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## **The Kellogg-Briand Pact – nearing the 90<sup>th</sup> anniversary for the outlawing of war**

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I am not sure whether Frank Billings Kellogg (1856-1937) was a distant relative of Will Keith Kellogg or not – Will being the founder of the Kellogg Company whom long after his death, through his W.K. Kellogg Foundation, generously supported the establishment of Kellogg College. Be that as it may, during Frank's term in office as the 45<sup>th</sup> United States Secretary of State between 1925 and 1929, he negotiated with his French counterpart, Aristide Briand, an international agreement that will next year mark its 90<sup>th</sup> anniversary: The General Treaty for Renunciation of War as an Instrument of National Policy. The treaty is also referred to as the Pact of Paris, but it is probably better known as the Kellogg-Briand Pact. This Pact had 63 parties before the outbreak of World War II, with Barbados succeeding to it as late as 1971.<sup>1</sup> Of the well-recognized states before World War II, only Bolivia, El Salvador, Uruguay and Argentina were non-parties,<sup>2</sup> and the British Foreign and Commonwealth Office held the Pact to be in force as late as 2013.<sup>3</sup>

One might wonder whether those negotiating the Pact were encouraged by the prohibition of dueling to seek a ban on war.<sup>4</sup> As for its object and purpose, the Pact merely mentions in its preamble the “solemn duty to promote the welfare of mankind” and the need for “uniting the civilized nations of the world in a common renunciation of war as an instrument of their national policy”. Moreover, the parties have been “[p]ersuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated”. Likewise, the parties are now “[c]onvinced 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, and 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”.

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<sup>1</sup> See United Nations Treaty Collection at <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280168041>. See also Yoram Dinstein, *War, aggression and self-defence*, 5<sup>th</sup> ed. (Cambridge University Press, Cambridge 2011) p. 85.

<sup>2</sup> Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, Oxford 1963) p. 75, n. 5.

<sup>3</sup> See the following link from [www.parliament.uk](http://www.parliament.uk), 16 Dec 2013 regarding Daily Hansard – Written Answers: [https://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm131216/text/131216w0004.htm#131216w0004.htm\\_wqn20](https://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm131216/text/131216w0004.htm#131216w0004.htm_wqn20).

<sup>4</sup> Yoram Dinstein, *War, Aggression and Self-defence*, 5<sup>th</sup> ed. (Cambridge University Press, Cambridge 2011) p. 163, n. 960.

The Pact itself includes only three articles, where Article III deals with traditional procedural matters of ratification, etc. As regards the rest, Article I condemns the recourse to war, whereas Article II deals with peaceful dispute settlement. No mention is made of the possibility of state parties leaving the Pact, and Brownlie found that it thus has “immunity from denunciation”.<sup>5</sup>

At Nobelprize.org we learn that “[t]he original initiative came from the French Foreign Minister and Peace Prize Laureate Aristide Briand. He had sought a Franco-American agreement which would keep France secure from German revanchism after Germany's defeat in World War I. The United States was not interested, so Kellogg proposed a more extensive but looser pact. In addition, he demanded exceptions, to prevent harm to US interests on the American continent.”<sup>6</sup>

At the time, the Pact was seen as an important achievement. The agreement was even hailed by Lauterpacht as “a legal document of revolutionary importance to the system and the science of international law”.<sup>7</sup> The Nobel Peace Committee was nevertheless somewhat troubled, as the Pact could be seen as protecting US interests, and the prize was not awarded by a unanimous decision. Frank Kellogg thus received the Nobel Peace Prize for 1929 for his role as one of the initiators of the Pact (Briand having already received the Prize in 1926 together with Gustav Stresemann for the reconciliation between Germany and France after World War I).<sup>8</sup>

Against this background, it might be worthwhile to consider the reach of the obligations flowing from the Pact, before we compare them with the current regime on the limitations on the use of armed force under the United Nations Charter.

Under the Pact, the use of war is renounced as an instrument of national policy between parties to it. However, disagreement exists on whether other uses of armed force, not technically war, have also been banned by Article II, as this latter article holds that the settlement of disputes or conflicts “shall never be sought except by pacific means”.<sup>9</sup>

Agreement nevertheless exists on the legality of the recourse to war in self-defense under the Pact. Admittedly, the Pact does not explicitly refer to self-defense, but the preamble does refer

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<sup>5</sup> Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, Oxford 1963) p. 92. See also James Leslie Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6<sup>th</sup> ed. (Clarendon Press, Oxford 1963) p. 331.

<sup>6</sup> Frank B. Kellogg – Facts, Nobelprize.org, downloadable from [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/1929/kellogg-facts.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/1929/kellogg-facts.html). See also from the Office of the Historian at the US Department of State at <https://history.state.gov/milestones/1921-1936/kellogg>. This would be a reference to the Monroe Doctrine, see here Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, Oxford 1963) pp. 245-246.

<sup>7</sup> Hersch Lauterpacht, *The Pact of Paris and the Budapest Articles of Interpretation*, vol. 20 *Transactions of the Grotius Society* (1934), pp. 178-204, p. 201.

<sup>8</sup> Frank B. Kellogg – Facts, Nobelprize.org, downloadable from [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/1929/kellogg-facts.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/1929/kellogg-facts.html), and Aristide Briand – Facts, Nobelprize.org, downloadable from [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/1926/briand-facts.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/1926/briand-facts.html).

<sup>9</sup> See Hersch Lauterpacht, *The pact of Paris and the Budapest Articles of Interpretation*, vol. 20 *Transactions of the Grotius Society* (1934), pp. 178-204, p. 183 (Lauterpacht), 203 (Keen) and 204 (the editor), and Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, Oxford 1963) pp. 84-88 and 395.

to the denial of benefits under the Pact to violators,<sup>10</sup> and the right to self-defense is addressed in many declarations issued by states upon becoming parties to the Pact. Dinstein considers this akin to the current concept of collective self-defense under the United Nations Charter.<sup>11</sup> A more general problem is here the corresponding lack of parameters to delimitate the reach of such self-defense, and the absence of a body authorized to pass judgment on whether a specific case actually constitutes self-defense.<sup>12</sup> Some states even held that they were themselves the final adjudicator on the legality of their self-defense actions.<sup>13</sup> Lauterpacht highlights this issue as “[o]ne of the principal weaknesses – perhaps the principal weakness – of the Pact”.<sup>14</sup>

The preamble signifies that if a state acts in violation of the Pact, third states are released from their obligation of not going to war against that state. Nonetheless, these third states may not use this avenue as an excuse for annexing territory belonging to the state which they respond against.<sup>15</sup> Here, the US Senate held that the Pact did not obligate parties to act against a state violating it,<sup>16</sup> although the US argued for an *entitlement* to enforce the prohibition under the Stimson Doctrine, whereby the US would not recognize any situation as lawful if it was established by the use of armed force. This took place in response to the Japanese occupation of Manchuria in 1931, whereby the resulting governmental entity of Manchukuo was merely seen as a puppet-state controlled by Japan.<sup>17</sup>

Furthermore, a state suffering a violation of the Pact could claim compensation from the aggressor, whereas third states could also undertake other kinds of reprisals against the violator than the mere use of armed force.<sup>18</sup>

Although Brierly held it to be inconceivable that parties to the Pact should declare themselves neutral in a war where one state had broken the Pact to the detriment of another party to it, this nevertheless remained a possibility.<sup>19</sup> Moreover, the International Law Association found

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<sup>10</sup> Hans Kelsen, *The Law of the United Nations* (Frederick A. Praeger, New York 1950) p.119.

<sup>11</sup> Yoram Dinstein, *War, Aggression and Self-defence*, 5<sup>th</sup> ed. (Cambridge University Press, Cambridge 2011) p. 86. Brownlie might hold a different view, see Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, Oxford 1963) p. 229.

<sup>12</sup> Yoram Dinstein, *War, Aggression and Self-defence*, 5<sup>th</sup> ed. (Cambridge University Press, Cambridge 2011) p. 86.

<sup>13</sup> See Philip C. Jessup, *A Modern Law of Nations: An Introduction* (The Macmillan Company, New York 1950) pp. 163-164, and J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6<sup>th</sup> ed. (Clarendon Press, Oxford 1963) p. 406.

<sup>14</sup> Hersch Lauterpacht, *The Pact of Paris and the Budapest Articles of Interpretation*, vol. 20 *Transactions of the Grotius Society* (1934), pp. 178-204, p. 199.

<sup>15</sup> Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, Oxford 1963) pp. 91 and 410.

<sup>16</sup> See the Office of the Historian at the US Department of State at <https://history.state.gov/milestones/1921-1936/kellogg>, Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, Oxford 1963) pp. 81 and 235-250, and Yoram Dinstein, *War, Aggression and Self-defence*, 5<sup>th</sup> ed. (Cambridge University Press, Cambridge 2011) pp. 85-86.

<sup>17</sup> Stephen C. Neff, *Justice among Nations: A History of International Law* (Harvard University Press, London 2014) p. 393. Admittedly, this Stimson Doctrine also rested on the Covenant of the League of Nations and a resolution of the League Assembly of 11 March 1932. See Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, Oxford 1963) p. 77.

<sup>18</sup> Stephen C. Neff, *War and the Law of Nations: A General History* (Cambridge University Press, Cambridge 2005) p. 295.

<sup>19</sup> As referred to in Hersch Lauterpacht, *The Pact of Paris and the Budapest Articles of Interpretation*, vol. 20 *Transactions of the Grotius Society* (1934), pp. 178-204, p. 194. On this topic, see also Edvard Hambro, *Das Neutralitätsrecht der nordischen Staaten*, vol. 8 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*

that third states were entitled to apply the law of neutrality in a partial manner to the benefit of the state having been attacked, something the US practiced during World War II until it became a party to the conflict.<sup>20</sup>

Another issue worth mentioning is that the Pact even provided the somewhat unclear foundation for individual criminal responsibility for the crime against peace at Nuremberg and Tokyo.<sup>21</sup>

When we then compare the Pact with the United Nations Charter, we notice that Charter Article 2 (3) is seemingly worded to the same effect.<sup>22</sup> On closer scrutiny, it would nevertheless seem that the Pact only obligates a party to avoid using other than pacific means if attempting to settle a dispute.<sup>23</sup> Here, rather than an obligation to settle the dispute by pacific means, the obligation of the Pact probably at best merely covers the *seeking* of a settlement of the dispute.<sup>24</sup> Art. II of the Pact nevertheless limits to a large extent the possibility of self-help, and may in the view of Brownlie help to narrowly construct reservations to the Pact.<sup>25</sup> The obligation of peaceful dispute settlement under the Charter is therefore wider than under the Pact.

As regards Art. 2(4) of the Charter, it covers the reach of Art. I of the Pact.<sup>26</sup> However, the prohibition on the use of armed force in the Charter goes further than does the prohibition under the Pact.

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(1938), pp. 445-469, pp. 448-449, 451 and 468. Compare here also with Art. 16 of the Covenant of the League of Nations whereby the aggressor, as long as it is a member state of the League of Nations, is seen as having committed *ipso facto* an act of war against all the other members of the League if it resorts to “war” in disregard of its obligations under the Covenant Arts. 12, 13 or 15. Boye finds that in such a situation “the other members of the League may not remain neutral. Even if they do not join in the use of military power, they must at least take part in the economic boycott of the covenant-breaking State”; Thorvald Boye, Shall a State which goes to War in Violation of the Kellogg-Briand Pact have a Belligerent’s Rights in Respect of Neutrals?, vol. 24 American Journal of International Law (1930), pp. 766-770, p. 769.

<sup>20</sup> Arthur Nussbaum, A Concise History of the Law of Nations, rev. ed. (The Macmillan Company, New York 1961) p. 254, Ian Brownlie, International Law and the Use of Force by States (Oxford University Press, Oxford 1963) pp. 107 and 403, Yoram Dinstein, War, aggression and self-defence, 5<sup>th</sup> ed. (Cambridge University Press, Cambridge 2011) p. 179, and Stephen C. Neff, Justice among Nations: A History of International Law (Harvard University Press, London 2014) pp. 393-394. The same view is held by Boye; Thorvald Boye, Shall a State which goes to War in Violation of the Kellogg-Briand Pact have a Belligerent’s Rights in Respect of Neutrals?, vol. 24 American Journal of International Law (1930), pp. 766-770, pp. 769-770.

<sup>21</sup> Ian Brownlie, International Law and the Use of Force by States (Oxford University Press, Oxford 1963) pp. 169-173 and 208-209, and Yoram Dinstein, War, aggression and self-defence, 5<sup>th</sup> ed. (Cambridge University Press, Cambridge 2011) pp. 127-128. On the issue of state responsibility, Boye holds that “the State which goes to war is guilty of a crime against humanity as a whole”; Thorvald Boye, Shall a State which goes to War in Violation of the Kellogg-Briand Pact have a Belligerent’s Rights in Respect of Neutrals?, vol. 24 American Journal of International Law (1930), pp. 766-770, p. 766.

<sup>22</sup> Compare UNC Art. 2(3) “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered” with Art. II of the Pact: “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>23</sup> Ian Brownlie, International Law and the Use of Force by States (Oxford University Press, Oxford 1963) p. 90.

<sup>24</sup> Ian Brownlie, International Law and the Use of Force by States (Oxford University Press, Oxford 1963) p. 90. For a rather similar view, see Leland M. Goodrich and Edvard Hambro, Charter of the United Nations: Commentary and Documents (World Peace Foundation, Boston 1946) p. 140.

<sup>25</sup> Ian Brownlie, International Law and the Use of Force by States (Oxford University Press, Oxford 1963) p. 90.

<sup>26</sup> Compare UNC Art. 2(4): «All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations” with Art. I of the Pact: “The High Contracting Parties solemnly declare

Firstly, the Charter provision refers merely to force (which is understood as armed force). The reference to war in the Pact gave at least the impression that other uses of armed force were not covered by the prohibition.<sup>27</sup> As Arts. 53 and 107 of the Charter are now defunct, they are moreover no longer a potential “breach” of the Pact.<sup>28</sup>

Secondly, whereas the Charter explicitly refers to “threats” of force, the Pact does not explicitly mention this.<sup>29</sup>

Thirdly, the Charter prohibits uses of armed force which are “inconsistent with the Purposes of the United Nations”, whereas the Pact prohibits war “as an instrument of national policy”. It would seem that quite a few uses of armed force – even war – could fall outside of the Pact prohibition simply by being undertaken for something else than national policy, like collective reprisals, and wars undertaken in the furtherance of religion, philosophy or ideology.<sup>30</sup> Some limitation on the possibility of considering sanctions of legal violations as something else than “national policy” would nevertheless flow from the obligation in Art. II of the Pact.<sup>31</sup>

Fourthly, although there are severe limitations on the institutional architecture of the United Nations that often hinder it from proper sanctioning a state violating Article 2(4), at the very least it is better than the absence of a dedicated institution in the Pact.

On the other hand, the Charter’s reference to “international relations”, whereas the Pact refers to “international controversies”, would not seem to make much difference here. Also, both instruments started out as mere treaties incapable of binding third parties, but they have over time succeeded – perhaps rather unclearly, but nevertheless well-established today – in achieving corresponding customary international law status.<sup>32</sup>

Thus, the Charter regulation upholds and expands on the regulation of peaceful dispute settlement and the prohibition on the use of war in the Pact. As the Charter prohibition on the use of force, although perhaps not yet the very *threat* of such use, has been found by the International Court of Justice in the Nicaragua case to constitute customary international

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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.”

<sup>27</sup> Yoram Dinstein, *War, Aggression and Self-defence*, 5<sup>th</sup> ed. (Cambridge University Press, Cambridge 2011) p. 87.

<sup>28</sup> See Hans Kelsen, *The Law of the United Nations* (Frederick A. Praeger, New York 1950) p. 120. Seen from the perspective of the Charter, “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” (Article 103).

<sup>29</sup> Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, Oxford 1963) pp. 88-89 and 364.

<sup>30</sup> For a reference to some of these concepts, see Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, Oxford 1963) p. 89, Yoram Dinstein, *War, Aggression and Self-defence*, 5<sup>th</sup> ed. (Cambridge University Press, Cambridge 2011) p. 86, and Stephen C. Neff, *War and the Law of Nations: A General History* (Cambridge University Press, Cambridge 2005) p. 294. Brierly held that “the Pact did intend to render wholly illegal all resort to war otherwise than in self-defence or as a sanction for the violation of the Pact”; James Leslie Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6<sup>th</sup> ed. (Clarendon Press, Oxford 1963) p. 410, and see also *ibid.*, p. 412.

<sup>31</sup> Yoram Dinstein, *War, Aggression and Self-defence*, 5<sup>th</sup> ed. (Cambridge University Press, Cambridge 2011) p. 86.

<sup>32</sup> See e.g. Yoram Dinstein, *War, Aggression and Self-defence*, 5<sup>th</sup> ed. (Cambridge University Press, Cambridge 2011) p. 87. For the view that the Kellogg-Briand Pact “created general binding on signatories and non-signatories alike”, see the sources mentioned in Philip C. Jessup, *A Modern Law of Nations: An Introduction* (The Macmillan Company, New York 1950) p. 134, n. 29.

law,<sup>33</sup> one may ask whether the Kellogg-Briand Pact has any relevance left as it approaches its 90<sup>th</sup> anniversary. The Pact did not achieve its lofty aims in the short run and there is little reference to it in current state practice.<sup>34</sup> However, the Pact helped us along the road to where we are today. And that is no small achievement in itself.

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<sup>33</sup> Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14, on pp. 99-101, paras. 188 and 190.

<sup>34</sup> See already Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, Oxford 1963) pp. 113-114.

Substantive provisions of the Kellogg-Briand Pact:

#### **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.