one that continues to play a role in international law and international relations.

We thus take a middle position on Kellogg-Briand. We neither see it as remaking the world nor as serving as an empty and meaningless gesture. Instead, it was a multilateral treaty with certain notable lasting consequences, well worth considering carefully, even ninety years after its signing.