

## THE LAW OF THE WORLD

OONA A. HATHAWAY & SCOTT J. SHAPIRO

### INTRODUCTION

If you were to ask at what moment the world as we know it was set into motion, few, if any, would point to August 27, 1928. On that day, the representatives of the great powers of the world packed into the ornate, chandelier-filled room of the Salle de l'Horloge deep within the Quai d'Orsay, which housed the French Ministry of Foreign Affairs. It was a room heavy with history—the beleaguered Versailles Treaty had been concluded in the same room almost a decade earlier.<sup>1</sup>

The crowded space was sweltering from six large movie lights set up to help capture the momentous event on film. Sitting in a horseshoe, the representatives of the fifteen assembled states faced a small table at the center of the room, on which the treaty lay. At the center sat Aristide Briand, the aristocratic Frenchman who had first proposed a treaty to renounce war.<sup>2</sup>

Briand did not look the part of the French statesman. Not tall or in any way striking, his face was furrowed and partly obscured by a long drooping mustache.<sup>3</sup> It was said that he often gave the impression of being bored.<sup>4</sup> Yet Briand was no jaded diplomat. Both as Prime Minister and as Foreign Minister, he had worked tirelessly to protect France with a web of protective treaties. Often credited with formulating the original proposal for a new economic union of Europe,<sup>5</sup> he had just two years earlier received the Nobel Peace Prize for his part in negotiating the Locarno Treaties, which aimed to bring a close to disputes that lingered from the Great War. He had first raised the idea of a bilateral nonaggression pact with the United States—then the only major world power outside the League of Nations—with the aim of filling a nagging gap in the protective web he had painstakingly constructed.

Before the signing began, Briand rose to address the crowd. He spoke from prepared notes, which was unusual for the normally spontaneous speaker.<sup>6</sup> He began by warmly acknowledging the United States representative, Secretary of State Frank Kellogg, who sat to his left, and the German representative, Gustav Stresemann, with whom he had shared the 1926 Nobel Peace Prize.<sup>7</sup> He then turned to the treaty. This moment, he declared, “marks a new date in the

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<sup>1</sup> New York Times (Edwin L. James), '15 Nations Sign Pact to Renounce war in Paris Room Where League was Born: Briand Dedicates it to Nations' (28 August 1928) 1 and 4.

<sup>2</sup> New York Times (Edwin L. James), '15 Nations Sign Pact to Renounce war in Paris Room Where League was Born: Briand Dedicates it to Nations' (28 August 1928) 1 and 4.

<sup>3</sup> Valentine Thomson, *Briand: Man of Peace* (Covici-Friede 1930) xii & 237.

<sup>4</sup> Valentine Thomson, *Briand: Man of Peace* (Covici-Friede 1930) xii.

<sup>5</sup> Cornelia Navari, "Origins of the Briand plan," *Diplomacy & Statecraft* (1992) 3: 74-104; D. Weigall and P. Stirk, eds., *The Origins and Development of the European Community* (Leicester University Press, 1992), pp. 11-15

<sup>6</sup> Valentine Thomson, *Briand: Man of Peace* (Covici-Friede 1930) 155-64.

<sup>7</sup> Department of State, *Treaty for the Renunciation of War, Text of the Treaty, Notes Exchanged Instruments of Ratification and of Adherence and Other Papers* 312 (1933) (text of speech by Briand upon signing of the Kellogg-Briand Pact).

history of mankind.” It marks the end, he explained, “of selfish and willful warfare.” “Considered formerly as based on divine right and having remained in international ethics as an attribute of sovereignty, that form of war is at least legally stripped of what constitutes its most serious danger: *its legitimacy*.”<sup>8</sup> The treaty does not merely create “a defensive organization against the scourge,” but “attack[s] the evil at its very root.”<sup>9</sup> The speech was met with a burst of applause.<sup>10</sup>

As Briand spoke, tears trickled down Kellogg’s cheeks.<sup>11</sup> He had been a member of the Senate during the vote on the Treaty of Versailles and was one of the few Republicans to support its ratification. After losing his reelection bid a year later, he had turned his attention to international affairs. Serving first as Ambassador to Britain, he had taken up the position of Secretary of State for President Calvin Coolidge in 1925. Thus far, significant international achievements had eluded him; he regarded this as the most profound moment of his time in office. And, indeed, he would later receive the Nobel Peace Prize for his role.<sup>12</sup>

The pact these two men forged—the General Treaty for the Renunciation of War, often called the Kellogg-Briand Pact or the Paris Peace Pact—was signed that day by fifteen nations. President Coolidge hailed it as the “a great forward step in the preservation of peaceful relations between nations.”<sup>13</sup> President Doumergue of France declared that he was “convinced that the act accomplished on this day responds to the intermost[sic] longings of all mankind.”<sup>14</sup> And Japanese Premier Tanaka of Japan declared that, “The treaty will ever mark an epoch in history. It always will stand as the portal to an era wherein it is officially proclaimed that war is unworthy of civilized man.”<sup>15</sup> Thus blessed, the treaty began traveling the globe, eventually winning the endorsement of almost every country then in existence.<sup>16</sup>

There were skeptics, of course. Senator Carter Glass of Virginia remarked that it was “not worth a postage stamp.”<sup>17</sup> Henry Cabot Lodge, Jr., who would become a Senator, U.S. Ambassador, and Vice Presidential nominee, opposed ratification of the treaty, arguing that, “[t]he conception of renouncing war by governmental fiat seems inherently absurd.”<sup>18</sup>

The plan unfortunately did not play out as its architects hoped. Not long after the agreement finished its travels around the globe to gather signatures, Japan invaded Manchuria and then Mongolia, and Italy invaded Ethiopia. A decade after the countries of the world officially

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<sup>8</sup> *Id.* at 313 (emphasis added).

<sup>9</sup> *Id.* at 314.

<sup>10</sup> *New York Times* (Edwin L. James), ‘15 Nations Sign Pact to Renounce war in Paris Room Where League was Born: Briand Dedicates it to Nations’ (28 August 1928) 1 and 4.

<sup>11</sup> *New York Times* (Edwin L. James), ‘15 Nations Sign Pact to Renounce war in Paris Room Where League was Born: Briand Dedicates it to Nations’ (28 August 1928) 1 and 4.

<sup>12</sup> David Bryn-Jones, *Frank B. Kellogg: A Biography* (1937), 171-251; L. Ethan Ellis, *Frank B. Kellogg and American Foreign Relations 1925-1929* (1961), at 193-212.

<sup>13</sup> *Coolidge Happy Over New Pact*, *Los Angeles Times* (Aug. 29, 1928), p. 2.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> By 1933, sixty-five countries had ratified the treaty.

<sup>17</sup> *MODERN AMERICAN DIPLOMACY* (John M. Carroll & George C. Herring, eds. 1996), at 74.

<sup>18</sup> Henry Cabot Lodge, *The Meaning of the Kellogg Treaty*, *Harper’s Magazine* (1929), at 41.

renounced war in the Salle de l'Horloge, Europe was on the verge of one of the bloodiest wars the world has ever witnessed.

In the years since, the Pact has come to be seen by many as an embarrassing footnote to history, clear evidence of the folly of international law. The activists came to be known by the double-edged sobriquet “the Idealists,” whereas the cynics were rewarded with the coveted title “the Realists.” Even the Office of the Historian of the U.S. Department of State declares that “[i]ts legacy remains as a statement of the idealism expressed by advocates for peace in the interwar period.”<sup>19</sup>

This book argues that this dismissive assessment misses something deeply important. Yes, the Pact proved incapable of preventing states from using force. But it set in motion a series of events that profoundly altered the course of the way the world is governed. It began, as a contemporary commentator rightly predicted, “nothing short of a world revolution.”<sup>20</sup>

### **The Old World Order**

To understand why the renunciation of war was so momentous, consider the world as it existed at the turn of the 20<sup>th</sup> century—what we will call the Old World Order. The most important rules of the international system were precisely the opposite of what they are today. War, far from illegal, was understood as a perfectly legitimate tool of statecraft and as a morally permissible way for individuals to remedy the violation of natural rights. When a state was wronged, war was the way to right the wrong. The legal right to territory, people, and goods were decided by war—even one that was entirely unjust. Agreements negotiated at the end of a gun were binding. Neutral states were required to trade equally with all parties to a war or lose their neutral status. States that used economic sanctions against aggressive states invited military retaliation. Indeed, they had as good as declared war.

At the time of the Kellogg-Briand Pact, this Old World Order had reigned with changes only at the margins for more than three hundred years. Set into motion by Hugo Grotius, the so-called “father of international law,” the Old World Order allowed individuals and states to treat war much like a lawsuit—using it to remedy violations of rights and to secure title to property and territory.

The only means to remedy wrongs in a world without a supreme sovereign or common judge was war. Grotius declared, “When judicial settlement ends, war begins.” War was thus neither illegal nor immoral. It was a sanctioned procedure—in fact, *the* sanctioned procedure—for resolving disputes. States had the right to go to war precisely because they could not turn to a court for relief. There was, after all, no world court. Unlike individuals, which could resolve their disputes in court, states had no choice but to take the law into their own hands. Thus, sovereigns could make war to enforce any legal claim, however mundane. States could use their military to collect debts, recover stolen property, claim compensation for accidents, resolve dynastic disputes,

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<sup>19</sup> U.S. Department of State, Office of the Historian, Milestones: 1921-1936: The Kellogg-Briand pact, 1928, <http://history.state.gov/milestones/1921-1936/Kellogg>.

<sup>20</sup> Charles Clayton Morrison, *Outlawry of War* 101 (1927).

seek redress for treaty violations, protect freedom of the seas, and even open up trade with xenophobic nations.

The fact that states had the legal right to use force in order to resolve their disputes had profound implications not only for international relations but for the law too. Indeed, the sovereign right to wage war formed the foundation of the entire legal system—for the law of the world, if you will. Invaders had the right to their conquests, strong states could extort valid treaties from weaker ones, and refusing to trade with an aggressor was itself seen as an act of aggression that gave the victim a legal right to respond.

The Kellogg-Briand pact represented nothing less than a repudiation of this framework, of the Old World Order. And in rejecting war as a legal remedy, it shaped nearly everything about the international system we know today.

### **The Renunciation of War**

The Pact itself contained just two substantive articles. In fact, it is so short that it literally fit on a postcard—thousands of which were produced to celebrate the renunciation of war soon after it the pact entered into effect. The first article declared that the state parties “in the names of their respective peoples . . . 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.” This article was the heart of the Pact. War had been, after all, an instrument of national policy of every state for more than three centuries. States hereby renounced the right to use war as they long had—to secure their interests, right wrongs, and make and enforce treaties.

The second article provided that the 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.” Interestingly, the Pact did not create any institution to enforce it or any court to adjudicate its terms. It provided only 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>21</sup> As James Shotwell, who encouraged Briand to propose the Pact, later explained, “[t]he novelty in this approach is that instead of enumerating the duties of the law-abiding states it denies the aggressor the right to calculate upon the continuance of friendly relations.”<sup>22</sup>

As Shotwell’s comment suggests, those who worked to “abolish the institution of war” were not so foolish as to think that they could end the resort to violence with a treaty. But they *could* deny legal status to changes resulting from its use—and thereby prevent Pact members from becoming unwitting “accomplices in the aggression.”<sup>23</sup> No longer would nations recognize changes brought about by force or duress, including annexation of territory. No longer would a nation be able to “establish right, justice or title by brute strength.”<sup>24</sup> An aggressor might still take a

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<sup>21</sup> Preamble.

<sup>22</sup> James T. Shotwell, *War as an Instrument of National Policy* (1929), at 221.

<sup>23</sup> *Id.* at 222.

<sup>24</sup> Levinson to McDonald (April 7, 1928), quoted in Stoner, at 193.

city by force, “but it would not, as a matter of law, be *his* city.”<sup>25</sup> They aimed, in other words, to do no less than change the *legal meaning* of war.

### **A New World Order Takes Shape**

It would take time for the promise of the Pact to be realized and for the full import of the renunciation of war to come clear. The Pact famously proved powerless to prevent the slide of the world into a second cataclysmic war. That was true, in part, because while the Pact repudiated war, it put nothing in its place. War had been the mechanism for resolving disputes and compelling treaty commitments during the Old World Order. If war could not be used to right wrongs, establish rights to territory, or enforce agreements, how would these essential functions of the global legal order be carried out?

It would take another world war before these questions would be answered. The world emerged from World War II with renewed commitment to the vision of the Pact. This time it embedded the renunciation of war in a new United Nations Charter, which guaranteed that “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.” But the renunciation would not stand alone; the Charter created a new international organization that could serve many of the functions war now no longer could.

Thus renewed and reinforced, the prohibition on the threat or use of force—the renunciation of war—became the linchpin of the post-war order. It soon became clear that the renunciation of war required a change in nearly all the rules governing international relations. The representatives assembled on that fateful day in Paris were prepared to reject the foundation on which the international system had been built three centuries earlier. But they had not come fully to terms with the extent to which the entire structure of international law Grotius had built depended upon that very same foundation.

The signing of the Pact was not the end of the story, but instead just the beginning. Once the countries of the world renounced war as an instrument of national policy, they found that they had begun to undo the rules by which the world had long been governed. They had set into motion a series of events that continue to unfold today. Like an ecosystem disrupted by a sudden change in the climate, the international system faced a cascade of changes triggered by the renunciation of war—changes that were the inevitable consequence of the Pact, if perhaps not foreseen by all those involved. The outlawry of war led to the end of territorial conquest, gunboat diplomacy, and immunity from prosecution for waging war, and it made possible economic sanctions and what we call outcasting as mechanisms for enforcing international law.

#### *The end of territorial conquest.*

While wars did not end with the Pact, the right to claim territory conquered through war did. In the modern era, in contrast with earlier eras, territory is rarely seized through military means and when it is, that territorial conquest is almost always subsequently reversed.<sup>26</sup>

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<sup>25</sup> John E. Stone, S.O. Levinson and the Pact of Paris (1943), at p. 192 (emphasis added).

This new reality became clear just a few years after the Pact entered into force. In 1931, a small bomb exploded near a railroad owned by Japan's South Manchuria Railway near Mukden, in the Manchurian province of China. The Imperial Japanese Army accused Chinese dissidents of staging the attack, and it responded with an invasion of the entire region. Within six months, Japan had installed a puppet government and had effectively displaced Chinese authority over the region.

On January 7, 1932, Secretary of State Henry Stimson wrote identical notes to the Chinese and Japanese governments. "The U.S. Government," he wrote, "cannot admit the legality of any situation de facto, nor does it intend to recognize any treaty or agreement entered into between those Governments or their agents which impairs the treaty rights of the United States or its citizens in China . . ." He continued, "The U.S. Government does not intend to recognize any situation or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27<sup>th</sup>, 1928, to which both Japan and China, as well as the U.S., are parties."<sup>27</sup>

The Pact of Paris thus formed the legal foundation for the United States' refusal to recognize Japan's conquest. The members of the League of Nations soon followed. It was the beginning of the end of the right to conquest—a basis of the international legal order for hundreds if not thousands of years.

By outlawing war and prohibiting conquest, the Pact *had the effect of making state sovereignty more precious than ever before*. Briand alluded to this at the signing of the treaty: "Thus shall the smaller nations henceforth enjoy independence in international discussions."<sup>28</sup> Yet this drastically understated the transformation in the value of sovereignty for the smallest and weakest states. Indeed, Briand's own speech contains further clues to the importance of the moment. Quoting President Coolidge, he proclaimed: "An act of war in any part of the world injures the interests of my country."<sup>29</sup> The message: An act of war against even the weakest member would injure the strongest, violating their shared commitment.

In today's world, this message may seem unremarkable, but it was transformational at the time. The survival of the state was no longer contingent on the capacity of the state to defend itself. The time of conquest that the Old World Order had enabled was at an end. Indeed, viewed in this light, the attack on international law as an imposition of state sovereignty is revealed as

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<sup>26</sup> A recent study of territorial change from the early 1800s to the present concluded that "[t]he most notable trend in the frequency of military conflict is a sharp decline in the proportion of violent territorial changes since 1950. . . . The ability to conquer land areas and incorporate them into the homeland has been severely limited. Many states have tried, most notably Iraq and Argentina in recent times, but the success rate is very low." Gary Goertz & Paul F. Diehl, *Territorial Changes and International Conflict* (1992), at p. 87. Our own initial evaluation of the empirical evidence supports this conclusion. Author's calculations, using Correlates of War, Territorial Change Dataset, 1816-2008 (v. 4.01), at <http://www.correlatesofwar.org/COW2%20Data/TerrChange/terrchange.html>.

<sup>27</sup> Identical Notes of United States to Certain Governments (1928), *reprinted in* 22 Am. J. Int'l L. 109 (Supp. 1928).

<sup>28</sup> Edwin L. James, "15 Nations Sign Pact to Renounce war in Paris Room Where League was Born: Briand Dedicates it to Nations, N.Y. Times, 28 August 1928, at 4.

<sup>29</sup> *Id.*

utterly mistaken. Far from undermining state sovereignty, international law—first the Kellogg-Briand Pact and later the UN Charter—made it invaluable.

*The end of coerced international agreements.*

Gunboat diplomacy was the norm under the Old World Order. Not only were coerced agreements common, they were enforceable—their violation was itself a cause for war. The renunciation of war brought this to an end. After the Pact, no state could legally carry out a threat to go to war. The illegality of war implied the illegality of coerced agreements.

Article 52 of the Vienna Convention on the Law of Treaties made the prohibition on coerced agreements express. The prohibition was, moreover, explicitly grounded in the Pact of Paris. Lauterpacht, Special Rapporteur to the International Law Commission on the law of treaties explained that the aim of the Article was to recognize the “renunciation and prohibition of the use of force in general international agreements”—a renunciation he traced to the Pact of Paris.<sup>30</sup>

The requirement of real consent had immense consequences for how states could make and enforce agreements. In a world in which states could no longer use or threaten to use force to make or enforce an agreement, state consent would become the coin of the realm. Indeed, today it is the *only* legitimate currency. States today only enter agreements that they believe serve their best interests. Agreements that promise states pain without sufficient gain will find very few takers indeed.

*The end of immunity.*

With war outlawed, it became possible to talk of the crime of aggression—an idea that would have been unworkable under the Old World Order. A key moment came at the close of World War II. At Nuremberg, several defendants were charged with the crime of aggression. The defense claimed that the crime of aggression did not exist at the time the war began and therefore holding the defendants to account would constitute an *ex post facto* punishment.

The tribunal responded by citing the Pact of Paris, which Germany had joined, in its decision to convict.<sup>31</sup> It explained, “the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that

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<sup>30</sup> He explained, “With the enactment of the Covenant of the League of Nations and the General Treaty for the Renunciation of War (Pact of Paris), a strong body of opinion began to develop which held that every state has the duty to refrain from the use of war as an instrument of national policy. Insofar as war or threats of force constitute internationally illegal acts, the results of those illegalities, imposed treaties, cannot be considered valid, nor do they produce legal rights that would benefit the lawbreaker.” (1953) 2 Y.B. Int’l L. Comm’n 90,147, U.N. Doc. NCN.4I63/1953.

<sup>31</sup> “Occupying the positions they did in the Government of Germany, the defendants, or at least some of them, must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. . . . This view is strongly reinforced by a consideration of the state of international law in 1939, so far as aggressive war is concerned. The General Treaty for the Renunciation of War of 27 August 1928, more generally known as the Pact of Paris or the Kellogg-Briand Pact, was binding on 63 nations, including Germany, Italy, and Japan, at the outbreak of war in 1939.” Nuremberg Judgment p. 461.

those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the pact.”<sup>32</sup>

The outlawry of war, in other words, brought with it the end of immunity for those who wage aggressive war. Precisely what this means—and how it should be institutionalized—continues to be a source of debate, most recently in the context of discussions over the proper jurisdiction of the International Criminal Court. But there is no longer any doubt that it is possible to speak of a crime of aggression and that those who wage war are not immune from being held to account for their crimes.

*Making economic sanctions—and outcasting—both necessary and possible.*

The prohibition on the use of force for any purpose may have made it impossible to force states into agreements they did not want, but it also had the effect of making it easier to persuade states to make treaty commitments they weren’t sure they could keep. After all, a state’s failure to live up to a treaty’s terms would no longer be cause for war against it. Indeed, the outlawry of war created a striking new reality: *international law protected states from being compelled to comply with international law.*

This would have the felicitous effect of enabling an explosion in international law. But this, like much else, would prove a two-edged sword. The renunciation of Grotius’s Old World Order would make possible unprecedented international cooperation. But it would also enable noncompliance. It would, moreover, generate the peculiar dilemma of the modern age: At the very moment of the human rights revolution, which placed obligations on states to respect the fundamental rights of their own citizens, the rules of the international order prevented states from enforcing those obligations through force. For the protection international law offers to sovereignty inheres in states regardless of the merit of their governments or their actions. It insulates the autocratic and the democratic, the rights-abuser and the rights protector, alike. Put differently, it protects liberal states from interference, but it also prevents liberal states from interfering.

Treaties, for example, had long been enforced by threat of war. The Pact outlawing war created a puzzle of how even to enforce the Pact itself. It would seem odd to enforce a treaty renouncing war by threat of war or by war—and, indeed, many explicitly rejected the idea. But if the treaty could not be enforced by threat of war, then the how could it be enforced? For that matter, how could *any* treaty be enforced? Indeed, the prohibition on war created a puzzle for international law as a whole: international law (in the form of the Pact) prohibited the use of force *even for the purpose of enforcing international law.* The Pact, in other words, renounced the very foundational principle on which Grotius had built the Old World Order—war could no longer be used as a legal remedy.

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<sup>32</sup> Id. at 462. It then quoted Henry Stimson: ““War between nations was renounced by the signatories of the Kellogg-Briand Treaty. This means that it has become throughout practically the entire world ... an illegal thing. Hereafter, when nations engage in armed conflict, either one or both of them must be termed violators of this general treaty law .... We denounce them as law breakers.”” Id.



The Pact would offer the solution to the very problem it had created. Under the Old World Order, neutral states, to remain neutral, were required to treat all parties to a conflict equally. If they failed to do so—by, for example, putting in place economic sanctions on one party—they lost their status as neutrals and became co-belligerents with the favored state. As a result, economic sanctions could not stand as an independent mechanism of statecraft.<sup>33</sup>

That all changed with the outlawry of war. As a Report by the Committee on Economic Sanctions put it in 1932: “Difficult as it is for legalists to grasp the fact, old-fashioned neutrality has disappeared with the signing of the Pact of Paris. Hostilities, should they break out, are no longer directed merely against the nation attacked; they are also directed against every other power signatory to the Pact of Paris. In such case the most solemn pledges would be broken. No power signatory to that Pact can possibly remain indifferent to such a violation of the pledges given to it.”<sup>34</sup> The renunciation of war thus made both *necessary* and *possible* the rise of economic sanctions as a tool of statecraft.

When the Stimson declared in 1932 that the United States did “not intend to recognize any situation or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27<sup>th</sup>, 1928,” he not only signaled the end of the right of conquest. He also established a new tool for enforcing the prohibition on war: non-recognition. The doctrine of non-recognition offered a tool for enforcing international law that did not require the use of military force. It therefore planted the seed for a new form of international law enforcement. States came to realize that they had power even if they could not use force. They could refuse to cooperate. If a state broke a legal commitment, others could simply deny that state the benefits of cooperation and membership. They could, in a word, use *outcasting*.

Outcasting may seem a poor substitute for war. But it would prove, if anything, *more* powerful than war. During the course of hundreds of years, the international system had intertwined states in a web of relations from which every state benefited and on which every state depended. States today rely upon one another for nearly everything they do—from postal delivery to protection of national security. When a state fails to live up to its side of the bargain—fails, for example, to honor an agreement to lower trade barriers—states have an important tool at their disposal: They can refuse to give the delinquent state the benefits of the bargain that it has broken. In other words, where they once used war, today states use targeted non-cooperation—outcasting—against the wrongdoers.

Outcasting, then, fills the immense gap left behind by the renunciation of war. It offers a tool that states may use to enforce international law without running afoul of the renunciation of war. Rather than leaving states powerless in the face of intransigence, it allows them to use the benefits of the international system to police and preserve the international system. Instead of using physical force against one another, states use their capacity to deny one another the benefits of membership. And that, it turns out, is extraordinarily powerful.

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<sup>33</sup> See, e.g., Gary Clyde Hufbauer, et al., *Economic Sanctions Reconsidered* (2007, ed ed), at p. 10 (“Only after World War I was extensive attention given to the notion that economic sanctions might substitute for armed hostilities as a stand-alone policy.”)

<sup>34</sup> *Boycotts and Peace: a Report By The Committee on Economic Sanctions: Nicholas Murray Butler, Chairman (President of Columbia University) (Evans Clark, Ed.) (1932)*, at 5.

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The renunciation of war begun by the Pact and incorporated into the new United Nations Charter would thus come to represent not simply the demise of the Old World Order but also the rise of a new order. It was not possible, the world discovered, to upend the foundation of the Old World Order without altering the structure built upon it.

In ways not fully recognized at the time or since, we will show, the prohibition on war brought about a revolution in the international system—in the resort to war, yes, but also in how states interacted with and related to one another and even in the very meaning of what it is to be a sovereign state. Understanding this transition and the lessons it holds is the project of this book.

## CHAPTER 4: THE WAR TO END WAR<sup>35</sup>

World War I was the perfect Grotian war. It began with an *injuria*: On June 28, 1914, Archduke Franz Ferdinand, heir to the Austro-Hungarian throne and his wife were assassinated by a Serbian nationalist.<sup>36</sup> Austria-Hungary quickly issued a series of demands on Serbia.<sup>37</sup> When Serbia refused to capitulate, Austria-Hungary declared war, seeking retribution for the loss of its heir.<sup>38</sup> The countries of Europe, and eventually much of the world, quickly lined up on both sides of the conflict.

The United States was not one of them, though it too played by the rules of the Old World Order. In a message to Congress upon the outbreak of the war in Europe, President Wilson declared that the United States would remain neutral.<sup>39</sup> As a neutral state, the United States would have the right to carry on trade with all parties to the conflict. Indeed, many Americans saw an opportunity in the outbreak of war abroad. With its European competitors at war, the United States could expand into markets where it had previously been unable to make headway. But Wilson cautioned the public that the country could enjoy the rights of neutrality only so long as it observed the responsibilities as well: “The United States must be neutral in fact, as well as in name, during these days that are to try men's souls. We must be impartial in thought, as well as action, must put a curb upon our sentiments, as well as upon every transaction that might be construed as a preference of one party to the struggle before another.”<sup>40</sup> To do otherwise would be tantamount to entering the war.

The eventual descent of the United States into war with Germany followed the Grotian script, as well. Tension between the U.S. and Germany began building as early as 1915, when a German U-boat sank a British passenger liner, the RMS *Lusitania*, killing hundreds of civilians, including 128 Americans on board. The public was outraged.<sup>41</sup> The

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<sup>35</sup> Our thanks to Michael VanderHeijden, of the Yale Law School Library, for his assistance with obtaining the Borah archives materials from the Library of Congress. Our thanks to Sarah Grusin for her assistance with the Levinson archives at the University of Chicago, to the Kansas Historical Society, which assisted with obtaining access to Senator Capper's papers, and Columbia University, which provided access to John Dewey's, Nicholas Murray Butler's, and James Shotwell's papers. Our thanks, as well, to Gregor Novak, Tiffany Ng, Will Smiley, Max Mishkin, Aadhithi Padmanabhan, and Michael Shih for outstanding research assistance.

<sup>36</sup> Joachim Remak *Sarajevo: The Story of a Political Murder* (Criterion 1959). pp. 137–142.

<sup>37</sup> The Austro-Hungarian Ultimatum to Serbia, July 23, 1914.

<sup>38</sup> The Austro-Hungarian Declaration of War on Serbia (July 28, 1914); The Serbian Response to the Austro-Hungarian Ultimatum (July 25, 1914).

<sup>39</sup> Woodrow Wilson, *Message to Congress*, 63rd Cong., 2d Sess., Senate Doc. No. 566 (Washington, 1914), pp. 3–4.

<sup>40</sup> *Id.*

<sup>41</sup> Howard Jones, *Crucible of Power: A History of U.S. Foreign Relations Since 1897* (Rowman & Littlefield 2001) p. 73.

sinking of the *Lusitania*—in apparent violation of the laws of neutrality and the freedom of the seas—would become a rallying cry. Wilson warned that if there were any further infringement of its rights as a neutral state, America would hold “Germany to a strict accountability for such acts of their naval authorities” and would “take any steps it might be necessary to take to safeguard American lives and property and to secure to American citizens the full enjoyment of their acknowledged rights on the high seas.”<sup>42</sup>

The Germans, however, claimed that the sinking was entirely justified. The ship, they argued, contained ammunition bound for the allies and was therefore a war ship and a legitimate target under international law. It had, moreover, been warned not to sail. After the sinking, a representative of the German Kaiser argued that “American passengers were being used as a cloak for England’s war shipments”—claims both Britain and America vigorously denied.<sup>43</sup> Recent evidence suggests Germany was right: Forensic examination of the wreck of the *Lucitania* (suspiciously pock-marked by depth charges set long after she sunk) suggested there were as many as four million rounds of ammunition on the ship when it went down.<sup>44</sup> It seems the Germans had been playing by the rules of the Old World Order, after all, though few believed it at the time.

With the country’s tenuous neutrality still holding by a thread, President Woodrow Wilson successfully campaigned for reelection in 1916 on the motto “He kept us out of war.”<sup>45</sup> But his promise would not last. On April 2, 1917, President Wilson found himself standing before a joint session of Congress seeking a declaration of war. Germany had resumed unrestricted submarine warfare despite its promises to the contrary. As Wilson put it, “Vessels of every kind, whatever their flag, their character, their cargo, their destination, their errand, have been ruthlessly sent to the bottom: without warning and without thought of help or mercy for those on board, the vessels of friendly neutrals along with those of belligerents.” It was no longer enough, Wilson declared, “to assert our neutral rights with arms, our right to use the seas against unlawful interference, our right to keep our people safe against unlawful violence.” It had proven impossible to defend merchant ships against threats from submarines that they cannot see. Moreover, he explained, “The German Government denies the right of neutrals to use arms at all within the areas of the sea which it has proscribed, even in the defense of rights which no modern

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<sup>42</sup> Wilson’s First Warning to the Germans (10 Feb. 1915).

<sup>43</sup> Sinking Justified Says Dr. Dernberg: *Lucitania* a “War Vessel” Known to be Carrying Contraband, Hence Search Was Not Necessary, *N.Y. Times* (May 9, 1915).

<sup>44</sup> Sam Greenhill, Secret of the *Lucitania*: Arms find challenges Allied claims it was solely a passenger ship, *Daily Mail* (December 19, 2008).

<sup>45</sup> Democratic Party Platform, June 16, 1916; see John Milton Cooper, Jr., *Woodrow Wilson: A Biography* (2009): p. 342.

publicist has ever before questioned their right to defend.”<sup>46</sup> It was time to wage the what he promised would be the “War to End all Wars.”<sup>47</sup>

It was no coincidence that Wilson’s speech appeared to take a page out of Grotius’s *Mare Liberum*. After all, Grotius had originally written his account precisely to justify the use of war to secure freedom of the seas. So clear was the connection that the Carnegie Institution (later the Carnegie Endowment for International Peace) republished Grotius’s works on the eve of the war for much the same purpose for which they had been published centuries earlier: to justify the recourse to war. The introductory note to the reprinted *Mare Liberum* makes the connection explicit: “the expression ‘Freedom of the Seas’ has been on the lips alike of belligerent and neutral, and it seems as advisable as it is timely to issue—for the first time in English—the famous Latin tractate of Grotius proclaiming, explaining, and in no small measure making the ‘freedom of the seas.’”<sup>48</sup>

The war that ensued brought devastation unlike anything seen before. No mere “cabinet war,” World War I was a “war of annihilation.”<sup>49</sup> The full resources of the modern, industrialized nations were brought to bear in an effort to wreak destruction on one another. And they succeeded. At the close of the war, roughly eight million men were dead, seven million permanently disabled, and another fifteen million wounded.<sup>50</sup> Disease, famine, and privation brought about by the war led to millions of civilian deaths.<sup>51</sup> By one estimate, roughly 3.5% of the European population was lost due to the war.<sup>52</sup> Few families were left untouched. At the close of the war, the question on everyone’s mind was simple: How to prevent this from ever happening again?

### **Enforcing the Peace**

Almost forty nations convened at the Paris Peace Conference. For more than eighteen months, beginning on January 12, 1919, their representatives wrangled over territory, material compensation, and how best to secure the peace. This conference, too,

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<sup>46</sup> Woodrow Wilson: "Address to a Joint Session of Congress Requesting a Declaration of War Against Germany," April 2, 1917. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=65366>.

<sup>47</sup> Wilson borrowed the phrase from H.G. Wells, *The War That Will End War* (New York: Duffield & Co. 1914).

<sup>48</sup> Hugo Grotius, *The Freedom of the Seas or the Right Which Belongs to the Dutch to Take Part in East Indian Trade* trans. Ralph Van Derman Magoffin (New York: OUP, 1916, p. v.

<sup>49</sup> Alan Kramer, *Dynamic of Destruction: Culture and Mass Killing in the First World War* (2007): p. 31.

<sup>50</sup> Derek H. Aldcroft, *From Versailles to Wall Street, 1919-1929* (1977): 13; Meredith Reid Sarkees, *The COW Typology of War: Defining and Categorizing Wars (Version 4 of the Data)* (showing 8,578,031 battle deaths).

<sup>51</sup> Aldcroft, at 14-17.

<sup>52</sup> Id. at 14. See also Samuel Dumas & K.O. Vedel-Petersen, *Losses of Life Caused by War* (Oxford 1923): 137-182.

was guided by the rules of the Old World Order. France insisted on crippling reparations from Germany, and borders across Europe were redrawn to reward the victors and penalize the conquered. Austria-Hungary ceased to exist, carved into pieces, some of which became new states and some awarded to its former foes. Germany lost thirteen percent of its pre-war territory. It was forced to forfeit all of its overseas colonies. The region of Alsace-Lorraine—which been seized from France by Prussia at the conclusion of the Franco-Prussian War in 1871—was once again awarded back to France. Belgium, an early victim of German aggression, laid claim to the port of Memel (now Klaipeda). Denmark gained northern Schleswig. Poland gained Posen-West Prussia.<sup>53</sup>

But how to secure the peace? Wilson was determined to fulfill his promise to make this the War to End all Wars. He pressed hard for the creation of a new “League of Nations.” The document that was hammered out at the negotiating table outlining the new League—the Covenant of the League of Nations—required that any future disputes between member states be submitted to arbitration, judicial settlement or a new Council. States were prohibited from resorting to war until three months after a decision was rendered by one of these bodies,<sup>54</sup> and states were required to comply with any award or decision “in full good faith.” No member could wage war against any other member that complied with a judgment. Any state that failed to comply would face sanctions determined by the Council—up to and presumably including military sanctions.<sup>55</sup>

Today, the League of Nations is often thought of as a precursor to the United Nations—a failed first effort that was put back into service after World War II with only minor changes. After all, even the names of the key institutions are nearly the same—the “League of Nations” was replaced by the “United Nations;” the “Permanent Court of International Justice” was replaced by the “International Court of Justice;” the “Assembly” was replaced by the “General Assembly;” and the “Council” was replaced by the “Security Council.” But there were several very important differences the surface similarities hide. To understand those differences, we must first understand how the League treated war.

Rather than prohibit or outlaw war, the League of Nations was set up to harness war to secure the peace. The idea was not a new one. It bore a close resemblance to collective security agreements that had long proliferated in Europe. The League of Nations that took shape in 1918 was heavily influenced by a proposal to ensure peace put together by an influential group of U.S. statesmen not long after the outbreak of the war in Europe.<sup>56</sup> Led by a Yale Law Professor, former U.S. President William Howard Taft and the President of Harvard University, A. Lawrence Lowell, a group of leading academic and

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<sup>53</sup> Paul Francis Diehl, *A Road Map to War: Territorial Dimensions of International Conflict* (), at 99.

<sup>54</sup> Covenant of the League of Nations, art. 12.

<sup>55</sup> *Id.* art. 13.

<sup>56</sup> Wilson made the closing address at the League’s dinner in 1915. *Enforced Peace: Proceedings of the First Annual National Assemblage of the League to Enforce Peace*, Washington, May 26-27, 1916 (1916), p. 159.

public figures had launched the “League to Enforce Peace.”<sup>57</sup> The group called for the creation of an international organization—“an Alliance or League comprising principle Nations”<sup>58</sup>—to *enforce* the peace, with force if necessary.

The group’s resolutions called for signatories to commit to a system for adjudicating disputes and to “jointly use their military forces to prevent any one of their number from going to war, or committing acts of hostility, against another of the signatories” without first seeking to resolve the dispute through peaceful means.<sup>59</sup> Thus, the group unanimously endorsed what one commentator described as “the drastic provision that ‘the signatory powers shall jointly use their economic and military forces against any one of their number that goes to war or commits acts of hostility against another of the signatories.’”<sup>60</sup> As the League’s published report explained:

Every city and town has its police force, every village its marshal, every rural precinct its constable, as the visible embodiment of the majesty of the law, ever ready to enforce respect for the statutes when voluntary observance fails. To compel a whole people to obey the law of nations is but to carry a step further a practice with which all the world is familiar in its daily life.<sup>61</sup>

The League to Enforce Peace did not purport to prohibit or prevent war. Quite the opposite. As one proponent explained, “The demand for a hearing of the dispute once complied with, nations, member of the League, are then free to go to war as under present conditions.”<sup>62</sup> Moreover, the League “as such” would stop short of enforcing the judgment or award, leaving states to their own devices.<sup>63</sup> The “sole cause for war by the League” would be the failure of a nation to submit a dispute for a preliminary hearing before going to war.<sup>64</sup> The proposal did not challenge the essential principles of the Old World Order, but instead sought to harness them to encourage peace by forcing states—on threat of war—to first seek peaceful means to resolve their disputes.

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<sup>57</sup> League to Enforce Peace is Launched, N.Y. Times (June 18, 1915). Taft was President of the group and Lowell the Chairman of the Executive Committee of the League to Enforce Peace. *Enforced Peace: Proceedings of the First Annual National Assemblage of the League to Enforce Peace*, Washington, May 26-27, 1916 (1916).

<sup>58</sup> *Enforced Peace: Proceedings of the First Annual National Assemblage of the League to Enforce Peace*, Washington, May 26-27, 1916 (1916), p. 5.

<sup>59</sup> *Enforced Peace: Proceedings of the First Annual National Assemblage of the League to Enforce Peace*, Washington, May 26-27, 1916 (1916), pp. 188-89.

<sup>60</sup> League to Enforce Peace is Launched, N.Y. Times (June 18, 1915).

<sup>61</sup> *Enforced Peace: Proceedings of the First Annual National Assemblage of the League to Enforce Peace*, Washington, May 26-27, 1916 (1916), p. 5.

<sup>62</sup> *Enforced Peace: Proceedings of the First Annual National Assemblage of the League to Enforce Peace*, Washington, May 26-27, 1916 (1916), p. 131

<sup>63</sup> *Id.* at 131-133.

<sup>64</sup> *Id.* at 134.

The League of Nations that emerged at the end of the war built on this foundation—and took it a step further. In what would prove the most controversial element, the Covenant of the new League *required* members to “undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members.”<sup>65</sup> If any state engaged in aggressive action against another, the Council would “advise upon the means” by which each state would fulfill its obligation to respond.<sup>66</sup> In what would prove a flashpoint, the Council could even advise members that they were obligated to go to war. The League would *enforce* the peace—with war, if necessary. The League did not prohibit war; it instead carefully regulated, managed—and indeed even reserved the right to require—its use.

Upon his return to the United States, President Wilson embarked on an ambitious and punishing tour across the United States to promote American membership in the League. He traveled eight thousand miles in twenty-two days. Clearly feeling the weight of his own responsibility for the war just ended, in his last major public address on the League, he declared: “My clients are the children; my clients are the next generation. They do not know what promises and bonds I undertook when I ordered the armies of the United States to the soil of France, but I know, and I intend to redeem my pledges to the children; they shall not be sent upon a similar errand.”<sup>67</sup> Wilson was supported in his efforts by the members of the League to Enforce Peace,<sup>68</sup> including Taft and Lowell, who co-wrote “The Covenanter,” a collection of essays reminiscent of the Federalist Papers, aimed at swaying public opinion in favor of Wilson’s Covenant.<sup>69</sup>

As ambitious as the plan to secure the peace that Wilson championed might have been, its undoing came not because it attempted to change too much but because it attempted to change too little. The League Covenant did not question any of the pillars of the Grotian regime. Its only real innovation was its size—nearly every state then in existence eventually became a member of the League (though several later withdrew or were expelled). But it left all the fundamental rules of the system untouched.

Far from the rejection of the Old World Order, the agreements negotiated in Paris at the close of the war might even be said to promise the perfection of it. The right of conquest? Left entirely intact, the defeated Central Powers carved into pieces that were distributed to those who had defeated them. Neutrality? The U.S. entry into the war to

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<sup>65</sup> League of Nations Covenant, Art. X and XI.

<sup>66</sup> *Id.*

<sup>67</sup> Woodrow Wilson, One of President Wilson’s Final Addresses in Support of the League of Nations, delivered in Pueblo, CO (Sept. 25, 1919).

<sup>68</sup> Wilson Praises Support: Cables His Appreciation to the League to Enforce Peace, N.Y. Times (Feb. 15, 1919).

<sup>69</sup> Issues “The Covenanter”: League to Enforce Peace Sends Copies to Members of Congress, N.Y. Times (July 2, 1919); William H. Taft, et al., *The Covenanter: An American Exposition of the Covenant of the League of Nations* (New York: Doubleday, Page & Co. 1919).



protect its neutral rights had left the principle firmly intact. Coerced agreements? It was clear that Germany had little choice in the matter over whether to accept the terms offered in Paris. And immunity from prosecution? There were no war trials. Although some of the allies sought to try German Kaiser Wilhelm II,<sup>70</sup> who had fled to the Netherlands, Queen Wilhelmina refused to extradite him. President Wilson’s advisors quietly counseled support for her decision, pointing out that creating penal responsibility for waging war “would be extralegal from the viewpoint of international law, . . . [and] would, in reality, be a political and not a legal creation.”<sup>71</sup> There was, simply put, no law against waging war.

That would soon change.

### **An Unlikely Revolutionary**

Salmon Levinson was an unlikely revolutionary. A successful corporate lawyer in Chicago, he made his name as the go-to lawyer for major financial reorganizations.<sup>72</sup> His many high-profile clients included Westinghouse, the St. Louis and San Francisco Railroad, and Sears, Roebuck and Company.

Salmon had little interest in international affairs. As he continued to build his successful law practice in the Midwest, his letters to friends and colleagues mentioned matters beyond the country’s shores no more than a handful of times before 1914.<sup>73</sup> That began to change in August when the Stock Exchange was forced to close in the face of an almost unprecedented sell-off—only the third time it had done so in history.<sup>74</sup> Levinson lamented the crippling rise in interest rates and Wilson’s decision to “tax[] us in every conceivable way as if we ourselves were at war.”<sup>75</sup>

But it was only after he read a lively exchange in the New York Times between German émigré and New York financier Jacob Schiff and Harvard President Emeritus Charles W. Eliot that he decided to do something about it. In the exchange, Schiff had argued that “England is unwilling to stop short of crushing Germany,” while Eliot maintained that Germany had shown itself to be unwilling to compromise: “for Germany,

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<sup>70</sup> The Versailles treaty provided for his arraignment for “supreme offence against international morality and the sanctity of treaties.” Versailles Treaty Art. 227.

<sup>71</sup> Memorandum by Miller and Scott, c. Jan. 18, 1919, quoted in Arthur Walworth, *Wilson and His Peacemakers: American Diplomacy at the Paris Peace Conference, 1919* (1986), at p. 214.

<sup>72</sup> John E. Stoner, *S.O. Levinson and the Pact of Paris* 8 (1943).

<sup>73</sup> *Id.* at 11-13.

<sup>74</sup> *Id.* at 12 n.2 (quoting the N.Y. Times). [Get NY times article from August 1, 1914 on stock market closure.]

<sup>75</sup> *Id.* at 12.

it is a question between world empire or utter downfall.”<sup>76</sup> Levinson decided that if he could use his negotiating skills to get these leading public intellectuals to agree on a plan to bring the war in Europe to an end, perhaps there was “a chance in a million of something coming of it.”<sup>77</sup> As he later put it, his “experience ha[d] been largely in dealing with problems arising from conflicts of interest due to industrial breakdowns and a consequent need for reorganization.” This experience convinced him “that the problem of adjusting large conflicting corporate interests is not essentially different as a human problem from that of the adjustment of conflicting national interests.”<sup>78</sup>

He used his extensive network to secure introductions, managing to meet with both Schiff and Eliot several times—flattering and coaxing one and then the other into overcoming their mutual dislike and engaging in a serious effort to find grounds for compromise. The stakes were not just intellectual for Levinson, for he had two fighting-age sons.<sup>79</sup> But his painstaking efforts were soon overtaken by events. The German army’s military victories, coupled with the sinking of the *Lusitania*, put an end to hopes of compromise. Levinson later wrote that “the torpedo that destroyed the *Lusitania* knocked the bottom out of our peace plans and my optimism in that line is laid up for repairs.”<sup>80</sup>

Levinson’s endeavor to find common ground between Schiff and Eliot, though ultimately fruitless, planted the seeds of a revolutionary idea that would have a lasting impact on him and, indeed, on the world. In his correspondence with Schiff, he had begun to develop a simple but profound thought. “The real disease of the world is the legality and availability of war,” he wrote in August 1917, “as the Court of first and last resort to protect criminal nations in their greed of aggression. Morally we are all accessories before the fact by recognizing and sanctioning wars as lawful.”<sup>81</sup> He concluded, “we should have, not as now, laws *of* war, but laws *against* war; just as there are no laws *of* murder or *of* poisoning, but laws *against* them.”<sup>82</sup>

Over the course of the next year, Levinson developed his thoughts into a memo that he circulated to close friends. Among them was Professor John Dewey, a professor of Philosophy at Columbia University and one of the leading public intellectuals of the time. Dewey and Levinson had met years earlier when through their wives. Levinson’s wife, the former Nellie B. Haire, had been a student of Dewey’s and a classmate and close friend of

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<sup>76</sup> Dr. Elliot and Mr. Schiff Discuss Ways to Peace, *New York Times* (Dec. 20, 1914); Stoner at 13.

<sup>77</sup> Stoner, *supra*, at 14 (quoting letter from Levinson to his partner, Benjamin V. Becker).

<sup>78</sup> Salmon O. Levinson, *The Legal Status of War*, *The New Republic* (March 9, 1918).

<sup>79</sup> His sons both fought in the war that ensued. Levinson Memo, July 20, 1928, Salmon Levinson Papers 28:7. Both boys enlisted in 1917. Levinson to Knox, December 27, 1919, Levinson Papers, Box 54, folder 7 (noting that both of his sons were home for Christmas for the first time since they enlisted “over two years ago.”).

<sup>80</sup> Stoner at 21.

<sup>81</sup> Levinson to Jacob Schiff, August 25, 1917, Levinson Papers, Box 44, folder 3.

<sup>82</sup> *Id.*

Dewey's wife at the University of Michigan. The two couples had become close before Dewey and his wife decamped to Columbia University in New York. Dewey would become Levinson's most important intellectual mentor over the course of the next decade as he embarked on nothing less than an effort to overturn the Old World Order.

## Questioning the Legal Status of War

Levinson's opening salvo appeared in the *New Republic* in 1918 under the title, "The Legal Status of War." Levinson had not intended to publicly enter the fray. He had sent what he called his "memo" to Dewey, asking Dewey to consider publishing the ideas as his own. Dewey instead forwarded the memo to his friends at the *New Republic*, which published it not long after.<sup>83</sup>

"Suppose the world at peace," the article began. "Abruptly Germany declares war upon France and invades her territories without even disguising the intention of annexation or even of reducing her neighbor to vassalage." "What," he asked, "happens legally?" The answer: It is henceforth a "legal war," with "other nations as much bound to neutrality and the observance of the rules laid down by international law as if the war were a benign enterprise." This "primary fact," he pointed out, is often ignored: "the civilized world puts all wars, as soon as they are initiated, upon the same plane of legality, without any regard to their origin and objectives." Even the League, he explained, "does not propose to declare war illegal; it proposes simply to refine those regulations under which war is legal."

Given this state of affairs, he argued, the only real way to bring an end to war was "[t]he outlawing of war." Levinson acknowledged that "[w]ar, though made illegal, might still conceivably occur." But, he explained, "it would be branded as a crime and the force of the world would be organized to deal with the criminal." In this way, war could and should follow the path of dueling: For centuries, efforts were made to moderate and regulate duels through "codes," which became increasingly more elaborate and more "humane"—not unlike the Hague Conventions regulating the humane conduct of war. Like the Hague Conventions, the Codes assumed the legality of the enterprise. Dueling was eventually declared illegal, and—as he later elaborated—"dueling is now extinct because it is plain murder under our laws."<sup>84</sup> So, too, should the efforts to regulate war be abandoned and war instead be declared illegal.<sup>85</sup>

Levinson's idea, outlawing war, was utterly unlike any other peace plan then under discussion. All the plans to date—proposals for disarmament, the League to Enforce Peace, the League of Nations, and countless variations thereon—assumed the legality of war. They varied only in the ways in which they sought to direct its use, their designers working to shape institutions and incentives to make recourse to war as rare as possible. In retrospect, it should come as no surprise that those who had endeavored to secure the peace

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<sup>83</sup> Stoner at 25-26 (quoting Dewey to Croly, January 28, 1918).

<sup>84</sup> Salmon O. Levinson, *Outlawry of War* 16 (1921).

<sup>85</sup> Salmon O. Levinson, *The Legal Status of War*, *The New Republic* (March 9, 1918).

did not even think to question the legality of war. It took someone entirely new to international law and politics to propose an idea so utterly at odds with the international system then in existence. After all, war had been a fundamental source of legal rights for hundreds, if not thousands, of years. Levinson's plan called for rejecting the basic organizing principle under which the world had long functioned. He proposed nothing less than bringing an end to war as a legal institution. As we shall see, that idea was not only revolutionary in its own right, but it would require reshaping nearly every other basic rule of the international system, as well.

But an idea is not likely to change the world as long as it remained simply an idea on the page. It was not enough for the idea of outlawry to appear in the *New Republic*. The public would need to be educated and engaged. And even that would not be enough: the proposal would go nowhere without politically savvy—and connected—advocates.

The evolution of outlawry from an idea to a movement to a plan and finally to a treaty would begin with a phone call to Levinson from Philander C. Knox, the junior Senator from Pennsylvania. Both men had voiced public support for the League while it was under negotiation. Levinson had even gone so far as to hold so-called mass meetings in Chicago to drum up popular support.<sup>86</sup> But that support vanished when he saw the text of the Covenant negotiated by Wilson. Knox, too, was utterly dismayed by the proposed Covenant. The day after it was made public, he invited Levinson to New York to discuss the new idea of outlawry. The two men met for hours a day over the course of three consecutive days in February.<sup>87</sup>

The first order of business was to defeat of the League. Outlawry might at first seem entirely consistent of the League—after all, both advocates of outlawry and the League sought to secure the peace. But in fact outlawry was directly at odds with the League proposed by Wilson. The League of Nations, like other efforts to regulate war before it, *assumed the legality of war*.<sup>88</sup> It, like the Hague Conventions, merely sought to regulate the conditions under which state could resort to war—requiring them to first attempt arbitration, in the case of the League, or to not use particularly gruesome methods, in the case of the Hague Conventions. Levinson—in one of many undated memos to

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<sup>86</sup> See Stoner, pp. 41-45.

<sup>87</sup> Levinson Memo, undated, Salmon Levinson Papers 28:8 (reporting that Levinson received the call on February 15, the day after the Covenant was made public, and met with Knox on February 17, 18, and 19); Levinson Memo, July 20, 1928, Salmon Levinson Papers 28:7.

<sup>88</sup> Legal experts came to agree that the League left the legality of war firmly intact. Oppenheim's third edition included a provision entitled, "War is a fact recognized and regulated by international law," that provided: "war is not inconsistent with, but a condition regulated by, International Law. It does not object to States which are in conflict waging war upon each other, provided they have—in compliance with the Covenant of the League of Nations—previously submitted the dispute to an inquiry by the Council of the League." Oppenheim 3<sup>rd</sup> ed. (1921) § 53.

himself that he was in the habit of writing (perhaps meant as a draft of an article or letter)—explained his feelings about such efforts:

Recently I heard a man cite a statement from a book on sanitation in the middle ages to the effect that in the days before bath tubs had been invented perfumes were used very profusely, and that when bath tubs came in, perfumes very largely went out. Now, our international experts are sold on perfumes, so to speak. They think to get rid of war's menace by stifling its stench somewhat. No matter how poor a perfume is put on the market, they never fail to embrace it eagerly nor to give it the most flattering advance notices, especially if it has been bottled in a certain town in Switzerland. When they come to grasp the fundamental principles of international sanitation and get sold on the bath tub idea, they will not be so enamored of perfumes.<sup>89</sup>

The bath tub, of course, was outlawry of war: "To outlaw war means to abolish this now lawful institution by smashing its legal props and branding it a crime."<sup>90</sup>

Knox had more immediate concerns: He and many of his fellow Republicans in the Senate who would have to vote on the proposed Covenant worried that membership in the League not only assumed the legality of war, but would inevitably draw the United States into war. Their fears focused in particular on provisions of the proposed Covenant—particularly Article 10—that appeared to require members to come to one another's aid in the event of an act of aggression.<sup>91</sup> As Senator Henry Cabot Lodge, then Chairman of the Senate Foreign Relations Committee, put it: "I object in the strongest possible way to having the United States agree, directly or indirectly, to be controlled by a league which may at any time, and perfectly lawfully and in accordance with the terms of the covenant, be drawn in to deal with internal conflicts in other countries, no matter what those conflicts may be."<sup>92</sup> Lodge had proposed adopting the Covenant with reservations meant to clarify that the United States would not go to war without Congressional approval.<sup>93</sup> Wilson had angrily dismissed the proposal as an attempt to undermine the agreement he had so

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<sup>89</sup> Levinson Memo, undated, Salmon Levinson Papers 28:8. Levinson may have been speaking here of the Locarno Treaties, negotiated at Locarno, Switzerland in October 1925 and formally signed in London in on December 3, 1925.

<sup>90</sup> *Id.*

<sup>91</sup> League of Nations Covenant, Art. X and XI.

<sup>92</sup> Henry Cabot Lodge, Speech of August 12, 1919, in William Safire, *Lend me Your Ears: Great Speeches in History* (W.W. Norton & Co. 2004).

<sup>93</sup> Levinson decried Lodge's efforts at compromise, stating that it "infuriated 'us irreconcilables'" and noting that "[o]ur valiant senators took hold and are doing the needful." Letter from Levinson to Mr. Otto H. Kahn, Jan. 24, 1920, Levinson Papers, Box. 54, folder 7.

carefully crafted. He lost Lodge's support—and, though he did not realize it at the time, probably all hope of gaining Senate approval—in the bargain.<sup>94</sup>

Levinson, Knox, and Lodge were joined in their opposition to the League by Republican Senator William E. Borah of Idaho. Once called the “perfect isolationist.”<sup>95</sup> Borah was known as a leader of the “irreconcilables” in the Senate—a group of Republican senators who were unbending in their opposition to the League (among whose number some count Knox).<sup>96</sup> Borah was known to enjoy riding horseback in Rock Creek Park, and his opponents joked that he was so contrarian, it was amazing that he would go in the same direction as his horse.<sup>97</sup>

Jokes aside, Borah was no mean opponent. He was widely recognized as one of the Senate's great orators, his advocacy skills honed during a career as a criminal lawyer and special prosecutor. When he rose to speak on the day of the vote on the Treaty of Versailles, his colleagues stopped to listen. He emphasized the danger that lay in the Covenant's requirement that member states use force to enforce the League's decisions: “You cannot yoke a government whose fundamental maxim is that of liberty to a government whose first law is that of force and hope to preserve the former,” he argued. “You may still keep for a time the outward form, you may still delude yourself, as others have done in the past, with appearances and symbols, but when you shall have committed this Republic to a scheme of world control based upon force, upon the combined military force of the four great nations of the world, you will have soon destroyed the atmosphere of freedom, of confidence in the self-governing capacity of the masses, in which alone a democracy may thrive.”<sup>98</sup> The speech, which one contemporary pronounced “one of the Senate's oratorical master-pieces,” reportedly moved Lodge to tears.<sup>99</sup>

To President Wilson's surprise and dismay, the opponents of the League carried the day. On March 19, 1919, the Senate defeated the Versailles Treaty, thereby preventing U.S. entry into the League of Nations.<sup>100</sup> The vote sounded a death knell not only for the treaty but for its greatest champion as well. Wilson had spent half a year in Europe

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<sup>94</sup> Bailey, *Woodrow Wilson and the Great Betrayal*, at 149-167

<sup>95</sup> U.S. Senate, *Classic Senate Speeches: William E. Borah, The League of Nations*, Nov. 19, 1919, [www.senate.gov/artandhistory/history/common/generic/Speeches\\_Borah\\_League.htm](http://www.senate.gov/artandhistory/history/common/generic/Speeches_Borah_League.htm) (noting he was one of the “irreconcilables”); John Chalmers Vinson, *William E. Borah and the Outlawry of War* (1957):1.

<sup>96</sup> Thomas A. Bailey, *Woodrow Wilson and the Great Betrayal* (New York: The MacMillan Co. 1945): p. 62.

<sup>97</sup> *Id.* at 64.

<sup>98</sup> 3 *The Senate 1789-1989 Classic Speeches 1830-1993* (GPO Bicentennial Edition): 573.

<sup>99</sup> U.S. Senate, *Classic Senate Speeches: William E. Borah, The League of Nations*, Nov. 19, 1919, [www.senate.gov/artandhistory/history/common/generic/Speeches\\_Borah\\_League.htm](http://www.senate.gov/artandhistory/history/common/generic/Speeches_Borah_League.htm).

<sup>100</sup> *Senate Defeats Treaty, Vote 49 to 35*, N.Y. Times, March 19, 1919: p. 1. Two years later, the country entered into a peace treaty with Germany that did not require the U.S. to join the League. *Senate Ratifies German Treaty by 66 to 20 Vote*, N.Y. Times (Oct. 19, 1921): p. 1. The treaty was necessary because the Congressional peace resolution did not itself effect peace. As Lodge explained: “It ended the war, as far as the United States is concerned, but it was not a treaty of peace.” *Opposition Grows to German Treaty; Plea by Harding*, N.Y. Times (Sept. 25, 1921): 1.

negotiating the treaty and had stumped throughout the nation seeking to rally Americans to its cause. Its defeat left him feeling battered, ill, and alone. He had failed to live up to his campaign theme by entering the U.S. into the war. And he feared that the defeat of the League would mean that the war would not be, as he had promised, the “War to end all Wars.” History, he feared, was destined to repeat itself without a strong international institution led by America to prevent it. Shortly after the vote Wilson suffered a stroke and fell into a decline from which he never recovered, dying less than three years after leaving office.

Three short months after delivering the *coup de grace* to Wilson’s hopes to bring the United States into the League, by co-sponsoring legislation to officially end U.S. involvement in World War I without joining the Versailles Treaty or the League, Knox, too, passed away.<sup>101</sup> But not before helping to launch a plan to outlaw war.

### **A Plan to Outlaw War**

With the League defeated, the next step was to devise a positive plan for peace based on Levinson’s outlawry idea. Levinson and Knox worked together on a pamphlet—entitled “Plan to Outlaw War”—that would explain outlawry to the members of Congress and the public.

Before issuing the plan, Knox showed a copy to his colleague, Senator William Borah—the very same Senator Borah who had spoken so movingly against the League. He was a member of the Senate Foreign Relations Committee and soon to be its Chairman. Borah had not only proven an implacable foe of the League, he would be one of only two Republicans to vote against the eventual bilateral peace treaty with Germany as an “instrument so framed as to bring the United States into the League of Nations some time in the future.”<sup>102</sup> He was not an obvious ally for those crafting a plan that called for an international conference of nations leading toward a treaty to outlaw war.

But Borah was aware that he was gaining a reputation as a man who was against everything and for nothing. He quietly harbored presidential ambitions and was eager for a plan for peace that he could support. As his biographer later put it: “A sort of polar

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<sup>101</sup> Knox, having successfully defeated the League, co-sponsored the alternative joint resolution later signed by President William G. Harding on July 2, 1921, officially ending U.S. involvement in World War I. Knox-Porter Resolution, [cite]; Wimer, Kurt; Wimer, Sarah (1967). "The Harding Administration, the League of Nations, and the Separate Peace Treaty". *The Review of Politics* 29 (1): 13–24. He died just three months later.

<sup>102</sup> Senate Ratifies German Treaty by 66 to 20 Vote, N.Y. Times (Oct. 19, 1921): p. 1; see Wilson’s Hand Seen as Fight on Treaty Stiffens in Senate, N.Y. Times, Sept. 26, 1921: pg. 1; Wilson Senators Plan Reservations in Fight on Treaty. N.Y. Times, Sept. 27, 1921: 1; Senate Ratifies German Treaty by 66 to 20 Vote, N.Y. Times (Oct. 19, 1921): p. 1.



attraction developed between the two. Borah was a man of influence without a plan for peace; Levinson had a plan but did not command the national spotlight.”<sup>103</sup> And Levinson—ever the clever negotiator—spoke to Borah’s ego and ambition in order to win an essential ally. Early in their correspondence, he wrote to Borah, “Great as your rising fame is there seems to be a general criticism you are always in the opposition and that you have done nothing really constructive.”<sup>104</sup> Outlawry would offer him a positive—but uncompromising—approach that he could champion. “It will,” Levinson wrote, “out the ground from under the wrongful impression which even many of your political associates create concerning you.”<sup>105</sup>

By Levinson’s account, the three men spent an entire afternoon in Knox’s office poring over the plan that Levinson had drafted at Knox’s behest.<sup>106</sup> Later published on Christmas 1919 as a pamphlet by the newly created American Committee to Outlaw War (founded and funded by Levinson),<sup>107</sup> it called for a conference of “all civilized nations” to declare, in part:

1. The further use of war as an institution for the settlement of international disputes shall be abolished.
2. War between nations shall be declared to be a public crime, punishable by the law of nations.
3. War shall be defined in the code and the right of defense against actual or imminent attack shall be preserved.
4. All annexations, exactions or seizures, by force, duress or fraud, shall be null and void.<sup>108</sup>

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<sup>103</sup> John Charlet Vinson, *William E. Borah and the Outlawry of War* (1957): 59.

<sup>104</sup> Samuel Levinson to William Borah, July 17, 1922, Box 3, folder 16 (page 8 of pdf).

<sup>105</sup> Samuel Levinson to William Borah, July 17, 1922, Box 3, folder 16 (page 8 of pdf). Levinson also encouraged his friend John Dewey to write to Borah to encourage him to lead the outlawry movement, a request Dewey honored after significant prodding from Levinson. Dewey wrote: “I firmly believe that if you were to take up this matter and put yourself at the head of the movement, all the dormant liberal sentiment of the country would rally about it and you, and there would be an awakening and an organized movement. It seems to me that the man who first takes the leadership in a constructive movement at the present time will put himself in a position to go as far in politics as he may care to, even to the presidency, and that you are far better situated to lead this movement than anyone else.” Dewey to Borah, March 6, 1922, 2 *The Correspondence of John Dewey, 1871-1952* ((Electronic Edition Doc. No. 04891). Borah did mount a presidential campaign in 1936, though he won only a handful of delegates.

<sup>106</sup> This account is drawn from Levinson’s recorded recollection in Levinson Memo, undated, Salmon Levinson Papers 28:8. According to that memo, the meeting took place in December 1919. It must have been earlier in December, because the pamphlet they reviewed was published on December 25, 1919.

<sup>107</sup> Levinson founded the Committee, which held its first meeting on December 10, 1921, and served as its Chairman. Levinson Papers, Box 1, folder 18 (miscellaneous papers associated with the American Committee for the Outlawry of War).

<sup>108</sup> Salmon O. Levinson, *Outlawry of War* 11 (1921). The plan was initially drafted by Levinson along with Senator Knox, but Knox passed away before the plan was published.

In a foreword to the plan, Levinson's old friend Dewey explained Levinson's and his abandonment of the League in favor of this new plan to outlaw war—a change of heart that had dismayed many of their former allies in the peace movement. “There are at least some persons who in the days just before and after the Armistice favored a League of Nations who afterwards changed their mind,” he began. “As one such person I should like to mention two reasons for the change.” In a harbinger of his work on education for which he would become perhaps best known, he wrote, “The peoples of the world are not yet educated enough in international affairs to guarantee the successful workings of a political League, even supposing the idea is inherently desirable.” Moreover, he explained, “any present scheme is bound to make much of the sanction of physical force against recalcitrant nations.” That is because, he noted, “it continues the old tradition of the lawfulness of war.” Instead, he supported the plan to outlaw war, which “does more than any other plan yet proposed to provide natural and orderly agencies for enlightening the peoples regarding disputes among nations, and for concentrating all the moral forces of the world against war, that abomination of abominations.”<sup>109</sup>

The pamphlet tiptoed around what would soon prove to be a fundamental challenge for the outlawry movement: How would its plan to outlaw war be enforced? The pamphlet called for disputes to be settled by an international court with jurisdiction over international disputes. But how would the decrees of this court be enforced? Levinson recognized the problem, but had difficulty offering any real answer: “The court must of course be given adequate power to enforce its judgments against all war criminals,” he acknowledged. But, he averred, “[t]he precise manner in which this may be best accomplished would be one of the important functions of the Codification Conference.” He could not resist pointing out, however, that the U.S. Supreme Court did not have the power to enforce its judgments either. Madison had maintained that “reliance must be placed on the consent of the states to the jurisdiction of the Supreme Court and on their agreement to abide by its decisions,” which “the late Senator Knox believed . . . to be a practical working model for the World Court.” He did not mention the glaring fact that the Supreme Court was backed by the executive branch and its capacity to use force, if necessary, to enforce the Court's judgments. But he did admit, “[m]uch may be said in favor of an international force, or a force contributed to by various nations to aid in the execution of the international court's civil decrees as well as its criminal judgments.”<sup>110</sup> In other words, the new court might need to be backed by force, or it might not.

In an effort to start a nationwide movement, Levinson sent his pamphlets to anyone and everyone of influence. He had fifty thousand copies made immediately and had the

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<sup>109</sup> John Dewey, foreword, in Salmon O. Levinson, *Outlawry of War* 7 (1921). Senator Knox died October 12, 1921.

<sup>110</sup> All quotations in this paragraph are from Salmon O. Levinson, *Outlawry of War* 19-20 (1921).

“type held for more”—100,000, “possibly more.”<sup>111</sup> The number of printed copies topped 200,000 within a month,<sup>112</sup> and 350,000 by the end of April. Chambers of Commerce, lawyers, men’s and women’s clubs, universities, colleges, libraries, ministers, superintendents of schools, leading manufacturers, labor organizations and individuals active in them, and farmers throughout Idaho, Montana, Oregon, Washington, California, and Arizona all received copies.<sup>113</sup> Feeling he still had not covered his bases, he asked for Senator Borah’s mailing list, as well.<sup>114</sup> He sent out 20,000 alone under Senator Arthur Capper’s name to “farmers and country merchants.”<sup>115</sup>

With Knox’s death in 1921, Borah finally agreed to take over the political leadership of the outlawry movement.<sup>116</sup> As the plan to outlaw war came closer to realization in legislation, however, its proponents could no longer duck the question of enforcement. Borah was utterly opposed to any mechanism that would require force. And, indeed, the very idea of enforcing a law against war with war was anathema to most of those who had stubbornly opposed the League on the ground that the international institutions meant to secure the peace would inevitably lead to war.

Levinson later recounted: “When Borah actively took up the cudgel he kept after me to solve the problem of force in international relations, which was perhaps the most difficult thing that I have had to do in this entire venture.”<sup>117</sup> Levinson was anxious for Borah to introduce a resolution to outlaw war in the Senate, but Borah was reluctant to do so as long as he was unsure of how it would be enforced.<sup>118</sup> Levinson had already

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<sup>111</sup> Levinson to Miss Cora Rubin, Secretary to Hon. Wm. E. Borah, Jan. 26, 1922, Borah Papers, Box 117 (p. 12 of pdf); see Miss Cora Rubin, Secretary to Hon. Wm. E. Borah, to Levinson, Jan. 27, 1922, Borah Papers, Box 117 (p. 10 of pdf); Telegraph from Levinson to Miss Cora Rubin, Secretary to Hon. Wm. E. Borah, Jan. 26, 1922, Borah Papers, Box 117 (p. 11 of pdf). The printing and mailing was coordinated through Senator Borah’s office, and paid for by the American Committee for the Outlawry of War, of which Levinson was chairman. Letters between Levinson and Miss Cora Rubin, Secretary to Hon. Wm. E. Borah Borah Papers, Box 117, *passim*.

<sup>112</sup> Levinson to Miss Cora Rubin, Secretary to Hon. Wm. E. Borah, Feb. 7, 1922, Borah Papers, Box 117 (p. 21 of pdf).

<sup>113</sup> Levinson to Miss Cora Rubin, Secretary to Hon. Wm. E. Borah, January 27, 1922, Borah Papers, Box 117 (p. 9 of pdf); Levinson to Miss Cora Rubin, Secretary to Hon. Wm. E. Borah, Feb. 10, 1922, Borah Papers, Box 117 (p. 31 of pdf).

<sup>114</sup> Levinson to Miss Cora Rubin, Secretary to Hon. Wm. E. Borah, January 27, 1922, Borah Papers, Box 117 (p. 9 of pdf).

<sup>115</sup> Arthur Capper to S.O. Levinson, February 1, 1922, Borah Papers, Box 117 (p. 22 of pdf).

<sup>116</sup> Levinson Memo, undated, Salmon Levinson Papers 28:8. It took some effort for Levinson to coax Borah into leading the movement. Letters between the two during this period make clear that Levinson was actively seeking a senatorial ally and public advocate in Borah. See, e.g., Levinson to Borah, December 16, 1921, Borah Papers, Box. 117; Borah to Levinson, December 10, 1921, Borah Papers, Box. 117; Levinson to Borah, December 8, 1921 Borah Papers, Box. 117. By July 13, 1922, Borah had begun working with Levinson on a resolution to outlaw war. Borah to Levinson, July 13, 1922, Borah Papers, Box. 117.

<sup>117</sup> Levinson Memo, undated, Salmon Levinson Papers 28:8, pg. 2.

<sup>118</sup> There was extensive correspondence between the two on this matter between 1922 and 1925. See, e.g., Levinson to Borah, Dec. 2 1922, Levinson Papers, Box 3, folder 16; Levinson to Borah, Dec. 15, 1922, Levinson Papers, Box 3, folder 16; Levinson to Borah, Nov. 24, 1923, Levinson Papers, Box 3, folder 16;

concluded that any kind of sanctions by one nation against another would be tantamount to war. But what of sanctions against individuals? Borah suggested this might be the solution: “[M]ust we not, in order to make this practical and to avoid getting right back to the proposition of settling war with war, confine the punishment to particular individuals who are responsible for the initiation of war rather than to the nation.”<sup>119</sup> Levinson saw some promise in this approach, not just for leaders, but for followers as well: “With war made a crime,” he observed, “governments can not employ conscription because the boys cannot be conscripted to commit murder.”<sup>120</sup> But Levinson saw problems with individual sanctions, too. Would Germany ever surrender the Kaiser? If a world court were empowered to punish officials such as the President of the United States, that would effectively give the court the power of a “super-state.”<sup>121</sup> That was not only politically infeasible but, in his view, simply unacceptable.

Levinson and Borah also considered the possibility that enforcement was not necessary at all. Several of their allies worried about the plan to grant jurisdiction the international Court, fearing that with jurisdiction must come the power to enforce—leading, once again, to war. Some cited comparisons to the Supreme Court, which they argued had the power to enforce its decrees—would the international Court take on a similar role? In an exchange with John Haynes Holmes, a prominent Unitarian minister and pacifist, who had helped found the NAACP in 1909 and the ACLU in 1920, Borah wrote that the best answer to someone who is concerned that the “Supreme Court has power to enforce its judgment against a State is to ask him: What is the process. How would he do it.”<sup>122</sup> The Supreme Court has “no armed force at its command to compel obedience to its decrees by a recalcitrant State,” he pointed out. Instead, the enforcement depends upon “the moral power of public opinion.” Yes, he acknowledged, the Court may be able to enforce its decree in a case between private individuals. But that does not apply when “the decree was against a sovereign.”<sup>123</sup> In his own letter to Holmes, Levinson echoed Borah, noting that the provision in the Constitution granting jurisdiction to the Supreme Court to controversies between states contained “no procedure or granting of power to enforce its decisions.”<sup>124</sup>

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Borah to Morrison, Apr. 9, 1928, Levinson Papers, Box 5, folder 4 (urging Morrison to talk to Levinson to explain that introducing the resolution during the debate over the Paris Peace Pact would undermine the State Department).

<sup>119</sup> Borah to Levinson, July 13, 1922, Borah Papers, Box 117 (pdf p. 8).

<sup>120</sup> Sanford Levinson, Additional Memoranda Re Outlawry, Memorandum (May 1, 1922) (attached to letter from Levinson to Borah, May 1, 1922, Borah Papers, Box 117 (p. 49 and 50 of pdf) (this memorandum contains many interesting reflections on the impossibility of international humanitarian law: “If it is lawful to kill, it is impossible to control the method of killing”).

<sup>121</sup> Levinson to Borah, June 12, 1922, Borah Papers, Box 117 (pdf p. 66).

<sup>122</sup> William Borah to John Haynes Holmes, Jan. 31, 1925, Levinson papers, Box 27, folder 18.

<sup>123</sup> Id.

<sup>124</sup> Levinson to John Haynes Holmes, Feb. 2, 1925, Box 27, folder 18.

Levinson and Borah failed to acknowledge, however, that while the Supreme Court of the United States might not command an army, the President of the United States certainly does. Just a few decades hence federal troops would be sent to desegregate Little Rock Central High School in Arkansas, enforcing the U.S. Supreme Court's decree in *Brown v. Board of Education* with force against a recalcitrant state. Yet Levinson and Borah were right that the judgments of the international Court probably would not enjoy similar enforcement. In order to persuade League opponents to participate in the Court, it had been unmoored from the League apparatus: States could join the Court without joining the League, as the United States eventually did in 1931. It was as if Texas could agree to the jurisdiction of the Supreme Court but not join the United States. Levinson and Borah were likely correct that such a court would not have the power to enforce its judgments. But then would its pronouncements have any meaning at all?

In a memo written to his files, Levinson offered an answer: "While it is true that at certain times and in certain places and under certain circumstances laws lose their effect unless there is ample force to maintain them it is nevertheless true that the principal basis of law and order is not the so-called sanctions of force but the habits of orderliness and obedience growing out of the very nature of man whether in a primitive community or in a highly civilized state."<sup>125</sup> If a large part of the citizenry were to determine to violate and resist the enforcement of existing laws, he explained, "there would be no possibility of compelling the execution of such laws by any existing force."<sup>126</sup> All laws, in other words, rest to some degree on the willingness of those bound by them to obey: "the very basis of government is not force but what might be called the habit of obeying laws."<sup>127</sup>

But states are not people. Could states develop a "habit" of obeying the law? The answer, Levinson argued, was to go through the people themselves. In an article entitled, "Can Peace Be Enforced?," Levinson began by explaining, once again, that in peace treaties and alliances, "sanctions mean physical enforcement or crushing penalties administered under the auspices of the war system." They are, in short, "the substantial equivalent of war." Outlawry advocates, in rejecting war, must reject sanctions: "What the proponents of outlawry are endeavoring to do is to have the institution of war, used from time immemorial for the settlement of international disputes, condemned and abolished by international law." Rather than rely on sanctions, advocates of outlawry "intend to rest its enforcement upon the will of the people themselves." Each nation will hold a plebiscite whereby the people would "condemn and outlaw the war system, abolish the institution of war for the settlement of international controversies and declare that the use of war for any

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<sup>125</sup> Levinson, memo (undated), Levinson Papers, Box 27, folder 18.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

purpose shall be made a crime under the law of nations,” after which each nation shall “handle and punish their own war criminals.”<sup>128</sup>

This conclusion bore the clear hallmarks of Levinson’s years of conversation with Dewey, who became known not long after as a powerful advocate of public education. Levinson’s vision—securing the outlawry of war through appealing to the will of the people—was almost the mirror image of the approach Grotius had so powerfully pioneered more than three centuries earlier. Whereas Grotius drew upon the social contract to explain the state’s privilege to wage war on behalf of the population, Levinson drew upon it to explain the *renunciation* of that privilege.

### Outlawry “with Teeth”

Not far from Dewey’s office at Columbia University, a very different vision for enforcing the peace was being nurtured. A Professor of medieval and modern European history and former managing editor of the *Encyclopedia Britannica*,<sup>129</sup> James T. Shotwell had been drafted to assist President Wilson during the Paris Peace Conference. He accompanied Wilson on his journey across the ocean,<sup>130</sup> part of the group unflatteringly depicted as a “desperate crew of college professors, in horn-rimmed glasses carrying textbooks, encyclopedias, maps, charts, graphs, statistics, and all sorts of literary crowbars with which to pry up the boundaries of Europe and move them around in the interests of justice.”<sup>131</sup>

Shotwell did not do much prying up of boundaries. He played only a small role in the negotiations—focusing primarily on the proposed International Labor Organization<sup>132</sup>--but he came out of the experience with newfound ambition. Having seen “history in the making,” as he later put it,<sup>133</sup> it was hard to go back to simply studying and teaching the dusty medieval history on which he had made his academic career. He resigned his position at Columbia University and accepted a job as chief editor of a comprehensive modern history of the war that would eventually involve two hundred collaborators who

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<sup>128</sup> Salmon O. Levinson, “Can Peace Be Enforced?” *The Christian Century* (Jan. 8, 1925): 46-47. Levinson developed many of these ideas first in a letter to Borah. Levinson to Borah, June 12, 1922, Borah Papers, Box 117 (pdf p. 66).

<sup>129</sup> Harold Josephson, *James T. Shotwell and the Rise of Internationalism in America* (1975): 9.

<sup>130</sup> *Id.* at 50. Shotwell first founded a National Board for Historical Service—a group of historians that aimed to address problems of international governance. His work creating that Board brought him to the attention of Colonel Edward M. House, who later invited him to join a committee to deal with postwar peace problems. It was his work on that committee that led to his invitation to accompany Wilson to the Paris Peace Conference. Josephson, at 65-98.

<sup>131</sup> Thomas A. Bailey, *Woodrow Wilson and the Lost Peace* (New York, 1944), pp. 108-09.

<sup>132</sup> Josephson at 79-98.

<sup>133</sup> James T. Shotwell, *The Autobiography of James T. Shotwell* (Bobbs-Merrill 1961), at 156.

together produced one hundred and fifty volumes covering fifteen countries—a project that he saw as a way to shape the public understanding of war and its costs.<sup>134</sup>

Now traveling in diplomatic circles, Shotwell became interested in the proposals for disarmament circulating at the League and in Washington.<sup>135</sup> The leading proposal called for allocating military personnel and armament quotas among the leading states. Shotwell found the idea fundamentally misguided. Peace could not be established “merely by insisting upon idealistic attitudes.”<sup>136</sup> He convened a group of scholars and public intellectuals at the Columbia University Club.<sup>137</sup> Together, they examined the draft treaty on disarmament then under consideration at the League. Its opening words declared, “aggressive war is an international crime.” Shotwell told the group that he thought this was likely to prove empty rhetoric without a working definition of aggression—which the treaty failed to provide. But no one had been able to figure out how to define aggression without sweeping in too much or too little.<sup>138</sup>

As the evening unfolded, an idea occurred to him: if a substantive definition of aggression was impossible, why not turn to a procedural one? States could be required to bring their disputes to a court and to accept its decision in good faith; those that refused would be considered the aggressor—even if they had taken no other aggressive acts! He excitedly explained it to those gathered, and together they began drafting the text of a new treaty on the back of a menu card.<sup>139</sup>

The document that emerged in 1924 came to be called “the American plan.” In a piece of historic irony, the plan conceived and drafted by a group of Americans found its audience in an organization the United States had spurned, the League of Nations. Indeed, Shotwell and his collaborators were in no small danger of criminal prosecution under the Logan Act, which made it a felony for U.S. citizens to negotiate with foreign

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<sup>134</sup> It was entitled, “The Economic and Social History of the World War,” and was commissioned by the Carnegie Endowment for International Peace. Josephson, at 99-115; Shotwell (Autobiography), at 134.

<sup>135</sup> Shotwell (Autobiography), at 180.

<sup>136</sup> J.T. Shotwell, *Locarno and After*, Association Men, vol. 51 (Feb. 1926): 269-70.

<sup>137</sup> Columbia University and the Carnegie Endowment played an important role in Shotwell’s career and in the debate over how to secure the peace during the interwar period. The Carnegie Endowment was founded in 1910 by Andrew Carnegie, at the behest of Nicholas Murray Butler, in order to use “hasten the abolition of international war, the foulest blot upon our civilization.” Edmund Jan Osmanczyk and Anthony Mango, *Encyclopedia of the United Nations and International Agreements*. London: Routledge, 2004. Butler served as President of both Columbia University and the Carnegie Endowment, and he was a strong supporter of the League of Nations and of Shotwell’s work, though the two were never personally close. See Josephson, at 136-37; Nicholas Murray Butler, *The Path to Peace: Essays and Addresses on Peace and Its Meaning* (1930). Butler received the 1931 Nobel Peace Prize (an honor he shared with Jane Addams) in part for his work at the Carnegie Endowment and its support of the Kellogg-Briand Peace Pact. Shotwell took the helm of the Carnegie Endowment in 1949.

<sup>138</sup> Josephson, at 117.

<sup>139</sup> Shotwell, *Autobiography*, at 182.

governments.<sup>140</sup> None of the collaborators worked for the U.S. government, and some of those they had bypassed were angry at the amateur diplomats for their meddling. But when Secretary of State Hughes suggested to Shotwell that he was guilty of violating the Act, Shotwell claimed to have cheekily replied that the Logan Act could not apply because the Administration had not recognized the League's existence—intimating that he could not be prosecuted for negotiating with an organization that did not exist. By Shotwell's own (perhaps self-serving) account, the Secretary burst out laughing and said, "You have me there!"<sup>141</sup>

To sell his new plan, Shotwell claimed the mantle of "outlawry": "It is the first attempt of which I am cognizant," he explained to the press, "to prepare a treaty that could actually give us an outlawry of war."<sup>142</sup> Though early on he courted Levinson, hoping to secure his support for his plan,<sup>143</sup> Shotwell could not resist criticizing outlawry as Levinson had proposed it—that is, without "forceful sanction."<sup>144</sup> He contrasted Levinson's outlawry with what he called his "practical plan" for disarmament. The proposed treaty—which was called the "Draft Treaty of Disarmament and Security" and then simply the "Geneva Protocol"—adopted outlawry but put the idea into a "new setting." Not only would "acts of aggression . . . and preparations for such acts of aggression . . . hereafter to be deemed forbidden by international law,"<sup>145</sup> but the Permanent Court of International Justice would also have jurisdiction to hear disputes over acts of aggression. That jurisdiction did not rest on the good will of its participants, but was backed up by a new system of harsh financial sanctions. In short, Shotwell presented his proposal as outlawry, but with teeth.

The proposal was designed to appeal to those who had opposed the League. Though it was developed through and proposed by the League, it would be open to non-parties. In an effort avoid the pitfalls that befell the League, the proposal did not provide for a collective military response to enforce the peace (which would have instantly drawn the ire of Borah, then chair of the Senate Foreign Relations Committee). Instead, the Protocol called for "sanctions": Any state party judged to be an aggressor would

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<sup>140</sup> The Act provided, "Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined under this title or imprisoned not more than three years, or both." 1 Stat. 613, January 30, 1799, codified at 18 U.S.C. § 953 (2004).

<sup>141</sup> Shotwell, *Autobiography*, 195.

<sup>142</sup> *American Arms Plan Taken up By League: Draft of Treaty to Outlaw Aggressive War is Presented on Europe's Invitation*, *N.Y. Times* (June 18, 1924), pg. 4; see also *An American Contribution*, *The New York Times*, June 19, 1924 (describing the proposal as providing for the "outlawry of aggressive war").

<sup>143</sup> Josephson, at p. 142.

<sup>144</sup> J.T. Shotwell, "A Practical Plan for Disarmament," *International Conciliation*, Vol. 10, No. 201, August 1924, at p. 318.

<sup>145</sup> *Id.*



immediately lose all “commercial, trade, financial and property interests” and “any privileges, protection, rights or immunities accorded by either international law, national law or treaty.”<sup>146</sup> The reaction would be swift and harsh. As Shotwell later explained, “A nation ignoring the four-day limit summons to court has ships on the high seas. Will they be received in any port with the world in league against them?”<sup>147</sup> The answer went without saying: No. The aggressor would become a pariah, an outcast.

As Shotwell launched a charm offensive on behalf of the Protocol,<sup>148</sup> Levinson boiled in rage back in Chicago at the appropriation of the movement he had so carefully nurtured. When asked for his opinion of the Protocol by William Hard, a leading political journalist, Levinson made clear that outlawry with teeth was not outlawry at all: it “conforms to diplomatic orthodoxy by using soft glove of Outlawry promise to conceal its iron hand of world control by force.”<sup>149</sup> In a separate memo with no addressee, he wrote that “Outlawry of War . . . which has become a powerful peace slogan, is being utilized as a label to a Treaty whose contents belie the label. . . . There is here the same old theory of power and might, offered by the war offices under a false guise.”<sup>150</sup>

Levinson never explained the precise source of his concern—aside from Shotwell’s effort to coopt his trademark slogan. But he was not alone in his opposition, and those who opposed the Protocol identified more clearly the source of the problem. The Geneva Protocol solved one problem very cleverly—the problem of defining aggression—by providing that any state that resorted to war without first submitting to the international dispute settlement machinery was an aggressor.<sup>151</sup> But in solving this problem, Shotwell and his allies unwittingly created a new one. Once a state was labeled an aggressor, League members would be required to cut off not only their own financial relations with that state but that of all non-member states as well—a group that at the time included the very powerful, and very well armed United States, as well as Germany and the U.S.S.R.<sup>152</sup> Yet

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<sup>146</sup> *Id.*

<sup>147</sup> Institute at Vassar Hears Dr. Shotwell: He Discusses the Proposed Disarmament Treaty Drafted for the League, *N.Y. Times* (June 20, 1924).

<sup>148</sup> See, e.g., *id.*; James T. Shotwell, Working Toward Disarmament, *The Nation*, Vol 119, No. 3082, p. 112.

<sup>149</sup> Telegram from Levinson to William Hard, October 3, 1924.

<sup>150</sup> Levinson, “Memo Re: Geneva,” September 20, 1924, Levinson Papers, Box 27, folder 19. This memorandum goes on at great length—spanning 13 single-spaced pages—on the legal vices of the proposed Protocol. Levinson emphasized in particular the various ways in which the Protocol promised to strengthen the League-based sanctions regime, making war more, not less, likely. In an earlier letter to Borah, Levinson wrote: “The whole treaty sounds in the expectation of war. It builds up an expected alliance of so-called defense and relies ultimately upon overwhelming force for the peace of the world. This marks a tremendous difference between our kind of outlawry and theirs.” Levinson to Borah, June 20, 1924, Levinson Papers, Box 4, folder 5.

<sup>151</sup> Geneva Protocol art. 10 (“Every State which resorts to war in violation of the undertakings contained in the Covenant or in the present Protocol is an aggressor.”).

<sup>152</sup> League members would “have the obligation of preventing all financial commercial or personal intercourse between the nationals of the State against whom the sanctions were directed, and those of a nation like the United States of America, which is not a member of the League.” Committee of Imperial

such non-party states still operated under the Old World Order. After all, they had not agreed to outlaw war. As neutrals, they had the legal right to carry on trade with all parties to a conflict without undue interference by others. And as non-parties to the Protocol, they retained their pre-existing legal right to go to war against any who sought to stop them. Under the Protocol, then, state parties could be required to enforce sanctions against states that had the legal right not to observe them, thus forcing state parties to inflict a legal wrong on states for whom *war was still a perfectly legal response*.

Great Britain's newly-elected government immediately recognized the danger. If the United States insisted on its rights to continue trading with a state labeled an aggressor—claiming its rights as a neutral under the Old World Order—Great Britain would find itself required by the Protocol to give the United States a cause for war by preventing it from exercising its lawful rights as a neutral. Great Britain could, in other words, find itself bound by the peace-enforcing League sanctions to go to war with the United States.<sup>153</sup> On these grounds, Great Britain quickly declared its intention not to ratify the Protocol.

The Protocol crumbled in the face of Great Britain's opposition.<sup>154</sup> In a world in which sanctions were still a cause for war for most states, outlawry backed by sanctions did not offer an end to war but simply a new path toward it.

### **A Second Attempt, Clothed “In More Diplomatic Terms”**

His proposal decisively defeated, Shotwell sought a new route to concluding a treaty. Again, it ran through Europe—this time through France and the Prime Minister, Briand, who had just won the Nobel Prize for peace for his work on the Locarno Treaties—a series of treaties that was seen as paving the way for normalized relations between Germany, France, and Great Britain.<sup>155</sup>

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Defence: Report of the Sub-Committee on the Geneva Protocol (Jan. 1925), p. 11, The National Archives, <http://filestore.nationalarchives.gov.uk/pdfs/small/cab-24-172-CP-105.pdf> (page 16 of 99). It thus threatened to not only awaken the thus-far dormant sanctions regime under the League, but to expand it. Geneva Protocol arts. 10 & 11 As Levinson put it to Hard, “it revives reinforces and make formidable the two dangerous articles of force namely ten and sixteen,” which “have been allowed to lie fallow.” Telegram from Levinson to William Hard, October 3, 1924.

<sup>153</sup> Again, Levinson flagged precisely the same problem in his telegraph to Hard: the Protocol created the possibility that the United States would “find ourselves in war with all League nations automatically against us.” Telegram from Levinson to William Hard, October 3, 1924.

<sup>154</sup> The Protocol was preliminarily approved by the 47 member states of the League of Nations on October 2, 1924 by all of the 47 member states at the 5<sup>th</sup> General Assembly. Once Great Britain declared that it would not ratify the protocol, other states followed suit.

<sup>155</sup> There remains debate over the true effect of the Locarno treaties. The principal treaty was the "Rhineland Pact" in which Germany, France, and Belgium undertook not to attack each other, with the United Kingdom and Italy acting as guarantors. In the event of aggression by any of the first three states against another, all

In March of 1927, Shotwell wrote to Arthur Fontaine, whom he had met at the Paris Peace Conference, where they had served together on a commission.<sup>156</sup> In his letter, Shotwell pointed out that France was increasingly viewed by those in the United States as “hostile . . . to the American proposal of disarmament”—a perception encouraged by German propaganda and given weight by the French government’s refusal to join the United States, Great Britain, and Japan in a naval disarmament conference to be held in Geneva that summer. He argued that “the only way to recapture American opinion is by some signal action of outstanding importance.” He suggested that “the occasion is at hand in the tenth anniversary of America’s entrance into the war on April 6, 1917.” France could make a statement in connection with that event to “make clear the line of its own contribution to the plans for disarmament.”<sup>157</sup> Fontaine passed the letter along to the French cabinet, and shortly thereafter Briand called to invite him to discuss the proposal in his office. After a heated discussion, Briand invited Shotwell to draft a memorandum to serve as a basis of negotiations. For once cautious of violating the Logan Act—this time by brazenly writing up negotiating points in aid of a foreign government in negotiations with his own country—Shotwell proposed instead that he outline a draft of a public address on the topic.<sup>158</sup>

On April 6, 1927, Briand issued a public statement to the Associated Press. Shotwell’s influence on Briand was significant, beginning with his suggestion that Briand adopt the term “outlawry.” Shotwell explained to Briand that it “represented a formula which had attained a definite place in the thinking of large sections of the Middle West through the advocacy of the inventor of the phrase, Salmon O. Levinson, and the acceptance of it by Senator William E. Borah.”<sup>159</sup> Although he did not find the outlawry proposal of Levinson and Borah practical, he explained, invoking the phrase would appeal to the public. In his outline, Shotwell suggested Briand propose “a formal engagement

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other parties, were obligated to assist the country under attack. In the process, Locarno guaranteed some borders within Europe, but arguably at the expense of leaving others vulnerable to revision. [c]

<sup>156</sup> Shotwell to M. Arthur Fontaine (March 18, 1927). Shotwell collection, Box AAA, “[Illeg.] (as of 1944) copy for book on Kellogg Pact” folder. They had worked together to help to set up the International Labor Organization, whose governing organization Fontaine now chaired. Waldo Chamberlin, *Origins of the Kellogg-Briand Pact*, *The Historian*, Vol. 15, No. 1 (1952).

<sup>157</sup> Shotwell to M. Arthur Fontaine (March 18, 1927). Shotwell collection, Box AAA, “[Illeg.] (as of 1944) copy for book on Kellogg Pact” folder.

<sup>158</sup> Here we rely heavily on Waldo Chamberlin, *Origins of the Kellogg-Briand Pact*, *The Historian*, Vol. 15, No. 1 (1952), at pp.77-92. Chamberlin’s account is widely regarded as the most authoritative account of Shotwell’s role in the origins of the Pact, but it is important to bear in mind that Chamberlin’s account is based in significant part on interviews with Shotwell himself. It is possible that it gives Shotwell more credit than deserved. Indeed, Salmon Levinson repeatedly decried Shotwell’s self-promotion and claims of influence over the Pact in his letters to acquaintances. Nonetheless, the textual analysis of Shotwell’s memo and Briand’s subsequent proposal detailed in Chamberlain’s account suggests that Shotwell did, indeed, play an important role early in the Pact’s genesis. Letters at the time between Shotwell and friends also seem to support the claim that Shotwell played a key role. See, e.g., Earl B. Babcock to Shotwell, April 20, 1927, Shotwell Papers, Box AAA.

<sup>159</sup> *Id.* at 80.

between France and America which, according to the expression widely current in America, would “outlaw war” between them.”<sup>160</sup> In a sly move once again meant to adopt the “outlawry” term to his own ends, Shotwell proposed Briand continue: “By this is meant that the signatories to such an engagement would renounce, for themselves mutually and reciprocally, the use of war as an instrument of national policy, an institution for the carrying out or enforcement of national purposes,” as was “already evident in the treaties of Locarno” and “implicit in the Covenant of the League of Nations.”<sup>161</sup> The phrasing was an obvious, but clever, twist on Carl Von Clausewitz’s famous claim that “war is an instrument of policy.”<sup>162</sup>

Shotwell was again attempting to adopt the outlawry movement to his own ends.<sup>163</sup> Perhaps he could use the phrasing to persuade the United States to enter an agreement that embodied the principles of the Geneva Protocol, the Locarno Treaties, and the League Covenant, but without obligating signatories to take specific actions against an aggressor nation—a requirement he knew would be a treaty’s undoing. While mandatory sanctions were explicit in the Geneva Protocol, they were much more subtle in this proposal. Under a treaty renouncing war, he made clear, the United States could announce that it would not enforce the prohibition on war with war. But “neutrality must be re-defined so that the neutral may not, as at present, thwart even the restrictions of disarmament by insisting on the right to supply the aggressor by arms and other supplies.”<sup>164</sup> It was, as his biographer put it, “a way to commit the United States to the European collective security system.”<sup>165</sup> America would not have to agree to place sanctions on an aggressor, but merely would be required to “refrain from trading with a declared aggressor.”<sup>166</sup> This was, of course,

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<sup>160</sup> Id. at 89 (quoting Shotwell’s text).

<sup>161</sup> Id. (quoting Shotwell’s text).

<sup>162</sup> Carl Von Clausewitz, *On War* (1976), at p. 605. Shotwell made this phrase the title of his own book, James T. Shotwell, *War as an Instrument of National Policy: And Its Renunciation in the Pact of Paris* (Harcourt, Brace & Co. 1929). Nicholas Murray Butler gave himself, not his colleague Shotwell, credit for the adoption of the phrase by Briand in 1926. He recounted saying: “My dear Briand, I have just been reading a book. . . . I came upon an extraordinary chapter in its third volume, entitled, ‘War as an Instrument of Policy,’ Why has not the time come for the civilized government of the world formally to renounce war as an instrument of policy?” By Butler’s account, Briand replied, “Would not that be wonderful if it were possible? I must read that book.” Nicholas Murray Butler, *Across the Busy Years II*, pp. 202-03. Most, however, give little credit to this account. *See, e.g.*, Ferrell, *Peace in Their Time*, at 66-67.

<sup>163</sup> Shotwell was explicit about this in a letter written after the signing of the Pact of Paris to Fontaine. He wrote: “It has amused me . . . to see how varied the stories are that are coming at the present time about the origins of it. The account in *Le Journal* was particularly interesting, for it stated that the American suggestion was to use the phrase ‘outlawry of war,’ and Monsieur Fromageot made it over into ‘renunciation of war as an instrument of national policy.’ As a matter of fact, the exact phrase attributed to Monsieur Fromageot was my own and was definitely intended in the formula I suggested to be given as a definition of the outlawry of war. It is the formula I had already suggested in Geneva in 1924.” Shotwell to Monsieur Fontaine, September 25, 1928, Shotwell Papers, Box AAA.

<sup>164</sup> Chamberlain, *supra* note ?, at 91 (quoting Shotwell’s text).

<sup>165</sup> Josephson at 161.

<sup>166</sup> Id.

simply sanctions by another name. It was the same proposal he had made so many times before, clothed “in more diplomatic terms.”<sup>167</sup>

Briand, who was at the time engaged in an ongoing campaign to build bilateral alliances across Europe in an effort to secure France’s safety, saw promise in Shotwell’s proposal. The United States had repeatedly rebuffed his and others’ efforts to draw it into collective security arrangements with its allies in Europe. But could it refuse a non-aggression pact, particularly one cloaked in language drawn from a grassroots movement whose most prominent public face was the Chair of the Senate Foreign Relations Committee? It was the best France could hope for.<sup>168</sup> If it could not bind the United States to come to its aid, at least it could neutralize the threat that it would find itself on the opposite side of a future military conflict from the emerging military superpower.

### “----- Pacifists”

On the ten year anniversary of the United States’ entry into World War I, Briand delivered what he and Shotwell hoped would be an historic address. In a draft that closely followed the memorandum prepared by Shotwell,<sup>169</sup> he called for an agreement between France and the United States for the “‘outlawry of war,’ to use an American expression.” Briand adopted Shotwell’s gloss on the phrase, noting that the “renunciation of war as an instrument of national policy is a conception already familiar to the signatories to the Covenant of the League of Nations and of Treaties of Locarno.”<sup>170</sup> He did not, however, elaborate on the impact of his proposal for America’s neutral rights and thus left unspoken whether he shared Shotwell’s views of the implication the renunciation of war would have for America’s capacity to continue trading with both sides in the event a war broke out in Europe. This was, no doubt, a wise omission, given that this was precisely the concern that had left the Geneva Protocol dead in the water a few short years earlier.

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<sup>167</sup> Id. This did not go unnoticed by Levinson, who wrote to Borah that “You know that the Kirby Pages, the Shotwells and the Butlers are trying to draw a close analogy between the Locarno treaty and the Kellogg proposal and that the latter really adds nothing new, etc. This we can kill with one word.” Levinson to Borah, May 31, 1928, Levinson Papers, Box 5, folder 4.

<sup>168</sup> Robert H. Ferrell, *Peace in Their Time* (?).

<sup>169</sup> Chamberlain, *supra*. In February 1928, Dewey told Levinson that Shotwell wrote Briand’s proposal for the Peace Pact. Dewey to Levinson, Feb. 29, 1928, Dewey Papers, No. 02882. Levinson replied in March 1928 with skepticism about Shotwell’s role, writing, “I have the direct word of one of the biggest men at Quai d’Orsay that Briand did not act on Shotwell’s suggestion.” Levinson to Dewey, Mar. 2, 1928, Dewey Papers, No. 02883. Nonetheless, comparing the text of Shotwell’s memo and Briand’s proposal, it appears that reports of Shotwell’s influence were correct, though he did not actually author the text for Briand. See Chamberlain, *supra*. Most contemporaries concurred that Shotwell indeed had an important influence on Briand. See, e.g., David Hunter Miller, *The Peace Pact of Paris: A Study of the Briand-Kellogg Treaty* (1928), at 7.

<sup>170</sup> Chamberlain, *supra*, at 89.

The proposal was met with indifference in the United States. It was dutifully printed on page five of the *New York Times* and page 12 of the *Chicago Herald-Tribune*, page 4 of the *Washington Post*, and ignored altogether by the *Chicago Daily Tribune* and the *Los Angeles Times*.<sup>171</sup> Attention was devoted instead to vigorous debates over prohibition. Shotwell arrived home from a lengthy sea voyage to discover that Briand's proposal had met with deafening silence. He quickly set to work, persuading Nicholas Murray Butler, President of Columbia University and a leading public intellectual, to support the proposal and the *New York Times* to carry the endorsement. On April 25, 1927, Kellogg opened the paper and found Briand's proposal, accompanied by a letter by Nicholas Murray Butler (reportedly penned by Shotwell).<sup>172</sup>

On his desk at the Department of State, Kellogg reportedly had a keyboard with buttons that would summon various officers from the Department. On mornings when he read something irritating in the paper, "he would strike the keyboard like a piano concertmaster, all fingers at once, and summon everybody he could think of."<sup>173</sup> On the morning of April 25, chances are good officers from all over the Department were scurrying to his office, where his famously profane temper was likely on full display.<sup>174</sup> Kellogg fumed at the impudence of Butler and the French prime minister—going to the newspapers rather than making the proposal to him directly. In a meeting soon after with a mutual friend of Butler's, Kellogg called Butler and his allies a "set of ----- fools," and accused them of making unworkable suggestions that "would have no effect whatever except temporarily to embarrass him." He added that "if there was anything in the world he hated, it was these ----- pacifists."<sup>175</sup>

Kellogg later put it more diplomatically, "I explained to a great many people that it was not customary for me to answer informal speeches made by Ministers of Foreign Affairs of other countries and that if Mr. Briand wished to make such a proposition to the United States, it would receive very careful and sympathetic consideration."<sup>176</sup> Briand did just that a few months later, proposing in June a bilateral treaty between France and the United States containing two articles. The first provided that the parties "in the name of the French people and the people of the United States of America . . . condemn recourse to war and that they renounce it respectively as an instrument of their national policy towards

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<sup>171</sup> April 6, 1927.

<sup>172</sup> Shotwell's biographer claims the letter was "largely written by Shotwell." Josephson, at 163. A review of Shotwell's papers reveals no drafts of the Butler letter, but Shotwell does appear to refer to it as "[o]ur text" in a letter. Shotwell to M. Arthur Fontaine (June 1, 1927). Shotwell collection, Box AAA, "[Illeg.] (as of 1944) copy for book on Kellogg Pact" folder.

<sup>173</sup> Robert H. Ferrell, *Peace in Their Time* (1952), at 80.

<sup>174</sup> *Id.*

<sup>175</sup> G.B. French to Butler, Jan 21, 1930, Butler Papers, Columbia University, Box 149. The meeting was with George Barton French, who reported the conversation to Butler when he returned to New York. Butler asked French for a record of the conversation for his personal files. French replied on Jan. 21, 1930. Also recounted in Ferrell (1952), at 81.

<sup>176</sup> Kellogg to Hon Wm. Allen White, April 24, 1933, Kellogg Papers, Roll No. 47, Frame No. 533.

each other.” The second stated that the settlement of any disputes would be “by pacific means.”<sup>177</sup>

Kellogg sat on the proposal for months, fully intending, it seems, to ignore it altogether. He later claimed the long wait was due to the President’s absence, which had made it impossible to discuss the matter with him.<sup>178</sup> In truth, Kellogg had little interest in the proposal. He saw it for what it likely was—an effort to pull the United States into a defacto alliance with France: “I felt that nothing could be accomplished by simply entering into a treaty between France and the United States, which countries had never been at war with each other and in all probability never would be, and furthermore that such a treaty would be misunderstood in Europe and it would look like an alliance or an entente, which had proved so disastrous in Europe.”<sup>179</sup>

The advocates of a peace treaty, however, would not let the matter rest. On this point, Shotwell and Levinson were in rare agreement.<sup>180</sup> It was an historic opportunity to achieve what they had each been working towards for close to a decade. Levinson wrote Kellogg in June and, at Kellogg’s “kindly suggestion” offered a draft form of a treaty between the United States and France. Levinson argued for keeping the treaty “perfectly simple” in order to “avoid the influence of European complications or subtle indirections.”<sup>181</sup> Besides, Levinson explained, “a short, simple treaty is exactly what M. Briand has in mind.”<sup>182</sup> He enclosed with it the pamphlet on Outlawry of War, which proposed a multilateral conference for precisely the same purpose.<sup>183</sup>

The two corresponded off and on over the next several months, with Levinson offering effusive praise and occasional suggestions, and Kellogg issuing short but

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<sup>177</sup> David Hunter Miller, *The Pact of Paris: A Study of the Briand-Kellogg Treaty* (1928), at 10 (reprinting the text of the proposal).

<sup>178</sup> Kellogg to Hon Wm. Allen White, April 24, 1933, Kellogg Papers, Roll No. 47, Frame No. 533, at 3-4.

<sup>179</sup> *Id.* at 3. His inference is supported by the title Briand gave the proposal, which he called a “Pact of Perpetual Friendship.” Miller (1928), at 11.

<sup>180</sup> Shotwell wrote to Earle Babcock, the Director-Adjoint of the Carnegie Endowment for International Peace, giving detailed instructions for a campaign on behalf of the treaty by the Endowment. See Shotwell to Earle Babcock [Director-Adjoint of the CEIP] (May 21, 1927). Shotwell Papers, Box AAA, “[Illeg.] (as of 1944) copy for book on Kellogg Pact” folder.

<sup>181</sup> S.O. Levinson to Hon. Frank Kellogg, June 24, 1927, Kellogg Papers, Roll 47, Frame No.576.

<sup>182</sup> *Id.* Levinson apparently met with Briand around this time. He wrote to Dewey in June 1927 that “Briand himself agreed with me that the proposal should be simple and utterly free from any inference that he was trying to inveigle the United States into European institutions or lure her into European traps.” Salmon O. Levinson to John Dewey, June 28, 1927, Dewey Papers, No. 02854. In the same letter, Levinson revealed his opinion of Shotwell, who was not only a colleague but a personal friend of Dewey’s (a friendship that would soon break under the strain of their disagreement over outlawry): “I know you don’t want to hear it, but I reached the conclusion long ago that Shotwell is not mentally honest.” *Id.* [note: this letter is also in the Levinson papers]

<sup>183</sup> *Id.*

courteous replies.<sup>184</sup> Levinson encouraged Kellogg to resist efforts to limit the pact to aggressive wars or to add reservations preserving the right to self-defense (which he regarded as implicit) and the Monroe Doctrine (which he also regarded as implicit insofar as it claimed a right to self defense).<sup>185</sup> In a letter written on the eve of the signing of the Pact, Levinson implored Kellogg: “If you do make an address, please consider emphasizing and elucidating the institutional status of war which . . . you are seeking ultimately to abolish.” He continued, “When people get it through their heads that war has been and is used as a ‘court’—as a lawful method of settling disputes, they will then see that the right of self-defense is irrelevant to the question of abolishing the institution of war as it is inherent and ineradicable as a naked right. No one in his right sense ever claimed, when the institution of dueling as a method of settling institutional disputes was outlawed in England and this country, that it affected in any way the right of personal self-defense.”<sup>186</sup>

Levinson’s emphasis on the legal status of war—and the absence of any direct mention of war as a crime—may have been influenced by his friend Dewey’s advice earlier that year: “It occurred to me,” Dewey wrote, “that the statement of our case might be simpler if you left out everything about war being made a crime; and stuck simply to taking it out from under the present protection of law. The reason is simply a talking point; the moment you speak of crime, they retort that crimes have to be opposed and punished. The mental association of crime, criminal police and punishment is very fixed.”<sup>187</sup> It was advice Levinson apparently took to heart, as he rarely mentioned criminalizing war thereafter, focusing instead on the legality of war and its results.

With their goal so close at hand, the Levinson and his allies unleashed a barrage of editorials, letters, resolutions, and public meetings in support of outlawry. Not content to limit his efforts to the United States, Levinson spread the message of outlawry in Europe as well. He hired Harrison Brown, whom he referred to as his “agent in Europe,” to buttonhole statesmen and their secretaries from London to Paris to Berlin to Geneva. He sent the voluminous outlawry literature, wrote them letters, and gave away copies of *The Outlawry of War: A Constructive Policy for World Peace*, a book written by the editor of the *Christian Century*, Charles Clayton Morrison, with a foreword by John Dewey.<sup>188</sup>

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<sup>184</sup> See Kellogg Papers, Roll No. 47, Frame Nos. 576-599 (letters and telegrams between Kellogg and Levinson between June 24, 1927 and August 9, 1929).

<sup>185</sup> Id.

<sup>186</sup> Levinson to Kellogg, August 1928, Kellogg Papers, Roll No. 47, Frame No. 596.

<sup>187</sup> Dewey to Levinson, Jan. 27, 1928, Dewey Papers, No. 02869.

<sup>188</sup> The Levinson papers contain extensive references to Brown. His role is also recounted in Ferrell (1952), at 103. The book distributed is Charles Clayton Morrison, *The Outlawry of War: A Constructive Policy for World Peace* (1927) (the second edition was dedicated to “Salmon Oliver Levinson, Author of the proposal for the outlawry of war and its indefatigable apostle,” and Dewey’s foreword was moved to the back of the book as an afterword).



Briand and Kellogg may have been deeply ambivalent about the treaty that would forever be linked with their names, but the “---- pacifists” were anything but.

### Touché

After several months, Kellogg unhappily came to the conclusion that he could not remain silent on the matter. Yet, what to do? The proposal put him in an impossible position. Accept it, and be drawn into the European system of alliances the United States had so far carefully avoided. Reject it, and not only be attacked by Butler, Shotwell, the outlawrists, and their powerful allies, but be suspected in Europe of harboring militaristic intentions. Upon reflection, he came up with a brilliant solution to the dilemma: He would propose a multilateral pact with precisely the same terms as Briand’s proposed bilateral agreement. Although Levinson had vigorously advocated just such a treaty for years, Kellogg later recalled the idea as his own, “I prepared a note proposing a mulit-lateral treaty to be signed by the principal power and open to the adhesion of all the nations of the world. This was the first suggestion of such a treaty.”<sup>189</sup>

Kellogg drafted a note to the French Foreign Minister deflecting the proposed bilateral arrangement, noting that the friendship between France and the United States “happily is not dependent upon the existence of any formal arrangement.” He then turned the proposal around: “it has occurred to me that the two Governments, instead of contenting themselves with a bilateral declaration of the nature suggested by M. Briand, might make a more signal contribution to world peace by joining in an effort to obtain the adherence of all the principal power of the world to a declaration renouncing war as an instrument of national policy.” He continued, “The Government of the United States is prepared, therefore, to concert with the Government of France with a view to the conclusion of a treaty among the principal powers of the world, open to signature by all nations, condemning war and renouncing it as an instrument of national policy in favor of the pacific settlement of international disputes.” For that purpose, he proposed drafting a multilateral treaty for submission by France and the United States jointly to the other nations of the world.”<sup>190</sup>

In one fell swoop, Kellogg masterfully evaded the trap that had been laid for him. Indeed, it is entirely possible that Kellogg embraced the idea of a multilateral treaty not out of a deeply held desire to outlaw war, but simply to deal a death blow to the bilateral treaty without rejecting it outright. After all, he suspected that France, which had hoped to draw the United States into a defacto alliance, would be much less enthusiastic about a multilateral agreement.

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<sup>189</sup> Id. at 4.

<sup>190</sup> Miller (1928), at 164-65 (reprinting the “American Note, December 28, 1927”).

At first, it seemed he was right. Upon receiving word of Kellogg's response, Briand was inclined to drop the matter altogether. Such an agreement would have utterly upset the delicate system of alliances France had so carefully constructed to shield itself from harm. An agreement open to all nations would upset the Locarno treaties and undermine French alliances with Belgium, Poland, Czechoslovakia, Romania, and Yugoslavia. Rather than strengthen France's position in Europe, a multilateral treaty threatened to weaken it. But how could the man who had just won the Nobel Peace Prize for the Locarno treaties and was hailed throughout Europe as the "Locarno prophet" refuse a treaty to renounce war among all nations, much less one that repeated the operative clauses of his proposed treaty almost verbatim? Kellogg had sprung himself from a trap, but in the process dropped Briand right in the center of one just as vexing.<sup>191</sup>

Likely not aware of the full import of the diplomatic jousting, Levinson heaped praise on the President and on Kellogg: "If I have at times lacked faith in the international views of the administration," he wrote the President, "let me now record my unstinted admiration and gratitude of the genius of commonsense that epitomizes your present stand. I sincerely believe the Kellogg proposal in response to the Briand offer will mark the greatest milestone in the history of world peace."<sup>192</sup> Privately, however, he expressed dismay that Kellogg's answer had not used the term "outlawry." He wrote Dewey, "You will find that the full text of Kellogg's reply published this week uses this expression [the "renunciation of war as an instrument of policy"] over and over again. He does not use the word 'outlaw' or 'outlawry'. Evidently Shotwell and his followers have put enough pressure on him so as to deprive us of the honor of having that word used in the Kellogg reply."<sup>193</sup>

Though Kellogg's reply did not use the term "outlawry," his response brought the cause of outlawry closer to realization than it had ever been before. The Geneva Protocol had used the outlawry language, but it had at the same time threatened to generate *causes* for war by requiring parties to violate the neutral rights of non-parties. Briand's draft

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<sup>191</sup> For more on Briand's reaction, see Ferrell (1952), at 145. The text of the two drafts is in David Hunter Miller, *The Peace Pact of Paris* (1929), at 161-63, 170.

<sup>192</sup> S.O. Levinson to President Coolidge, January 24, 1928, Kellogg Papers, Roll 47, Frame No. 591. See also S.O. Levinson to Frank B. Kellogg, February 1928, Kellogg Papers, Roll 47, Frame No. 592; S.O. Levinson to President Coolidge, March 1, 1928, Kellogg Papers, Roll 47, Frame No. 593; Telegram from S.O. Levinson to Hon. Frank B. Kellogg, June 25, 1928, Kellogg Papers, Roll 47, Frame No. 594. Kellogg acknowledged the praise in letters in return. Frank B. Kellogg to S.O. Levinson, Feb. 28, 1928, Kellogg Papers, Roll 47, Frame No. 593; Frank B. Kellogg to S.O. Levinson, June 28, 1928, Kellogg Papers, Roll 47, Frame No. 594.

<sup>193</sup> Levinson to Dewey, Mar. 2, 1928, Dewey Papers, No. 02883. Indeed, the animosity between Levinson and Shotwell continued to grow. In March 1928, Levinson wrote Dewey, "I just catch in the Times of March 14th Shotwell's real views. He tells Yale that we should enter the League, that Kellogg's offer is 'national hypocrisy' [sic]. There is no use of trying to do anything with this animal. He is hopeless and his judgment is a minus quantity." Levinson to Dewey, Mar. 14, 1928, Dewey Papers, No. 02886. Not long after, he would refer to Shotwell as "an infernal hypocrite" and "a damnable nuisance." Levinson to Dewey, Feb. 15, 1929, Dewey Papers, No. 03025.

treaty—which Kellogg proposed opening to all the nations of the world—contained no such requirement. While the absence of sanctions may have made the proposal appear weaker, in reality it made the agreement much more powerful. Earlier proposals to outlaw war promised to provoke a clash between those states seeking to bring an end to the Old World Order and those still adhering to it. The proposal on the table now would avoid that by simply outlawing war—renouncing it as an instrument of national policy. If, that is, Kellogg and Briand could come to agreement.

### **A Plan Takes Shape**

The next few months witnessed extensive back-and-forth between Kellogg, his Assistant Secretary of State William Castle, and the French Ambassador to the United States, Paul Claudel, who spoke on behalf of Briand. As talks unfolded, Castle wrote in his diary that it was “more and more evident” that Briand had made his bilateral suggestion “for political reasons solely and that he has now got a bad case of cold feet. They will be positively frozen when we drive him into the open and make him do something, or refuse to do something.”<sup>194</sup>

An issue that quickly surfaced was the question of what, precisely, the pact prohibited. Did it just prohibit “aggressive war,” leaving states free to engage in “defensive wars”? Did it preserve the right to self-defense? These were issues over which Levinson and Shotwell had long sparred. Levinson had long insisted on outlawing all war, whereas Shotwell had pressed for outlawing only “aggressive war.” Shotwell thought it a distinction without a difference, as Levinson allowed for self-defense and thus, in Shotwell’s view, for defensive war. Levinson, however, saw the inherent right of self-defense and defensive war as distinct concepts: “There could be the exercise of force and violence, conceivably, against a nation and the nation thus attacked would have the inherent right of self-defense. But it would be unfair and entirely inaccurate to describe the nation struggling to defend itself as waging a defensive war.”<sup>195</sup> Levinson warned, moreover, that “the claim of ‘defensive war’ has too often been invoked as a subterfuge for the ‘aggressive’ use of force.”<sup>196</sup>

Kellogg, like Levinson, viewed any express reference to aggressive or defensive war as unnecessary and, indeed, counterproductive. He, too, regarded the right to self-defense as a given, and therefore strongly resisted efforts to reserve the right to self-defense in the treaty. As he put it in a hearing before the Senate Foreign Relations Committee, “It seemed to me incomprehensible that anybody could say that any nation

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<sup>194</sup> Castle diary, Jan 1., 1928, quoted in Ferrell, at 147.

<sup>195</sup> Levinson memorandum (undated), Levinson Papers, Box 66, folder 1; see also Levinson Memorandum, Aggression-International (undated), Levinson Papers, Box 66, folder 1.

<sup>196</sup> Levinson Memorandum, Aggression-International (undated), Levinson Papers, Box 66, folder 1.

would sign a treaty which could be construed as taking away the right of self-defense if a country was attacked. That is an inherent right of every sovereign, as it is of every individual, and it is implicit in every treaty.” He continued, “I said it was not necessary to make any definition of ‘aggressor’ or ‘self-defense.’ I do not think it can be done, anyway, accurately. They have been trying to do it in Europe for six or eight years, and they never have been able to accurately define ‘aggressor’ or ‘self-defense.’”<sup>197</sup>

Another issue of contention was how the prohibition on war would be enforced. Unlike the League Covenant, the Pact did not allow states to go to war to enforce the peace. And unlike the Geneva Protocol, the agreement did not provide for severe financial sanctions. But how would it be enforced without military or economic sanctions? Walter Lippmann was among the critics who complained that a treaty without sanctions would be worthless. Levinson fumed in a letter to Borah, “With Lippmann a treaty to go to war is good without sanctions to enforce it while a treaty not to go to war is worthless unless it has sanctions. . . what price logic.”<sup>198</sup> Whether logical or not, the criticism required an answer. The Pact’s advocates came to a startlingly simple, but effective one: If a state broke the multilateral treaty, the other parties “would be released and could take such action as they saw fit as to the belligerent nations.”<sup>199</sup> The crucial difference between the Pact and the League or the Geneva Protocol was that the Pact did not *require* states to respond in any particular way. It did not require sanctions, either military or economic, against parties or non-parties. States were simply understood to be released from their obligation to not to resort to war against a state party that itself resorted to war.<sup>200</sup>

While talks were ongoing, Levinson met in person with Kellogg to discuss the French response to his counter-proposal. Levinson recounted by letter to Borah, Kellogg “seemed to be obsessed with the idea that France was unreasonable, making impossible conditions.” Kellogg “was very nervous, walked up and down in an agitated way and spoke almost with vehemence.” Levinson was taken aback by Kellogg’s reaction, noting that what so troubled Kellogg struck him as “mere questions of phraseology.” He closed

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<sup>197</sup> Testimony of Frank Kellogg, Hearings Before the Committee on Foreign Relations United States Senate Seventieth Congress on The General Pact for the Renunciation of War signed at Paris August 27, 1928 (December 7 and 11, 1928), [http://avalon.law.yale.edu/20th\\_century/kbhear.asp](http://avalon.law.yale.edu/20th_century/kbhear.asp).

<sup>198</sup> Telegram from Levinson to Borah, April 12, 1928, Levinson Papers, Box 5, folder 4.

<sup>199</sup> Id.

<sup>200</sup> Both Borah and Levinson appear to have found this unobjectionable. Levinson wrote Borah with a suggestion for a “simple exchange of notes” on this point. Levinson to Borah, April 30, 1928, Borah Papers, Box 254 (page 23 of pdf) (Quoting Lord Grey: “The United States might quite consistently agree that any power breaking the treaty should no longer be entitled to the advantage of the protection the treaty gives. In other words, those who are parties to the treaty should be freed of all restraints and obligations of the treaty with regard to any power breaking it.”). As Shotwell rightly explained to Babcock, “this device is as near a sanction as the United States can go at present. Shotwell to Babcock, May 21, 1927, Shotwell papers, Box AAA.

his letter to Borah, “my dear Borah, you still have an enormous job on your hands taking care of the situation in the interest of world peace.”<sup>201</sup>

Less than a week later, Kellogg sent France a suggested draft treaty that looked remarkably like the early drafts of Briand and Kellogg and was, in all important respects, identical to the text that would soon be adopted by nearly every nation then in existence.<sup>202</sup> The draft as finally adopted contained two operative articles:

Article I. 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.

On August 27, 1928, the representatives of fifteen nations gathered together to sign this renunciation of war. Levinson cabled Borah: “The first realization of our dream comes true today and forecasts the destruction of the infamous war system.”<sup>203</sup>

Senator Borah, now chair of the Senate Foreign Relations Committee, was as vigorous in his campaign in favor of the new Peace Pact as he had been in opposition to the League. The agreement was quickly approved by a vote of 85 to 1, with only Wisconsin Republican John J. Blaine voting against it.<sup>204</sup>

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<sup>201</sup> Levinson to Borah, April 7, 1928, Levinson Papers, Box 5, folder 4. Borah had his own meeting with Kellogg on April 9, and he expressed confidence in a letter to Levinson the next day that “we are reaching the place where the foreign powers will have to either accept or reject our proposition substantially as made.” Borah to Levinson (April 10, 1928) Levinson Papers, Box 254 (p. 12 of pdf). Levinson persuaded Borah to place outlawry into the Republican Party Platform that summer. Republican Party Platform of 1928, June 12, 1928. Both Levinsons were delighted when Borah sent his badge from the Convention to Mrs. Levinson as a memento of the occasion. Levinson to Borah, June 18, 1928, Levinson Papers, Box. 5, folder 4.

<sup>202</sup> The text of the proposal, dated April 13, 1928, is reprinted in Miller (1928), at p. 184-85.

<sup>203</sup> Levinson to Borah, Aug. 27, 1928, Borah Papers, Box 254 (page 7 of pdf).

<sup>204</sup> Initially there were calls to add reservations and understandings to the agreement, but in the end the treaty was ratified without any conditions attached. Telegraph from Borah to Levinson, July 27, 1928, Levinson Papers, Box 5, folder 5 (“The treaty is to be signed precisely as proposed without any side understandings protocols or interpretations.”); see also correspondence between Borah and Levinson regarding proposed reservations, which distressed Levinson, who pressed Borah to insist on a clean treaty. Levinson papers, Box 5, folder 5; Kellogg to Hon Wm. Allen White, April 24, 1933, at 5 Kellogg Papers, Roll No. 47, Frame No. 533 (“ I know that some of the writers on the subject of the Paris pact have claimed there were many reservations made by the different countries . . . This is not true. There was not a single reservation made by any country.”). The Senate did not add any reservation, but it did pass a measure "interpreting" the treaty which stated that the treaty must not infringe upon America's right of self defense and that the United States

### **“it will come to something sometime”**

The closer the agreement came closer to fruition, the more Kellogg warmed to it. He began to imagine his place in history—and to work to secure his place in the history books. While publicly feigning disinterest, he launched a full scale campaign for the Nobel Peace Prize shortly after the agreement was signed.<sup>205</sup> He charged his assistant, William Beck, with conducting systematic outreach to dozens of leaders to solicit letters in support of his Nobel nomination, even offering to pay for their telegrams to the committee.<sup>206</sup> What followed was an intense and circumspect campaign to solicit endorsements among the leading members of society. Kellogg tasked Beck with conducting systematic outreach to dozens of leaders. Kellogg also corresponded personally with a number of closer friends and associates, asking them to solicit additional letters of support.<sup>207</sup>

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was not obliged to enforce the treaty by taking action against those who violated it. [cite to leg] Blaine was defeated in his reelection bid in 1932.

<sup>205</sup> Kellogg was nominated in 1929, but the Committee decided not to grant an award at all that year. This rankled Kellogg: “If it were not for the fact that this matter [the Nobel nomination] had been advertised all over the world last year, I should not care anything about it now, but to be endorsed last year and not this year would be rather embarrassing.” Roll 39, Frames 132-133: Letter to William H. Beck, December 27, 1929 (asking Beck to help him solicit endorsements to Nobel Committee). Others knew of Kellogg’s aspirations and moved carefully around them. The editor of the *Christian Century* wrote to Borah: “I do not want to do anything that will tend to divide Mr. Kellogg’s interest in the thing that he has done so well thus far or that will suggest to him that in the last chapter his fame will have to be shared by anyone else. At the same time the world must eventually know who’s who in this business.” Editor of the *Christian Century* to Borah, Apr. 12, 1928, Levinson Papers, Box 5, folder 4.

<sup>206</sup> Frank Kellogg to William H. Beck, December 27, 1929, Kellogg Papers, Roll 39, Frames 132-133: (asking Beck to help him solicit endorsements to Nobel Committee). Beck is sometimes referred to as “Private Secretary to the Secretary of State” and elsewhere as “Assistant to the Secretary.” Letter from the U.S. Legation in Portugal to William H. Beck, May 23, 1927, Kellogg collection, Roll 26, Frame 120, (referring to him as Private Secretary to the Secretary of State); Letter from William H. Beck to Dr. W.H. Wilmer, May 27, 1927, Kellogg collection, Roll 26, Frame 169 (signed “Assistant to the Secretary”).

<sup>207</sup> An unsigned memo from January 1930, likely prepared by Beck, shows the breadth and depth of the campaign. Roll 39, Frames 409-410: “List of conferences, letters, etc.” (unsigned, undated) (listing out people who have already or will write letters of recommendation for Kellogg to receive the Nobel prize). *See also, e.g.*, Roll 39, Frame 294: Letter to Willis Van Devanter, January 16, 1929 (notifying him that Justice Butler wrote nomination letter to Nobel Committee and suggesting that he do the same); Roll 39, Frame 393: Letter from Willis Van Devanter, January 23, 1930 (enclosing letter from Attorney General Mitchell endorsing Kellogg for Nobel); Roll 39, Frames 154-155: Letter to Donald J. Cowling, December 28, 1929 (regarding nomination procedures for Nobel prize). By the end of the campaign, Kellogg (via Beck, Culbertson, Van Devanter, Carr, Marriner, and Cowling) had secured endorsements from the Chief Justice of the Supreme Court William Taft, 4 Associate Justices of the Supreme Court, Attorney General William Mitchell, almost all members of the Senate Foreign Relations Committee (Borah, Swanson, Moses, Walsh, Capper, Gillett, George, Fess, Goff, Harrison, Vandenberg), many other prominent senators and representatives, several U.S. Ambassadors, and over a dozen additional civil society leaders and university presidents. Roll 39, Frames 414-415: Letter to Laurite Swenson, January 27, 1930 (updating Swenson on who had written letters for Kellogg and asking whether more should be written).

At the same time, Kellogg sought—successfully it turned out—to consign Levinson, who had also been nominated for the Prize, to the dustbin of history.<sup>208</sup> When Kellogg learned in December 1929 that Levinson’s name was in contention for the Nobel Peace Prize, he wrote Laurite S. Swenson, the Envoy Extraordinary and Minister Plenipotentiary at the American Legation in Norway who was actively involved in Nobel Committee matters. “A campaign was being carried out for a man by the name of Levinson in Chicago – I have forgotten his first name – who claims to be the originator of the idea,” Kellogg wrote. Levinson “never had anything to do with the negotiation of the Treaty” and that while he may have sent documents to the State Department, Kellogg had never seen them and never had anything to do with Levinson. He added, “Levinson is a persistent, bumptious, conceited man, who evidently thinks that he is the first man in the world who ever thought of outlawing war and Castle tells me he is the man who brought influence against the [Nobel] award being given to me this year. However, I am not going to lower myself by starting a campaign.”<sup>209</sup> Kellogg and Briand were jointly awarded the Nobel Peace Prize a year later.<sup>210</sup>

Meanwhile, the Kellogg-Briand Pact, as it was now commonly known, continued to gain state parties. Within a few short years, nearly every country in the world had ratified the agreement. Although Levinson had played little role in the negotiation of the treaty, it remained the realization of an idea he had first put to paper ten years earlier in an unassuming memo to a friend. Then, he had, against all odds, imagined the possibility of

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<sup>208</sup> Meanwhile, Levinson was working with Elihu Root and others to try to smooth the way for the U.S. to join the International Court. Correspondence between Stimson and Elihu Root from June 28, 1929 to May 7, 1935, Levinson Papers, Box 43, Folder 9. Henry Stimson provided Levinson with a letter of introduction to Root on June 28, 1929, which led to their first in-person meeting not long after. Levinson also worked on securing debt relief for Europe. Levinson did not go entirely unrecognized for these efforts, or for his work on outlawry. The majority of contemporary accounts credited him as the father of outlawry and a key figure behind the Paris Peace Pact. He received several honorary degrees from universities. And in 1934, he was made a chevalier of the French Legion of Honor for “his efforts in laying he ground work for the Briand-Kellogg pact of Paris outlawing war, and for his other efforts in behalf of amity among nations.” Chicago Daily News, June 16, 1931. He also won the \$50,000 Bok Peace Prize “for his plan of adjusting War reparations and debts”—a plan to which he devoted himself after the conclusion of the Paris Pact. Mr. Levinson’s Way, Time Magazine, October 13, 1930.

<sup>209</sup> Roll 39, Letter to Laurite S. Swenson, December 28, 1929. Kellogg also solicited negative letters regarding Levinson’s role in the evolution of the Pact almost as eagerly as he solicited positive letters to support his own bid. *See, e.g.*, Spence Phenix to Frank Kellogg, April 26, 1933, Kellogg Papers, Roll 46, Frame No. 541 (“My recollection of the Levinson matter is very much the same as yours. It is absurd for him to claim that he had any part in the negotiations of the Anti-War Treaty.”).

<sup>210</sup> In 1929, the Nobel Committee decided that none of the year’s nominations met the criteria for the prize. According to the Nobel Foundation’s statutes, the Nobel Prize can in such a case be reserved until the following year, and this statute was then applied. Kellogg and Briand therefore received their Nobel Prizes for 1929 one year later, in 1930.

declaring war illegal, much as dueling had been made illegal before.<sup>211</sup> The Pact did just that. War was, to use Levinson's phrase, outlawed.

The outlawry of war would prove transformative. Almost immediately, it began to change how states interacted with one another. Over the course of the next three decades, legal rights long taken for granted, including the right to military conquest, would be questioned, challenged, and then decisively rejected. These changes would, in turn, require a revolution in international law—from its creation to its enforcement. Indeed, if anyone deserves to be called the father of our modern international law, it is not Grotius, but instead the father of outlawry, Salmon O. Levinson.

For all the important legal changes it would bring about, the outlawry of war would prove powerless to prevent a second world war from breaking out. On September 1, 1939, Germany invaded Poland, and the world began to descend into war once again—one that would prove even bloodier than the last. A year later, as Levinson lay ill, a few short months from death, Dewey described “Sol” to his second wife as “the man who started the Outlawry of War – poor man – though it will come to something sometime.”<sup>212</sup>

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<sup>211</sup> Indeed, his 1921 plan to outlaw war had called for an international agreement that would provide “[t]he further use of war as an institution for the settlement of international disputes shall be abolished.” Salmon O. Levinson, *Outlawry of War* (1921), at 11.

<sup>212</sup> John Dewey to Robbie Tunkintell (Roberta Lowitz Grant Dewey), November 30, 1940, Dewey Papers. (The letter is addressed to “Robbie Tunkintell,” which was apparently an affectionate nickname for Dewey’s second wife, Roberta L. G. Dewey. See, e.g., John Dewey to Roberta Lowitz Grant Dewey, Undetermined Month, 1945), Dewey Papers, Letter #09978. Levinson died on February 2, 1941.