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Kellogg-Briand Pact (1928)

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A. Historical Background

- 1 The General Treaty for Renunciation of War as an Instrument of National Policy also known as the Kellogg-Briand Pact after the French Foreign Minister Aristide Briand (1862–1932) and his US counterpart, Secretary of State Frank B Kellogg (1856–1937), was signed at Paris on 27 August 1928. The Pact condemned ‘recourse to war for the solution of international controversies’ and stipulated its renunciation ‘as an instrument of national policy’ (Art. 1) by the major powers of the world. It formed an important stepping stone in the evolution towards the prohibition of the use force (→ *Use of Force, Prohibition of*) by States under positive international law which started with the → *Hague Peace Conferences (1899 and 1907)* and culminated in the → *United Nations Charter*.
- 2 The Pact was initially signed and ratified by fifteen States, including Germany, the United States, Belgium, France, Great Britain, Canada, Australia, New Zealand, South Africa, Ireland, India, Italy, Japan, Poland and Czechoslovakia. France and Great Britain made reservations (→ *Treaties, Multilateral, Reservations to*), whereas Japan and the United States submitted interpretative statements. It was acceded to by an additional 48 States, bringing the total number at 63, to include all members of the → *League of Nations* with the exception of Argentina, Bolivia, El Salvador and Uruguay. The USSR, Egypt and Persia rejected the reservations of other States at their accession. Nepal, San Marino and Yemen, which were not members of the League, did not accede. The Pact is still in force.
- 3 The initiative to the Pact was taken by Aristide Briand, who in a letter to the American people of 6 April 1927 invited the United States to make a mutual agreement to ‘outlaw war’. Briand’s initiative was yet another attempt by French diplomacy to tie the United States more securely to the peace settlement in Europe. At the Paris Peace Conference leading to the → *Versailles Peace Treaty (1919)*, France had tried to induce Great Britain and the United States to enter into a permanent defensive alliance in order to guarantee its security against Germany. In the face of a staunch refusal by President Wilson, France had to settle for the system of → *collective security* to be set up under the Covenant of the League of Nations (‘League Covenant’). The United States’ subsequent rejection of the Versailles and other Parisian Peace Treaties and its failure to accede to the League of Nations left France empty handed (see also → *Peace Treaties after World War I*). After the debacle following the Franco-Belgian occupation of the Ruhr (1923–25), France changed track and started to seek a new accommodation with Germany around the Versailles Peace Treaty, in combination with more substantial guarantees from London and, if at all possible, Washington. In the → *Locarno Treaties (1925)*, Belgium, France, Germany, Great Britain and Italy guaranteed the borders between Belgium, France and Germany. The main treaty also contained mutual promises between Belgium and Germany and between France and Germany not to attack or invade each other (→ *Non-Aggression Pacts*), making reservations for acts of → *self-defence*, actions in pursuance of Art. 16 League Covenant and actions resulting from a decision of the League of

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Nations under Art. 15 League Covenant. The five signatories promised to come to the help of a co-signatory which fell victim to an attack or invasion in violation of the non-aggression clause. The treaty was supplemented with a set of arbitration treaties (→ *Arbitration and Conciliation Treaties*) and with defensive alliance treaties between France and Czechoslovakia and France and Poland.

- 4 The Locarno Treaties gave France the guarantee it had sought from Britain but left it without any security commitment from the United States. Briand's initiative was a prudent attempt to remedy this and establish a bilateral treaty relationship about a security issue with the United States, albeit one of the weakest kind in terms of an American commitment. Before making his proposition, Briand had been in contact with the American pro-League and peace activist James Shotwell (1874–1965) who belonged to the movement striving for 'outlawry of war,' a general prohibition of war. In the United States, a particular strong pacifist movement had developed over the 1920s (→ *Pacifism*). While some of its members did deplore the fact that their country had not acceded to the League of Nations, many like its great inspirer Salmon Levinson (1865–1941) did not. To them, the League Covenant was unsatisfactory as it had not stipulated a general prohibition against all war and had left a loophole for the case of war against a State that failed to abide by the rules of the League Covenant regarding the pacific settlement of disputes. An attempt by pro-League activists to bring the United States into the League had been defeated in 1926. But one of the main points on the American pacifist agenda on which both pro- and anti-League activists, the latter group including the leading Republican Senator William E Borah (1865–1940), could agree was to attain a general prohibition of war in international law, the so-called 'outlawry of war'. Thus, with his proposition Briand hoped to tie in with the American pacifist movement and part of the political establishment, including some of the isolationists.
- 5 At first, Briand's message was almost unnoticed by the American press. His official treaty proposal of 20 June 1927 went unanswered by the American administration as the American President John Calvin Coolidge Jr (1872–1933, President 1923–29) and Kellogg saw through the French stratagem and feared a bilateral treaty would establish a unique security relation with France. But over 1927, through the efforts of Shotwell, the President of Columbia University Nicholas Murray Butler (1862–1947) and others a public debate ensued. Meanwhile, in the League, Poland filed a proposal for a general non-aggression pact. On 28 December 1927, Kellogg answered Briand's proposal with a counterproposal to enlarge the French initiative and to invite all the major powers to commit themselves to 'a declaration renouncing war as an instrument of national policy' ('The Secretary of State to the French Ambassador' in US Department of State [ed] *Papers Relating to the Foreign Relations of the United States 1927* [US Government Printing Office Washington 1942] vol 2, 626). Whereas this failed to satisfy France's initial purposes and raised several questions regarding the right of self-defence, the Locarno guarantees and the right to use force under the League Covenant, France had little choice but to move along.
- 6 After further negotiations between the two protagonists, France and the United States sent two different drafts of the treaty to Germany, Great Britain, Italy and Japan. The French had already given in on the American demand to drop any reference to → *aggression* and to include a renunciation of war in general. The United States felt that a reference to aggression would direct the treaty too much towards constituting a defensive alliance treaty against potential German aggression. Whereas the French draft contained an express reservation for self-defence, the American did not. In a letter of 1 March 1928, Kellogg had, however, assured the French ambassador that the pact would not 'deprive

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the signatories of the right of legitimate defence'. The other Great Powers adopted the American draft.

B. Content of the Agreement

- 7 The Pact counted only two substantive articles. Art. 1 contained a solemn declaration by the States to 'condemn recourse to war for the solution of international controversies, and [to] renounce it as an instrument of national policy in their relations with one another'. In Art. 2, the signatories agreed 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'.
- 8 Radical although it may seem, the Pact was part of a gradual evolution towards the limitation of the right of States to resort to war under positive international law. The first step had been set at the Hague Peace Conferences (1899 and 1907). Apart from prohibiting the resort to force for the recovery of contract debts (Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts [done 18 October 1907, entered into force 26 January 1910] [1908] 2 AJIL Supp 81; → *Drago-Porter Convention [1907]*) and demanding that wars be preceded by a formal declaration with an → *ultimatum* (Convention relative to the Opening of Hostilities [done 18 October 1907, entered into force 26 January 1910] [1907] 205 CTS 263), in the Convention for the Pacific Settlement of International Disputes ([adopted 18 October 1907, entered into force 26 January 1910] [1907] 205 CTS 233) the signatory parties had agreed to 'use their best efforts' (at Art. 1) first to resort to pacific means of dispute settlement before resorting to war. The agreement did not amount to a formal obligation as it was qualified, among others by the limitation 'as far as circumstances allow' (at Art. 2). The pacific means mentioned in the Convention included → *good offices*, → *mediation*, an international commission of inquiry or international → *arbitration*. For the purposes of the latter the → *Permanent Court of Arbitration (PCA)* was set up. Before and after World War I, numerous arbitration treaties were made. The → *Bryan Treaties (1913-14)* provided for an international commission of conciliation in case of an international dispute and stipulated that the signatories had to respect a cooling down period of twelve months before they could resort to force in case the commission failed to settle the dispute. This idea of a cooling down period found its way into the League Covenant. The Covenant imposed upon the Members of the League the obligation to submit any dispute likely to lead to war, to either arbitration, the → *Permanent Court of International Justice (PCIJ)* or the Council of the League and to respect a period of three months upon reception of the arbitral award or the report of the Council before they could resort to war. Art. 16 League Covenant held that any resort to war in violation of these obligations would be tantamount to an act of war against all other Members of the League and would automatically lead to the disruption of all trade and financial relations. The same article stipulated that the Council would make recommendations about the military means the Members would have to contribute. Art. 10 League Covenant imposed upon the Members the obligation to 'respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League' and made any aggression or threat or danger of it a matter for the Council.
- 9 Under the classical law of nations (17th to 19th century), States had the right to resort to war to enforce their rights or protect their interests. Nevertheless, States had always been careful to avoid the ignominy of committing an act of aggression and had in most cases taken a lot of trouble to argue that they were acting defensively against a prior injury or

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act of aggression committed by the enemy. With Art. 10 League Covenant, a first step was set towards a prohibition of aggression under positive international law. Art. 10 had important weaknesses. It did not contain a definition of aggression so that it was not clear whether wars started to defend or uphold an existing right by a State fell under the definition. It did not stipulate what the obligation of the Members to 'respect and preserve' against aggression encompassed and it did not stipulate any sanctions. The relation with the sanction regime of Art. 16 League Covenant was not made clear. Moreover, the Covenant did not provide for a truly general prohibition as it allowed for some 'gaps' or exceptions to the prohibition. Art. 15 (7) League Covenant preserved the right of States, in case the Council of the League failed to make a unanimous report, 'to take such action as they shall consider necessary for the maintenance of right and justice'. Art. 15 (8) League Covenant precluded the Council of the League to make any recommendation in case it ruled that the matter fell within the domestic jurisdiction of a State involved in the dispute, thus leaving the freedom to resort to war. Art. 12 League Covenant implied that States could resort to war three months after they had received the decision or recommendation of the arbiters, the Court or the Council against a State that did not comply. It also implied that if no recommendation was made by the Council within six months or if no decision was reached by the Court or arbiters within a reasonable time, parties would be free to take any action they seemed fit.

- 10 In the 1920s, several attempts were made to define aggression, to introduce a clear and unqualified prohibition of aggression under international law and to strengthen the League of Nations system of collective security in the face of aggression. These included the League of Nations Draft Treaty of Mutual Assistance (1923), the Geneva Protocol (1924), resolutions of the Assembly of the League of Nations entitled 'Peaceful Settlements of International Disputes' and 'Resolution relative to Wars of Aggression' and the Resolution on Aggression of the 6th International Conference of American States at Havana (1928). These documents prepared the ground for the Kellogg-Briand proposal of 1928, but they failed to attain a clear prohibition of either war or aggression; neither did they offer an unequivocal definition of aggression.
- 11 In the Pact the term 'aggression' was dropped and substituted for war 'as an instrument of national policy', the phrase preferred by the Americans. The American preference came partly from political sensitivities but also from the fact that aggression—and self-defence—had proven hard to define. This choice of words did not bring more clarity on the point of what fell under the renunciation by the signatories and what not. A first major point of discussion, which was raised in contemporary doctrine, was the question whether 'war' needed to be understood in its technical sense as a war formally declared leading to a formal state of war, or whether measures short of war such as → *reprisals* or forcible intervention were also covered by the Pact. Whereas the discussion among scholars remained largely inconclusive, it appears from subsequent → *State practice* that the signatories understood the term 'war' in a more extensive meaning than formally declared war. From the practice of the 1930s, it can be concluded that States invoked the Pact to condemn substantial uses of force other than formally declared wars. It was made clear during the preliminary discussion—most famously so in an American interpretative note of 23 June 1928—that self-defence was not impaired or restricted by the Pact. Great Britain, Japan, South Africa and Czechoslovakia made reservations or statements to the same extent. France, Great Britain, Japan made reservations or statements regarding the obligations existing under the Locarno Treaties. In the note of 23 June 1928, the United States concurred that there was no conflict between these treaties and the Pact, a position the other signatories accepted or took note of. The Pact, however, did not solve the

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problem of defining self-defence, and thus conversely of defining the aggression against which a State acted in self-defence. By consequence, the Kellogg-option not to make reference to these terms because of their lack of clarity solved nothing.

- 12 Great Britain expressly made a reservation for actions against interference in 'certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety' (A Chamberlain 'Note of 19 May 1928' reprinted in US Department of State [ed] *Papers Relating to the Foreign Relations of the United States 1928* [US Government Printing Office Washington 1942] vol 1, 66 at para. 10). This stretched the concept of self-defence as it did not restrict it to actions against prior or imminent armed aggression but also to the defence of → *vital interests*—in this case the defence of the British Empire—against all forms of 'interference' (see also → *Intervention, Prohibition of*). Some writers, among them Hans Kelsen (1881–1973), even held that the Pact did not prohibit war in reaction to a violation of international law, but this remained a marginal position Kelsen himself later revoked.
- 13 The words 'as an instrument of national policy' also qualified the prohibition of war. They seemed to exclude forcible action for other actions than those of → *self-help*, such as forcible intervention, from the renunciation of Art. 1 Pact. In 1930, Germany took that position making a distinction between war as an instrument of national policy and war as 'a means of international action which may be considered necessary for the maintenance of order in international life' ([1930] League of Nations Official Journal 368).
- 14 France, Great Britain, Japan, South Africa and the United States also made it clear that the Pact did not clash with the rights and obligations existing under the League Covenant. As this was again part of the American note of 23 June 1928, it was accepted or taken note of by the other signatories. In 1930, a League of Nations Committee reported on the relation between the League Covenant and the Pact and suggested some changes to the former, most importantly a proposition to bar out the text of Art. 15 (7) League Covenant which preserved the right of States to resort to force in case the League Council failed to attain a unanimous position. The amendments were never adopted.
- 15 Art. 2 Pact did not stipulate a clear obligation of States to settle their disputes by pacific means, but only to 'seek' a solution through such means. It did not add to the obligations existing under the League Covenant. There was no provision for the threat of war. The Pact did not limit in any way the right to resort to war between non-signatories or between signatories and non-signatories. Lastly, the Pact did not provide sanctions.

C. Significance for the Subsequent Legal Development

- 16 In as far as the Pact entailed a prohibition of war, it was not an enforceable one. But this did not preclude it from producing effects on the legal consequences of war pursued in violation of the Pact. In the ensuing years, four consequences were attached to the 'outlawry of war'. First, by making war illegal, the Pact could offer an additional legal argument for making an aggressor State liable for all costs and damages arising out of the war, as the Versailles and other Parisian Peace Treaties of 1919–20 had done. Although no express reference to the Pact was made in the treaties, the → *Peace Treaties (1947)* with the European allies of Germany imposed → *reparations* for war damages and costs upon them for 'bearing their share of responsibility' for the war (→ *Reparations after World War II*). Second, at Nuremberg, the International Military Tribunal referred to the Pact to reject the argument made by the defence that the category of 'crimes against peace' had only been retroactively introduced in international law by the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis to

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establish the Tribunal. The Tokyo Tribunal too made reference to the Pact. Third, the 1939 Harvard Law School Draft Convention on the Rights and Duties of States in Case of Aggression relaxed the duty of strict impartiality imposed upon non-belligerent States existing under the laws and customs of neutrality and allowed them to render aid to the victim of an act of aggression. In the preamble, reference was made, to among others the Kellogg-Briand Pact. Indeed, after 1928, armed conflicts between States were more rarely considered by third States as formal wars but rather as cases of aggression and self-defence, thus allowing to relax the duty of strict impartiality and allowing non-belligerent States to render aid to one of the sides (→ *Belligerency*). Fourth, from the illegality of a war logically followed under the general principles of law that no legal rights could come out of it. In 1932, the American Secretary of State Henry Stimson (1867–1950) stated this in response to the Japanese attack on Manchuria (→ *Doctrines [Monroe, Hallstein, Brezhnev, Stimson]*). The Stimson Doctrine was sustained in ‘The Effect of the Briand-Kellogg Pact of Paris on International Law: Articles of Interpretation proposed by the Committee’ by the → *International Law Association (ILA)*.

- 17 The Kellogg-Briand Pact had its influence felt in two further ways. First, the text served as a source of inspiration and emulation for later texts, and served as an important stepping stone towards the more general prohibition of the use and threat of force in Art. 2 (4) UN Charter. In 1933, several Latin-American countries adhered to the → *Saavedra Lamas Treaty (1933)*, named after the Argentinean Minister of Foreign Affairs Carlos Saavedra Lamas (1878–1959). Upon an invitation of the 7th International Conference of American States that same year, most American States including the United States acceded. Later, eleven other countries joined as well. The treaty condemned wars of aggression, imposed upon the signatories to settle their disputes solely by pacific means and forced them not to recognize any territorial arrangement not reached through pacific means. Art. 2 (4) UN Charter was forged to address some of the gaps left by the Kellogg-Briand Pact. The term ‘war’ was replaced by ‘use of force,’ thus encompassing all measures short of war, except for self-defence, to which an express reference was made in Art. 51 UN Charter. Art. 2 (4) also prohibited the threat of force (→ *Use of Force, Prohibition of Threat*).
- 18 Second, some scholars have found that a case could be made from the State practice of the late 1920s up to the UN Charter for illegality under → *customary international law* of the use of force as an instrument of national policy other than self-defence or defence of an ally. In itself, it was not new for States to condemn aggression and even to consider it illegal, but the Pact had given this position a stronger foothold in positive international law. In their rejections of aggressive actions, States often invoked the Kellogg-Briand Pact. But the Pact also had its reverse effects. The qualified prohibition of war induced States to avoid formal war and to classify their armed actions as much as possible in terms of measures short of war, most frequently as self-defence.

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