

## I. THE LONG SHADOW OF EARLY CONTROVERSIES

# Delegitimizing Aggression

## First Steps and False Starts after the First World War

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### Abstract

*The interwar years marked the movement in international law towards the prohibition of aggressive war. Yet a notable feature of the 1920s and 1930s, despite suggestions to the contrary at the Nuremberg and Tokyo tribunals, was the absence of legal milestones marking the advance towards the criminalization of aggression. Lloyd George's proposal to arraign the ex-Kaiser for starting the First World War came to nothing. Resolutions mentioning the 'international crime' of aggression, such as the draft Treaty for Mutual Assistance and the Geneva Protocol, were never ratified. And the Kellogg-Briand Pact, while renouncing war 'as an instrument of national policy', made no mention at all of aggression, much less individual responsibility for it. Not until the closing stages of the Second World War, with defeat of the Axis powers within sight, did politicians and jurists reconsider the problem of how to deal with enemy leaders, and contemplate the role that a charge of aggression might play in this process.*

### 1. Introduction

Just after the Germans signed the armistice ending the First World War on 11 November 1918, the British Prime Minister David Lloyd George visited Newcastle, electioneering on behalf of his incumbent Coalition Government. Addressing a packed audience at the Palace Theatre, he raised the theme that was to dominate that year's 'khaki election': the ex-Kaiser's responsibility for a criminal war. *The Times* republished his speech verbatim, complete with responses from the audience:

Somebody... has been responsible for this war that has taken the lives of millions of the best young men in Europe. Is no one to be made responsible for that? (Voices, 'Yes.') All I can say is that if that is the case there is one justice for the poor wretched criminal, and another for kings and emperors. (Cheers.) There are ... undoubted offences against the law of nations... The outrage upon international

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law which is involved in invading the territory of an independent country without its consent. That is a crime... Surely a man who did that ought to be held responsible for it. (Voices. 'Fetch him out,' and 'We will get him out,' and cheers.)<sup>1</sup>

Lloyd George's proposal, embodying the ideas that initiating a war was a crime and that individuals could be held responsible for it — the constituent elements of the latter-day 'crime of aggression' — was ahead of its time. It raised issues that prefigured future debates, such as whether national leaders could be held personally responsible for embarking upon war, and if so, whether their punishment should take a legal or a political form. But the idea soon stranded on the rocks of judicial disapproval: it was Lloyd George's own Solicitor-General, Sir Ernest Pollock, who disposed of the idea at the Paris Peace Conference a few months later.

Thereafter, policy-makers and jurists looked towards the newly formed League of Nations for solutions to the problem of war. The League, which was established to provide pacific methods for resolving differences between states, signalled the start of the shift towards the delegitimization of certain categories of war. In the twenties and the thirties, treaties and proposed treaties emphasised the unlawfulness of wars other than those of self-defence or international sanction. Some unratified drafts and resolutions went so far as to declare that aggression was an 'international crime'. But the idea of holding individuals criminally liable for aggression did not reappear until after the Second World War, when, at the Nuremberg and Tokyo tribunals, the Allied powers charged the Axis leaders for 'crimes against peace'.

The inter-war decades may have been barren of examples of the criminalization, but they established patterns of state behaviour with respect to attempts to prohibit aggression that are still very much in evidence today. Whether at Geneva in the twenties or at Kampala last year, the most consistent advocates of strong measures have been the small and insecure states, which, as well as looking to international law for protection against the vicissitudes of international life, have sought to wrest control over the determination of aggression from political institutions by proposing automatic methods for its identification. The most powerful states, by

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<sup>1</sup> 'Prime Minister on German Crimes', *The Times*, London, 30 November 1918, at 6. See also, 'Coalition Policy Defined, Mr Lloyd George's Pledges', *The Times*, London, 6 December 1918, at 9.

contrast, have been consistently inconsistent, oscillating according to the force-fields exerted by other powerful states — the American and Soviet/Russian equivocations over a definition of aggression being typical. All states, needless to say, have looked to national interest as well as international security, and it is to these enduring themes that we now turn.

## **2. The Ex-Kaiser and the Versailles Settlement**

### ***A. The ‘Rather Delicate’ Task***

As soon as Lloyd George mooted the trial of the former Kaiser, he encountered opposition from his Cabinet colleagues. At an Imperial War Cabinet meeting on 20 November 1918, the Australian Prime Minister William Hughes rejected the idea outright: ‘You cannot indict a man for making war,’ he said, because ‘he had a perfect right to plunge the world into war, and now we have conquered, we have a perfect right to kill him, not because he plunged the world into war, but because we have won.’<sup>2</sup> Munitions Minister Winston Churchill also rejected the idea, warning: ‘[Y]ou might easily set out hopefully on the path of hanging the ex-Kaiser... but after a time you might find you were in a very great *impasse*, and the lawyers all over the world would begin to see that the indictment was one which was not capable of being sustained.’<sup>3</sup>

But Lloyd George did not let the matter drop. On 2 December he met with Georges Clemenceau and Vittorio Orlando in London, and they jointly decided that the ex-Kaiser should be surrendered to an international court for authorship of the war and breaches of international law by the German forces.<sup>4</sup> A month later, Lloyd George and a large British delegation departed for France, where the victorious powers were gathering for the preliminary sessions of the Paris Peace Conference.

At Paris, the major *entente* powers — Britain, France, the United States, Italy and Japan — faced the task of drafting terms with the defeated powers, establishing a post-war international order, and (to borrow an epigram from a later era) keeping the Germans down, the Americans in, and the Russians out. Regarding the ‘German question’, they proposed reparations, part-occupation, and the redistribution of

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<sup>2</sup> National Archives, UK (hereafter, ‘NA’), CAB 23/43: ‘Imperial War Cabinet 37’, 20 November 1918, at 7 and 8.

<sup>3</sup> *Ibid.*, at 8.

<sup>4</sup> NA, FO 608/247: Foreign Office to Washington and New York, 2 December 1918. For an account of the London meeting, see V.E. Orlando, ‘On the Aborted Decision to Bring the German Emperor to Trial’, 5 *Journal of International Criminal Justice* (2007) 1015.

colonies and peripheries. For the ‘Russian problem’, they sought to undermine the new government and defuse revolutionary movements in Germany, Hungary and elsewhere. As for the United States, they hoped that it would permanently abandon its neutrality and take up international responsibilities within the proposed League of Nations.

On 25 January 1919, the preliminary Peace Conference delegated to the ‘Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties’ the task of deciding whether Germany and its allies had violated international law by initiating or fighting the First World War, and if so, recommending suitable penalties. This 15-member body was presided over by the American Secretary of State, Robert Lansing, and included among its members the British Attorney-General Sir Gordon Hewart and Solicitor-General Sir Ernest Pollock, Greek Foreign Minister Nicolas Politis, New Zealand Prime Minister William Massey, and the jurists Edouard Rolin-Jacquemyns of Belgium and Fernand Larnaude of France.

The Commission’s task was ‘rather delicate’, Georg Schwarzenberger later observed, because it had to establish legal responsibility for acts which, other than the violation of neutrality, were lawful when they were committed but had subsequently become ‘highly reprehensible’.<sup>5</sup> Deep differences emerged between the American and European delegates. The Americans feared that a trial would establish legal precedents affecting sovereignty, and spark insurrection in Germany, and therefore wished to avoid the distortion of the law to deal with the ex-Kaiser and his ministers. But British and French delegates, who represented nations that had borne the brunt of the war in Western Europe, insisted upon the establishment of some kind of international tribunal to determine responsibility for crimes arising from the conflict.

Debates in the Commission and its sub-committees were frequently acrimonious. ‘Feeling ran about as high as feeling can run’, recalled the American delegate, James Brown Scott. ‘It ran especially high in the British membership, and it ran especially high in the French members. It ran so high that relations were somewhat suspended.’<sup>6</sup> This divergence of opinion resulted in a majority report,

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<sup>5</sup> G. Schwarzenberger, ‘War Crimes and the Problem of an International Criminal Court’, *Czechoslovak Yearbook of International Law* (1942) 67, at 77.

<sup>6</sup> J. Brown Scott, ‘The Trial of the Kaiser’, in E.M. House and C. Seymour (eds), *What Really Happened at Paris: The Story of the Peace Conference, 1918-1919* (Hodder & Stoughton, 1921), at 480.

representing the views of the major European powers and their continental allies, and two reservations submitted by nations more insulated from the war's effects — the United States and Japan.

### ***B. Germany's Crimes of War***

The Commission's majority report, produced on 29 March 1919, departed from positive international law on the question of 'laws of humanity', but not, as it turned out, on the initiation of the war. True, it stated at the outset that responsibility for the conflict lay 'wholly upon the Powers' — Germany and Austria, and their allies Turkey and Bulgaria — 'which declared war in pursuance of a policy of aggression, the concealment of which gives to the origin of this war the character of a dark conspiracy against the peace of Europe'.<sup>7</sup> And further, it insisted (against the prevailing act of state doctrine) that there was no reason why rank 'should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal', and that the point applied 'even to the case of Heads of States'.<sup>8</sup> But it stopped short of making the connection between the two ideas by holding the ex-Kaiser and his ministers criminally responsible for starting the First World War.

Again, the British played a decisive role. Lloyd George had earlier led the advance on the issue of responsibility for the war, and now other British ministers, who had in the meantime fully digested its implications, led the retreat. At the conference, Sir Ernest Pollock advised most strongly against charging the ex-Kaiser for initiating hostilities. He articulated the legal view that there was 'not a little difficulty in establishing penal responsibility upon the sovereign head of the State for conduct which was in its essence national, and a matter of state polic[y], rather than one of individual will'.<sup>9</sup> In his view, the allies were more likely to secure a conviction for traditional war crimes than for 'political crimes'.<sup>10</sup> And he warned of the dangers of bringing a case which would entail investigation of the causes of the war — a highly sensitive question involving many other nations aside from Germany — which 'must raise many difficulties and complex problems which might be more fitly

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<sup>7</sup> Paris Peace Conference, 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties', LON Misc. 43, 29 March 1919 (hereafter, 'Commission'), at 3.

<sup>8</sup> *Ibid.*, 11.

<sup>9</sup> NA, FO 608/246/1: 'Proceedings of a Meeting of Sub-Committee No. 2...', 17 February 1919, at 13-14.

<sup>10</sup> *Ibid.*, 4.

investigated by historians and statesmen than by a Tribunal appropriate to the trial of offenders against the laws and customs of war'.<sup>11</sup>

Pollock was able, without much difficulty, to persuade his fellow members to support this line. As a result, the majority Commission report stated that despite conduct 'which the public conscience reproves and which history will condemn', they would not bring before the proposed tribunal acts which had provoked the war and accompanied its inception because 'by reason of the purely optional character of the Institutions at The Hague for the maintenance of peace ... a war of aggression may not be considered as an act directly contrary to positive law'.<sup>12</sup> It concluded: 'We therefore do not advise that the acts which provoked the war should be charged against their authors and made the subject of proceedings before a tribunal.'<sup>13</sup>

The majority did, however, believe that the ex-Kaiser and others were liable for the second cluster of crimes: 'Violations of the laws and customs of war and the laws of humanity'.<sup>14</sup> As with a charge of aggression, there was no precedent for bringing them before an international court. Trials for violations of the laws and customs of war, codified by the Geneva and Hague conventions, had hitherto only taken place in national courts, while indictments for the nebulous 'laws of humanity' had hitherto been unknown under international law. Nevertheless, the Commission proposed the constitution of an international 'High Tribunal' to try those that it held to be responsible for them.<sup>15</sup>

### ***C. American and Japanese Reservations***

The American reservation, written by Robert Lansing and James Brown Scott, advanced a comprehensive critique of the Commission's approach — and would become a benchmark for discussions about international justice in future decades. They agreed that those responsible for causing the war and violating the laws of war should be punished, but not by legal means. They argued that it was important to separate law and morality, and accept that only offences recognized in law were

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<sup>11</sup> *Ibid.*, at 12.

<sup>12</sup> Commission, *supra* note 7, at 12.

<sup>13</sup> *Ibid.*, at 13.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, at 15.

justiciable. Moral offences ‘however iniquitous and infamous and however terrible in their results’ were beyond the reach of judicial procedure.<sup>16</sup>

In particular, they objected to the idea of subjecting the ex-Kaiser to criminal proceedings for actions taken when he was head of state. They argued that national leaders were answerable only to their own people, not to foreign entities. In consequence, they stated that: ‘heads of States are, as agents of the people, in whom the sovereignty of any State resides, responsible to the people for the illegal acts which they may have committed, and ... should not be made responsible to any other sovereignty’.<sup>17</sup>

In their view, the idea of trying the ex-Kaiser for actions not designated crimes when carried out, smacked of retroactivity. They noted that an act could not be a crime in the legal sense ‘unless it were made so by law’, and an act declared a crime by law ‘could not be punished unless the law prescribed the penalty to be inflicted’.<sup>18</sup> The acts cited by the majority did not meet those criteria: there was no precedent for making a violation of the laws and customs of war — never mind the ‘laws of humanity’ — ‘an international crime, affixing a punishment to it’.<sup>19</sup> They were therefore against the *ex post facto* creation of new law, new penalties, and, in particular, a new tribunal, which were ‘contrary to an express clause of the Constitution of the United States and in conflict with the law and practice of civilized communities’, although they added that they *would* cooperate in the use of existing tribunals, laws and penalties.<sup>20</sup>

The Japanese reservation, submitted by the delegates Adachi Mineichirō and Tachi Sakutarō, raised a number of points that were highly pertinent to the future 1946-48 Tokyo Tribunal. Anticipating debates about ‘victors’ justice’, the Japanese questioned whether it could be admitted as a principle of the law of nations ‘that a High Tribunal constituted by belligerents can, after a war is over, try an individual belonging to the opposite side’.<sup>21</sup> Attempting to foreclose the discussion about negative criminality, they advocated ‘a strict interpretation of the principles of penal liability’ when dealing with senior figures who had failed to prevent the commission

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<sup>16</sup> *Ibid.*, at 51.

<sup>17</sup> *Ibid.*, at 61.

<sup>18</sup> *Ibid.*, at 60.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*, at 61.

<sup>21</sup> *Ibid.*, at 64.

of war crimes.<sup>22</sup> (Tokyo developed the law on precisely this issue.) Finally, in order to avoid the establishment of precedents that would affect the Emperor Meiji or his descendants, they requested the elimination of references to heads of state in the majority report. The Japanese were not alone in wishing to preserve the monarchical principle: the Belgians also declined, on similar grounds, to host a trial of the ex-Kaiser.

#### ***D. The Compromise over the Tribunal***

With the *entente* powers at loggerheads over the handling of the ex-Kaiser, the only remaining option was to find a formula that would allow both sides to claim that they had achieved what they had set out to do. The ‘Council of Four’ — made up of Lloyd George, Clemenceau, Wilson and Orlando — considered the majority report and the reservations, and on 9 April 1919, they agreed a statement on penalties, which manifested the same differences over the use of criminal proceedings as had split the Commission. On one hand, it indicated that the ex-Kaiser should be delivered for trial before a special tribunal (in accordance with the views of Lloyd George and Clemenceau). On the other, it declared that ‘the offence for which it is proposed to try him [is] *not to be described as a violation of criminal law* but as a supreme offence against international morality and the sanctity of treaties’ (thus reflecting the views of Wilson and Orlando).<sup>23</sup> The Drafting Committee reworked this section of the statement so that by 26 April it read: ‘The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, not for an offence against criminal law, but for a supreme offence against international morality and the sanctity of treaties.’<sup>24</sup> At a ‘Council of Four’ meeting on 1 May, Lloyd George successfully insisted upon the deletion of the words ‘not for an offence against criminal law but’,<sup>25</sup> presumably on the grounds that this negative formulation drew attention to the dispute.

The compromise between them appeared in Articles 227-231 of the Treaty of Peace Between the Allied and Associated Powers and Germany, or ‘Treaty of Versailles’, signed on 28 June 1919. These contained several pointers to the

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<sup>22</sup> *Ibid.*

<sup>23</sup> NA, FO 608/247: ‘Outline Suggested with Regard to Responsibility and Punishment’, signed by Clemenceau, Lloyd George, Orlando, Wilson and Saionji, undated, with cover note, Hankey to Dutasta, 10 April 1919. Emphasis added.

<sup>24</sup> NA, FO 608/245: ‘Draft Clauses Prepared by the Drafting Committee’, 26 April 1919.

<sup>25</sup> NA, FO 608/147: Norman to Headlam-Morley, 24 October 1919.



subsequent criminalization of aggression. Article 227 emphasised the idea that a national leader could be called to account for violating international standards, while Article 231 advanced the idea that a nation which started an aggressive war would be subject to penalties. The intervening three articles set out proposals for the trials before national military tribunals of those accused of violating the laws and customs of war, and provided the framework for the war crimes trials held under German jurisdiction at Leipzig.

Addressing the question of aggression first, Article 231 emerged out of the conference's Commission on Reparations, which devised the formula to justify the *entente* powers' claims for damages from Germany. It read:

The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.<sup>26</sup>

The use of the word 'aggression' introduced a new perspective on warfare. It signalled that a nation was not being punished for *losing* a war, as had traditionally been the case, but for *starting* one. While there had previously been no legal stigma attached to the initiation of conflict, this article suggested that the war that Germany had 'imposed' on the *entente* powers was not just morally reprehensible, but also unlawful.

This proposal did not derive its authority from pre-existing international statutes or conventions. Instead, it attempted to create a new standard. The drafters were explicit about this, stating in response to German protests that 'the present treaty is intended to mark a departure from the traditions and practices of earlier settlements, which have been singularly inadequate in preventing the renewal of war'.<sup>27</sup> Clyde Eagleton spelt out the significance of Article 231: 'Such a statement does not go so far as to outlaw war, in the sense of making it an international crime, but it effectively penalizes aggressive war by holding the aggressor responsible for losses resulting

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<sup>26</sup> Treaty of Peace Between the Allied and Associated Powers and Germany (signed 28 June 1919, entered into force 10 January 1920) 225 CTS (hereafter, 'Treaty of Peace') 189, at 286.

<sup>27</sup> Quoted in S.E. Baldwin, 'The Proposed Trial of the Former Kaiser', 29 *Yale Law Journal* (1919) 75, at 81.

from the war — a ruinous cost!’<sup>28</sup>

On the question of individual responsibility, Article 227 set out plans for the trial of the ex-Kaiser. But the aforementioned dispute between the *entente* powers was apparent in its ambiguous wording. It stated:

The 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.

A special tribunal will be constituted . . . .

In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.<sup>29</sup>

Other clauses provided for the establishment of the ‘special tribunal’ to be presided over by five judges (from France, Italy, Japan, United Kingdom, and United States), and stated that the *entente* powers would ask the Netherlands to surrender the ex-Kaiser for trial.

In the light of the previous discussions, the most striking aspect of Article 227 was that despite referring to ‘international morality’, ‘international policy’ and ‘international undertakings’, it did not once refer to international *law*. The word ‘offence’ hinted at the commission of a crime, but it was framed in predominantly moral terms. Suffice it to say that jurists were unimpressed: Hans Kelsen condemned the first clause as ‘insincere and inconsistent’,<sup>30</sup> while James Brown Scott enquired: ‘What is morality? What is international morality? What is an offense against international morality? And what is a *supreme* offense against this thing, whatever it may be?’<sup>31</sup>

But if the alleged offence against ‘international morality or the sanctity of treaties’ was not a crime and did not attract penalties, how might the ex-Kaiser actually be punished? James Garner, writing in 1920, speculated that the court might

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<sup>28</sup> C. Eagleton, ‘The Attempt to Define Aggression’, 264 *International Conciliation* (1930) 577, at 587.

<sup>29</sup> Treaty of Peace, *supra* note 26, at 285.

<sup>30</sup> H. Kelsen, ‘Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals’, 31 *California Law Review* (1943) 530, at 545.

<sup>31</sup> Scott, *supra* note 6, at 239. Original emphasis.

issue a formal pronouncement, ‘stigmatizing him perhaps as a treaty breaker primarily responsible for the war and holding him up to the execration of mankind’.<sup>32</sup> But as Article 227 had already pronounced him guilty, ‘it is not quite clear what would have been gained by having a court try him on moral charges, for which he had already been convicted, and to pronounce a condemnation which he had already received.’<sup>33</sup>

In the end, Article 227 satisfied nobody. Lloyd George had wanted confirmation of the idea that the ex-Kaiser was criminally liable for starting an aggressive war, but was compelled to accept a construction that precluded both aggression and criminality. And Woodrow Wilson, who in the name of justice had opposed legal innovations, was prepared to submit to (in the words of historian James Willis) ‘the kind of proceedings least likely to be conducted fairly’.<sup>34</sup> The Americans might have broken the stalemate by rejecting a trial outright, but other factors were at play: Willis speculates, for example, that Wilson conceded to the British the idea of arraigning the ex-Kaiser in exchange for British support over a reference to the Monroe Doctrine in the Covenant.<sup>35</sup>

As it turned out, the ‘special tribunal’ established to try the ex-Kaiser was never convened. On 15 January 1920 the *entente* powers asked the Netherlands to deliver up Wilhelm II ‘in order that he may be judged’.<sup>36</sup> The Dutch government refused on the grounds that as a neutral state it was not bound to associate itself with ‘this act of high international policy’,<sup>37</sup> although it would consider cooperating in future with international bodies dealing with ‘war deeds qualified as crimes and submitted to its jurisdiction by statute antedating the acts committed’<sup>38</sup> — a pointed reference to the *ex post facto* nature of the *entente*’s proposal. It also rebuffed a second request issued on 14 February 1920.

The matter was not pressed further. Having wrung electoral benefits from the ex-Kaiser, the British Government possibly conveyed to the Dutch, in Churchill’s words, ‘some assurance that they would not be immediately fallen upon with armed

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<sup>32</sup> J.W. Garner, ‘Punishment of Offenders Against the Laws and Customs of War’, 14 *American Journal of International Law* (1920) 70, at 92.

<sup>33</sup> *Ibid.*

<sup>34</sup> J.F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Greenwood, 1982), at 80.

<sup>35</sup> *Ibid.*, at 79.

<sup>36</sup> Scott, *supra* note 6, at 242.

<sup>37</sup> *Ibid.*, at 243.

<sup>38</sup> *Ibid.*, at 244.

violence by all the victorious nations' if they refused to extradite him.<sup>39</sup> In the process, the Netherlands Minister in London, Jonkheer R. de Marees van Swinderen, told Lord Curzon that 'several persons of the highest eminence had implored him to use his influence with his own Government to induce them to refuse the surrender ... in order to get the Allied Powers, and Great Britain in particular, out of a disagreeable scrape.'<sup>40</sup> A few decades later, van Swinderen's wife told the Nuremberg prosecutor Robert Jackson that it was none other than Lloyd George who had urged her husband 'to prevail upon the Netherlands government not to surrender him for trial'.<sup>41</sup> So the ex-Kaiser escaped prosecution, and lived the rest of his days in de facto exile in the Netherlands. When the Germans invaded in May 1940, Britain offered him asylum, which he declined.

### **3. The Covenant's Template for Peace**

#### ***A. Underwriting the Status Quo***

All of the peace agreements concluded with the vanquished powers were made up of two parts: the settlement of accounts over the war, and the new blueprint for the peace — the Covenant of the League of Nations<sup>42</sup> — which became the touchstone for the development of international law on war and peace in the ensuing decades. As the Preamble states, the Covenant's aim was 'to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war'.<sup>43</sup> Mindful of sovereignty, it set out a voluntary system of rights and duties designed to enhance peaceful relations between states while offering methods other than war for resolving conflicts between them, such as arbitration, adjudication and official enquiry. It did not advocate the 'outlawry of war' — the rallying cry of the peace movements of the time.<sup>44</sup> Instead, it aimed to draw the initiation of war *into* the regulatory framework of international law, the better to prevent it from occurring in the future.

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<sup>39</sup> W.S. Churchill, *The World Crisis: The Aftermath* (Thornton Butterworth, 1929), at 159.

<sup>40</sup> NA, FO 608/144: Curzon to Robertson, 19 July 1919.

<sup>41</sup> Library of Congress, Jackson papers, Box 95: Diary, 2 June 1945.

<sup>42</sup> The treaties of Versailles and Saint-Germain-en-Lay also incorporated the constitution of the International Labour Organization.

<sup>43</sup> Covenant of the League of Nations (signed 28 June 1919, entered into force 10 January 1920) 225 CTS (hereafter, 'Covenant') 195, at 195.

<sup>44</sup> H. Wehberg, *The Outlawry of War*, trans. by E.H. Zeydel (Carnegie Endowment for International Peace, 1931), at 7.

The Covenant was brought to life on the cusp of two eras, one in which war was legal and another in which war was not. Its purpose was to prevent another conflagration like the First World War, but while it established the machinery to provide methods other than the force of arms for resolving disputes, it did not make war unlawful as such. At its heart were Articles 10 and 11: one wedded to the *status quo*, the other to global solidarity; one setting out duties, the other rights.

The main purpose of Article 10 was to protect the new post-war settlement established by the peace treaties. It stated:

The Members ... undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.<sup>45</sup>

It thus imposed on members the duty to respect and preserve ‘the territorial integrity and existing political independence’ of other members, the word ‘existing’ underlining the commitment to uphold the *status quo*. It also used the freighted word ‘aggression’ — as distinct from the neutral phrase ‘resort to war’ used elsewhere in the treaty. Even so, ‘aggression’ was qualified by the word ‘external’ (on the insistence of the American delegate General Tasker Bliss) to show that it pertained only to wars *between* nations, not conflicts *within* them such as civil wars or internal rebellions.<sup>46</sup> Finally, in a case of aggression or its threat the Council would ‘advise’ (but not order) ‘the means by which this obligation shall be fulfilled’.<sup>47</sup>

Even at the drafting stage, Article 10 caused a stir. At a British Empire Delegation meeting, the Canadian Justice Minister Charles Doherty thought it would oblige his nation to go to war on issues remote from its own interests<sup>48</sup> — a view later shared by the American Senators who refused to allow the United States to join the League. Regarding its underwriting of the *status quo*, Doherty also objected to the presumption that ‘whatever is, is right’.<sup>49</sup> To this, Britain’s delegate Lord Robert Cecil replied: ‘Article 10 ... meant that these arrangements, whether just or unjust,

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<sup>45</sup> Covenant, *supra* note 43, at 198.

<sup>46</sup> D.H. Miller, *The Drafting of the Covenant*, vol. 2 (GP Putnam’s Sons, 1928), at 94.

<sup>47</sup> Covenant, *supra* note 43, at 198.

<sup>48</sup> NA, FO 608/156: ‘Minutes of a Meeting of the British Empire Delegation ...’, 21 April 1919, at 4.

<sup>49</sup> *Ibid.*

should not be upset by force. Whatever other remedies should be taken, no State should be allowed to take the law into its own hands.’<sup>50</sup> In the prevailing view, security overrode justice: peace, even an unjust peace, was preferable to war, even a just war.

By contrast, Article 11 signalled a new collaborative method for keeping the peace, and a more accommodating approach to changes to the existing order. heralding the opening of an era of global collective security it declared: ‘Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League’.<sup>51</sup> At the same time, it allowed for a more flexible approach to change, stating simply that ‘the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations’.<sup>52</sup> As an official British commentary stated, the Covenant was not intended ‘to stamp out the new territorial settlement as sacred and unalterable for all time’, but rather to regulate international affairs in accordance with future needs.<sup>53</sup>

The next cluster of articles outlined the machinery and methods for the peaceful settlement of disputes. Under Article 12, members agreed that any dispute ‘likely to lead to a rupture’ be submitted to arbitration, adjudication or enquiry.<sup>54</sup> Members could not go to war until three months after an award, judgment or unanimous report — in other words, they were obliged to observe a moratorium, but would not be prevented from resorting to war after that. Further, under Articles 12 and 15, restrictions on war were also waived: if the Council failed to produce a unanimous report; if a plea of domestic jurisdiction was upheld; if the other party failed to accept an award, judgment or unanimous report; or if those decisions were not produced in reasonable time.<sup>55</sup> Article 14 committed the Council to formulate and submit plans for the establishment of a Permanent Court of International Justice.

Article 10 had indicated that the Council would advise on how to deal with aggression, and Article 16 set out specific measures for applying pressure to nations. The Americans and British were wary of committing themselves to enforcing sanctions, and most were of a non-military nature, such as the severance of trade or

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<sup>50</sup> *Ibid.*, at 5.

<sup>51</sup> Covenant, *supra* note 43, at 198.

<sup>52</sup> *Ibid.*

<sup>53</sup> ‘The Covenant of the League of Nations With a Commentary Thereon’, *British Parliamentary Papers*, Misc 3. HMSO, June 1919, at 15.

<sup>54</sup> Covenant, *supra* note 43, at 199.

<sup>55</sup> *Ibid.*, at 199-201.

financial relations, the prohibition of all intercourse between members' nationals and the nationals of the Covenant-breaking state, and ultimately, expulsion from the League. If the Council decided that military sanctions were necessary, it could recommend what members might 'severally contribute to the armed forces to be used to protect the covenants of the League', but members were not obliged to follow this recommendation.<sup>56</sup>

### ***B. The Rise of Jus contra bellum***

The Covenant did not absolutely prohibit wars, but distinguished between wars conforming to the terms of the Covenant and wars in breach of them. The justice of a conflict was not a determining factor. If a state refused to submit its dispute to arbitration or adjudication, or failed to wait the requisite three months for an award before embarking on war, it would be in breach of the Covenant, even if its cause were just. By the same token, if the Council failed to reach a unanimous decision, or the other party refused to accept a judgment, a state could embark on a war under the terms of the Covenant, even if its cause were unjust. As Clyde Eagleton pointed out, a war of self-defence (which, incidentally, was nowhere mentioned) was not necessarily permissible under the Covenant.<sup>57</sup> Likewise, as drafter David Hunter Miller indicated, an invasion was not necessarily impermissible, for 'with a permissible war there could of course be a permissible invasion'.<sup>58</sup> In other words, the Covenant distinguished between permissible and impermissible wars, and proposed methods for dealing with the latter.

This new approach emerged out of, and in response to, the doctrines of the nineteenth century. In the period prior to the First World War, conflict was seen as the unwelcome but inescapable by-product of an international community made up of competing sovereign states. Given the apparent inevitability of war, jurists focussed their attention predominantly on *jus in bello* — such as the amelioration (through humanitarian law) and avoidance (through neutralism) of the effects of war. But the savagery of the war forced the leading nations to rethink this approach. The old regulatory mechanisms — neutral rights, belligerent duties, humanitarian principles — had all collapsed under the onslaught, with profound consequences. 'The

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<sup>56</sup> *Ibid.*, at 201.

<sup>57</sup> Eagleton, *supra* note 28, at 591.

<sup>58</sup> Miller, *supra* note 46, vol. 1, at 170.

immoderation shown by the great powers toward one another', Robert Tucker later wrote, 'revealed the vulnerability of the traditional system and, by so doing, opened the issue of its legitimacy'.<sup>59</sup> The 1917 Russian revolution was but one potent reminder of this vulnerability. Reform was required, and this was enshrined in the Covenant.

So, in the aftermath of the First World War, the *jus ad bellum* again became the dominant feature of international law. But whereas the classical purveyors of the just war doctrine had attempted to *justify* certain kinds of war as a means of remedying injustice, the authors of the Covenant tried to *delegitimise* wars that had been embarked upon without first exhausting pacific remedies. It did not, as some claimed, represent a revival, secular or otherwise, of the late medieval and early modern doctrines of just war.<sup>60</sup>

The Covenant did not complete the delegitimization process, however. It allowed new ideas to coexist with old assumptions, and provided the interpretive space for an oscillation between the two. Even though Article 10 suggested that aggression contravened the duty to preserve existing arrangements, and Article 16 indicated that resort to war might be punished by sanctions, old practices were not wholly discarded. Instead of expunging neutrality, the Covenant tacitly accommodated it. Sanctions were optional, so nations could still assert their neutrality in particular controversies, thereby admitting the legality of the war in question. The effect thus far, as Humphrey Waldock noted, was to impose on members 'a partial, but only partial, renunciation of war'.<sup>61</sup>

#### **4. Attempts to Close the Gaps in the Covenant**

##### ***A. Security before Disarmament***

In the decade following the First World War there was a surge of interest in international law, and in particular the development of international legal instruments to prevent further conflicts. Law journals and legal institutes flourished, and were hotbeds of debate. The twenties were thus characterized by attempts to strengthen the Covenant by closing the 'gaps' that allowed a state to resort to war. Yet despite this

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<sup>59</sup> R.W. Tucker, *The Inequality of Nations* (Martin Robertson, 1977), at 22.

<sup>60</sup> See, for example, H. Kelsen, *General Theory of Law and State*, trans. by A. Wedberg (Harvard University Press, 1946).

<sup>61</sup> C.H.M. Waldock, 'The Regulation of the Use of Force by Individual States in International Law', 81 *Recueil des Cours /Academie de Droit International* (1952 – II) 455, at 470.



burgeoning belief in the efficacy of international law, governments nevertheless proceeded cautiously, and several initiatives that had evolved under the auspices of the League were abandoned for lack of support.

Between the wars, the question of aggression was framed by the debate about disarmament. The League Council was required under Article 8 of the Covenant to formulate plans for the ‘reduction of national armaments to the lowest point consistent with national safety’.<sup>62</sup> It established various committees to tackle disarmament — or rather, as it transpired, the entwined issues of disarmament, security and sanctions. Prominent among the early initiatives was the draft Treaty of Mutual Guarantee (later renamed the draft Treaty of Mutual Assistance). This venture devolved from Resolution 14, passed by the Assembly on 27 September 1922, which stated that ‘many Governments’ — notably France, Belgium, and the states created in 1919 — ‘would be unable to accept the responsibility for a serious reduction of armaments unless they received in exchange a satisfactory guarantee of the safety of their country’.<sup>63</sup>

With this ‘security before disarmament’ formula in mind, the members of the League’s Temporary Mixed Commission drafted a treaty containing detailed provisions for mutual assistance (and less detailed provisions for disarmament). The first article declared that ‘aggressive war is an international crime’ and that no party would be ‘guilty of its commission’,<sup>64</sup> which was a groundbreaking statement, with its invocation of criminal law terms such as ‘crime’ and ‘guilty’. Yet it was out of keeping with the rest of the draft, which established that if one state were attacked by another in breach of the Covenant, the League Council would determine within four days what form assistance would take, and direct treaty signatories from the same continent to go to that state’s aid, provided that it had reduced or limited its armaments. Sanctions were therefore to be directed by a non-judicial body, and imposed by non-judicial means: the draft envisaged economic sanctions or ‘military, naval or air operations’, the latter later paid for by the aggressor state ‘up to the extreme limits of its financial capacity’.<sup>65</sup>

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<sup>62</sup> Covenant, *supra* note 43, at 197.

<sup>63</sup> Resolutions and Recommendations Adopted by the Assembly During Its Third Session, 9 *League of Nations Official Journal Special Supplement* (1922), at 26.

<sup>64</sup> Records of the Fourth Assembly, Minutes of the Third Committee, 16 *League of Nations Official Journal Special Supplement* (1923), at 203.

<sup>65</sup> *Ibid.*, at 205.

So how might aggression be gauged? The League's Permanent Advisory Commission concluded that 'under the conditions of modern warfare, it would seem impossible to decide even in theory what constitutes an act of aggression'.<sup>66</sup> A Special Committee set up by the Temporary Mixed Commission concurred with this approach, contending that 'no simple test of when an act of aggression has actually taken place can be devised'.<sup>67</sup> The latter therefore concluded that the Council should be given 'complete discretion' when making a decision.<sup>68</sup> It did, however, anticipate future definitions by producing a list of factors that might inform Council views: some were examples of aggression (such as air, chemical or naval attack, or the presence of armed forces on another state's territory); others were procedural breaches (such as refusal to submit a dispute to the Council or Court, or accept a decision).<sup>69</sup>

On 29 September 1923, the League Assembly requested that the Council submit the draft treaty to governments inside and outside the League for their comments. The response was positive but not overwhelming: by the following February, a total of 21 nations had accepted the draft in principle (though many with caveats), while three others had not responded to the call.<sup>70</sup> Among the latter was Britain, which stalled. Although Lord Robert Cecil, operating in a private capacity, had played a prominent role in the drafting process, both Ramsay MacDonald's new Labour government and the Whitehall foreign and service departments expressed deep reservations about aspects of the proposed treaty.

Their main concern was that it would compel them to assume even greater responsibility for underwriting the post-war settlement in Europe. Back at the Paris Peace Conference, Britain had been a major force behind the creation of the settlement, but it had then been operating on the premise that the United States would share the burden of maintaining peace. Priorities changed, however, when Washington refused to join the League. Britain was saddled with war-debts, overstretched in the Empire, overtaken by the Americans on every front (including, potentially, naval power), and was neither able nor willing to act as the defender of the 'insecure' states in Europe. It therefore sought flexibility — withdrawal from its

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<sup>66</sup> *Ibid.*, at 183.

<sup>67</sup> *Ibid.*, at 184.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*, at 185.

<sup>70</sup> 'The Debate on Policy', *The Times*, London, 14 February 1924, at 7.

continental responsibilities while shepherding Germany back into the fold — rather than the rigidity of the draft Treaty, which had been designed to keep her fully engaged with the arrangements of the past. It was with these priorities in mind that Leo Amery, the First Lord of the Admiralty, wrote:

Any treaty of mutual guarantee must, in fact, be a guarantee of the *status quo* established by the recent Peace Treaties. No other guarantee would be acceptable to any of our late Allies; and, for the same reason, no such guarantee could really be acceptable to any of our late enemies. We should be committed by it to intervening by force in order to maintain, in every detail, a settlement which, by the very nature of the circumstances under which it was concluded, could not be wholly equitable or deserve permanence in respect to many of its features. We should be stereotyping the rigid division of Europe into two camps, instead of giving reasonable free play to the forces which will gradually, by a series of minor upheavals, bring about the necessary readjustment.<sup>71</sup>

On 5 July 1924, Ramsay MacDonald declared that Britain would not become a party to the draft treaty, citing among other things the aforementioned committees' failure to find a definition of aggression that would offer 'that element of certainty and reliability which is essential if the League of Nations is to recommend the adoption of the treaty ... as a basis for reduction in armaments.'<sup>72</sup> This was pure humbug, of course, especially given Britain's refusal to countenance definitions on other occasions. But her repudiation of the draft treaty doubtless influenced the other wavering states to abandon it and transfer their hopes to a new venture.

### ***B. The Protocol and its Critics***

At the opening of the fifth League Assembly on 5 September 1924, the French Prime Minister Édouard Herriot coined a new slogan: 'Arbitration, security, and disarmament'.<sup>73</sup> The proposed instrument embodying this idea, worked out between himself and Ramsay MacDonald and drawn up against the background of the Ruhr occupation and the Dawes Plan, was the Protocol for the Pacific Settlement of International Disputes, or the 'Geneva Protocol'. It was designed to address an old

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<sup>71</sup> NA, FO 371/9420: Amery, 'Treaties of Mutual Guarantee and the Reduction of Armaments', 4 July 1923.

<sup>72</sup> NA, FO 371/10578: MacDonald to Secretary-General, 5 July 1924.

<sup>73</sup> 'M. Herriot's Speech', *The Times*, London, 6 September 1924, at 9.

problem (enhancing security in order to promote disarmament) by new means. Whereas the draft Treaty for Mutual Assistance had focussed primarily on the *reversal* of aggressive war through mutual assistance, the Protocol would concentrate predominantly on the *prevention* of aggression through compulsory arbitration and judicial settlement.

Once again, the problem of aggression was introduced in terms that were not reflected in the rest of the treaty. In the Preamble, signatories, recognising the solidarity of members of the international community, asserted ‘that a war of aggression constitutes a violation of this solidarity and an international crime’.<sup>74</sup> Although judicial remedies were mooted alongside others for addressing the problem of aggression, responsibility attached only to states. Despite the use of the word ‘crime’ there was nothing in the Protocol to suggest a shift from state to individual responsibility for aggressive war.

The Protocol’s aim was to render broader categories of war unlawful by closing the gaps of the Covenant on ‘resort to war’ and on arbitration. This approach was not new. At the Paris Peace Conference, the French delegates, acutely insecure about Germany, had advanced various proposals for strengthening the Covenant, such as compulsory arbitration and forceful sanctions. The British and American delegations had brushed these aside. Realising that the League would offer them little general protection, the French therefore broached more specific schemes, and it was only the compensatory (and unfulfilled) promise of security pacts with the United States and Britain that had persuaded them to abandon their plan to detach the Rhineland from Germany. After that, France had concluded various pacts aimed at the containment of Germany, while continuing to campaign for iron-clad international guarantees, culminating in 1924 with the Geneva Protocol.

Inspired by the French, and especially by their Geneva delegate, former Prime Minister Aristide Briand, the Protocol revived the concept of obligatory arbitration and judicial settlement. States would be compelled to submit their legal disputes to the Permanent Court of International Justice, and their non-legal disputes to the Council — or, if the Council could not reach a unanimous decision, to a committee of arbitration. (This last closed the gap in the Covenant’s Article 15 that allowed a state to go to war if the Council was divided.) If a signatory claimed that its dispute was a

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<sup>74</sup> Resolutions and Recommendations Adopted by the Assembly During Its Fifth Session, 21 *League of Nations Official Journal Special Supplement* (1924), at 21.

matter of domestic jurisdiction, the issue would be referred to the Court, whose decision was binding.

Having reinforced the Covenant, the negotiators felt compelled to define aggression — thus embarking on new territory, and in the process initiating a debate which, nearly nine decades later, still shows no sign of flagging. After protracted discussions, the drafters produced Article 10, which began:

Every State which resorts to war in violation of the undertakings contained in the Covenant or in the present Protocol is an aggressor. Violation of the rules laid down for a demilitarised zone shall be held equivalent to resort to war.<sup>75</sup>

The first sentence designates as aggression the ‘resort to war’ *in violation of undertakings* (thereby exempting self-defence or sanction). The second sentence expands ‘resort to war’ by referring to rules on demilitarised zones (such as Articles 42-44 of the Versailles Treaty, which deemed fortification-building or troop-assembling in the Rhineland as a ‘hostile act’, though not necessarily war).<sup>76</sup> Ensuing paragraphs of Article 10 set out the specific circumstances in which a state would be presumed to be an aggressor, such as refusal to submit to, or accept, arbitration or judicial settlement after resorting to a proscribed war.

As all this shows, the decision about aggression was not left to the discretion of the Council, as it had been by the draft treaty. Instead, the drafters of the Protocol proposed an automatic and objective method for the presumption of aggression — namely, violations of the Covenant and Protocol, and more precisely, failure to agree to settlement. It was only later in the process, when designated international bodies weighed claims and decided on action, that subjective interpretation entered the equation.

So the drafters of the Protocol tried to insert new teeth into the mouth of the Covenant. As the British Committee of Imperial Defence noted, the proposed instrument ‘with its compulsory arbitration, its restrictions on the right to take defensive precautions, its automatic definition of an aggressor, its increased reliance on force, its provisions for working out plans for economic coercion and for ascertaining in advance the amount of force to be placed at the disposal of the League,

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<sup>75</sup> *Ibid.*, at 24.

<sup>76</sup> Treaty of Peace, *supra* note 26, at 213.

and its tendency to enhance the authority of the Council at the expense of the States, goes considerably beyond the Covenant, which is based on the idea of using the moral force of the public opinion of the world, with material force in the background.’<sup>77</sup> Or as Nicolas Politis, rapporteur for the drafting committee, stated: ‘It closes the circle drawn by the Covenant; it prohibits all wars of aggression.’<sup>78</sup>

The Assembly lauded the Protocol when it was opened for signature on 2 October 1924. Its most powerful champion, France, was the first to sign. Once again, though, Britain hesitated. Whitehall was mindful of the disapproving signals emanating from Washington over its implications for the Monroe doctrine, and from some Dominions over possible Court scrutiny of domestic policies. But the main impulse behind its equivocation was its desire to retain freedom of action. This assumed a dual form: on the one hand, the British wanted to retain their unqualified right to resort to war without being accused of aggression, especially in the flammable peripheries of the Empire; while on the other, they did not want to enforce the Protocol in conflicts in which they had no interest or might incur the wrath of neutrals (such as the United States, should its trade be curtailed by British naval blockades in Europe). MacDonald started to back away from the instrument he had helped bring to life, instructing his delegates in Geneva not to sign. After his government lost the October 1924 election, Stanley Baldwin’s incoming Conservative administration delivered the *coup de grâce*. Although nineteen nations signed the Protocol, it did not enter into force.

Yet again, a British government had thwarted an initiative designed to promote security and disarmament. Aware of its reputation as spoiler, and concerned that a flat rejection would heighten insecurity, it proposed an alternative — a non-aggression treaty dealing with Germany’s western frontier, initialled by Belgium, France, Germany, Italy and the United Kingdom at Locarno on 16 October 1925<sup>79</sup> (six other bilateral treaties were also concluded at Locarno, and all seven entered into force on the same day). At around the same time, several motions condemning aggression as an international crime were raised in international and regional fora – such as at the

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<sup>77</sup> NA, CAB 24/172: Committee of Imperial Defence, ‘The Geneva Protocol and Security’, February 1925, at 22.

<sup>78</sup> Records of the Fifth Assembly, Minutes of the Third Committee, 26 *League of Nations Official Journal Special Supplement* (1924), at 197.

<sup>79</sup> Treaty of Mutual Guarantee (Belgium, France, Germany, Italy, United Kingdom) (initialled 16 October 1925, signed 1 December 1925, entered into force 14 September 1926) 54 LNTS, at 289.

Sixth League Assembly in 1925,<sup>80</sup> the Eighth League Assembly in 1927,<sup>81</sup> and the Sixth Pan-American Conference in 1928. These initiatives suggested that a general move towards the delegitimization of aggression was taking place, but had not yet acquired traction within general international law. They either lacked binding force or were concluded as regional, rather than international, agreements. Summarising the trend towards the ‘outlawry of war’ in the years up to 1925, Quincy Wright concluded that despite some piecemeal developments, ‘customary international law does not make war illegal’.<sup>82</sup>

#### **4. The Significance of the Kellogg-Briand Pact**

##### ***A. High Hopes and Low Politics***

In late 1927, discussions began over an initiative which, unlike previous efforts, would eventually win near-universal governmental support. The General Treaty for Renunciation of War as an Instrument of National Policy, also known as the ‘Kellogg-Briand Pact’ or the ‘Pact of Paris’, was proposed outside the structure of the League, and, unlike the draft treaty and Protocol, commanded the support of the United States. It was an important landmark in international law, signalling a shift in the status of certain wars from lawful to unlawful, and would later be presented as the precursor to the subsequent criminalization of aggression.

On 6 April 1927, French Foreign Minister Aristide Briand gave a statement to Associated Press proposing a pact repudiating war between France and the United States. It barely caused a ripple. He followed it up with a note of 2 June to the American Secretary of State Frank Kellogg, proposing that France and the United States sign a Pact of Perpetual Friendship.<sup>83</sup> Briand had several motives for broaching it: on one hand, he feared a rapprochement between the United States and Germany, and on the other, he wished to stabilize the European *status quo* through non-aggression pacts with as many states as could be persuaded to enter into them, including the United States.

Briand’s overtures to Washington were not received with open arms. The State

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<sup>80</sup> Resolutions and Recommendations Adopted by the Assembly During Its Sixth Session, 32 *League of Nations Official Journal Special Supplement* (1925), at 19.

<sup>81</sup> Resolutions and Recommendations Adopted by the Assembly During Its Eighth Ordinary Session, 53 *League of Nations Official Journal Special Supplement* (1927), at 22.

<sup>82</sup> Q. Wright, ‘The Outlawry of War’, 19 *American Journal of International Law* (1925) 76, at 89.

<sup>83</sup> NA, FO 371/12790: Houghton to Chamberlain, 14 April 1928, and notes between France and the United States, June 1927-26 March 1928, at 2.

Department had no wish to commit to a perpetual ‘special relationship’ with France, which would oblige the United States to stand aside if France became embroiled in a war, and thereby impose restrictions on relations with other states. And the timing of Briand’s proposal aroused suspicions: the Department’s head of the Division of Western European Affairs, Theodore Marriner, thought Briand was trying to divert attention away from France’s refusal to attend a naval limitation conference convened by Calvin Coolidge, and was drumming up a pretext for the postponement of the settlement of war debts, thereby creating the impression in France that ‘payment was unnecessary’.<sup>84</sup>

So Washington bided its time. When the Secretary of State Frank Kellogg finally replied to Briand some six months later on 28 December 1927, he accepted the proposal, but with one crucial caveat: instead of signing it with France alone, he wished to open the treaty first to the principal powers and thereafter to all nations.<sup>85</sup> With this counter-proposal, it was the turn of others to suspect American motives. An election year was imminent in the United States, and it was assumed that the Republican incumbents would use the proposed pact as a sop to liberal American opinion otherwise alienated by its bellicose ‘Big Navy’ campaigns. As the British Foreign Secretary Austen Chamberlain wrote, the handling of the Briand note conveyed the impression ‘that Kellogg’s main thought is not of international peace but of the victory of the Republican party’.<sup>86</sup>

On 5 January 1928, Paul Claudel, the French Ambassador in Washington, transmitted his government’s reply to Kellogg. It cautiously accepted the American proposal for a multilateral pact, but mindful of existing League and Locarno commitments, proposed a treaty ‘under the terms of which the high contracting parties shall renounce all war of aggression and shall declare that for the settlement of differences of whatever nature which may arise between them they will employ all pacific means’.<sup>87</sup> Kellogg, replying on 11 January, fixed upon the phrase ‘wars of aggression’, which, he said, limited the ‘unqualified renunciation of all war as an

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<sup>84</sup> Marriner memo, 24 June 1927, US Department of State, *Foreign Relations of the United States 1927*, vol. 2 (Government Printing Office, 1942), at 617.

<sup>85</sup> Kellogg note, 28 December 1928, reprinted in D.H. Miller, *The Peace Pact of Paris: A Study of the Kellogg-Briand Treaty* (GP Putnam’s Sons, 1928), at 164-165.

<sup>86</sup> C. Petrie, *The Life and Letters of the Right Hon. Sir Austen Chamberlain*, vol. 2 (Cassell & Co, 1940), at 322.

<sup>87</sup> Claudel note, 5 January 1928, reprinted in Miller, *supra* note 85, at 167.



instrument of national policy'.<sup>88</sup> On 27 February, still pre-occupied with the same problem, Kellogg added that by introducing a definition of aggression and 'exceptions and qualifications stipulating when nations would be justified in going to war,' the Pact's value as a guarantor of peace would be 'virtually destroyed'.<sup>89</sup> (At the Foreign Office, Robert Craigie, having read the press reports, speculated that this was due to the United States' reluctance to accept League decisions on the question of aggression.<sup>90</sup>)

After further exchanges of notes between the United States and France in spring 1928, discussion over the terms of the treaty was opened with four more powers: Britain, Italy, Japan and Germany (the latter now rehabilitated and in the League). The final wording of the main operative articles stated the following:

*Article I.* 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 II.* 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.<sup>91</sup>

Much can be deduced from these two articles beyond the stated fact that the parties condemned recourse to war, renounced it as an instrument of national policy, and agreed that the solution to disputes should not be sought except by pacific means. In the first article, the phrase 'recourse to war' indicated that the Pact did not preclude force short of war. Likewise, the phrase 'international controversies' excluded internal strife and civil war; the phrase 'national policy' suggested that international actions (such as League sanctions) were not the subject of the treaty; and the phrase 'with one another' suggested that wars with non-signatories were exempted. 'The intention,' Humphrey Waldock wrote, 'was to forbid all unilateral resort to war for purely national objects *whether on just or unjust grounds* but to permit war as a

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<sup>88</sup> Kellogg note, 11 January 1928, reprinted in Miller, *supra* note 85, at 169, 170.

<sup>89</sup> Kellogg note, 27 February 1928, reprinted in Miller, *supra* note 85, at 176.

<sup>90</sup> NA: FO 371/12789: Craigie, 10 January 1928.

<sup>91</sup> General Treaty for Renunciation of War as an Instrument of National Policy (signed 27 August 1928, entered into force 24 July 1929) 94 LNTS (hereafter, 'General Treaty') 57, at 63.

collective sanction either under the Covenant or the Pact itself'.<sup>92</sup> He added that the Pact did not forbid wars conducted in self defence, a matter referred to not in the treaty, but as will be seen, in the accompanying notes.

In the second article, the agreement that the 'solution of all disputes... shall never be sought except by pacific means' did not necessarily mean that the solution would never be *found* except by pacific means. In the British Foreign Office, Robert Craigie minuted: 'I suppose... it is a question of the interpretation of the word "sought". The signatory Powers agree not to *seek* a settlement except by pacific means, but may presumably be driven to the adoption of war-like means if their efforts to "seek" a pacific settlement should fail.'<sup>93</sup> Hersch Lauterpacht further observed that the Pact contained 'no specific obligation to submit controversies to binding settlement, judicial or otherwise'.<sup>94</sup> In addition, he noted that at around the time the United States signed the Pact, it also concluded several arbitration treaties 'which maintained to a practically unabated degree its traditional freedom of action'.<sup>95</sup>

Like previous efforts such as the draft Treaty and the Protocol, the Pact was designed to uphold the existing order against violent rearrangement. The Preamble, for example, expressed the wish that 'the peaceful and friendly relations now existing between their peoples may be perpetuated' and that 'all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process' — the phrases 'now existing' and 'orderly process' underlining the intent to maintain things much as they were or change them by non-forceful methods.<sup>96</sup> The British, with their imperial commitments, were especially keen to emphasise this feature of the treaty. As Robert Craigie wrote of these clauses:

[This] gets as near to a recommendation for the preservation of the *status quo* as any United States Government is likely to go. This wording may prove useful in the event of Egypt, for instance, attempting to modify, by any process which is not 'peaceful and orderly', the relationship with this country.<sup>97</sup>

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<sup>92</sup> Waldock, *supra* note 61, at 474. Original emphasis.

<sup>93</sup> Craigie, *supra* note 90. Original emphasis.

<sup>94</sup> L. Oppenheim and H. Lauterpacht (eds), *International Law – A Treatise*, Vol. 2: *Disputes, War and Neutrality* (7th edn Longmans, Green & Co, 1952), at 184.

<sup>95</sup> H. Lauterpacht, 'The Pact of Paris and the Budapest Articles of Interpretation', 20 *Transactions of Grotius Society* (1934) 178, at 186.

<sup>96</sup> General Treaty, *supra* note 91, at 59.

<sup>97</sup> NA, FO 371/12794: Craigie, 25 June 1928.

The historical irony of the United States sponsoring a treaty that effectively endorsed the British Empire was not lost on some observers, including James Shotwell, one of the progenitors of the Pact.<sup>98</sup>

Unlike previous efforts, however, the Pact did not propose sanctions. Instead, it was expected that the treaty would be effectuated through complementary mechanisms already in existence, such as the Covenant and Locarno treaty system. Leaving aside Kellogg's reminder, in line with the thinking of the time, that 'a preamble is not a binding part of a treaty',<sup>99</sup> there was, however, a sanction of sorts in the Preamble's third clause, which stated that parties were: 'Convinced ... that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty.'<sup>100</sup> The effect of this denial, as Kellogg explained, was that a violation of the Pact 'would automatically release the other parties from their obligations to the treaty-breaking state'.<sup>101</sup> Signatories were free to stop renouncing war and start *waging war* against the violator. The treaty therefore made no practical contribution to the maintenance of peace, although it did exonerate Britain and France for declaring war on Germany in September 1939.

Finally, despite contrary indications at the Nuremberg and Tokyo tribunals, the Pact did *not* renounce aggression. It renounced recourse to war 'as an instrument of national policy'.<sup>102</sup> Some, such as the British legal advisor Cecil Hurst, thought there was little difference in practice,<sup>103</sup> but Frank Kellogg, fully attuned to the currents of Senatorial opinion, knew the distinction was important enough to insist upon. As one of the few Republican Senators who had supported the Covenant in 1919-20, he was well aware of the toxicity of the word 'aggression' in Article 10, the second sentence of which was interpreted by most of his colleagues as evidence that the League would compel the United States to act against its own interests. Kellogg had no wish to revive that bruising debate and watch the Pact suffer the same fate as the Covenant. From a political perspective, the omission of the word 'aggression' meant the

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<sup>98</sup> J.T. Shotwell, 'A British Monroe Doctrine?' *New York Herald Tribune*, New York, 12 June 1928.

<sup>99</sup> Kellogg speech, 15 March 1928, reprinted in Miller, *supra* note 85, at 270.

<sup>100</sup> General Treaty, *supra* note 91, at 59-61.

<sup>101</sup> American note, 23 June 1928, reprinted in Miller, *supra* note 85, at 215.

<sup>102</sup> This formulation could equally well describe self-defence, but self-defence was exempted by reservation.

<sup>103</sup> See, for example, NA, FO 371/12789: Hurst, 16 January 1928.

difference between the Senate ratifying the Pact, with domestic kudos for the Administration, and *not* ratifying the Pact, which, just eight years after the United States had refused to join the League, would have killed the treaty, contributed to the atmosphere of suspicion and anxiety in Europe, and alienated many of Washington's allies.

Nor, it should be added, was there the slightest suggestion in the Pact or the accompanying correspondence that war was a crime, involving individual liability. Later, in response to such suggestions, the Tokyo Tribunal's President William Webb compared the language of the Pact ('condemn', 'renounce') to the language of earlier texts such as the Protocol ('international crime') and observed 'a distinct modification of terms, which I think can only be associated with a purpose not to make the initiation of war criminal'.<sup>104</sup> So when Britain's Chief Prosecutor Hartley Shawcross, opening the case on 'crimes against peace' at the Nuremberg Tribunal, stated that 'aggressive war had become, in virtue of the Pact of Paris ... illegal and a crime',<sup>105</sup> the Pact's strictest interpreters, such as Frank Kellogg, might have contested both of those claims.

### ***B. The Expansive Concept of Self-defence***

When the negotiations were opened to the other powers, their notes — effectively reservations — on self-defence further circumscribed the Pact's already circumscribed remit on recourse to war. The accompanying debate over these casts a revealing light over states' attitudes to war in the 1920s, as well as demonstrating a general tendency: if law prohibits all wars except those of national self-defence and international sanction, then nations push to expand the definitional scope of self-defence to cover new contingencies.

The American reservation on self-defence, delivered by Kellogg in a speech before the American Society of International Law, and later formalized in a note of 23 June 1928, stated that:

There is nothing in the American draft of an antiwar treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state

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<sup>104</sup> Australian War Memorial: Webb papers, 3DRL 2481 Series 4/8/20: Webb, 'Is Aggressive War a Crime?', 12 June 1946.

<sup>105</sup> International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal*, vol 3 (Nuremberg, IMT 1947-49), at 103.

and is implicit in every treaty. 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.<sup>106</sup>

Kellogg's conception of self-defence was extremely broad. His assertion that each nation should be sole judge of its actions was at odds with the more general view that states were at least nominally accountable to the international community for their actions. As Clyde Eagleton explained: 'If a State has the right to decide its own rights, and then to defend them, in legitimate self-defense, there can be no control of war.'<sup>107</sup> David Hunter Miller added that the idea that a state alone was competent to decide the question was a matter on which 'jurists generally would disagree'.<sup>108</sup> Yet Kellogg, unperturbed, stretched the concept quantitatively as well as qualitatively. Although he did not mention the Monroe Doctrine in public for fear of offending Latin American sensibilities, he nevertheless made it perfectly clear through diplomatic contacts that his conception of American self-defence under the Pact did not just cover the United States, but extended across the entirety of Latin America as well. (The Latin American states suspected as much, which was why some did not sign it.)

In Britain, meanwhile, Austen Chamberlain added further embellishments to the concept of self-defence. In his note 19 May 1928, he set out a policy, dubbed in Parliament the 'British Monroe doctrine',<sup>109</sup> which exempted from the Pact's remit 'certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety'.<sup>110</sup> The note 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. It must be clearly understood that His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect.'<sup>111</sup>

Britain therefore claimed the right of self-defence not just over her own territory and her Empire, but also over unnamed 'certain regions' outside it. Most observers

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<sup>106</sup> F.B Kellogg, 'Remarks', 22 *Proceedings of the American Society of International Law* (1928) 141, at 143.

<sup>107</sup> Eagleton, *supra* note 28, at 610.

<sup>108</sup> Miller, *supra* note 85, at 86.

<sup>109</sup> 'Britain and the Pact', *The Times*, London, 31 July 1928, at 14.

<sup>110</sup> NA, FO 371/12792: Chamberlain to Houghton, 19 May 1928.

<sup>111</sup> *Ibid.*

assumed that this phrase meant just Egypt, an independent state, but in fact, an internal British Foreign Office memorandum identified a far wider sweep of the Middle East — Egypt, Nejd, the Hejaz, Iraq, Persia and Afghanistan — covering the routes to its most important colonial possession, India.<sup>112</sup> The indeterminacy of ‘certain regions’ prompted Edwin Borchard, an American opponent of the Pact, to complain that the British went ‘far beyond anything claimed by the United States under the Monroe Doctrine, which at least has geographical limits known to everybody’.<sup>113</sup>

More was to come. According to Chamberlain’s note, defensive actions could be triggered not just by war but also by actions *short of war*. The model alluded to was Britain’s 1922 Declaration on Egypt, by which Egypt gained nominal independence but Britain retained ‘special relations’ with her over the Suez Canal.<sup>114</sup> This Declaration warned other states that Britain would not allow these relations to be ‘questioned or discussed’ by other powers, and would regard as an unfriendly act ‘any attempt at interference’ in Egyptian affairs, and would repel such ‘aggression... with all the means at their command’.<sup>115</sup> By this reasoning, defensive action could be mounted not just against all-out attack but also against rather less forceful activities such as ‘questioning’ and ‘interference’.

Chamberlain’s extensive claims to the right of self-defence were regarded with misgivings in some quarters. The Australian Prime Minister, Stanley Bruce, cabled London: ‘I have grave doubts effectiveness of this reservation and... whether such action would not be contrary to very principle on which treaty itself rests.’<sup>116</sup> He continued (in telegraphese): ‘Concrete case would be that of Great Britain being forced to... protect British interests Egypt by landing troops bombarding ports or aircraft action. I cannot entirely dismiss possibility such acts being construed as acts of war notwithstanding British Declaration 1922.’<sup>117</sup> A senior official in the British Admiralty, which was responsible for policing the Suez Canal and its approaches, echoed this sentiment, minuting that in the event of a threat to British lives and property in Egypt, ‘I am anxious to know what means other than “an ultimatum

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<sup>112</sup> NA, ADM 116/2673: ‘Draft Treaty for the Renunciation of War ...’, 29 June 1928.

<sup>113</sup> E.M. Borchard, ‘The Multilateral Treaty for the Renunciation of War’, 23 *American Journal of International Law* (1929) 116, at 118.

<sup>114</sup> Draft Treaty, *supra* note 112.

<sup>115</sup> *Ibid.*

<sup>116</sup> NA, DO 117/116: Bruce, 18 July 1928.

<sup>117</sup> *Ibid.*

followed by the dispatch of warships” are envisaged by the Foreign Office in order to correct the situation.’<sup>118</sup>

Despite these cavils, the Foreign Office was reasonably confident that the United States and Japan, with their own ‘certain regions’ in Latin America and Manchuria, could be relied on to support Britain’s stance.<sup>119</sup> This proved to be the case. HG Chilton of the British Embassy reported that Kellogg had told him that: ‘the treaty does not affect United States Monroe Doctrine and ... he does not see why we should not have ours’.<sup>120</sup> This tacit arrangement satisfied the states concerned, but displeased some jurists: as Clyde Eagleton grumbled, the self-defence exceptions to the Pact ‘destroy its whole meaning’.<sup>121</sup>

### ***C. ‘A Bell Sans Tongue, A Saw Sans Teeth’***

As the Americans had stressed from the beginning, the Pact was more a statement of principle than of law. Indeed, Alanson Houghton, the American Ambassador to London, impressed on Chamberlain that there was really nothing for jurists to decide, since the question was ‘not juridical but political’.<sup>122</sup> And when Japanese *chargé d’affaires* Sawada Setsuzo informed Under-Secretary of State Robert Olds that the Pact was being examined by lawyers on Japan’s Privy Council, Olds replied: ‘[We] would not be disposed to listen very much to jurists. This was not that kind of treaty.’<sup>123</sup>

The Pact was opened to signature on 27 August 1928 — first to 15 states, then to all. A few years later, Hersch Lauterpacht offered a balanced appraisal of its effects: ‘On the one hand there was no doubt that the Pact had effected a fundamental change in international law. Prior to [it] ... war was an instrument not only for giving effect to international law, but also for changing the law. This had indisputably been changed. On the other hand, it had been widely held that the legal results of the Pact were next to nothing.’<sup>124</sup> (At around the same time, Lauterpacht rebuked the

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<sup>118</sup> NA, ADM 116/2673: WNF, 13 July 1928.

<sup>119</sup> NA, DO 117/116: ‘The Effect of the Treaty on Egypt and Other Special Regions’, c July 1928.

<sup>120</sup> NA, ADM 116 /2673: Chilton to Foreign Office, 21 August 1928.

<sup>121</sup> Eagleton, *supra* note 28, at 607.

<sup>122</sup> Houghton to Secretary of State, 3 May 1928, US Department of State, *Foreign Relations of the United States* 1928, vol. 1 (Government Printing Office, 1942), at 50.

<sup>123</sup> Olds, 12 June 1928, US Department of State, *Foreign Relations of the United States* 1928, vol. 1 (Government Printing Office, 1942), at 85.

<sup>124</sup> J. Fischer Williams and others, ‘Recent Interpretations of the Briand-Kellogg Pact’, 14 *International Affairs* (London) (1935) 346, at 363.

International Law Association, which had issued a generous ‘interpretation’ of it, for adding to the atmosphere ‘of befogging unreality and artificiality created by such treaties’.<sup>125</sup>)

Meanwhile the US Senate dutifully ratified the Pact, passing it by 85 votes to one on 15 January 1929. The national campaign in its favour had managed to attract support from across the political spectrum, from conservatives who saw it as a vehicle for American moral suasion, to liberals who interpreted it as a move towards collective security. Pragmatism also played a part: Senator Carter Glass stated that he did not believe that the treaty was ‘worth a postage stamp in bringing about international peace ... but it would be psychologically bad to defeat it’.<sup>126</sup> And Hiram Johnson, who also voted for it, closed the debate with a verse from François Villon:

To messire Noël, 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 bed sans sheet, a board sans meat,  
A bell sans tongue, a saw sans teeth  
To make his nothingness complete.<sup>127</sup>

Immediately after the vote on the Pact, the Senators turned their attention to a more pressing matter: a bill authorising a massive expansion of the US Navy through the construction of 15 new cruisers. Noting this, George Wickersham likened the Senate to the temple of the two-headed Janus: ‘one contemplating peace and the other smiling at war!’<sup>128</sup>

Over the next decade, the Kellogg-Briand Pact enjoyed just a few moments of prominence, one of them being in 1932. After Japan embarked upon its occupation of Manchuria in late 1931, the Hoover Administration in Washington, unwilling to exert itself militarily or economically, searched for alternative ways to express its disapproval of Japanese expansionism. What emerged was the policy of diplomatic

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<sup>125</sup> Lauterpacht, *supra* note 95, at 196.

<sup>126</sup> ‘The Congress: Senate Week’, *Time*, 28 January 1929, available at <http://www.time.com/time/magazine/article/0,9171,723564,00.html> (accessed 2 June 2011).

<sup>127</sup> *Ibid.*

<sup>128</sup> G.W. Wickersham, ‘The Pact of Paris: A Gesture or a Pledge?’ 7 *Foreign Affairs* (1929) 356, at 356.



‘non-recognition’ of territorial gains made during wars conducted in violation of the terms of the Pact. By this method, the Acting Secretary of State William Castle explained, the ‘spoils of war become Dead Sea fruits’.<sup>129</sup>

The originator of this policy, Secretary of State Henry Stimson, made reference to the Pact (the hinge upon which non-recognition hung) during a speech at the Council on Foreign Relations on 8 August 1932. He accurately stated that it transformed war into ‘an illegal thing’, and more speculatively added that when nations engaged in armed conflict, ‘we denounce them as lawbreakers’.<sup>130</sup> One observer, British Ambassador Sir Ronald Lindsay, offered a jaundiced but plausible explanation for Stimson’s policy: ‘Refusal of recognition costs nothing and to a sanctimonious government it might well appear a very handy sort of chloroform wherewith to stifle the outcries of unintelligent idealists. As a form of international pressure it is, of course, perfectly futile’.<sup>131</sup>

Was the Pact an exercise in futility? As originally conceived by Briand on behalf of France as a way to inveigle the United States into a perpetual alliance, it was highly useful. As subsequently conceived by Kellogg as a means to sidestep France and turn a ‘political trick’ in domestic affairs,<sup>132</sup> it was of little moment. Yet it had significance beyond these immediate national considerations. In political terms it represented the shift of trans-Atlantic power away from Britain and towards the United States. And in legal terms, it marked the tipping point from the old regime that tolerated war, to the new regime under which war was unlawful unless conducted as self-defence or sanction.

## **6. The Renewed Search for a Definition**

### ***A. The Soviets Propose a List***

For all the debate about issues pertaining to *jus contra bellum*, aggressive war was not itself defined in any of the major international treaties ratified after the First World War. Their authors either looked for other ways to determine treaty breaches, or shied away from yardsticks for appraising national conduct. As David Hunter Miller wrote

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<sup>129</sup> Quoted in F.A. Middlebush, ‘Non-Recognition as a Sanction of International Law’, 27 *Proceedings of the American Society of International Law* (1933) 40, at 47.

<sup>130</sup> H.L. Stimson, ‘The Pact of Paris: Three Years of Development’, 11 *Foreign Affairs* (1932-33) vii, at x.

<sup>131</sup> NA, FO 115/3401: Lindsay (Washington) to Foreign Office, 21 January 1932.

<sup>132</sup> William Castle quoted in R.H. Ferrell, *Peace in Their Time: The Origins of the Kellogg-Briand Pact* (Yale University Press, 1952), at 165.

of the reference to aggression in the Covenant: 'it was wise to leave the matter vague and uncertain' because 'precision in any international document, particularly regarding such a momentous issue, is not always desirable'.<sup>133</sup> *Omnis definitio in jure periculosa est.*

As the threat of war loomed larger in the early 1930s, insecure states began to demand from international law greater protection from aggression. Among the most prominent of these was the Soviet Union, which feared a war on both flanks. To the East, Japan's Kwantung Army in Manchuria straddled the Chinese Eastern Railway connecting Vladivostok with Russia. To the West, fascist movements had either assumed power or were in the process of doing so in a number of eastern and central European states, such as Germany, Hungary, Italy and Romania. With this in mind, Stalin revived Lenin's older tactic of 'peaceful coexistence' with capitalist states in order to build new alliances against these burgeoning threats. This process included cooperation with and eventual membership of the League of Nations.

This policy of 'peaceful coexistence' was given fresh impetus by Hitler's appointment as German Chancellor on 30 January 1933. Seven days later, at the League-sponsored Disarmament Conference, the Soviet Foreign Minister Maxim Litvinov proposed attaching a 'Definition of "Aggressor"' to the convention on security and disarmament then under discussion. But instead of defining aggression as a state's refusal to submit to international remedies, as had previous treaties, it set out a list of illustrative examples of state aggression, starting with 'declaration of war'. It was this list, born of Soviet insecurity, which provided the blueprint for all of the subsequent enumerative definitions mooted after the Second World War, from proposals made by Robert Jackson at the London Conference in 1945 and Andrey Vishinsky in the UN's First Committee in 1950, to the annex of Resolution 3314 passed by the UN Assembly in 1974 and the derivative definition accepted at Kampala last year.

After a Preamble acknowledging the right to national independence, territorial inviolability, security and self-defence, the definition of aggressor, with its emphasis on the chronology of events ('first'), stated as follows:

The aggressor in an international conflict shall be considered that State which is the first to take any of the following actions:

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<sup>133</sup> Miller, *supra* note 46, vol. 1, at 181.

- a) Declaration of war against another State;
- b) The invasion by its armed forces of the territory of another State without declaration of war;
- c) Bombarding the territory of another State by its land, naval or air forces or knowingly attacking the naval or air forces of another State;
- d) The landing in, or introduction within the frontiers of, another State of land, naval or air forces without the permission of the Government of such a State, or the infringement of the conditions of such permission, particularly as regards the duration of sojourn or extension of area;
- e) The establishment of a naval blockade of the coast or ports of another State.<sup>134</sup>

This codification of aggression was followed by the warning that, ‘No considerations whatsoever of a political, strategical or economic nature ... shall be accepted as justification of aggression.’<sup>135</sup> This was expanded on in a 15-point list, which prohibited various pretexts for the use of force, such as ‘Political, economic or cultural backwardness’, ‘Alleged mal-administration’, ‘Possible danger to life or property of foreign residents’, and ‘Revolutionary or counter-revolutionary movement, civil war, disorders or strikes’.<sup>136</sup> The Soviet Union was highly protective of its sovereignty, but these stipulations would also have ameliorated other nations’ concerns about the definition’s effect on the conduct of their domestic affairs.

This was followed by exclusions of the use of force on the grounds of national policies, such as the infringement of international agreements, the rupture of diplomatic or economic relations, the repudiation of debts, the non-admission or limitation of immigration, or religious or anti-religious measures. As *The Economist* noted, the list included ‘every excuse ... that any country has ever offered for attacking the Soviet Union’.<sup>137</sup> But it was designed to appeal to other states as well, including the Pacific Rim nations that had erected barriers to Japanese immigration, such as Australia and the United States; the Asian nations that had boycotted a foreign occupier’s goods, such as China and India; and the European and Latin American nations that were indebted to the United States.

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<sup>134</sup> Conference for the Reduction and Limitation of Armaments (Series B, vol. 2) Minutes of the General Commission, 6 February 1933 (‘Definition of “Aggressor”: Draft Definition’, Doc. Conf.D/C.G.38.) 234, at 237-238.

<sup>135</sup> *Ibid.*, at 238.

<sup>136</sup> *Ibid.*

<sup>137</sup> ‘The Disarmament Conference’, *Economist*, 11 February 1933, 284, at 285.

### ***B. An Objective Standard***

When Litvinov proposed his definition, he did not refer to any aggressor by name, but his words clearly conveyed the Soviets' concerns about their security in the immediate future, based on the assaults to which they had been subjected in the recent past, such as the *entente* powers' interventions in support of the white Russians in 1918-1921. Given this experience, could they expect international adjudications carried out by similarly motivated powers on questions of aggression to be wholly impartial towards the Soviet Union? Litvinov thought not. It was not so long ago, he reasoned, that 'the phenomenon of a Soviet socialist State was so distasteful to the whole capitalist world that, at the time, attempts were even made by way of intervention to restore capitalism in our country'.<sup>138</sup> He added that fresh assaults were probably still being contemplated.<sup>139</sup>

Litvinov illustrated his point about national self-interest by reference to the Kellogg-Briand Pact, which the Soviets had ratified while refusing to assent to the accompanying notes. The reference to the Pact was pertinent at the Disarmament Conference because France had proposed the establishment of an international body to enforce its terms, or, as Litvinov put it, to 'provide for certain international sanctions with regard to a State infringing the Pact — that is to say, a State found to be the aggressor in any armed conflict' (a construction that narrowly avoided using the word 'aggression', which Kellogg had so firmly excluded from the treaty).<sup>140</sup> But the old problem of states looking to their own interests — which was manifested, he said, through the Western powers' notes on self-defence, which had practically nullified the Pact — would not go away unless this body was guided by a universally accepted definition.<sup>141</sup>

It was to rectify this state of affairs that Litvinov proposed his simple and objective determinant of aggression: which nation attacked first? Subjective questions such as intent or provocation were of less import. And because determination was automatic, there was no need for international bodies to *interpret* events. Litvinov's

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<sup>138</sup> Conference for the Reduction and Limitation of Armaments (Series B, vol. 2) Minutes of the General Commission, Discussion, 6 February 1933 (Conf.Doc.146.) 233, at 236.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*, at 236, 237.

emphasis on the first strike was designed to compel them to act impartially, no matter which states happened to be involved in the dispute.<sup>142</sup>

Although Litvinov had couched his proposal almost entirely in terms of Soviet national self-interest, it attracted significant support from other nations. France had long pushed for a definition, and a majority of others, including Poland, Turkey, Chile, Persia and the ‘little entente’ states were also in favour. Weaker nations in particular looked to international law for protection from the machinations of the great powers. In the interwar years international law offered only the flimsiest protection, but it was nevertheless seen as upholding the principle of universality and equity, the interests of the weak as well as the strong — hence the smaller states’ consistent agitation for its codification and enforcement. Litvinov’s proposal, which set down an unyielding and objective standard for the identification and stigmatization of an aggressor, mined this rich seam of vulnerability.

As a consequence, delegates from the most powerful states — the United States and Britain — reached for emollient terms in which to couch their objections to a definition of aggression. Their private view was that a definition would be restrictive and counterproductive, but their public argument was that aggression was too complex and multifarious a matter to be adequately defined, and that attempts to devise a formula for its identification were therefore misplaced. British delegate Anthony Eden quoted the Temporary Mixed Commission’s earlier view that in the conditions of modern warfare ‘it would seem impossible to decide, even in theory, what constitutes an act of aggression’,<sup>143</sup> while the American Hugh Gibson suggested that there ‘would always be ways of resorting to force which remained technically outside any definition that man in his finite wisdom could conceive’.<sup>144</sup>

These public claims about the *impossibility* of adequate definition, advanced as a riposte to Litvinov, were unconvincing — human activities are eminently definable, as the corpus of the law testifies. Indeed, Anglo-American authors soon undermined them by advancing definitions of their own. The most significant of these was presented on 16 May 1933, when Franklin Roosevelt sent a message to the Conference in which he stated that nations should enter a non-aggression pact and ‘individually agree that they will send no armed force of whatsoever nature across

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<sup>142</sup> *Ibid.*, at 235-237.

<sup>143</sup> Conference for the Reduction and Limitation of Armaments (Series D, vol. 5) Minutes of the Political Commission, 10 March 1933 (Doc. Conf.D/C.G./P.V.38.) 47, at 53.

<sup>144</sup> *Ibid.*, at 55.

their frontiers'.<sup>145</sup> (This definition, which has been overlooked in subsequent debates and commentaries, infuriated the British.) Six days later, Norman Davis, the American delegation head, stated that 'the simplest and most accurate definition of an aggressor is one whose armed forces are found on alien soil in violation of treaties'.<sup>146</sup> And a week after that, the British and the Americans, still mindful of Litvinov, worked out a spoiler definition which proposed: 'a state in violation of treaties, invades with its armed forces the territory of another state, whether by land, sea or air and whether with or without a declaration of war'.<sup>147</sup> The existence of all these definitions made it clear that the objection to the idea was nothing more than a debating point against the Soviets.

Britain's real motives for rejecting Litvinov's proposal emerged in the private correspondence between representatives at the conference and the Foreign Office in London. One example, a memorandum written by the Foreign Office legal advisor William Malkin and summarized here by one of his diplomatic successors, shows that they had several grounds for opposition, the most prominent being that Britain might itself engage in actions listed in Litvinov's definition. In the Foreign Office view:

Our main reasons for disliking this proposal (apart from an inherent preference for approaching each case on its merits) were (a) that it was based upon a restrictive continental view of frontiers etc., which might well prove in an emergency militarily embarrassing to us (indeed it was suspected that the proposal was drafted with this aim in view); (b) that the list was in any case not exhaustive and could be got around with a little ingenuity by a determined aggressor; and (c) that it was inherently bad and dangerous in basing itself ... on 'the purely chronological test that the aggressor is that party to the dispute *who is the first to commit* any of the specified acts'.<sup>148</sup>

### ***C. Aggression through Proxies***

The question of the definition was referred to the conference's Committee on Security Questions, presided over by Nicolas Politis — by then a longstanding participant in

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<sup>145</sup> Conference for the Reduction and Limitation of Armaments, General Commission, 19 May 1933 (Doc. Conf.D./C.G./P.V.59.), at 2.

<sup>146</sup> Davis to Secretary of State, 19 May 1933, US Department of State, *Foreign Relations of the United States 1933* (vol. 1) *General*, (Government Printing Office, 1950), at 157.

<sup>147</sup> Davis to Secretary of State, 30 May 1933, US Department of State, *Foreign Relations of the United States 1933* (vol. 1) *General*, (Government Printing Office, 1950), at 176.

<sup>148</sup> NA, FO 371/95721: Holmer, 2 March 1951, recapitulating Malkin's minute of 13 October 1933. Original emphasis.

the debates about aggression.<sup>149</sup> His report, ‘An Act Relating to the Definition of the Aggressor’, presented on 24 May 1933, was essentially a reworking of, rather than a departure from, the Litvinov resolution. The most significant change was the removal of the clause on the landing of military forces in another country without its permission, and its replacement with another clause relating to indirect aggression (aggression through proxies) carried out by armed bands.

This ‘armed bands’ clause was inserted on the insistence of Turkey’s delegate Tewfik Rushdi Bey, whose nation was attempting to crush a Kurdish rebellion on its eastern border (in 1930, the Turks had deployed 60,000 troops against Kurdish incursions from Mount Ararat, which was then in Persia).<sup>150</sup> Pantcho Hadji-Mischeff, the delegate from neighbouring Bulgaria, opposed the clause on the grounds that the Treaty of Neuilly prevented his nation from possessing a border force large enough to control the movement of armed bands, and his nation had no wish to be punished as an aggressor for this deficiency.<sup>151</sup> The clause stood, however, and appeared in the Politis-Litvinov draft as follows:

Provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take in its own territory all the measures in its power to deprive these bands of all assistance and protection.<sup>152</sup>

Once again, Anthony Eden opposed the entire definition, this time on the grounds that the formula was inflexible. He argued that a definition setting out a rigid and automatic basis for judgment lacked the elasticity to address the doubtful and difficult cases. In those instances, any consideration of the prior circumstances (such as deliberate provocation) was not only left out of account, but absolutely excluded by the terms of the definition — a state of affairs which might lead an unjust or inequitable decision.<sup>153</sup> In *The Times*, meanwhile, the jurist H.A. Smith cited anomalies based on a ‘first strike’ interpretation: ‘France appears to have been the

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<sup>149</sup> Politis was a frequent contributor to the French-language literature on aggression, along with Paul Bastid, Albert Geouffre de Lapradelle, Louis Le Fur, Yves Leroy de la Brière, Robert Redslob, Georges Scelle, René Vignol and others.

<sup>150</sup> ‘The Kurdish Rising’, *The Times*, 25 July 1930, at 11; ‘Soviet Offer to Mediate’, *The Times*, 14 August 1930, at 10.

<sup>151</sup> NA, FO 371/17361: Leeper, 31 May 1933.

<sup>152</sup> Conference for the Reduction and Limitation of Armaments, General Commission, 24 May 1933 (Doc. Conf.D/C.G./108, P.V.38.), at 15-16.

<sup>153</sup> ‘Defining an Aggressor’, *The Times*, London, 26 May 1933, at 13.

aggressor in 1870', he wrote, and 'The United States becomes the aggressor against Spain in 1898 and Japan against Russia in 1904.'<sup>154</sup>

The Politis-Litvinov formula was shelved, but a few months later the Soviets resurrected the revised resolution (retaining the clause about armed bands) as the core of three Moscow-sponsored treaties, each entitled Convention for the Definition of Aggression, signed on 3, 4, and 5 July 1933 with Afghanistan, Czechoslovakia, Estonia, Latvia, Lithuania, Persia, Poland, Romania, Turkey and Yugoslavia.<sup>155</sup> But by the time these treaties were ratified, the League's first experiment in collective security was virtually over. Japan withdrew from the League over Manchuria on 25 February 1933, and Germany walked out of the Disarmament Conference, and thence the League, over arms limitations on 14 October. Thereafter, rearmament rather than disarmament dominated the international agenda.

## 7. Conclusion

The interwar years marked the transition between two regimes in international law. But in retrospect, and given the claims to the contrary made at Nuremberg and Tokyo, the most remarkable feature of the period was the *absence* of legal milestones marking the advance towards the criminalization of aggression. Lloyd George's proposal to arraign the ex-Kaiser for starting the war came to nothing. Resolutions mentioning the 'international crime' of aggression, such as the draft Treaty for Mutual Assistance and the Geneva Protocol, were never ratified. And the Kellogg-Briand Pact, while renouncing war 'as an instrument of national policy', made no mention of aggression, never mind individual responsibility for it. After 1919, the idea of trying national leaders for starting wars lay dormant in international policy-making circles until the closing stages of the Second World War. It was only then, with the defeat of the Axis powers within sight, that politicians and jurists returned to the problem of the disposal of enemy leaders, and to the role that courts might play in this process.

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<sup>154</sup> H.A. Smith, 'To the Editor of the Times', *The Times*, London, 31 May 1933, at 10.

<sup>155</sup> See, for example, Convention for the Definition of Aggression (Afghanistan, Estonia, Latvia, Persia, Poland, Romania, Turkey, USSR) (signed 3 July 1933, entered into force 16 October 1933) 147 LNTS, at 69.