The “Renunciation of War as an Instrument of National Policy”

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Recently there have been several international armed conflicts that cannot simply be called wars in the traditional sense. In 1999, no NATO Member State carrying out armed actions in Yugoslavia had previously been attacked. They did not act in self-defence nor did they help a State by collective self-defence because Kosovo was not a sovereign State. NATO and its members therefore carefully avoided the word war and justified their actions as humanitarian intervention. This notion existed already but “war against terror” is a new one. Created after the terrorist aeroplane attacks in New York and Washington on 11 September 2001, the notion represents a new form of armed conflict. Even though the United States often uses the word war her armed actions, and those of her allies, in Afghanistan against the Taliban regime and the terror organization Al Quaida cannot be called a war of self-defence in the traditional sense. The United States has not been attacked by a foreign State or a de facto regime.

There has never been and probably there will never be unanimity on what constitutes war. However, McNair’s already 76-year-old attempt at a definition seems to be one that many can agree on. Since declarations of war fell out of fashion one has to concentrate on part (c):

“The state of war arises in International Law (a) at the moment, if any, specified in a declaration of war; or (b) if none is specified, then immediately upon the communication of a declaration of war; or (c) upon the commission of an act of force, under the authority of a State, which is done animo belligerendi, or which, being done sine animo belligerendi but by way of reprisals or intervention, the other State elects to regard as creating a state of war, either by repelling force by force or in some other way; retroactive effect being given to this election, so that the state of war arises on the commission of the first act of force.”

Much has been written on the legality or illegality of armed force in the above-mentioned conflicts or “wars”. I do not intend to add another learned opinion. Instead, I

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will take the present opportunity to examine how war was outlawed in the aftermath of the First World War and what impact this had on international legal thinking. Parallels between today’s arguments and those raised 70 years ago leap to the eye.

1. The Freedom to Wage War in Public International Law Prior to 1928

On the eve of the First World War, governments of the world, public opinion, and legal scholars agreed that every sovereign State could have recourse to war whenever it seemed advisable. The motto of Clausewitz’s classic treatise on war was the reality of contemporary thinking: “War is an instrument of policy”. For example, in the Spanish-American War of 1898, the Boer War of 1899-1902, the Balkan Wars of 1912 and 1913 and, finally, the World War of 1914-18, many of the world’s States trusted more in military action than in the instruments of diplomacy or arbitration. According to the prevailing positivist opinion, public international law was indifferent towards the State’s extra-legal decision to go to war. All natural law theories stating that a just war (bellum iustum) depended on certain pre-conditions had virtually disappeared during the nineteenth century. Still, some legal scholars declared that war was only legal as the ultimate reaction to a breach of international law. However, they had to concede that the State’s decision was not verifiable. Thus there was no real difference between this right to war (ius ad bellum) and the theory of extra-legality. Deviating from this rule of general law very few treaties prohibited war in certain cases, especially those guaranteeing the neutralization of Belgium and the Drágo-Porter Convention of 1907.

The Hague Peace Conferences of 1899 and 1907 tried to promote the peaceful settlement of conflicts by arbitration and mediation but these means never became obligatory. Furthermore, the Conferences partially codified and improved the laws of war (ius in bello). Only after long years of incredible losses and great suffering in the World War, the peace movements aiming at a restriction or even a prohibition of the ius ad bellum gained more influence. This found different juridical expression. On the one hand, some scholars, mostly the Catholic scholastic ones,2 revived bellum iustum theories. But it is not absolutely clear whether the Paris Peace Treaties of 1919 were based on an assumption of Germany’s and her allies’ war guilt in a strictly legal sense and thus a bellum iustum theory. On the other hand, the Covenant of the League of Nations of 1919 did not alter the principle of the freedom of war. Nevertheless, League members were subject to essential restrictions that covered nearly all cases of the right to go to war. Although US President Wilson was one of the League’s greatest protagonists his country and several other States did not join the League (nor the Permanent Court of International Justice [PCIJ]). Hence, it never reached the universality the succeeding United Nations (and the International Court of Justice [ICJ]) obtained after the Second World War. Therefore the unrestricted ius ad bellum continued to exist for

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those States after 1919. At the same time, some “progressive” international lawyers started to turn upside down the old relation of rule and exception: they conceived the free resort to war as an obsolete exception to the rule of peace.

In 1924 the League of Nations tried to perfect its system by the Geneva Protocol which prohibited aggressive war and contained effective sanctions. However, due to British opposition the Protocol never came into effect. After this failure some States renounced their right to war on a mutual basis. Outstanding was the so-called Rhine Pact of Locarno of 1925 by which Germany and France as well as Germany and Belgium renounced aggressive war against each other. Great Britain and Italy guaranteed the Pact. But the virtually insurmountable political antagonisms of that time – especially enforcement or revision of the Paris Peace Treaties, disarmament, and the imbalance of power in Europe – were scarcely eased, let alone solved.

2. Origin and Universality of the Briand-Kellogg Pact

In this situation, there came in 1928 the first worldwide prohibition of war. The Briand-Kellogg Pact (otherwise the Kellogg Pact or the Pact of Paris; below called BKP) owes its origin to very different powers. These cannot be understood without some knowledge of the background of the old law and the conclusions many people had drawn from the First World War. While the League of Nations relied on international organization to secure peace, the most influential faction in the American movement for the outlawry of war distrusted the League. That faction was the group around the Chicago lawyer Salmon Levinson and Senator William Borah based on political isolationism and Puritan values. Their impetus to prohibit war was founded on ethical conviction similar to the campaigns for the prohibition of slavery, duels, and alcohol before. Another, not less idealistic, faction was the pro-League group around the New York-based Carnegie Endowment for International Peace. Due to pressure from the outlawry movement, the governments and diplomats took up the idea of outlawry and promoted it actively from the turn of the year 1927-1928. Three of the most important antagonisms, which played a mayor role in the negotiations, were internationalism (idealistic internationalism as well as power politics in disguise) and isolationism, the quest for legal exactness and the confidence in the public opinion’s power to judge, winners and losers of the World War.


4 Esp. Salmon Levinson’s pamphlet Outlawry of War, edited by the American Committee for the Outlawry of War (1921), Charles Morrison, The Outlawry of War (1927), his journal The Christian Century, and Borah’s initiatives in the Senate.

In 1927 French-American tensions over the repayment of war loans and the deadlock in disarmament were high. Taking advantage of the tenth anniversary of the American intervention in the First World War in April 1927, French foreign minister Aristide Briand tried to ease the situation and to tie the United States closer to France. To this end, he took up an idea of James Shotwell of the Carnegie Endowment for International Peace and suggested, via the press instead of diplomatic channels, a bilateral treaty. His message took up the American notion of outlawry of war and turned upside down Clausewitz’s famous phrase:

“[…] la France serait prête à souscrire publiquement, avec les Etats-Unis, tout engagement mutuel tendant à mettre entre ces deux pays, suivant l’expression américaine, ‘la guerre hors la loi’. La renonciation à la guerre comme instrument de la politique nationale est une conception déjà familière aux signataires du pacte de la Société des Nations et des traités de Locarno.”

US Secretary of State Frank Kellogg tried to ignore the shocking disrespect of diplomatic customs and thus Briand’s message. But the outlawry-of-war movements mobilized public opinion and put pressure on Washington, which faced elections in 1928. Not earlier than 28 December 1927 Kellogg countered Briand’s initiative with the suggestion of universality. Probably his idea was to frustrate French attempts to make the United States an ally of France in European power politics. France’s power in Europe was based on military alliances and she needed the war option as ultima ratio to hold her old foe Germany in check. Now, both foreign ministers tried to make use of public opinion against each other, although, at least from Spring 1928 on, in the depths of their hearts both supported the idea of outlawry. Therefore they immediately published all notes they exchanged during the negotiations – a novelty in diplomacy. Within a few weeks Kellogg had manoeuvred Briand into a position in which the latter had to agree to negotiations on a multilateral outlawry treaty with all the other great powers: Germany, Great Britain, Italy, and Japan. Later the negotiations were extended to the three smaller Locarno States (Belgium, Czechoslovakia, Poland) and the semi-sovereign parts of the British Empire (India and the Dominions Australia, Canada, Ireland, New Zealand, South Africa). On 27 August 1928 all fifteen parties signed the BKP in Paris. Its operative articles are short:

“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 whatever origin they may be, which may arise among them, shall never be sought except by pacific means.”

Nearly all the world’s States ratified the BKP at once or within a few years. It came into force on 24 July 1929. Four Latin American States that opposed American foreign
policy did not accede but by virtue of the Saavedra Lamas Treaty, repeated in its Article 1 the content of the BKP, they were bound as well by the prohibition of aggressive war since 1935. Only four European microstates (San Marino, Liechtenstein, Monaco, Vatican State) and a few Asian territories which did not clearly belong to the international community of States and did not or practically not participate in international relations (esp. Mongolia and Yemen) were not bound contractually. Thus the prohibition of aggressive war has to be called universal public international law since 1929 or, by the latest, 1935. In the inter-war period no treaty had more Member States than the BKP with its 63 participants. Even the international pariah, the Soviet Union, acceded although the Communist Party’s Central Committee called the Pact in 1929 a “hypocritical pact of the bourgeoisie.” Ironically, the USSR was the first country to ratify.

3. Imperfection as Prerequisite

The BKP was negotiated and globally ratified quickly because it left open three fundamental difficulties. Any more detailed commitment would have been blocked by the United States Government or isolationist senators and probably by some other countries as well.

a) First of all, the BKP’s wording prohibits just “war”; it is not restricted to illegal aggression or aggressive war. The contracting parties did not agree on any definition of war nor did they list and define the exceptions within the treaty, especially the right to self-defence.

Some exceptions are expressly mentioned or at least indicated in the diplomatic notes preparing the Pact. Their interpretation is difficult because no State made a formal reservation when signing or ratifying the BKP. Therefore there are no reservations in the strict legal sense although the vast majority of politicians and legal authors simply spoke of reservations. The first important book on the BKP already insists on the irrelevance of legal accuracy in this regard:

“Whether it be called explanation or interpretation or qualification or reservation, everything that the Parties themselves agreed that the Treaty means, it does mean.”

By far the most important so-called reservation is self-defence as described by Kellogg in the decisive US note of 23 June 1928:

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6 Only the Universal Postal Union with several colonies as separate members had more members (77).


“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-defence.”

Thus Kellogg states the impossibility of transferring competence to international institutions. This is not the unavoidable consequence of sovereignty. If it were, there would necessarily be a general rule that no international institution could ever be competent to decide any matter which a party calls vital. But this attitude can be found in many American publications of that time: They simply could not imagine any international institution controlling the justness of an action which the USA itself calls self-defence.

In addition to self-defence, there are often listed five further “reservations”. All of them are related to self-defence or collective self-defence: (1) Most authors called the Monroe doctrine a reservation to the BKP, although the diplomatic notes do not mention it. To Kellogg and many of his compatriots this old doctrine without fixed limitations was nothing but a case of self-defence and therefore implied in every treaty ratified by the United States; (2) The British Government reminded the United States that “there are certain regions in the world the welfare and integrity of which constitute a special and vital interest of our peace and safety. […] interference with these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defence.”

This “reservation”, generally called the British Monroe Doctrine, had a more specific content (interference by attack) than the American Monroe Doctrine but no clear territorial limits; (3) Sanctions of the League of Nations against aggressor States according to Article 16 of its Covenant; (4) The breach of Article 2 of the Rhine Pact of Locarno (i.e. different cases being defined as aggression) could be sanctioned by war by all other parties; (5) Actions according to France’s traités de neutralité. The term circumscribed her treaties of alliance. It was controversial whether this “reservation” could be more than normal collective self-defence.

b) Second, the BKP does not contain any procedure or any competence of an international institution to determine whether a State wages illegal war or defends itself legally. Thus, the only means of control are public opinion and the other Member States. Kellogg wrote: “If it [i.e. the State] has a good case the world will applaud and not condemn its action.” According to the preamble, the parties are not bound to the

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9 Note of 23 June 1928, in Materialien zum Kriegsächigungspakt (3rd edn. 1929) p. 70 sub No. 1.
10 Note of 19 May 1928, ibid, pp. 46, 48 sub No. 10. Such a “certain region” was certainly Egypt while some authors thought that e.g. the Persian Gulf, Afghanistan or China were covered as well.
11 Note of 14 July 1928, ibid, p. 84; in the note of 21 January 1928 they were called “international conventions relative to guarantees of neutrality”, ibid. p. 20.
12 Note of 23 June 1928, ibid., p. 70 sub No. 1.
renunciation of war in respect of a State going to war contrary to the Pact. Therefore, those parties which are not attacked themselves may wage war against the Pact breaker, too. The BKP does not explicitly contain further sanctions.

c) Third, Article 2 states that “the settlement or solution of all disputes or conflicts, which may arise among the parties, shall never be sought except by pacific means.” This wording allows the conflict to remain unsolved; the parties are not obliged to seek a solution in good faith. The negotiating parties did not even try to put the notion “pacific means” in concrete terms. Therefore the interpretations varied extremely. Some said that pacific means comprised all means which were not belligerent means in the formal sense while others read the article as a prohibition of threat and use of force. The second alternative transfers the problem of defining illegal war to the problem of defining illegal force. This is today’s situation with Article 2(4) of the UN Charter. Therefore, the notion war is seldom discussed in-depth nowadays.

The absence of clarity made it appear as if the parties had abstained on purpose from realizing the publicly pledged outlawry of war. Some critics, politicians as well as international lawyers, stressed these shortcomings in such a way as to hint that they regarded the “reservations” as the rule and the written text of the BKP as a legally non-binding, purely political, declaration. Especially some American isolationists, like Edwin Borchard, shared this opinion with German and Italian champions of the powerful, absolutely sovereign State. For example, Carl Bilfinger and Carl Schmitt denied that sovereign States could bind themselves in political matters which, like war and peace, touch the States’ own existence:

“Thus you have to deny that the Kellogg Pact has got a normative character. […] It is a programmatic declaration without the minimum of legal commitment that political legal norms require. […] The subject of the regulation touches the political, the existence of the – political – state which strives against normative chains.”

Thus Bilfinger regards the BKP to be a non-committal political declaration in the guise of a treaty. Whether one regards this opinion as an exaggeration or not, depends on whether one imputes to the acting statesmen the will to bind their States. If this will to conclude a real treaty is imputed to them, the BKP has to be conceived as a revolution in international law. In 1934, at a conference of the International Law Association,

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chairman Manley Hudson used, like many jurists before him, this word to describe what had happened:

"I cannot believe that we shall fail to realise that a profound revolution is taking place in international relations, and if that be true, that revolution will necessarily call for the building of a new International Law."\(^{15}\)

If one accepts this view, the freedom of States to resort arbitrarily to war without breaking international law ceased with the BKP. Even without a special procedure to determine the aggressor, Article 1 would doubtless be a valid legal rule. In the 1920s most rules of international law were not secured by arbitration clauses or other procedures but nobody doubted their validity. Just take the last treaty on the laws of war concluded before the BKP. The “Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, And of Bacteriological Methods of Warfare” of 1925 has the same structure as the BKP. It contains a substantive rule but no procedural rules on the competence to interpret it nor a rule on the consequences of its breach. But no international lawyer contended that this Protocol was legally non-binding. The deniers of the BKP could accept such restrictions of the means of warfare. However, they could not accept the restriction of the sovereign freedom to use war as an instrument of policy, even though there are no reasonable legal doubts to ignore the contractual form and the text of the BKP. Neither when they negotiated nor when they ratified the Pact did the parties express their unwillingness to be bound by it.

The same has to be said about Article 2. The interpretations ranged from one extreme, that Article 2 was devoid of any substance, to the other, that it contained a prohibition of armed force and the obligation to solve conflicts, if necessary, by arbitration. In his report to the French Chambre des députés discussing the ratification of the BKP, Pierre Cot put this range in an all-or-nothing dilemma: "Ou bien ce texte ne veut rien dire, ou bien il pose le principe de l’arbitrage obligatoire sans réserve."\(^{16}\)

Most of those who conceived the BKP as a non-obligatory declaration confined themselves to calling Article 1 meaningless or a pious aspiration because States could uncontrollably justify all their acts as self-defence. This reduces the interpretation with respect to two important points: The BKP has got two substantive articles and it has to be read in the context of all international law. James Brierly criticized this reduction already in 1929:

\(^{15}\) Manley Hudson, “Opening statement” in International Law Association, *Briand-Kellogg Pact of Paris, Articles of Interpretation* (1934) p. 13. Others used the term revolution as well, e.g. a resolution of the Union Interparlementaire, *Compte rendu de la XXVIe conference tenue à Londres* (1930) p. 46; rapporteur was Paul Bastid, France.

“The first is that whilst almost all discussion has centred around Article 1, […] Article 2, properly understood, contains a solution of most of the doubts of the difficulties raised by Article 1. The second is that the Pact is not an isolated event. The criticism which regards it as no more than a pious aspiration would be justified if in 1919 we had been given this Pact instead of the Covenant of the League. But the date of the Pact is 1928, and it has been born not into a wholly unorganised world society, but into one in which the foundations of peace […] are already well and truly laid.”

One example of these foundations of peace was Article 11 of the Covenant of the League of Nations, which declared “every war and every threat of war, whether immediately affecting a Member of the League or not, a matter of concern to the whole League”. Thus three quarters of the world’s States could demand that their organization deal with any breach of the BKP. Furthermore, by ratifying the optional clause of the Statute of the PCIJ several States submitted themselves with respect to all their international legal conflicts to obligatory jurisdiction. Among those States was Great Britain in 1929, thereby implicitly abandoning the always disputed British Monroe doctrine.

But despite all sympathy for an extensive interpretation of Article 2 it seems obvious that many States were ready to sign the BKP just because its provisions were not more specific. Significantly, the relevant diplomatic notes do not discuss this aspect. Some English and German lawyers described the discrepancy between the States’ commitment to outlaw war and their unwillingness to provide effective pacific alternatives with the German proverb “Wash me, but don’t make me wet.”

4. Academic and Political Demands: Interpretations between 1928 and 1948

Only a few international lawyers were really content with the state of international law reached by the BKP. Nevertheless, most of the world’s international lawyers supported the Pact’s aim. They hoped for further treaties and activities improving and amending the Pact on a global level or, more realistically, within the system of the League of Nations. Especially French lawyers frequently stressed the BKP’s shortcomings compared to the Geneva Protocol of 1924. Most pleased by the Pact were those who at the same time supported peace and rejected the League of Nations, fearing that it could develop into a super State endangering sovereignty or into an instrument in the hands of the strongest.

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18 Art. 36 para 2 PCIJ Statute was identical to today’s art. 36 para 2 ICJ Statute.
of non-peaceful States. This attitude was widespread in the United States and, to a lesser extent, in some traditionally neutral European countries as well. The United States majority favoured an isolationist or neutralist policy because it did not want to get entangled with European or Asian problems. The outlawrists around Levinson and Morrison regarded the BKP as a great step forward to be followed by a second step. According to them the Pact should be secured by a vigilant public opinion and – not by the PCIJ suspected of being too dependent from the League but – "a real court equipped with a code of real law, universally recognised as law, and clothed with affirmative jurisdiction. This is the other half of the outlawry of war."  

Naturally, the legal valuation of the BKP was frequently determined by the authors' political opinion. An exception was the famous Pure Theory of Law. Hans Kelsen and his circle favoured the League's efforts to create mechanisms against war but rejected the BKP's method to outlaw war for legal, not for political reasons. They thought that law is only law if there is at least a potential sanction on its breach. According to Kelsen's modern version of *bellum iustum*, arbitrary freedom to resort to war does not exist. Instead, war is like reprisals only – and always! – lawful as a sanction to a breach of international law. As long as international law is still primitive and devoid of a court with obligatory jurisdiction in all cases, war is necessary to establish international law as real law. Otherwise it would just be a non-commital code of political rules. Therefore Kelsen preferred a narrow interpretation of the BKP leaving untouched the legality of a war as a sanction.

This wide range of views on the BKP was regularly published until it was superseded by the international legal discussion of the UN Charter. In addition to the discussion of the Pact's content, reflections on its incorporation into the League of Nations Covenant started at once. Often the discussions in academic as well as political circles overlapped because many professors of international law were at the same time foreign minister or their country's representative at the League (e.g. Nicolas Politis of Greece, Östen Undén of Sweden, Rafael Erich of Finland). Extensive discussions in journals as well as in the Assembly of the League did not result in a revision of the Covenant. Especially the problem of sanctions rendered any agreement impossible. Due to pacifist convictions or, more often, their countries' policy of neutrality, many politicians and international lawyers disapproved of armed sanctions which could or even would have to be applied if the BKP's unrestricted prohibition of war would replace the Covenant's partial prohibitions of war. Meanwhile many others pleaded passionately – often reminding of Grotius' seventeenth century *bellum iustum* doctrine – to vest the League with the power to wage sanction or even punitive wars. They hoped that these means would make the outlawry of war more effective. Because of

this fundamental disagreement the Covenant was never adapted to the BKP. Moreover, three years after the signing of the BKP the centre of international discussion shifted to the Conference for the Reduction and Limitation of Armaments for which virtually the whole world assembled in Geneva. When the conference failed in 1933 the League’s reform efforts waned.

The Geneva General Act of 1928 provided a complete package of obligatory procedures for dispute settlement in order to enforce the existing law. But it did not have lasting success. Only a few States accepted it. The General Act never bridged the outstanding differences between the winner and the loser States of the First World War. Lawyers of the respective countries followed national interests no matter which methodological school of thinking they normally belonged to or how scientifically sound they regarded their views. The winners represented in a positivistic way the preservation of the status quo of 1919 with the preservation of peace. Therefore the existing order could only be changed by agreement of all parties: “C’est ne pas à dire que le statu quo soit à jamais sacré et intangible. […] Mais tout de même, le statu quo présent de l’Europe et du monde, c’est la paix.”22 The losers however, constantly made use of natural law arguments to justify the revision of the Treaties of Versailles, St. Germain, Trianon etc. They argued that justice and equality demanded a change of the status quo, if necessary against the will of the lucky possessors. At least the peaceful among these lawyers hoped to restore justice and thus peace without belligerent self-help by virtue of dynamic interpretation and constant revision of the existing law. Walther Schücking, judge at the PCIJ, said:

“The Kellogg Pact makes […] the second step before the first. It prohibits war without providing an apparatus for the peaceful solution of state conflicts. […] We are the real friends of the League of Nations if we repeat publicly the claim that the dynamic character of all law is admitted and that the law must be adapted to justice again and again.”23

The discussions of the 1930s showed that there is often a short step from the morally well-founded claim for peaceful change in respect of, for example, access to colonial raw materials, to the claim for naked power scarcely disguised as justice. In that time nearly everybody, pacifists as well as ruthless dictators, loved to praise “peaceful change” as the alternative to war.

Nowhere was the BKP written about as widely as in the USA. As a side effect, the Pact was the first central subject of international legal science in which the English language became as important as French. Not only the quantity but also the perception of the English language publications equalled the French. German publications

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followed at a significant distance. In this discussion no other language played an
important role outside the respective country; not even Italian, which was still an im-
portant language of international legal theory (e.g. Anzilotti), had any significance
outside Italy.

On the one hand, the number and importance of American authors can be explained
by the fact that European attention was more focused on the League. On the other
hand, the outlawry of war inevitably gave rise to the question whether the old law of
neutrality had ceased and whether the United States policy of neutrality could con-
tinue. The vehement quarrel between the anti-neutral, often pro-League and the pro-
neutral, mostly isolationist schools of thinking remained the favourite subject of
international lawyers in the United States until the country was dragged directly into
the Second World War in December 1941. Traditionally, neutrality was based on the
conception of States fighting like duellists while all others had to refrain from judging
the justness of either party. The anti-neutral school contended that war was no longer a
matter for the belligerent parties alone: Since at least one belligerent would not be
acting in self-defence, war violated the rights of all BKP States. Therefore the Pact
took away the basis of neutrality. The pro-neutral school maintained its opinion that no
State had the right to judge another State’s sovereign decision to act in self-defence. As
long as there was no judge, third States had to remain neutral. Thus the BKP did not
touch the laws of neutrality. Furthermore the pro-neutral school regarded neutrality as
morally superior because it helped to restrict the war to a few parties. This school
accused the anti-neutralists and the League of Nations of risking world war against the
party that they would arbitrarily denounce as the aggressor. The anti-neutralists replied
that it was morally unbearable to continue trade and normal relations with a Pact vio-
lator as if nothing had happened. These arguments show us how authors in both schools
regularly combined or even mixed inextricably the levels of moral, political, and legal
assessment.

In international legal practice the law of neutrality changed little. No State explic-
itely contested its general continuance; on the contrary, several treaties presupposed or
confirmed it. The strict impartiality of neutrals had often been more pretence than
political reality. Under the Stimson doctrine it lost its basis. In 1931 Japan began to
conquer the Chinese provinces of Manchuria; she pretended that her troops protecting
a Japanese railway in Manchuria had been attacked by China. In reality, she sought an
excuse for a quasi-colonial annexation of that vast region. The League of Nations sent
a commission, led by Lord Lytton, to Manchuria to inquire the conflict. In his report,
Lytton called the conflict a war in disguise. The BKP States did not want to react by
armed force on this violation of the Pact. But United States Secretary of State Henry
Stimson declared – and the States in the League Assembly agreed in unison – that they
did “not intend to recognise any situation, treaty or agreement which may be brought
about by means contrary to the covenant and obligations of the Pact of Paris”. This
meant that the States did not remain strictly neutral but discriminated against the
belligerents. The resulting uncertainty about the legal status of neutrality led to a change
of terminology. Many scholars as well as statesmen replaced “neutrality” by “non-
belligerency”. But nearly everybody understood the new notion differently: “[…] it
will appear that ‘non-belligerency’ has connoted various shades of partiality toward the contending parties, but stops short of war in the full legal sense.”

The Manchurian conflict intensified reflections on the prohibition of armed force. Up to 1931 only a few international lawyers and politicians had understood Article 2 of BKP in this way. A glance at the treatises on international law shows that, unlike today, only war, not force, was the focus of international legal doctrine. But now, having the Manchurian “war in disguise” in mind, several declarations and draft treaties at the World Disarmament Conference, often promoted by the Romanian foreign minister Titulescu and the above-mentioned Nicolas Politis, raised the subject of armed force. In a resolution of 2 March 1933 concerning the détente policy in Europe, the 26 national representatives at the conference’s Political Commission unanimously increased the renunciation of war to the renunciation of force as an instrument of national policy. In spite of this success, and Politis’ many other efforts to promote this interpretation of the law, for example, in the *Institut de Droit International*, the prohibition of use and threat of force did not become part of a multilateral treaty or indeed the majority opinion in the academic sphere. On the legislative level, the attempt to prohibit armed force got an important boost by three Conventions on the Definition of Aggression concluded between the Soviet Union and many of her neighbours in 1933. These Conventions were based on a report by Politis to the World Disarmament Conference. They defined five cases of aggression in breach of the BKP and listed several reasons that would never justify aggressive actions as self-defence. The definitions of aggression contain cases of armed force that did not constitute war according to traditional doctrine, such as maritime blockade. While the French speaking part of the scientific community – positivists as well as natural lawyers but most English-speaking scholars did not show any interest in these conventions drafted in a “French style” – welcomed these conventions, they did not prevent their promoter, the Soviet Union, from invading Poland and Finland in 1939.

The doctrine of the prohibition of force and the anti-neutral understanding of the BKP received fresh impetus from the Budapest conference of the International Law Association in 1934. It adopted “Articles of Interpretation of the Briand-Kellogg Pact”, drafted by a predominantly British committee (*inter alia*, Brierly, Colombos, Fischer Williams and McNair). The Budapest Articles were the attempt at a common interpretation obliged to nothing but pure scientific conviction. As usual, when a valuing

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24 Robert Wilson, “‘Non-Belligerency’ in Relation to the Terminology of Neutrality”, *AJIL* 35 (1941) pp. 121, 122.

science has to judge questions of political explosiveness, scientific method and political preferences cannot be fully distinguished. However, with these inherent problems in mind, the Budapest Articles achieved a power of persuasion seldom attained by conferences. The Budapest Articles state, *inter alia*, the end of the traditional law of neutrality and the prohibition of use and threat of armed force.

At the Budapest Conference Walter Simons put the difficulties of interpretation in a nutshell:

“I venture to warn you by virtue of my double experience against extending the juridical interpretation of the Briand-Kellogg Pact over and above the strictly necessary limits. The elasticity of the words of the Pact is its weakness and its virtue; its weakness, because it leaves doubts to the interpretation, and that is the real sorrow of us lawyers; its virtue, because it is apt to the new and changing cases of reality, and that is the good luck of the politicians. You know history is past politics; politics is future history. The Briand-Kellogg Pact is drafted by a politician, a lawyer and an historian. Do not destroy their work in trying to better it. The Briand-Kellogg Pact is like a caoutchouc string; you cannot measure by it in a just way things of different size, but you can bind them by it. If you, as lawyers, overstrain the string, the politicians will break it.”26

The BKP’s role in the judgments of the International Military Tribunals (IMT) of Nuremberg in 1946 and Tokyo in 1948 was in the eyes of many lawyers such an overstrain severely harming the Pact’s reputation. For obvious reasons, the most vehement critics were German or Japanese. The BKP does not state explicitly that the responsibility of a State waging an illegal war includes the criminal responsibility of the acting individuals. Only the words “condemn recourse to war” in Art. 1 BKP could possibly be interpreted in that way. The Nuremberg Judgment declared the Statutes of the IMT defining crimes against peace to be sufficient for convicting the defendants. However, the judges observed that, due to the significance of this charge, they wanted to

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26 Walter Simons, “Statement”, in *International Law Association* (note 15) pp. 45, 46-47. He had in Germany’s democratic era successively been foreign minister, president of the highest courts and professor of international law.

The question, whether dynamic interpretation of international conventions is legitimate, is not restricted to questions of war and peace. It often puzzles international legal practice and theory. Just confer the recent ICJ judgment in the *LaGrand* case of 27 June 2001. The ICJ interpreted Art. 36 Vienna Convention on Consular Relations in a dynamic way by granting rights to individuals while the convention’s authors in 1963 certainly did not think of anything else than State rights. While many hail the judgment from a human rights perspective others, e.g. Christian Hillgruber, “Comment”, *Juristenzeitung* 57 (2002) pp. 94, 96, criticize the ICJ’s method of interpretation as dangerous for international law because States could become even more reluctant to transfer competence to the ICJ.
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scrutinize the BKP as well. They said it had to be interpreted as making aggressive war not only an illegal action of States but a crime of individuals, too.27

Scholars of international law and of criminal law had already discussed the problems of international criminal law extensively in the 1920s and 1930s. Only a few of them regarded aggressive war as a crime for which individuals could be punished, while many hoped for legislation of that kind. Among the proposals was a Plan d’un code répressif mondial containing the crime of aggressive war drafted by the Roman- nian professor Vespasian Pella on behalf of the Inter-Parliamentary Union, the International Law Association, and the Association Internationale de Droit Pénal.28 Although the opinion that this crime existed already in international law grew from about 1942 onwards, it still was not recognized by a majority of States or jurists. Nevertheless, the criticism of the Nuremberg Judgment does not convince because in 1945 positive public international law did not contain any rule that might have collided with the IMT Statutes.

5. Outlawry of War, Authority and Credibility of International Law

In his standard work on the history of public international law,29 Grewe reprimands the fact that the BKP seemed to promise more than it could achieve in the political reality in a short time: “The outlawry of war, loaded as it was with moral pathos and ideological rhetoric, inflicted serious damage upon the authority and credibility of interna- tional law, which was hardly compensated by the intended but never achieved restriction of war as a means of national policy.”30 Grewe’s starting point is correct. Large gaps between lofty legislation, on the one hand, and inadequate observance and enforce- ment depending on political opportunity, on the other hand weaken the authority and credibility of legal orders. However, this is the basic problem of every imperfect legal order without obligatory courts and collective action against treaty violators. In this regard, the BKP is in line with most of the rest of international law.

As long as the League of Nations did not comprise more than two thirds of the world’s States, and as long as the League did not have a powerful position to help to enforce the treaty rights of its Member States against violators, international law was even more imperfect than today. In each important international conflict – Japan’s wars against China, Italy’s war against Abyssinia, the military interference of other countries in the Spanish Civil War, Germany’s subjugation of half of Europe – there

were international lawyers who either justified the aggressive actions as self-defence or denied any legal consequences of the BKP.\textsuperscript{31} Japan called its actions self-defence and claimed that the so-called British Monroe doctrine was applicable to every State having interests in other countries. In spite of several Italian-Abyssinian treaties, Italy simply denied that the African State was a civilized member of the international community protected by international law. In the Spanish Civil War, the interfering States denied either their belligerent actions and/or the appliability of the BKP on – according to the form, but not to the facts – non-international wars. Germany pretended to have been attacked by Polish combatants before she and the USSR dismembered and annexed Poland. This shows that even the most aggressive dictatorships felt the political need to justify themselves to their people.

Additionally, these statesmen and their international lawyers tried to convince the League of Nations and third States demanding the restoration of peace that their actions were not illegal wars but in accordance with international law. At least before 1939, the most aggressive States tried to avoid calling their actions war. This shows that statesmen paid attention to the new role of war in international law, even though it did not prevent all aggression.\textsuperscript{32} The only significant difference between the BKP and “normal” international law is its highly political nature because it transfers the vital decision about recourse to war from the sphere of sovereign freedom into the sphere of international law. This is the normal function of international law. Just compare this effect with trade treaties, which prohibit the originally sovereign decision to impose protectionist tariffs.

Hence, the opposite of Grewe’s judgement seems to be correct. The BKP enforced the authority and credibility of international law although its lofty obligations were often broken. Classical international law did not prohibit States from invading and even extinguishing other States. Due to their sovereignty they could trample upon foreign sovereignty without even having to pretend that there was legal justification. What is the worth of sovereignty as the basis of international law if the sovereignty itself is not legally protected? In 1914 Germany frankly stated political and military reasons for its invasion of France, while France had already been waiting for long to take revenge for the defeat of 1870. After the horrors and uncountable dead of the First World War, a legal order tolerating this was no longer tenable. For that reason the vast majority of international lawyers hailed the Briand-Kellogg Pact in 1928 in spite of its clear imperfections.

The only important setback by the BKP is that it, and later the United Nations Charter as well, contributed to the avoidance of the word war even if the situation indicates the existence of war. If State A, being in an armed conflict, can say with clear conscience that State B was the first to have recourse to war, State A has no reason not to

\textsuperscript{31} As a typical example of the latter group see Grewe, “Die Kriegsschuldfrage als völkerrechtliches Problem”, \textit{Monatshefte für Auswärtige Politik} 7 (1940) pp. 99, 102.

\textsuperscript{32} Unfortunately historians have no reliable method to examine which armed conflict was prevented or limited by the outlawry of war and the changed role of war in the political thinking of many statesmen and citizens.
use the notion “war”. On the contrary, the notion would help to make the legal consequences of the situation more definite. Unless a civil war exists, war requires the use of force between at least two States and the *animo belligerendi* of at least one of them. Therefore, the term “war against terror” is a battle cry that should be avoided for the sake of legal clarity. If any big terrorist attack by an organization that is not a governmental organization or a *de facto* regime is called war from now on, the notion will lose another significant part of its already low distinctiveness.