

The Kellogg Treaties Sanction War. ¹⁾

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I.

The origin of the negotiations between the United States and other Powers leading to the conclusion of the so-called Kellogg Treaties is well known. Beginning with an expression of good-will in M. Briand's note of April 6, 1927, commemorating the entry of the United States into the war and expressing France's willingness to conclude a treaty renouncing war between France and the United States, the negotiations developed rapidly. On June 20, 1927, the French Foreign Minister presented the draft of a treaty embodying his proposal, providing for a condemnation of "recourse to war" and renouncing war as between France and the United States as an "instrument of their national policy". The settlement of all disputes was never to be sought "except by pacific means".

On December 28, 1927, Mr. Kellogg proposed to the French ambassador the extension of the proposed declaration to all the principal Powers. It was argued in the United States that, if the treaty were signed by the United States and France alone, it would be a treaty of alliance. In his accompanying draft of a treaty, Mr. Kellogg recommended the outright and unconditional renunciation of war and the solution of disputes by pacific means only.

The French press was critical. It was maintained that France had obligations to the League of Nations and could not make these new commitments. But the criticism was dropped after forty-eight hours on the publication of the French reply undertaking to renounce "wars of aggression". This gave apparently a new turn to the negotiations. The State Department did not reply officially, but officers of the department pointed out that the term "aggressive" changed the entire meaning of the proposition and was not acceptable to the United States. In this position the State Department seems to have had the support of the American press. Editorially it was agreed that "renunciation of

¹⁾ An address delivered before the Williamstown Institute of Politics on August 17, 1928.

aggressive war" was too intricate an expression to define and that the French interpolation of this qualification left Mr. Kellogg's proposition denatured of its vital part and meaningless. Mr. Kellogg pointed out in his new note that the first French note of June 20, 1927, contained no limitation of wars of aggression. In this connection it is well to note that Sir Austen Chamberlain rejected the attempted definition of "aggressor" in the Geneva Protocol as, I believe, one who declines to submit a dispute to discussion in these words: "I therefore remain opposed to this attempt to define the 'aggressor' because I believe that it will be a trap for the innocent and a signpost for the guilty."

Considerable correspondence took place in the early part of 1928 as to the construction to be given to the proposed treaty. In his note of February 27, 1928, in explaining his objection to qualifications on the obligation to renounce war, Mr. Kellogg stated:

The ideal which inspires the effort so sincerely and so hopefully put forward by your (the French) Government and mine is arresting and appealing just because of its purity and simplicity; and I cannot avoid the feeling that if governments should publicly acknowledge that they can only deal with this ideal in a technical spirit and must insist on the adoption of reservations impairing, if not utterly destroying, the true significance of their common endeavors, they would be in effect only recording their impotence, to the keen disappointment of mankind in general.

The same thought was expressed in Mr. Kellogg's speech to the Council on Foreign Relations on March 15, 1928, in which he said:

"It seems to me that any attempt to define the word 'aggression' and by exceptions and qualifications to stipulate when nations are justified in going to war with one another would greatly weaken the effect of any treaty such as that under consideration and virtually destroy its positive value as a 'guaranty of peace'.

The subsequent negotiations, however, disclose the unfortunate fact that these very exceptions and qualifications to which Mr. Kellogg objected as so nullifying in effect have, in fact, found their way into the treaty as now universally construed.

The French Government maintained that the treaties must be construed so as not to bar the right of legitimate defense, the performance of obligations under the Covenant of the League of Nations, under the treaties of Locarno, under its treaties of alliance with its allies — now for some unexplainable reason called treaties of neutrality — that the treaty was to become ineffective if violated by one nation, and that it was to be signed by every state before it became effective as to any state. With the exception of this last reservation, Secretary Kellogg agreed to this interpretation of the French Government in his speech before the American Society of International Law on April 28, 1928,

and incorporated his interpretation of this reservation as to self-defense, wars under the League Covenant, under the treaties of Locarno, and certain undefined and evidently unknown "neutrality" treaties, in his note of June 23, 1928, to the Powers, some fifteen in number, adding that "none of these governments has expressed any dissent from the above-quoted construction."

In his note of May 19, 1928, accepting the American proposition in principle, Sir Austen Chamberlain for Great Britain expressed his assent to the reservations made by France and added a new one in the following paragraph:

"There are certain regions of the world, the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defense. It must be clearly understood that *His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect.* The Government of the United States have comparable interests; any disregard of which by a foreign Power they have declared they would regard as an unfriendly act."

The words in italics were repeated in the British note of July 18, 1928, undertaking to sign the treaty only on the understanding that the British Government maintain this freedom of action with respect to those regions of the world in which it had "a special and vital interest".

II

The original proposition of Mr. Kellogg was an unconditional renunciation of war. The treaty now qualified by the French and British reservations constitutes no renunciation or outlawry of war, but in fact and in law a solemn sanction for all wars mentioned in the exceptions and qualifications. When we look at the exceptions we observe that they include wars of self-defense, each party being free to make its own interpretation as to when self-defense is involved, wars under the League Covenant, under the Locarno treaties, and under the French treaties of alliance.* If self-defense could be limited to the terms "to defend its territory from attack or invasion", as suggested by Mr. Kellogg, it would be of some value, but it is understood that no specific definition of self-defense is necessarily accepted. Considering these reservations, it would be difficult to conceive of any wars that nations have fought within the past century, or are likely to fight in the future, that cannot be accommodated under these exceptions. Far from constituting an outlawry of war, they constitute the most solemn sanction of specific wars

that has ever been given to the world. This cannot be charged primarily to Secretary Kellogg, whose intentions were of the best, but is a result of the reservations insisted upon by European Powers, which, it is still to be feared, comprehend peace as a condition of affairs achieved through war or the threat of war. The mere renunciation of war in the abstract in the first article of the treaty has but little scope for application, in view of the wars in the concrete, which the accompanying construction of the treaty sanctions. It is idle to suppose that the official construction given to the treaty by all the signatory Powers is not as much an integral part of the treaty as if it had been made a part of article I.

Again it will be noticed that the United States recognizes a British claim to use war as an instrument of national policy in certain undefined "regions of the world", any "interference" with which by anybody, including the United States, will be regarded by Great Britain as a cause of war. To this we subscribe. When the United States at the first Hague Conference secured recognition by our cosignatories for the Monroe Doctrine, it was regarded as an achievement of American diplomacy. But the Monroe Doctrine has geographical limits known to everybody. To this new British claim there are no geographical limits. The vague and expansive terms of the British claim to make war, now recognized by the United States, covers any part of the world in which Britain has "a special and vital interest". No such broad claim of the right to make war has ever before been recognized.

But the most extraordinary feature of this treaty still remains to be mentioned. It will have been noticed that we recognize the legality of League wars and Locarno wars. As Europe correctly seems to assume, we are now bound by League decisions as to aggressors and League policy generally but without any opportunity to take part in the deliberations leading to League conclusions. We indeed recognize by this treaty the legal right of the League to make war against us, and it will be observed that Sir Austen Chamberlain in his note of May 19, 1928, frankly admits that respect for the obligations arising out of the Covenant is "the foundation of the policy" of Great Britain. Whether the further European claim that we are bound to support League conclusions as to "aggressor" nations, and other political conclusions, either by joining with the League or by refusing to trade with the League-declared pariah, is sustainable or not, at the very best it places us in the uncomfortable position either of being bound by decisions in the making of which we had no part or of having recriminations levelled against us for refusing to support our treaty. The new contract begins with diverse interpretations of its obligations, for European views, reflected by Mr. Edwin James of the New York Times, leave no doubt that Europe regards this treaty as a means of involving us in European politics. And we

are entangled in the most dangerous way, for we are bound by decisions made in our absence, even decisions made against ourselves — because the recognition of the French and British reservations, now made the authoritative interpretation of the treaty by all the signatories, is a commitment for us. Our hands are tied, not theirs. The reservations are made at our expense, not theirs. Far better and safer would it be had we openly joined the League of Nations and been privileged to take part in deliberations which may lead to most important consequences. We might have been able to prevent undesirable conclusions and use our bargaining power to obtain occasional benefits and advantages instead of disadvantages only. We are now about to sign a treaty in which we expressly recognize the right of the other signatories to make war upon anybody, including ourselves, for the purpose of enforcing, even against us, their mutual obligations under the Covenant of the League of Nations, not to mention individual undefined national interests in any part of the world. They alone will determine the occasion of such action, without our participation.

In justice to Europe, it cannot be said that they have left us in doubt as to their conception of our obligations. Indeed, these obligations are expressly or implicitly contained in the very reservations which the United States has accepted. Should we repudiate these commitments, we shall be denounced as a violator of our own treaty and not without some justification.

It has not been a pleasant task to analyze these treaties. The original American proposal was progressive, pure and simple, to use Mr. Kellogg's expression. The European amendments transformed the proposal into something entirely different — into a universal sanction for war, into a recognition by us of Europe's right to wage war, even against the United States, whenever the individual interests of certain nations are deemed to require it and whenever the League, in its uncontrolled discretion, decides upon it.

Need more be said? Would it not be far better either to join the League outright and have a share in those deliberations which to us may be so portentous or, better still, make the recourse to arbitration of justiciable issues and the submission to conciliation of non-justiciable issues obligatory at the request of either party? That would be a positive commitment which would make war extremely difficult, whereas the present treaties make war extremely easy. It is to be doubted whether the supposed valuable psychological effects of renunciation of war in the abstract can counterbalance the positive legal sanction for war in the concrete. If and when this treaty is ratified, the test of its efficacy will be its effect on a limitation of armaments. The President's declaration that it is not expected to have any such

effect and the avowed pleasure of certain foreign official newspapers at that promise hardly justify at the moment strong hopes of such a result. The abolition of war will, therefore, have to be pursued along other lines. Possibly in the elimination of the economic causes of conflict, including the attempted monopoly of raw materials and markets, and in the entente of business interests across national boundaries, there lies more hope than in legal efforts to preserve by force the status quo. Other machinery is needed to make changes in existing conditions, when time and circumstances require. To that effort but little attention has yet been paid. These matters are mentioned merely to indicate that, even if the ratification of the Kellogg treaties is accompanied by explanatory reservations or comments on our part, the solution of the problem of war and peace among independent nations has, perhaps, hardly been begun.