

# A NUCLEAR KELLOGG-BRIAND PACT: PROPOSING A TREATY FOR THE RENUNCIATION OF NUCLEAR WAR AS AN INSTRUMENT OF NATIONAL POLICY

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*Si vis pacem, para bellum* (“If you want peace, prepare for war”)  
– Roman adage

*Si vis pacem, para pacem* (“If you want peace, prepare for peace”)  
– Inscription on the ceremonial pen used to sign the Kellogg-Briand Pact

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## INTRODUCTION

The Kellogg-Briand Pact has gotten a bum rap. That bold 1928 agreement, formally known as the General Treaty for the Renunciation of War as an Instrument of National Policy,<sup>1</sup> represented the height of post-World War I idealism. Under it, the leading powers of the day, with the United States in the vanguard, condemned recourse to war and pledged themselves to resort only to pacific means for the resolution of all their future disputes.

Unfortunately, the treaty has been widely derided for a generation as foolhardy in the extreme. Critics have portrayed Kellogg-Briand as the ultimate illustration of legal and diplomatic hubris, in pretending that something meaningful could be accomplished by purporting to “outlaw” a phenomenon as pervasive as international combat. We can’t simply legislate this scourge away, proclaim the realists; idealistically waving a piece of solemnly signed parchment did not prevent World War II, and it would be similarly ineffectual against any modern outbreak of hostilities, too.

Such harsh assessments have some merit; Kellogg-Briand can seem quixotic when viewed with the hindsight of nearly a century of

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1. See generally General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 (entered into force Jul. 24, 1929) [hereinafter Kellogg-Briand Pact].

unrelenting, increasingly bloody, often widespread, war. But this article argues that Kellogg-Briand was, in truth, a great success – it marked a crucial turning point in the intellectual history of warfare, if not a watershed in its actual conduct. In earlier years – into World War I – war was widely regarded as something inevitable, an ineluctable phenomenon of the human condition. War was an expensive and nasty business, to be sure; it was uncomfortable and possibly fatal, but it was inherent in life, part of the “settled order of things,” much as a harsh, cold winter might be. Neither circumstance was, as a practical matter, avoidable; neither needed a “justification”; certainly neither was subject to close or effective regulation by law.

In the inter-war period, however, attitudes around the world about war were transformed. Populations and their leaders came to see warfare as something extraordinary, something subject to human volition. Especially (but not only) in the democracies, a new appreciation grew that war could, and should, be controlled and regulated; that states should not resort to war easily and for transient reasons. Most dramatically, the leading statesmen of the era proclaimed that going to war required a certain type of justification – in particular, it must have an acceptable legal rationale.

The Kellogg-Briand Pact – originally proposed modestly as a bilateral France-United States accord, but quickly expanded to embrace dozens of key states all around the world – played a central role in that transformation. This short instrument – still in force today, although largely superseded by the Charter of the United Nations<sup>2</sup> – captured the *zeitgeist* and substantially deepened and broadened its pervasive influence. Kellogg-Briand is a political, social, and legal inflection point – it catalyzed a lasting change in the way people and states think, talk, and act about war.

This article further argues that the time has come to extend that success to an additional realm, to adapt Kellogg-Briand to twenty-first century conditions and needs, by proposing a “nuclear version” of the monumental accord. Under that structure, the states of the world would unite to renounce nuclear war in particular; to declare that they will not resort to, or threaten, that apocalypse; to insist that they will always find alternative mechanisms for resolving international disputes; and – exceeding the accomplishments of Kellogg-Briand – to undertake specific steps, unilaterally and in concert, to reduce the likelihood of any outbreak of nuclear hostilities. The article proceeds as follows:

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2. See generally Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 [hereinafter U.N. Charter].

After this introduction, Section I provides an in-depth analysis of the text of the Kellogg-Briand accord, dissecting its provisions and noting both what it includes and what its drafters intentionally or unconsciously omitted. The drafting architecture of the document reflects its era; it is not styled as modern treaties on such critical topics would be today, but there are lessons nonetheless.

Section II then provides more background about the evolution of the treaty, noting its kindred antecedents and numerous other contemporaneous instruments pursuing similar objectives. It also describes several subsequent lawmaking tools, including a chain of like-minded “confidence-building” accords that reaches into the modern era, and critically assesses their impact. This part of the discussion concludes by summarizing the key features of Kellogg-Briand, highlighting a number of aspects that resonate into contemporary arms control efforts.

Next, Section III turns to nuclear weapons, nuclear proliferation and the specter of nuclear war. It focuses, in particular, on the potential military, legal, and political “usability” of nuclear weapons, and on a series of “negative security assurances” and “no first use” pledges, through which the states that possess nuclear weapons have undertaken (more or less) to refrain from using or threatening to use nuclear weapons against states that have foregone their own possible nuclear aspirations. It suggests that the world already has, to some extent, promulgated something akin to a partial “nuclear version” of Kellogg-Briand, but without the deliberative process and the comprehensive, negotiated text that would make it most meaningful.

Section IV then presents the heart of the matter: a proposed new treaty to renounce nuclear war as an instrument of national policy. The draft text includes numerous footnotes that explain the provisions, highlight the drafter’s options, and cite precedents. The accompanying discussion elaborates multifarious suggested steps to “operationalize” the outlawry of nuclear war – features of a type that were notably absent from Kellogg-Briand – and to insinuate the commitments into the practices and plans of the nuclear weapons-possessing countries.

Finally, Section V offers some concluding observations. Overall, the thesis of the article is that states should now commit, with renewed vigor, to the imperative of avoiding nuclear war, and they should undertake immediate, legally binding steps to reduce the likelihood of that civilization-threatening catastrophe. These measures would complement the “Getting to Zero” campaign for global nuclear disarmament, but could and should be undertaken independently and promptly, even if the ultimate objective remains elusive. In short, a new

approach to nuclear weapons – inspired by the 1928 cognitive shift established in Kellogg-Briand – should now be reflected in international law, moving the world in a safer, more secure direction.

## I. PARSING THE TEXT OF THE KELLOGG-BRIAND PACT

Kellogg-Briand does not look like a modern arms control treaty. The official text of the instrument is largely “procedural,” in identifying the participating states and their respective representatives.<sup>3</sup> The document includes four preambular paragraphs;<sup>4</sup> only two “operational” articles;<sup>5</sup> and a third “boilerplate” article describing the procedures for ratification, accession, and entry into force.<sup>6</sup> The two operational

3. Kellogg-Briand Pact, *supra* note 1, at introduction (the treaty records the names of the plenipotentiaries who negotiated the instrument on behalf of the nine participating sovereigns: Germany, the United States, Belgium, France, Great Britain [with separate recognition of Canada, Australia, New Zealand, South Africa, Ireland and India], Italy, Japan, Poland, and Czechoslovakia).

4. The preamble describes the parties as

*“[d]eeply sensible of their solemn duty to promote the welfare of mankind; Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated; Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty; and Hopeful that, encouraged by their example, all the other nations of the world will join in this humane endeavor and by adhering to the present Treaty as soon as it comes into force bring their peoples within the scope of its beneficent provisions, thus uniting the civilized nations of the world in a common renunciation of war as an instrument of their national policy.”*

*Id.* at preamble (italics added).

5. Article I provides: “The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.” Article II provides: “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.” *Id.* arts. I-II.

6. Article III provides:

“The present Treaty shall be ratified by the High Contracting Parties named in the Preamble in accordance with their respective constitutional requirements, and shall take effect as between them as soon as all their several instruments of ratification shall have been deposited at Washington. This Treaty shall, when it has come into effect as prescribed in the preceding paragraph, remain open as long as may be

articles, each consisting of just a single sentence, combine for only seventy-eight words.<sup>7</sup> There are but five active verbs.

In contrast, arms control treaties today are behemoths,<sup>8</sup> incorporating expansive provisions that specify the obligations with precision, often accompanied by reams of exquisitely crafted legal definitions.<sup>9</sup> Modern negotiators elaborate the exact scope of the undertakings and provide detailed timetables for the mandated actions.<sup>10</sup> They frequently create new international organizations to oversee and implement the agreement, and they specify all the institutional

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necessary for adherence by all the other Powers of the world. Every instrument evidencing the adherence of a Power shall be deposited at Washington and the Treaty shall immediately upon such deposit become effective as between the Power thus adhering and the other Powers parties hereto. It shall be the duty of the Government of the United States to furnish each Government named in the Preamble and every Government subsequently adhering to this Treaty with a certified copy of the Treaty and of every instrument of ratification or adherence. It shall also be the duty of the Government of the United States telegraphically to notify such Governments immediately upon the deposit with it of each instrument of ratification or adherence."

*Id.* art. III.

7. James T. Shotwell, one of the leading advocates for the outlawry movement culminating in the Kellogg-Briand Pact, commented that "[s]eldom had so important an event so little text behind it or so direct and simple a history." JAMES T. SHOTWELL, *WAR AS AN INSTRUMENT OF NATIONAL POLICY AND ITS RENUNCIATION IN THE PACT OF PARIS 189* (Harcourt Brace & Co. 1929).

8. Consider, for comparison, three major modern arms control agreements, the 1991 START I nuclear weapons treaty between the United States and the Soviet Union (Treaty on the Reduction and Limitation of Strategic Offensive Arms, U.S.-U.S.S.R., Jul. 31, 1991, S. TREATY DOC. NO. 102-20) [hereinafter START I]; the multilateral 1993 Chemical Weapons Convention (Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 103-219, 1974 U.N.T.S. 317) [hereinafter CWC]; and the multilateral 1996 Comprehensive Nuclear-Test-Ban Treaty, Sept. 10, 1996, 35 I.L.M. 1439 (not in force) [hereinafter CTBT]. START I includes nineteen articles, as well as six attached protocols, an annex of thirty-eight "agreed statements," and several other related instruments; the CWC includes twenty-four articles, three annexes, and other documents; and the CTBT includes seventeen articles, two annexes, a protocol and other items. *But see* Strategic Offensive Reductions Treaty, U.S.-Russ., May 24, 2002, 944 U.N.T.S. 3 (demonstrating a very brief U.S.-Russia arms control treaty that incorporated provisions of START I).

9. *See, e.g.* START I, *supra* note 8, at Annex on Terms and Their Definitions (defining 124 terms); CWC, *supra* note 8, art. II (defining fourteen terms).

10. *See, e.g.* START I, *supra* note 8, art. II (requiring parties to reduce nuclear weapons in three stages, with benchmarks at three, five, and seven years); CWC, *supra* note 8, at Annex on Implementation and Verification, Part IV(A)C.17 (specifying the timetable for destruction of chemical weapons, with interim deadlines at two, five, seven, and ten years).

arrangements.<sup>11</sup> Importantly, weapons-related treaties nowadays demonstrate fastidious attention to provisions for “verification” of parties’ compliance with the commitments, and drafters stay at the bargaining table until they have hammered out minute details about data reporting, confirmatory inspections, and mechanisms for resolution of disputes.<sup>12</sup> Unsurprisingly, these modern arms control agreements are prolix: the 1991 START I Agreement, for example, is 257 pages long; the 1993 Chemical Weapons Convention (“CWC”) runs to ninety-seven pages; and the 1996 Comprehensive Test Ban Treaty (“CTBT”) is sixty-one pages.<sup>13</sup>

The gestation period for these documents reflects their length and overall state of development. The Kellogg-Briand pact was crafted in about eight months, via a series of exchanges of diplomatic notes;<sup>14</sup> it entered into force eleven months after signature.<sup>15</sup> In contrast, the United States and the Soviet Union brokered START I over a period of nine years;<sup>16</sup> the negotiation of the CWC required only a slightly less extended process;<sup>17</sup> and the CTBT talks consumed about two and one half years.<sup>18</sup> After signature, the hiatus before entry into force for START I was three and one half years;<sup>19</sup> for the CWC, more than four

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11. See, e.g., START I, *supra* note 8, art. XV (establishing a Joint Compliance and Inspection Commission); CWC, *supra* note 8, art. VIII (establishing the Organization for the Prohibition of Chemical Weapons); CTBT, *supra* note 8, art. II (establishing the Comprehensive Nuclear-Test-Ban Treaty Organization).

12. See, e.g., START I, *supra* note 8, art. XI; CWC, *supra* note 8, at Annex on Implementation and Verification; CTBT, *supra* note 8, art. IV.

13. Page lengths are taken from THOMAS GRAHAM, JR. & DAMIEN J. LAVERA, CORNERSTONES OF SECURITY: ARMS CONTROL TREATIES IN THE NUCLEAR ERA (2003) (START I is found on pages 889-1145; CWC is found on pages 1170-1266; and CTBT is found on pages 1380-1440). Published in this format, the Kellogg-Briand Pact would be less than one page.

14. HANS WEHBERG, THE OUTLAWRY OF WAR: A SERIES OF LECTURES DELIVERED BEFORE THE ACADEMY OF INTERNATIONAL LAW AT THE HAGUE AND IN THE INSTITUT UNIVERSITAIRE DE HAUTES ÉTUDES INTERNATIONALES AT GENEVA 72-74, 78 (Edwin H. Zeydel trans., 1931).

15. The Kellogg-Briand Pact was signed on August 27, 1928 and entered into force on July 24, 1929. *Kellogg-Briand Pact 1928*, YALE UNIV. AVALON PROJECT, available at <http://www.yale.edu/lawweb/avalon/imt/kbpact.htm> (last visited Dec. 18, 2014)[hereinafter YALE UNIV. AVALON PROJECT].

16. GRAHAM, JR. & LAVERA, *supra* note 13, at 884-85 (START negotiations began in July 1982; the treaty was signed on July 31, 1991).

17. *Id.* at 1168-70 (CWC negotiations began in earnest in 1984; the treaty was signed on January 13, 1993).

18. *Id.* at 1377-79 (CTBT negotiations opened in early 1994; the treaty was signed on September 24, 1996).

19. *Id.* at 885-87 (START I was signed on July 31, 1991 and entered into force on

years;<sup>20</sup> and the CTBT is still not in force, despite having been opened for signature on September 24, 1996.<sup>21</sup>

Kellogg-Briand thus manifests the benefits and disadvantages of brevity. In it, the parties (acting “in the names of their respective peoples”<sup>22</sup>) “condemn recourse to war for the solution of international controversies, and [reciprocally] renounce it as an instrument of national policy.”<sup>23</sup> They further agree that all disputes or conflicts among themselves, of whatever nature or origin, shall be resolved exclusively via “peaceful means.”<sup>24</sup>

And that’s essentially it. The treaty does not define “war” or explain exactly what it means to condemn or renounce it; it does not enlighten the reader regarding the notion of rejecting war specifically “as an instrument of national policy.”<sup>25</sup> Importantly (as elaborated

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December 5, 1994).

20. *Id.* at 1170 (CWC was signed on January 13, 1993 and entered into force on April 29, 1997).

21. *Id.* at 1379 (date of signature of CTBT).

22. Kellogg-Briand Pact, *supra* note 1, art. I; see Edward A. Harriman, *The Effect of the Kellogg-Briand Treaty*, 9 B.U. L. REV. 239, 240 (1929) (noting that this is a novel phrase in treaties; it has no legal effect, but symbolically suggests a change in the general theory of statehood, with governments now acting as agents of their people).

23. Kellogg-Briand Pact, *supra* note 1, art. I; see WEBBERG, *supra* note 14, at 82-83 (arguing that this language in the Kellogg-Briand Pact amounts to “outlawing” war; the phrase “outlawry of war” is hardly more than a catch-word repeated by everyone,” but the vocabulary of condemnation and renunciation expresses more clearly what is desired); SHOTWELL, *supra* note 7, at 103, 07 (discussing the American origins of the concept of “outlawry,” and its modification by Briand).

24. Kellogg-Briand Pact, *supra* note 1, art. II.

25. WEBBERG, *supra* note 14, at 76, 85, 98-99 (noting that this phrase could be interpreted to permit a war undertaken for a purpose other than “national policy,” such as a means of “international policy,” to assert a “religious” dogma or a philosophy of life, or to crush the communist Soviet Union); see Harriman, *supra* note 22, at 246 (arguing that war “as an instrument of national policy” includes all wars undertaken in pursuance of national claims or in promotion of national interests, other than wars of self-defense); DIPLOMATIC NOTE FROM THE SOVIET GOVERNMENT CONTAINING ITS ADHESION TO THE PEACE PACT, AUGUST 31, 1928, reprinted in J.W. WHEELER-BENNETT, INFORMATION ON THE RENUNCIATION OF WAR 1927-1928, at 181, 184 (1928) (official comments of Soviet Union, objecting to the “national policy” phrase in the Kellogg-Briand Pact and asserting that all wars should be forbidden, including those undertaken for the purpose of oppression of national liberation movements); DAVID HUNTER MILLER, THE PEACE PACT OF PARIS: A STUDY OF THE BRIAND-KELLOGG TREATY 38-42 (1928) (contrasting the early French focus on renouncing wars of aggression with the U.S. focus on war as an instrument of policy); ROBERT H. FERRELL, PEACE IN THEIR TIME: THE ORIGINS OF THE KELLOGG-BRIAND PACT 66 (1968) (suggesting that the phrase “as an instrument of national policy” might have originated as a derivative from the famous dictum of Karl von Clausewitz that war is an instrument of policy, a continuation of politics by other means); SHOTWELL, *supra* note 7, at 209-19 (emphasizing that the structure of Kellogg-Briand amounts to “defining war without



below) the negotiators fully appreciated that “defensive” war – waged in opposition to an enemy’s aggression – would remain legitimate, yet they never alluded to that distinction in the text, and nowhere attempted to explicate the crucial offensive/defensive bifurcation. Kellogg-Briand has no provisions for verification or enforcement of compliance; there is no institutional mechanism to monitor parties’ performance or inflict coordinated sanctions on violators. Moreover, the treaty did nothing to mitigate the vast and growing war-making capabilities of its parties – it has no arms limitation or reduction provisions. Nor did it specify or suggest what is included in the obligatory “pacific means” or create any new dispute-resolution institutions or avenues.

The treaty does specify some of the legal procedural provisions that are now common in modern agreements – it requires ratification by the original signatories and allows other states to join subsequently as well, and it entrusts to the United States the specified duties of a depositary<sup>26</sup> – but it is bereft of any provisions for duration, withdrawal, or amendment.

Kellogg-Briand was ratified by its original fifteen parties and by thirty-two others by July 24, 1929, when it entered into force; eight more joined shortly thereafter.<sup>27</sup> Today, the treaty has seventy parties, including representatives from every continent except Antarctica.<sup>28</sup>

The most significant sleight-of-hand in crafting Kellogg-Briand was the juxtaposition of the seemingly “absolute” rhetoric (apparently renouncing all war without exception or limitation) together with a *sub silentio* preservation of a right to respond with force against a neighbor’s unprovoked aggression, and even a recognition of the obligations, imposed by other balance-of-power agreements of the age, to come to the aid, by military means if necessary, of an allied state that had been victimized by an enemy’s unwarranted use of military force.<sup>29</sup>

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a definition.”).

26. Kellogg-Briand Pact, *supra* note 1, art. III.

27. YALE UNIV. AVALON PROJECT, *supra* note 15.

28. *Treaties in Force 2013*, U.S. DEP’T ST. at 467, available at <http://www.state.gov/documents/organization/218912.pdf> (last visited Dec. 18, 2014) (listing treaties in force for the United States on January 1, 2013).

29. See WEHBERG, *supra* note 14, at 34-36, 73-77, 85 (treaty negotiators agreed that defensive war would be permitted, without reflecting that consensus in the text of the document); Diplomatic note from Mr. Kellogg to M. Claudel, February 27, 1928, reprinted in WHEELER-BENNETT, *supra* note 25, at 85; *General Pact for the Renunciation of War: Hearings before the Committee on Foreign Relations*, 70th Cong. 2 (Dec. 7 and 11, 1928) (statement of Frank B. Kellogg, Secretary of State), available at [http://avalon.law.yale.edu/20th\\_century/kbhear.asp](http://avalon.law.yale.edu/20th_century/kbhear.asp) (last visited Dec. 18, 2014) [hereinafter *Hearings*] (affirming that a party to the Locarno Treaty could lawfully come to the aid of a

In addition, the participants understood that other important “escape hatches” persisted – the United Kingdom made clear that it would continue to fulfill what it regarded as special obligations regarding its vast overseas empire,<sup>30</sup> and the United States retained Monroe Doctrine rights that might seem inconsistent with complete outlawry of war.<sup>31</sup> But the text nowhere addresses these ineffable complexities.<sup>32</sup>

## II. THE ANTECEDENTS AND SEQUELAE OF KELLOGG-BRIAND

How did the world get to the 1928 treaty? The social history of the convention was, of course, grounded in the trauma of World War I – the supposed “war to end all wars” that did not quite work out that way. Three factors, in particular, stand out. First, the epochal horror and absurdity of that senseless blood-letting – the planet stumbling into a conflagration that seemingly no one wanted and no one benefitted from – propelled a consciousness that future pyrrhic conflicts: a) must be avoided and b) could be avoided.<sup>33</sup> Warfare had become so devastating,

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treaty partner who had been attacked; the Kellogg-Briand Pact would not inhibit that act of cooperative self-defense, but would also not require the United States to join it); see also Vilho Harle, *The Implementation of Peace Ideas: The Case of Outlawry of War*, 10 HIST. EUR. IDEAS 677, 684 (1989) (arguing that because the Kellogg-Briand Pact permitted defensive war, “it was a total failure” for the idea of outlawry.)

30. See SHOTWELL, *supra* note 7, at 200-08 (discussing the “British Monroe Doctrine”); WEHBERG, *supra* note 14, at 77, 86; WHEELER-BENNETT, *supra* note 25, at 36-40; Diplomatic Note Reply of the British Government, May 19, 1928, reprinted in WHEELER-BENNETT, *supra* note 25, at 115; *Hearings*, *supra* note 29, at 4 (Kellogg describing the British position on defending interests throughout the empire); FERRELL, *supra* note 25, at 180.

31. WEHBERG, *supra* note 14, at 85 (“There is also no doubt that America does not look upon disputes concerning the Monroe Doctrine as matters of purely national policy.”); see Harriman, *supra* note 22, at 249 (noting that the report of the Senate Foreign Relations Committee interpreting the Kellogg-Briand Pact asserted that the Monroe Doctrine is part of the U.S. system of national defense); see *Hearings*, *supra* note 29, at 10-11; Congressional Record vol. 70-a, 70th Cong. 2, Jan. 15, 1929, p. 1730 (quoting report of Senate Foreign Relations Committee).

32. *Hearings*, *supra* note 29, at 6 (colloquy between Senator Reed and Secretary Kellogg regarding the reliance upon diplomatic notes to alter the plain meaning of the treaty); Henry Cabot Lodge, *The Kellogg-Briand Peace Pact: A Contemporary Criticism*, TEACHINGAMERICANHISTORY.ORG 2 (Dec. 1928), available at <http://teachingamericanhistory.org/library/document/the-kellogg-briand-peace-pact-a-contemporary-criticis-m-1928-29/> (last visited Dec. 18, 2014) (criticizing the use of diplomatic notes, sent prior to conclusion of the treaty, as expressions of reservations to the text).

33. J.M. WINTER, *THE EXPERIENCE OF WORLD WAR I*, at 202-21 (Oxford Univ. Press 1989) (1988); SAMUEL HYNES, *A WAR IMAGINED*, 269-352 (1990); Jennifer Llewellyn, Jim Southey & Steve Thompson, *The Human Cost of World War I*, ALPHA HISTORY, available at <http://alphahistory.com/worldwar1/human-cost/> (last visited Dec. 18, 2014) (estimating at

so expensive in blood and treasure, that it could no longer be sustained; the habit or tradition of armed combat simply had to be abandoned.<sup>34</sup> Populations could exert control, or at least influence, over their sovereign decision-making, and could unite to banish too-easy recourse to international violence.<sup>35</sup>

Second was a growing appreciation for the efficacy of international law – a new belief that legal tools, institutions, and procedures could play a leading role in the world's escape from warfare. The 1919 Covenant of the League of Nations<sup>36</sup> provides the most vivid illustration

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least twelve million deaths and twenty million serious injuries from World War I, as well as a significant social psychological sense of loss); John Simkin, *Financial Cost of the First World War*, SPARTACUS EDUC. (Sept. 1997), available at <http://spartacus-educational.com/FWWcosts.htm> (last visited Dec. 18, 2014) (calculating a total of over \$185 billion costs of World War I to the combatant states). *But see* MICHAEL HOWARD, *THE INVENTION OF PEACE: REFLECTIONS ON WAR AND INTERNATIONAL ORDER* 55-59 (2000) (arguing that World War I was not “accidental”; many people welcomed it with enthusiasm).

34. SHOTWELL, *supra* note 7, at 36 (asserting that war “is no longer a safe instrument for statesmanship . . . it is too dangerous to employ.”); Akira Iriye, *The Globalizing of America*, 3 CAMBRIDGE HIST. AM. FOREIGN REL. 103 (1993) (describing the peace movement of the 1920s as a global “hegemonic ideology”); Jacob Heilbrunn, *The Case for Normal Angell*, NAT'L INT. (Sept. – Oct. 2013).

35. SHOTWELL, *supra* note 7, at 14-15 (discussing the “recognized principle of international law” in the eighteenth and nineteenth centuries that a sovereign state “is entirely free to strike at any adversary or to work its will by force and to accept no curb upon its power save only such as it may agree to in the exercise of its very sovereignty.”); Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, 36 (1946) (explaining that prior to the Kellogg-Briand Pact, a central idea of international law was that a state had the right to resort to war not only to defend its legal rights, but to destroy the legal rights of others; according to Machiavelli, any war which is necessary is just); Robert H. Jackson, *The Legal Basis of Our Defense Course: We Are Creating Important Precedents* (March. 27, 1941), available at <http://www.ibiblio.org/pha/policy/1941/1941-03-27a.html> (last visited Dec. 18, 2014) (arguing that under the traditional view, there is no law to keep the peace, so all wars are legal; this view was swept away in the twentieth century); FERRELL, *supra* note 25, at 14 (observing that “The ‘intrusion’ of public opinion into foreign policy nonetheless was a notable fact of the period after the 1918 Armistice, which professional diplomats had to reckon with whether they liked it or not.”); John Norton Moore, *Strengthening World Order: Reversing the Slide to Anarchy*, 4 AM. U. J. INT'L L. & POL'Y 1, 9 (1989) (saying that Kellogg-Briand “reflected a fundamental shift in the history of conflict management that may have been the single most important intellectual leap in history.”); Barry Kellman, *Of Guns and Grotius*, 7 J. NAT'L SECURITY L. & POL'Y 465 (2014) (surveying evolving trends in legal history regarding international warfare); WEHBERG, *supra* note 14, at 32 (suggesting that education of American and global public opinion became a moral force strongly promoting the Kellogg-Briand Pact); *see also* WEHBERG, *supra* note 14, at 2-5 (discussing the ancient “just war” tradition, which maintained that a just war had to have a just cause).

36. *See generally* Treaty of Versailles Part I, June 28, 1919, 2 Bevans 235, 13 A.J.I.L. Supp. 151 [hereinafter League of Nations Covenant]; *see also* James Barros, *The League of Nations and Disarmament*, in 2 ENCYCLOPEDIA ARMS CONTROL & DISARMAMENT 605

of this conviction. That instrument not only established the first permanent global security institutions (a Council of leading states, supported by a more inclusive Assembly and a permanent Secretariat),<sup>37</sup> it specified that any war or threat of war would be an emergency of concern to all states;<sup>38</sup> that mandatory dispute resolution procedures would apply to all discord that might lead to a rupture of the peace;<sup>39</sup> and that a three-month “cooling off period” would have to intervene before an aggrieved state could resort to war.<sup>40</sup> These sinews of legal process, it was hoped, could abate any rush to war, providing additional opportunities for diplomacy to intervene, and could deter aggression by assembling a staunch front of nations united in opposition.<sup>41</sup>

Another critical manifestation of the newfound affinity for law was the burgeoning “outlawry” movement in the United States and elsewhere.<sup>42</sup> Faith grew that a public declaration that war was now illegitimate could make a difference – that the labels and concepts of law were impactful. The hypotheses that war should be officially condemned as “illegal,” and that such a designation mattered, were hot topics in public international discourse, and various drafts of an outlawry instrument were eagerly circulated and vigorously debated.<sup>43</sup>

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(Richard Dean Burns ed., 1993).

37. League of Nations Covenant, *supra* note 36, arts. 2, 4.

38. *Id.* art. 11.

39. *Id.* arts. 12, 13, 15.

40. *Id.* art. 12.

41. Moore, *supra* note 35, at 7 (noting that under the Covenant of the League of Nations, “the lawfulness of resort to war was primarily defined in procedural terms.”).

42. WEHBERG, *supra* note 14, at 5-9 (describing peace and outlawry movements just before and after World War I); *id.* at 17-20 (discussing the origins of the American outlawry movement); FERRELL, *supra* note 25, at 31-37; Sandi E. Cooper & Lawrence S. Wittner, *Transnational Peace Movements and Arms Control*, in 1 ENCYCLOPEDIA ARMS CONTROL & DISARMAMENT 491 (Richard Dean Burns ed., 1993); Harle, *supra* note 29, at 678 (asserting that “[t]he movement for the complete outlawry of war originated in the United States.”).

43. WEHBERG, *supra* note 14, at 7-8 (describing early draft treaties); *id.* at 64-67 (discussing prominent proposed outlawry treaty drafted by American professors); FERRELL, *supra* note 25, at 86-87 (describing catalytic drafting role of American professors James T. Shotwell and Joseph P. Chamberlain); SHOTWELL, *supra* note 7, at 53-70, 271-78 (presenting influential early draft outlawry treaty); *see also* Aristide Briand, Speech at the Signing of the Kellogg-Briand Pact (Aug. 27, 1928) (official translation), *reprinted* in WHEELER-BENNETT, *supra* note 25, at 171, 174 (emphasizing that war, which had previously been a “divine right” and an “attribute of sovereignty” was now being deprived of its legitimacy; emphasizing that solemn international legal process constituted “a direct blow to the institution of war, even to its very vitals.”); Frank B. Kellogg, *Address to the Council on Foreign Relations, New York* (Mar. 15, 1928), available at <http://www.foreignaffairs.com/articles/68889/frank-b-kellogg-secretary-of-state/the-war-prevention-policy-of-the-united-states> [hereinafter *Kellogg Address to the Council on Foreign Relations*] (noting that treaties alone cannot “afford a certain guarantee against

Third, it is noteworthy that the contemplated legal and political undertakings were to be public and multilateral. Reflecting the first of President Woodrow Wilson's celebrated 1918 "Fourteen Points" ("Open covenants of peace, openly arrived at"<sup>44</sup>), this notion rejected backroom transactions and private balance-of-power bargaining between selected state partners. Self-serving "special deals" between particular sovereigns were suspect – this was one of the leading reasons why the United States insisted upon expanding the original French proposal for a bilateral treaty into the global Kellogg-Briand accord.<sup>45</sup>

#### A. Three Types of Anti-War Treaties.

The first decades of the twentieth century therefore proved a fertile period for the progressive development of international law in opposition to war. Three noteworthy streams of international agreements emerged (with some documents contributing to more than one objective), and each resonates into the modern era: dispute resolution, disarmament, and outlawry.

First, the era witnessed a vivid flowering of alternative dispute-resolution mechanisms and fora. For example, the Permanent Court of Arbitration – "the first global mechanism for the settlement of disputes between states"<sup>46</sup> – was established in 1900, pursuant to the First Hague Peace Conference. A companion institution, the Permanent Court of International Justice – the first "world court" – was created as part of

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those conflicts between nations," but asserting that legal implements help the world make great strides toward pacific adjustments of international disputes); Joseph Preston Baratta, *The Kellogg-Briand Pact and the Outlawry of War*, in 2 ENCYCLOPEDIA ARMS CONTROL & DISARMAMENT 695, 699 (Richard Dean Burns ed., 1993) (noting that supporters likened the outlawry of war to the abolition of dueling, which had once been commonplace, but eventually lost its "aura of honor" and was finally "put down as an odious abuse.").

44. Woodrow Wilson, President of the United States, *Address to the Joint Session of Congress: Fourteen Points* (Jan. 8, 1918), available at [http://avalon.law.yale.edu/20th\\_century/wilson14.asp](http://avalon.law.yale.edu/20th_century/wilson14.asp) (last visited Jan. 9, 2015) [hereinafter *President Woodrow Wilson, Fourteen Points*]. Point I states "[o]pen covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in public view" and the first paragraph of the presentation introducing the fourteen points asserts that the day of "secret covenants entered into in the interest of particular governments" is gone by. *Id.*

45. WEHBERG, *supra* note 14, at 72-73; WHEELER-BENNETT, *supra* note 25, at 20-26.

46. *Permanent Court of Arbitration: History*, PERMANENT CT. ARBITRATION, available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1044](http://www.pca-cpa.org/showpage.asp?pag_id=1044) (last visited Dec. 18, 2014); *The Court: History*, INT'L CT. JUST., available at <http://www.icj-cij.org/court/index.php?p1=1&p2=1> (last visited Dec. 18, 2014) (tracing the history of international arbitration to the 1794 Jay Treaty between the United States and Great Britain; observing that the name "permanent court" does not accurately describe the arbitration institution).

the Covenant of the League of Nations, becoming operational in 1922.<sup>47</sup> International arbitration of all types and formats was greatly in fashion in this period, with a series of multilateral and bilateral engagements committing countries to pursue exclusively non-violent reconciliation.<sup>48</sup> For the United States, a flurry of "Bryan treaties" (named for Secretary of State William Jennings Bryan, who fostered the negotiations, beginning in 1913) ultimately grew to forty-eight international agreements binding the parties to conciliation processes and to refrain from resorting to hostilities while talks were pending.<sup>49</sup>

Second, regarding disarmament, Wilson's fourth "Point," as elaborated in Article 8 of the Covenant of the League of Nations, recognized that "the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety."<sup>50</sup> The most prominent successes in this sector were the 1921-22 Washington Naval Conference and the 1925 Geneva Protocol.<sup>51</sup> The Washington Conference generated a fistful of interlocking treaties limiting the naval assets of the United States, Great Britain, Japan, and other key players, principally by establishing a 5:5:3 ratio for the tonnage that the three chief protagonists could deploy.<sup>52</sup> This

47. *The Court: History*, INT'L CT. JUST., available at <http://www.icj-cij.org/court/index.php?p1=1&p2=1> (last visited Dec. 18, 2014); League of Nations Covenant, *supra* note 36, art. 14; Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031; T.S. 993.

48. WEHBERG, *supra* note 14, at 14 (discussing several treaties concluded in the 1920s among European states containing provisions for mandatory arbitration to resolve disputes); Manley O. Hudson, *The Inter-American Treaties of Pacific Settlement*, FOREIGN AFF. (Oct. 1936) (describing arbitration and conciliation treaties establishing a system of pacific settlement for the Americas); David J. Hill, *The Second Peace Conference at The Hague*, 1 AM. J. INT'L L. 671, 681-84 (1907) (listing arbitration treaties).

49. *Bryan Treaties*, in WEST'S ENCYCLOPEDIA OF AMERICAN LAW, (2nd ed. 2005) (also noting that few disputes were actually submitted to these arbitral procedures); Harold Josephson, *Outlawing War: Internationalism and the Pact of Paris*, 3 DIPLOMATIC HIST. 377, 383 (Oct. 1979) (reporting that President Hoover negotiated twenty-five arbitration treaties and seventeen conciliation treaties); see Hudson, *supra* note 48; *Kellogg Address to the Council on Foreign Relations*, *supra* note 43 (discussing eighteen Bryan treaties then in force, as well as two multilateral conciliation treaties with Central and South American states).

50. *President Woodrow Wilson, Fourteen Points*, *supra* note 44, at point IV; League of Nations Covenant, *supra* note 36, art. 8.

51. See Iriye, *supra* note 34, at 78 (concluding that the 1920s was the only recent decade in which actual arms reductions took place; "there was in the world less armament in 1929 than in 1919.").

52. Treaty for the Limitation of Armament, Feb. 6, 1922, 25 T.S. 201 (also referred to as the Five Power Treaty/Agreement); *The Washington Naval Conference, 1921-1922*, U.S. DEP'T ST., available at <http://history.state.gov/milestones/1921-1936/naval-conference> (last visited Jan. 9, 2015); *1921-1922 Washington Naval Conference*, GLOBAL SECURITY,

instrument led to the scrapping of several capital ships by each country and the cancellation of plans for what would otherwise have become an expensive and destabilizing arms race in battleship construction.<sup>53</sup> The Geneva Protocol,<sup>54</sup> responding to the particularly loathsome use of chemical weapons in the trenches of World War I,<sup>55</sup> created a prohibition on “asphyxiating, poisonous or other gases, and of bacteriological methods of warfare.”<sup>56</sup> It attracted widespread adherence and remained for half a century the world’s strongest legal bulwark against those insidious forms of combat.<sup>57</sup>

Finally, the particular concept of outlawing or renouncing war was expressed in several treaties, resolutions, and other commitments. Noteworthy in this regard were the 1925 Locarno treaties,<sup>58</sup> the most important of which (the “Rhineland Pact”<sup>59</sup>) incorporated reciprocal promises by Germany and Belgium, and by Germany and France, “that they will in no case attack or invade each other or resort to war against

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available at <http://www.globalsecurity.org/military/world/naval-arms-control-1921.htm> (last visited Jan. 9, 2015); Thomas H. Buckley, *The Washington Naval Limitation System 1921-1939*, in 3 *ENCYCLOPEDIA OF ARMS CONTROL AND DISARMAMENT* 369 (Richard Dean Burns ed., 1993). In addition to the Five Power Treaty, separate overlapping agreements were concluded as the Four Party Treaty, the Nine Power Treaty, and others. Under the Five Power agreement, the United States and Great Britain were each allowed to deploy capital ships totaling 525,000 tons displacement; Japan was allowed 315,000 tons, and Italy and France 175,000 tons each. Additionally, battleships and aircraft carriers were limited in size.

53. Iriye, *supra* note 34, at 75-78 (reporting that these agreements would result in the United States destroying thirty of its forty-eight large ships (in being or under construction), Britain would reduce its navy from forty-five to twenty warships, and Japan would destroy seventeen of its twenty-seven warships).

54. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571 [hereinafter Geneva Protocol].

55. See generally L.F. HABER, *THE POISONOUS CLOUD: CHEMICAL WARFARE IN THE FIRST WORLD WAR* (1986); ROBERT HARRIS & JEREMY PAXMAN, *A HIGHER FORM OF KILLING: THE SECRET HISTORY OF CHEMICAL AND BIOLOGICAL WARFARE* (1982); JONATHAN B. TUCKER, *WAR OF NERVES: CHEMICAL WARFARE FROM WORLD WAR I TO AL-QAEDA* (2006); see also GRAHAM, JR. & LAVERA, *supra* note 13, at 7-8.

56. Geneva Protocol, *supra* note 54.

57. See GRAHAM, JR. & LAVERA, *supra* note 13, at 7-10. The Geneva Protocol was eventually supplemented by the 1972 Biological Weapons Convention (Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction), April 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163, T.I.A.S. No. 8062 and the CWC, *supra* note 8.

58. WEHBERG, *supra* note 14, at 32-40 (emphasizing the Locarno treaties as a major accomplishment); FERRELL, *supra* note 25, at 48-49 (discussing the hopeful “spirit of Locarno” generated by those treaties).

59. Treaty of Mutual Guarantee Between Germany, Belgium, France, Great Britain, and Italy, Oct. 16, 1925, 54 L.N.T.S. 305.

each other,"<sup>60</sup> with Great Britain and Italy acting as guarantors of the peace.<sup>61</sup> In the Western Hemisphere, the Fifth International Conference of American States, meeting in Santiago, Chile in May 1923, adopted a Treaty to Avoid or Prevent Conflicts,<sup>62</sup> and the sixth such conference, in Havana in February 1928, passed two resolutions similarly expressing the participants' unqualified condemnation and prohibition of war in their mutual relations.<sup>63</sup>

### B. *The Evolution of the Kellogg-Briand Pact.*

The peripatetic French Foreign Minister, Aristide Briand (who had shared the Nobel Peace Prize in 1926 for his work on the Locarno treaties<sup>64</sup>), attempted to build on that European success by proposing a cognate U.S.-France peace bond.<sup>65</sup> His interlocutor in the Coolidge Administration, Secretary of State Frank B. Kellogg,<sup>66</sup> welcomed the initiative, but insisted upon multilateralizing it, to embrace all the key international players of the era.<sup>67</sup> A draft treaty quickly took shape, via a series of diplomatic notes – Kellogg preferred correspondence to face-to-face meetings, fearing that a formal conference would inevitably engage legions of lawyers, who would jeopardize the enterprise by burdening it with unnecessary details and complexity.<sup>68</sup>

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60. *The Locarno Pact*, AVALON PROJECT art. 2. (2008), available at [http://avalon.law.yale.edu/20th\\_century/locarno\\_001.asp](http://avalon.law.yale.edu/20th_century/locarno_001.asp) (last visited Dec. 18, 2014). These commitments would not apply in the case of legitimate defense against an unprovoked act of aggression. See *id.*

61. *Id.* arts. 1, 5. In case of a flagrant violation of article 2, the other parties to the treaty agree to come to the aid of the victim. *Id.* art. 4 (3).

62. Treaty to Avoid or Prevent Conflicts between the American States, May 3, 1923, 33 L.N.T.S. 25.

63. WHEELER-BENNETT, *supra* note 25, at 25; WEHBERG, *supra* note 14, at 68-72; Kellogg Address to the Council on Foreign Relations, *supra* note 43.

64. See *Aristide Briand - Biographical*, NOBELPRIZE.ORG, available at [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/1926/briand-bio.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/1926/briand-bio.html) (last visited Dec. 18, 2014); FERRELL, *supra* note 25, at 62-65.

65. See WEHBERG, *supra* note 14, at 64, 72-73; WHEELER-BENNETT, *supra* note 25, at 19; SHOTWELL, *supra* note 7, at 41-52, 71-77; FERRELL, *supra* note 25, at 68-83; MILLER, *supra* note 25, at 7-12.

66. See *Biographies of the Secretaries of State: Frank Billings Kellogg*, U.S. DEP'T ST., available at <http://history.state.gov/departmenthistory/people/kellogg-frank-billings> (last visited Dec. 18, 2014); see FERRELL, *supra* note 25, at 79-83.

67. See WEHBERG, *supra* note 14 at 73-74; WHEELER-BENNETT, *supra* note 25, at 21-23.

68. See *Hearings*, *supra* note 29, at 4 (Kellogg explaining that a multilateral meeting of lawyers "would be the end of any treaty"); SHOTWELL, *supra* note 7, at 128-44 (describing the early Franco-American negotiations); MILLER, *supra* note 25, at 20-37, 154-83 (French and U.S. diplomatic notes); WHEELER-BENNETT, *supra* note 25; YALE UNIV.



When the draft treaty was ready for prime time, Kellogg circulated it to two tiers of countries: first, those fifteen who would be stylized as original High Contracting Parties, whose ratification would be required for entry into force;<sup>69</sup> and second, a miscellaneous wider array, who would be invited to affiliate immediately or at any subsequent time.<sup>70</sup> Remarkably, all the solicited first wave of countries joined on with alacrity; few if any modifications in the original text of the document were proposed.<sup>71</sup> The imperative for speed was pronounced, prompted by agitation from national publics, who were well aware of the contents and progress of the negotiations, and impatient that the articulation of a basic outlawry agreement was taking so long.<sup>72</sup> In fact, when the Soviet Union was invited to participate, among its complaints was the apprehension that the Kellogg-Briand ratification process might be unacceptably prolonged. Therefore, the Soviet Foreign Minister, Maxim Litvinov, negotiated a companion instrument, joined by Estonia, Latvia, Poland, and Romania, as well as the U.S.S.R., which accomplished an immediate effectuation, on substantially identical terms. This Litvinov Protocol entered into force on March 16, 1929, four months before Kellogg-Briand.<sup>73</sup>

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AVALON PROJECT, *supra* note 15 (collection of diplomatic notes leading to Kellogg-Briand Pact).

69. The original participants were selected to reach the major powers and additional states that had been engaged in conflicts with them, while not including so many states that prompt conclusion and entry into force of the treaty would be delayed. See WEHBERG, *supra* note 14, at 78-80; WHEELER-BENNETT, *supra* note 25, at 43; SHOTWELL, *supra* note 7, at 145-58, 172-76; MILLER, *supra* note 25, at 80-111.

70. See WEHBERG, *supra* note 14, at 78-79.

71. See WHEELER-BENNETT, *supra* note 25, at 28-51; WEHBERG, *supra* note 14, at 79; FERRELL, *supra* note 25, at 138-43, 192-200; SHOTWELL, *supra* note 7, at 192-93 (describing British reaction). Russia asserted numerous complaints about the text of the agreement (its failure to prohibit all war, its lack of disarmament commitments), but agreed to join. SHOTWELL, *supra* note 7, at 78-79; see Diplomatic Note from the Soviet Government Containing its Adhesion to the Peace Pact, *supra* note 25. Many additional states signaled their willingness to join soon; only Argentina and Brazil remained aloof. WEHBERG, *supra* note 14, at 80.

72. See WHEELER-BENNETT, *supra* note 25, at 52 (noting public criticism of perceived dilatory policy of United Kingdom government dealing with Kellogg-Briand); SHOTWELL, *supra* note 7, at vii, 83-92 (highlighting the growing power of public opinion); FERRELL, *supra* note 25, at 177, 183-85.

73. See Protocol for the Immediate Entry into Force of the Treaty of Paris arts. 1-II, Feb. 9, 1929, 89 L.N.T.S. 370. The Kellogg-Briand Pact is attached as an annex to the Litvinov Protocol; the effect of the Protocol is to bring Kellogg-Briand into force as soon as individual states ratify the Protocol, without waiting for all the original parties to the Pact to ratify it. *Id.* arts. 1, II. The Litvinov Protocol was later extended to include Turkey, Persia and Lithuania. See WHEELER-BENNETT, *supra* note 25, at 54-58; WEHBERG, *supra* note 14, at 79.

Subsequent lawmaking and interpretation<sup>74</sup> regarding all three themes of alternative dispute resolution, disarmament, and outlawry, continued unabated for another decade, before being punctured by the rise of Nazi and associated totalitarianism. Noteworthy accomplishments included the 1928 General Act for Pacific Settlement of International Disputes,<sup>75</sup> the 1933 Argentine Anti-war Treaty of Non-Aggression and Conciliation among the United States and Latin American partners,<sup>76</sup> and others.<sup>77</sup>

### C. *The Post-World War II Legacy.*

After World War II, including in the depths of the cold war, reminders of the spirit of Kellogg-Briand can be discerned in a variety of "confidence-building" measures (sometimes expanded into transparency-, confidence-, and security-building measures). Noteworthy in the roster of such accords would be bilateral U.S.-U.S.S.R. instruments, such as the 1963 agreement to establish the "hotline" and its 1971 and 1984 upgrades;<sup>78</sup> the 1971 Agreement on

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74. In September 1934, the International Law Association, meeting in Budapest, offered a weighty commentary of interpretation and reinforcement of the Kellogg-Briand Pact, emphasizing the stringency of its prohibitions. See generally *International Law Association, Briand-Kellogg Pact of Paris, Budapest Articles of Interpretation*, 20 TRANSACTIONS GROTIUS SOC'Y 205, 205-06 (1934); see also Josephson, *supra* note 49, at 381-82; Hersch Lauterpacht, *The Pact of Paris and the Budapest Articles of Interpretation*, 20 TRANSACTIONS GROTIUS SOC'Y 178 (1934).

75. See generally General Act for Pacific Settlement of International Disputes, Sept. 26, 1928, 71 L.N.T.S. 101 (replaced by 1949 revision).

76. See generally Anti-war Treaty of Non-aggression and Conciliation, Oct. 10, 1933, U.S.T.S 906, 163 L.N.T.S. 394 (also known as the Saavedra Lamas Treaty, terminated and replaced in 1948); see also Hudson, *supra* note 48.

77. See Philip C. Jessup, *Rights and Duties of States in Case of Aggression*, 33 AM. J. INT'L L. SUPP. 819, 824-25 (1939) [hereinafter Harvard Research] (concluding that of seventy-one states in the world, sixty-nine had accepted obligations to refrain from resort to armed force under some circumstances); *id.* at 848-52 (collecting treaties that deal with aggression); *id.* at 872 (concluding that "practically every State of the world, except perhaps Lichtenstein, Yemen, and one or two others of like magnitude, are parties to either the Covenant of the League, the Pact of Paris or the Argentine Anti-War Pact.").

78. See generally Memorandum of Understanding Between the United States of America and the Union of Soviet Socialist Republics Regarding the Establishment of a Direct Communications Link, U.S.- U.S.S.R., June 20, 1963, 472 U.N.T.S. 163; Agreement Between the United States of America and the Union of Soviet Socialist Republics on Measures to Improve the U.S.A.-U.S.S.R. Direct Communications Link, September 30, 1971, 806 U.N.T.S. 402; Agreement Between the United States of America and the Union of Soviet Socialist Republics to Expand the U.S.-U.S.S.R. Direct Communications Link, July 17, 1984, available at <http://www.state.gov/t/isn/4786.htm> (last visited Dec. 18, 2014). This sequence of agreements created, and sequentially upgraded, mechanisms for quick and reliable communications between the superpowers, to reduce the dangers of accidents or

Measures to Reduce the Risk of Outbreak of Nuclear War,<sup>79</sup> the 1972 Incidents at Sea Agreement;<sup>80</sup> the 1973 Prevention of Nuclear War Agreement;<sup>81</sup> the 1987 Agreement on the Establishment of Risk Reduction Centers,<sup>82</sup> and the 1988 Ballistic Missile Launch Notification Agreement.<sup>83</sup> Among multilateral instruments, the 1986 Stockholm Document on Confidence- and Security-Building Measures and Disarmament in Europe<sup>84</sup> and the associated Vienna Documents of 1990 and thereafter<sup>85</sup> stand out.

These agreements, for the most part, do not require countries to

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miscalculations that might cascade into nuclear war. *See* sources cited *supra*.

79. *See generally* Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War, U.S.-U.S.S.R., Sept. 30, 1971, 807 U.N.T.S. 57. This instrument included reciprocal pledges to maintain and improve organizational and technical arrangements to prevent the accidental or unauthorized use of nuclear weapons, and to notify each other in case of related incidents. *See id.*

80. *See generally* Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Incidents on and over the High Seas, U.S.-U.S.S.R., May 25, 1972, 852 U.N.T.S. 152. This treaty addresses the problem of near-collisions between the states' ships and aircraft, by adopting safety measures and signals and by avoiding provocative maneuvers. *See id.*

81. *See generally* Agreement on the Prevention of Nuclear War, U.S.-U.S.S.R., June 22, 1973, 917 U.N.T.S. 86. In this agreement, the two countries stated their objective "to remove the danger of nuclear war and the use of nuclear weapons." *Id.* art. I. The two countries also agreed, "that each Party will refrain from the threat or use of force against the other Party." *Id.* art. II.

82. *See generally* Agreement on the Establishment of Nuclear Risk Reduction Centers, U.S.-U.S.S.R., Sept. 15, 1987, 1530 U.N.T.S. 387. The Risk Reduction Centers supplement the hotline agreements, which are reserved for use by heads of the two governments, by providing a secure, reliable and routine mechanism for communication of non-crisis information, including the frequent notifications that must be exchanged pursuant to nuclear arms control agreements. *See id.*

83. *See generally* Agreement Between The United States of America and The Union of Soviet Socialist Republics on Notifications of Launches of Intercontinental Ballistic Missiles and Submarine-Launched Ballistic Missiles, U.S.-U.S.S.R., May 31, 1988, 27 I.L.M. 1200. Under this agreement, the parties provide twenty-four hours advance notice of the planned date, launch site and impact area of any launch of an intercontinental ballistic missile or submarine-launched ballistic missile. *See id.*

84. *See generally* Document of the Stockholm Conference on Confidence- and Security-Building Measures and Disarmament in Europe Convened in Accordance with the Relevant Provisions of the Concluding Document of the Madrid Meeting of the Conference on Security and Cooperation in Europe, Sept. 19, 1986, 26 I.L.M. 190. The Stockholm Document contains a variety of measures such as notification of upcoming military exercises, invitation of observers to monitor those exercises, and aerial and on-site inspections. *See id.*

85. *Vienna Document 1999 of the Negotiations on Confidence- and Security-Building Measures*, COM (1999) 1/99 final (Nov. 16, 1999). The Vienna Document called for increased transparency of military assets and activities, annual exchanges of information, and improved consultation procedures. *See id.*

limit or reduce their armed forces or armaments; they do not directly restrict participants' military deployments or operations. They do, however, enhance regional and global stability and security by committing the parties to a modicum of prudential self-restraint, mutual respect, and concern for how their ambiguous actions might be perceived by the other side; by reducing accidents, miscommunications, and misunderstandings that could cascade into calamity; and by instituting practices, exchanges, and transparency that can help reassure nervous countries that their neighbors and erstwhile foes are not secretly preparing an armed attack.<sup>86</sup>

Kellogg-Briand was the pathbreaker for these agreements, and reflected a remarkable degree of social consensus, inside the United States and around the world. The U.S. Senate, for example, provided its advice and consent to the treaty on January 16, 1929 by a resounding vote of 85-1.<sup>87</sup> The pact drew vigorous support from even the "Irreconcilables," such as Idaho Republican Senator William E. Borah, who had zealously opposed the Treaty of Versailles and U.S. participation in the League of Nations, but who considered legal abolition of warfare to be propitious.<sup>88</sup> Kellogg was awarded the Nobel

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86. Confidence-building measures of various sorts are employed in a wide variety of contexts, to promote peace and stability, even without directly reducing arms. See, e.g., *U.S. Dep't of St., Rep. of the U.S. Pursuant to Actions 5, 20, 21 of the 2010 Nuclear Non-Proliferation Treaty Review Conference Final Doc.*, U.S. DEP'T. ST. 12-14 (2014), available at <http://www.state.gov/documents/organization/225580.pdf> (last visited Dec. 18, 2014) [hereinafter *Actions Report*] (summarizing transparency and confidence-building measures adopted by the United States and others in response to demands from non-nuclear countries); *U.S. Rep. to the Org. of American States on the Application of Confidence and Security Building Measures for 2009 and 2010*, AG/RES.2447, U.S. DEP'T. ST. (2011), available at <http://www.state.gov/p/wha/rls/187741.htm> (last visited Dec. 18, 2014); *Rep. of the U.N. Group of Governmental Experts on Transparency and Confidence-Building Measures in Outer Space Activities*, A/68/189, UNITED NATIONS (2013), available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/68/189](http://www.un.org/ga/search/view_doc.asp?symbol=A/68/189) (last visited Dec. 11, 2014); Daryl Kimball, *Open Skies Treaty at a Glance*, ARMS CONTROL ASS'N (Oct. 2012), available at <http://www.armscontrol.org/factsheets/openskies> (last visited Dec. 18, 2014).

87. Congressional Record vol. 70-a, 70th Cong. 2, Jan. 15, 1929, p. 1731 (Senate vote on Kellogg-Briand); see FERRELL, *supra* note 25, at 252 (noting that John G. Blaine (Republican from Wisconsin) was the lone dissenter); Josephson, *supra* note 49, at 378-79 (explaining that Kellogg-Briand united diverse political constituencies; it promoted the interests of multiple factions); Herbert Hoover, U.S. President, Remarks Upon Proclaiming the Treaty for the Renunciation of War (Kellogg-Briand Pact) (July 24, 1929) (characterizing the treaty as "a proposal to the conscience and idealism of civilized nations. It suggested a new step in international law, rich with meaning, pregnant with new ideas in the conduct of world relations."); Baratta, *supra* note 43, at 703 (noting that the Kellogg-Briand Pact was displayed in post offices across the United States, "creating the impression that a historic event was afoot").

88. JOHN CHALMERS VINSON, WILLIAM E. BORAH AND THE OUTLAWRY OF WAR 59-70,

Peace Prize for his leadership of the treaty process, and was later appointed to the Permanent Court of International Justice (“PCIJ”).<sup>89</sup> The NGO community – perhaps best represented by Andrew Carnegie’s Endowment for International Peace, which had sponsored sequential high-visibility iterations of an anti-war treaty – was never stronger.<sup>90</sup>

President Calvin Coolidge enthused, as the Kellogg-Briand negotiations neared conclusion:

Had an agreement of this kind been in existence in 1914, there is every reason to suppose that it would have saved the situation and delivered the world from all the misery which was inflicted by the great war . . . . It holds a greater hope for peaceful relations than was ever before given to the world. If those who are involved in it, having started it will finish it, its provisions will prove one of the greatest blessings ever bestowed upon humanity.<sup>91</sup>

Barely a decade later, however, World War II – a different kind of war, with different causes and stakes – dealt a lasting blow to the whole concept of outlawry, and to Kellogg-Briand in particular.<sup>92</sup> The treaty continued to be frequently cited,<sup>93</sup> and the spirit animating the peace

122-32, 149-75 (Univ. of Ga., 1st ed. 1957); *William E. Borah*, ENCYCLOPEDIA BRITANNICA (2014), available at <http://www.britannica.com/EBchecked/topic/73799/William-E-Borah> (last visited Dec. 18, 2014); WEHBERG, *supra* note 14, at 18, 133 (reprinting one of Borah’s Senate resolutions in support of outlawry); see also FERRELL, *supra* note 25, at 33.

89. See *Biographies of the Secretaries of State: Frank Billings Kellogg*, *supra* note 66.

90. Carnegie founded the Endowment for International Peace in 1910, to “hasten the abolition of war, the foulest blot upon our civilization.” *Carnegie at 100: A Century of Impact*, CARNEGIE ENDOWMENT INT’L PEACE (2014), available at <http://carnegieendowment.org/about/?fa=centennial> (last visited Dec. 18, 2014). Experts affiliated with the Carnegie Endowment provided much of the public intellectual support for the concept of outlawry of war and drafted alternative versions of a treaty. See Josephson, *supra* note 49, at 379 (discussing contributions of James T. Shotwell and Joseph P. Chamberlain); see WHEELER-BENNETT, *supra* note 25, at 19; see FERRELL, *supra* note 25, at 21-23.

91. FERRELL, *supra* note 25, at 208 (Calvin Coolidge spoke about the Kellogg treaty in Wassau, Wisconsin on August 15, 1928).

92. See Josephson, *supra* note 49, at 387-88 (as World War II approached, most internationalists abandoned support for Kellogg-Briand, concluding that armed force was required to protect international peace and security against the dictators); Iriye, *supra* note 34, at 131-48 (the rise of totalitarianism threatened democracies in ways that institutions such as Kellogg-Briand could not address).

93. See Josephson, *supra* note 49, at 383 (U.S. Secretary of State Henry L. Stimson “invoked the Kellogg-Briand pact in the Sino-Russian conflict in Manchuria in 1929 and then again in the Sino-Japanese conflict during the early 1930s.”); *id.* at 386 (President Franklin D. Roosevelt and his Secretary of State Cordell Hull invoked the pact on numerous occasions in the late 1930s); Jackson, *supra* note 35, at 7 (calling the Kellogg-Briand Pact a cornerstone of U.S. foreign policy and stating that the United States had invoked it repeatedly); Baratta, *supra* note 43, at 696; Richard N. Current, *Consequences of the Kellogg Pact*, in *ISSUES AND CONFLICTS: STUDIES IN TWENTIETH CENTURY AMERICAN*

movement never fully retreated, but it was never again the centerpiece of international attention and diplomacy. After World War II, the conceit of Kellogg-Briand provided essential intellectual and legal underpinnings for the Nuremberg and Tokyo war crimes tribunals, substantiating the doctrine of prosecuting aggressors for “crimes against the peace.”<sup>94</sup>

In its ninth decade, however, the legacy of the Kellogg-Briand pact is often portrayed as one of abject failure and misguided idealism – the treaty is the poster child for those who would deride the whole concept of marshaling legal instruments to help constrain pernicious national behaviors. Of course we can’t meaningfully outlaw war, skeptics laugh – aspirational legal instruments are a weak reed against the tenacity of determined evil-doers. Only armed might, backed by eternal vigilance, counts for much in modern international confrontations; unverifiable and unenforceable declarations are not worth the parchment they’re written on, and serve only to lull the soft-hearted into a false sense of security.<sup>95</sup> Even those inclined to be sympathetic with the ambitions of the Kellogg-Briand enterprise tend to conclude, sadly, that it was

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DIPLOMACY 210, 212-15 (George L. Anderson ed., 1959).

94. Josephson, *supra* note 49, at 388 (allied prosecutors at Nuremberg emphasized the crime of conspiring to wage aggressive war in violation of Kellogg-Briand); Baratta, *supra* note 43, at 696-97; Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT’L L. 38, 54, (1947); Henry L. Stimson, *The Nuremberg Trial: Landmark in Law*, 25 FOREIGN AFF. 179, 183-84 (Jan. 1947).

95. See, e.g., Richard Perle, *Yes, Nukes: The Global Zero Utopia*, WORLD AFFS. J. (Mar./Apr. 2011), available at <http://www.worldaffairsjournal.org/article/yes-nukes-global-zero-utopia> (last visited Dec. 18, 2014) (describing “the illusion created by Kellogg-Briand” as one of the factors precipitating World War II; asserting that utopianism does not make the world more idealistic and may bring about the very evils the advocates are attempting to eliminate; and comparing the current effort to abolish nuclear weapons to Kellogg-Briand); Charles Krauthammer, *The Age of Obama: Anno Domini 2*, HERITAGE FOUND. (Feb. 1, 2010), available at <http://www.heritage.org/research/lecture/the-age-of-obama-anno-domini-2> (last visited Dec. 18, 2014) (describing Kellogg-Briand as “an absurdity” and a “useless treaty”); Andrei Shoumikhin & Baker Spring, *Strategic Nuclear Arms Control for the Protect and Defend Strategy*, HERITAGE FOUND. (May 4, 2009), available at <http://www.heritage.org/research/reports/2009/05/strategic-nuclear-arms-control-for-the-protect-and-defend-strategy> (last visited Dec. 18, 2014) (criticizing Kellogg-Briand as “ambitious and ultimately unachievable,” “utopian grandeur,” flawed in confusing ends with means, and giving the United States an “unfounded faith” that impeded effective response to Japanese aggression; also comparing modern arms control initiatives to Kellogg-Briand); Josephson, *supra* note 49, at 377 (noting the views of historians, journalists and commentators who deride Kellogg-Briand as naïve, feeble, a worthless piece of paper, or a diplomatic charade); Matthew J. Morgan, *A New Kellogg-Briand Mentality? The Anti-Personnel Landmine Ban*, 13 SMALL WARS & INSURGENCIES 97, 98 (2002) (commenting about Kellogg-Briand that “The futility of this endeavor cannot be exaggerated” and criticizing the effort to ban land mines as reminiscent of it).

largely a benighted, utopian failure.<sup>96</sup>

#### D. *Principal Attributes of Kellogg-Briand*

In concluding this section, the article attempts to extract some of the key features of Kellogg-Briand that may be relevant for twenty-first century conditions – especially nuclear conditions. These highlights might not rise to the level of “lessons learned” – and the article certainly does not contend that Kellogg-Briand was a flawless success – but there are at least “suggestions” from the heady 1928 experiences about traits that a nuclear version of the treaty might try to replicate (or to avoid).

##### 1. *Kellogg-Briand is Legally Binding.*

The aspirations of the drafters were lofty and their rhetoric was bold, and they chose to express their ambitions in the form of a written, legally binding treaty, rather than a hortatory “agreement in principle,” a joint statement of intentions, or a series of grand policy speeches.<sup>97</sup> Legally binding tools are not necessarily more important or more enduring, nor are they automatically more likely to be complied with, but this choice is not merely one of style.<sup>98</sup> The formalities of law – both international law and the domestic legal processes that individual states must follow in order to affiliate – signify a special depth of commitment and seriousness of purpose.<sup>99</sup>

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96. See FRANKLIN D. ROOSEVELT, *OUR FOREIGN POLICY: A DEMOCRATIC VIEW* 573, 585 (1928) (emphasizing that “war cannot be outlawed by resolution alone”); Josephson, *supra* note 49, at 385 (noting that prior to his election as president, Roosevelt considered Kellogg-Briand to be harmless but unrealistic); Baratta, *supra* note 43, at 698.

97. Under Article 2 of the Vienna Convention on the Law of Treaties, a treaty is “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” Here, the critical factor is that Kellogg-Briand is “governed by international law.” Vienna Convention on the Law of Treaties art. II, May 23, 1969, 1155 U.N.T.S. 331 (U.S. not a party).

98. Harriman, *supra* note 22, at 239, 252 (arguing that the legal effect of Kellogg-Briand is not as important or interesting as its political effect, but is noteworthy nonetheless); see Emily Cumberland, *The End of Treaties? An Online Agora*, AJIL UNBOUND (Apr. 28, 2014), available at <http://www.asil.org/blogs/end-treaties-online-agera> (last visited Dec. 18, 2014) (discussing the possible decline in formal treaties as a mechanism of cooperation in international law); see also *Treaty Survival*, GEORGE WASH. UNIV. (Apr. 9, 2014), available at <http://www.law.gwu.edu/News/2013-2014events/Pages/TreatySurvival.aspx> (last visited Dec. 18, 2014) (panel discussion of continued effectiveness of treaties in modern era).

99. See *Circular 175 Procedure*, U.S. DEP’T ST. (2014), available at <http://www.state.gov/s/l/treaty/c175/> (last visited Dec. 18, 2014) (noting that in U.S. practice, the Department of State oversees the “Circular 175 process,” which determines whether a particular international agreement will be structured as a legally binding

Moreover, Kellogg-Briand was not just any treaty, but an aggressively multilateral one, attracting the participation of virtually all the critical global players, and it was a fully public enterprise, in which civil society populations looked eagerly over the shoulders of the drafters.<sup>100</sup> The treaty both drew strength from, and reciprocally helped reinforce, the world-wide, populist anti-war zeal.

## 2. *Kellogg-Briand is, in Effect, a "No First Use" Commitment.*

Despite sometimes being advertised as a comprehensive, full-scope non-war undertaking, the true upshot of Kellogg-Briand is limited in this important – and realistic – way. Although the text of the document is not explicit, the parties were completely clear among themselves that the function was to outlaw aggressive or offensive war; each state necessarily retained the inherent right to defend itself and its allies.<sup>101</sup>

At the same time, the document utterly failed to define the core distinction between (prohibited) offensive war and (permitted) defensive engagement, or to offer any line-drawing assistance in resolving what could frequently be problematic and intensely contested international fact patterns.<sup>102</sup> Kellogg refused to attempt any negotiations toward a definition of the term "aggression"<sup>103</sup> – an effort that would inevitably lead the diplomats down a hopeless rabbit hole<sup>104</sup>

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instrument, and if so, whether it will be handled for domestic purposes as a treaty or an executive agreement).

100. See WHEELER-BENNETT, *supra* note 25, at 21-24 (noting rapid public and media responses to the evolving negotiation of the Kellogg-Briand Pact).

101. See WHEELER-BENNETT, *supra* note 25, at 107 (reprinting Frank B. Kellogg, Speech to American International Law Association, Washington, D.C., April 29, 1928) ("There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-[defense].").

102. See WEHBERG, *supra* note 14, at 46-51 (describing the 1925 conflict between Greece and Bulgaria that raised difficult issues in defining the distinction between offensive and defensive war); *id.* at 100-08 (discussing defensive war, war undertaken to sanction a country, and war to punish aggression); *id.* at 81 (concluding that despite definitional problems, the Kellogg-Briand Pact succeeded in reversing the burden of proof about the legitimacy of a use of military force); see also WHEELER-BENNETT, *supra* note 25, at 59 (noting that the Kellogg-Briand Pact permits the use of force "in the case of Great Britain, in [defense] of certain places or strategic points which are vital to the safety of the Empire.").

103. WEHBERG, *supra* note 14, at 72-76; WHEELER-BENNETT, *supra* note 25, at 24-25; Kellogg Address to the Council on Foreign Relations, *supra* note 43, at 90; Hearings, *supra* note 29, at 8 (Kellogg testifying that "nobody on earth, probably, could write an article defining 'self-defense' or 'aggressor' that some country could not get around"); see Matthew Lippman, *The History, Development and Decline of Crimes Against Peace*, 36 GEO. WASH. INT'L L. REV. 957, 986-90 (2004).

104. See Harvard Research, *supra* note 77; see also Report of the Working Group on the Crime of Aggression, *infra* note 120 (regarding the difficulty of negotiating text



— and the Americans insisted that the treaty would not contain any commitments (as in the Treaty of Versailles<sup>105</sup> and the Locarno Pact<sup>106</sup>) to come to the aid automatically of a state that found itself victimized by another.<sup>107</sup>

### 3. *Kellogg-Briand Does Not Address Disarmament, and Contains no Implementation Mechanisms or Diplomatic Infrastructure.*

Many of Kellogg-Briand's proponents earnestly advocated disarmament, of course, seeing weapons programs as exorbitantly expensive, wasteful and provocative; they wanted to rein in the "merchants of death."<sup>108</sup> But Kellogg-Briand is a specialized, single-purpose instrument, content with the solo function of condemning recourse to war; the arms reductions would be addressed separately, in a different series of instruments.<sup>109</sup>

In the same vein, it must be noted that Kellogg-Briand is also bereft of specifications about the intended concrete meaning of a general "renunciation" of war; it contains no subsidiary obligations pursuant to which states would give operational content to the abstract commitment. After joining the agreement, parties were not required to

concerning the definition of the crime of aggression for the International Criminal Court).

105. Under the League of Nations Covenant in Part I of the Treaty of Versailles, *supra* note 36, Article 11 states that any war or threat of war is "declared to be a matter of concern to the whole League [of Nations]," and Article 16 declares any state that resorts to unwarranted war "shall ipso facto be deemed to have committed an act of war against all other Members of the League." League of Nations Covenant, *supra* note 36, arts. 11, 16; see WEHBERG, *supra* note 14, at 11, 22 (noting American resistance to the obligation imposed upon members of the League of Nations to use force in response to aggression against another member); *Hearings*, *supra* note 29, at 3-4 (colloquy between senators and Secretary Kellogg regarding contrasting types of obligations in the Kellogg-Briand Pact and other treaties of military alliance).

106. See WEHBERG, *supra* note 14, at 32-40 (analyzing parties' commitments to use military power to enforce the Locarno commitments); WHEELER-BENNETT, *supra* note 25, at 32-33 (noting American suspicion of other treaties under which European states committed to use military force to assist each other against aggression).

107. See Iriye, *supra* note 34, at 63, 69, 80 (noting varying opinions in the United States regarding committing to participation in international affairs, especially regarding the use of force); see also Lodge, *supra* note 32, at 3-5 (questioning the value of the Kellogg-Briand Pact, if it does not really constitute a pledge of military support); Josephson, *supra* note 49, at 380 (some saw Kellogg-Briand as a door that would open the United States to the League of Nations and the world court); see also Current, *supra* note 93, at 221-23.

108. WEHBERG, *supra* note 14, at 97 ("The great importance of a radical disarmament for the idea of the outlawry of war can hardly be overemphasized.").

109. The Soviet Union strongly complained that Kellogg-Briand should do more to reduce arms; Foreign Minister Litvinov emphasized this as a priority. See Diplomatic Note from the Soviet Government Containing Its Adhesion to the Peace Pact, *reprinted in* WHEELER-BENNETT, *supra* note 25, at 181-87.

undertake any particular follow-up steps to substantiate their act of outlawry. The treaty does not indicate any possible day-to-day measures that would assist in making international armed conflict less likely or more avoidable, or create any “firebreaks” that could impede adverse developments. Nor does the treaty establish any fresh diplomatic infrastructure – no new organization or international institutions are elicited.<sup>110</sup>

#### 4. *Kellogg-Briand Reinforces the Parties' Commitment to Peaceful Dispute Resolution.*

The one partial exception to the observation made in the immediately preceding paragraph is the treaty's insistence that any future disputes or conflicts shall be resolved exclusively via “pacific” means.<sup>111</sup> Again, Kellogg-Briand does not itself establish or enlarge any international mechanisms for this purpose, but multiple companion instruments had proliferated an array of judicial, arbitration, conciliation and related services. These alternatives were intended to provide practical, readily available surrogates for armed force in the resolution of disputes (although, in practice, these opportunities were only rarely exploited).<sup>112</sup>

#### 5. *Kellogg-Briand is Reciprocal.*

The treaty extends its protection only to states that join the club – parties renounce war only “in their relations with one another.”<sup>113</sup> This, of course, is a pregnant political choice, and the drafters expressed their hope that all states would “join in this humane endeavor,”<sup>114</sup> but it would certainly have been possible to condemn all war, including war

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110. Harriman, *supra* note 22, at 240 (arguing that Kellogg-Briand's condemnation of war “is, of course, merely an expression of opinion and does not call for any action by the parties.”).

111. Kellogg-Briand Pact, *supra* note 1, art. II; *see also* Harriman, *supra* note 22, at 243-46 (arguing that in this context, “‘pacific’ does not mean “amicable”; the treaty would allow all measures of redress that fall short of war, including retorsion, reprisal, embargo, etc.).

112. In this connection, note especially article 12 of Part I of the Treaty of Versailles, which requires that any serious international dispute be submitted either to arbitration or to the Council of the League of Nations, and that parties not resort to war until three months after the award by the arbitrators or the report by the Council. League of Nations Covenant, *supra* note 36, art. 12; *see also* SHOTWELL, *supra* note 7, at 255 (identifying four formal institutional alternative mechanisms for resolving international disputes); Current, *supra* note 93, at 216-18.

113. Kellogg-Briand Pact, *supra* note 1, at preamble para 3, art. I.

114. *Id.* at preamble para 4.

launched against states that had not yet, for whatever reason, signed and ratified the document.<sup>115</sup>

#### 6. *Kellogg-Briand is Permanent.*

Unlike many treaties, Kellogg-Briand has no fixed duration; it has avoided sunset (and even any amendment) to the present day.<sup>116</sup> Moreover, the document has no “withdrawal” clause, of the sort that has become commonplace in more recent arms control treaties.<sup>117</sup> The Charter of the United Nations has, for most practical purposes, come to supersede Kellogg-Briand,<sup>118</sup> and the 1928 restraints would be suspended (or inapplicable) if a party were attacked by another state, so there is a type of “escape hatch,” but it has never been formally or overtly exercised.

#### 7. *Kellogg-Briand is Not About Criminal Law.*

Despite invoking the rhetoric of “outlawry,” the treaty is not concerned with imposing criminal sanctions on countries or individuals. Today, the crime of aggression might be prosecuted in an international tribunal, such as a successor to forums established at Nuremberg and Tokyo, or more recent variations,<sup>119</sup> or perhaps, in the future, the International Criminal Court.<sup>120</sup> Likewise, pursuant to “universality”

115. See Harriman, *supra* note 22 at 247 (concluding that under Kellogg-Briand, an aggressive war of conquest against a non-party is permitted).

116. See MILLER, *supra* note 25, at 146 (highlighting as “perhaps the most striking feature” of Kellogg-Briand the fact that the treaty is permanent; saying that “the significance of such perpetuity is almost impossible of overstatement.”).

117. See, e.g., START I, *supra* note 8, art. XVII.3; CWC, *supra* note 8, art. XVI.2; CTBT, *supra* note 8, art. IX.2 (each establishing a party’s right to withdraw from the treaty if it determines that extraordinary events related to the subject of the treaty have jeopardized its supreme national interests).

118. Under the Charter, a country may use military force in self-defense or pursuant to authorization from the Security Council. U.N. Charter, *supra* note 2, arts. 2.4, 42, 51. In the event of a conflict between the Charter and any other treaty, the obligations of the Charter prevail. *Id.* art. 103. See also Robert J. Delahunty, *Paper Charter: Self-Defense and the Failure of the United Nations Collective Security System*, 56 CATH. U. L. REV. 871, 888-89 (2007).

119. See DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* (Princeton Univ. Press 2012) (discussing various international and mixed war crimes tribunals); *UN Tribunals Crucial for Delivering Justice for Rwanda, Former Yugoslavia, Security Council Told*, UN NEWS CENTRE (June 5, 2014), available at <http://www.un.org/apps/news/story.asp?NewsID=47968#.U5DMGoU13bk> (last visited Dec. 18, 2014) (assessing the impact of ad hoc war crimes tribunals established by the U.N. Security Council for Rwanda and the former Yugoslavia).

120. The International Criminal Court, established pursuant to the Rome Statute of the International Criminal Court exists to prosecute individuals for “the most serious crimes of

jurisdiction, perhaps any state could prosecute an individual guilty of the most serious crimes against the peace.<sup>121</sup> But those eventualities were not in prospect in 1928.<sup>122</sup>

8. *Fundamentally, Kellogg-Briand Represents a Psychological Shift.*

That is, the radical spirit behind the treaty is to effect a change (or to reflect a change that was already occurring in the 1920s) in the way people (military and civilian leaders, kings and elected officials, and their general populations) thought about war. The objective was to de-emphasize war as a normal mode of operation of the international community; to no longer understand war as something that “just happens”; to characterize war as extraordinary and aberrational, and as a phenomenon that requires a justification, including a basis in international law. The proponents wanted to see war, and preparations for war, differently – it would not be something that countries would possess an untrammled right incessantly to prepare for, threaten, and conduct; instead, it would be something perpetually to be avoided, to be circumnavigated via alternative, better processes.

The entire field of modern *jus ad bellum*, regulating the circumstances under which a state may now lawfully initiate international hostilities, thus owes its genesis (or at least its renaissance from an earlier “just war” tradition) to this paradigm shift. Of course, the treaty was far from perfect, and alterations in international law cannot by themselves fully extirpate war from the human experience – any more than a massive, armed combat can truly “end all wars” – but new patterns of thought can make an important difference.<sup>123</sup>

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concern to the international community as a whole” including genocide, crimes against humanity, war crimes and aggression. UN Doc. A/CONF. 183/9, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (1998) (entered into force July 1, 2002). However, the court’s jurisdiction over the crime of aggression has not yet been activated. Report of the Working Group on the Crime of Aggression, RC/11, 11-E-011110 45, Annex III, Dec. 22, 2010, available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/RC-11-Annex.III-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-11-Annex.III-ENG.pdf) (last visited Dec. 18, 2014).

121. See AM. LAW INST., RESTATEMENT (THIRD) OF THE FOREIGN REL. LAW OF THE U.S. § 404 (1987) (discussing the small category of offenses “recognized by the community of nations as of universal concern,” enabling any state to assert jurisdiction; the crime of aggression is not listed, but might be considered of equivalent status).

122. See WEHBERG, *supra* note 14, at 20, 107 (discussing the possibility of criminal prosecution of states or individuals for violations of Kellogg-Briand); see also sources cited *supra* note 94 (noting the role that Kellogg-Briand played in underpinning the post-World War II criminal trials of Nazi and Japanese aggressors).

123. See WEHBERG, *supra* note 14, at 82 (emphasizing the “moral value” of the treaty); Josephson, *supra* note 49, at 384 (U.S. Secretary of State Henry L. Stimson believed that if global public opinion desired to make Kellogg-Briand effective, it could become

### III. NUCLEAR WEAPONS, PROLIFERATION, AND WAR

The devastating power of nuclear weapons, the precarious dangers of nuclear proliferation, and the catastrophic effects of nuclear war are now so well-appreciated that little elaboration here is required.<sup>124</sup> In response to these extraordinary hazards, the world community has undertaken a series of multilateral, bilateral, and unilateral arms control initiatives – but no one can pretend that this present conglomeration is adequate to meet the appalling threats.<sup>125</sup>

#### A. *The Current Threat.*

Nuclear weapons pose the greatest danger in the world today; indeed, the greatest danger humanity has ever confronted. A single nuclear weapon (the standard model of which is now many times more powerful than the devices that obliterated Hiroshima and Nagasaki in 1945) could annihilate a city. Even a relatively “small,” limited nuclear

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irresistible); Harriman, *supra* note 22 at 241–42 (prior to Kellogg-Briand, every state had an absolute right under international law to make war; that has changed); Harvard Research, *supra* note 77, at 857 (noting that in the 1890s, it was not possible to say that state’s decision to go to war could be illegal – it was either permitted by international law or simply unregulated by it); see Moore, *supra* note 35, at 9; Quincy Wright, *The Outlawry of War and the Law of War*, 47 AM. J. INT’L L. 365, 369 (1953) (arguing that the moral, social, and psychological change effected by the Kellogg-Briand Pact would require generations, not merely decades, to succeed); HOWARD, *supra* note 33, at 9 (discussing St. Augustine’s concept of “just war”); Christopher M. Petras, *The Use of Force in Response to Cyber-Attack on Commercial Space Systems-Reexamining “Self-Defense” in Outer Space in Light of the Convergence of U.S. Military and Commercial Space Activities*, 67 J. AIR L. & COM. 1213 (2007); Leo Van den hole, *Anticipatory Self-Defence Under International Law*, 19 AM. U. INT’L L. REV. 69 (2003).

124. See *Nuclear Weapons Effects Technology, Militarily Critical Technologies List: Sec. VI, Nuclear Weapons Effects Technology*, FED’N OF AM. SCIENTISTS, available at <http://www.fas.org/irp/threat/mct198-2/p2sec06.pdf> (last visited Dec. 18, 2014); *The Effects of Nuclear War*, U.S. OFFICE TECHN. ASSESSMENT (May 1979), available at <http://www.fas.org/nuke/intro/nuke/7906/index.html> (last visited Dec. 18, 2014); U.S. DEP’T DEF. & ENERGY RESEARCH & DEV. ADMIN, *THE EFFECTS OF NUCLEAR WEAPONS* (Samuel Glasstone & Philip J. Dolan eds., 1977), available at <http://www.fourmilab.ch/etexts/www/effects/> (last visited Dec. 18, 2014)[hereinafter *THE EFFECTS OF NUCLEAR WEAPONS*]; *Scientific Aspects of Nuclear Explosion Phenomena*, TRINITY ATOMIC WEBSITE, available at [http://www.abomb1.org/nuke/flct/enw77b3.html#foot\\_7](http://www.abomb1.org/nuke/flct/enw77b3.html#foot_7) (last visited Dec. 18, 2014); *Nuclear Detonations: Contemplating Catastrophe: Development and Disarmament Roundtable*, BULL. ATOMIC SCIENTISTS (2013), available at <http://thebulletin.org/nuclear-detonations-contemplating-catastrophe> (last visited Dec. 18, 2014).

125. See generally STEVEN PHER & MICHAEL E. O’HANLON, *THE OPPORTUNITY: NEXT STEPS IN REDUCING NUCLEAR ARMS* (2012); OLIVER MEIER & CHRISTOPHER DAASE, *ARMS CONTROL IN THE 21<sup>ST</sup> CENTURY: BETWEEN COERCION AND COOPERATION* (2013); WARD WILSON, *FIVE MYTHS ABOUT NUCLEAR WEAPONS* (2013); GRAHAM, JR. & LAVERA, *supra* note 13.

war would inflict devastation of historic proportions on a country (or several). A massive nuclear exchange would jeopardize the planet's civilization and quite possibly eradicate all human life on earth. For the United States, nuclear weapons pose an existential threat – they are the only mechanism that could inflict sudden, massive, inescapable societal destruction.<sup>126</sup>

Nine countries are known to possess nuclear weapons: China, France, India, Israel, North Korea, Pakistan, Russia, the United Kingdom, and the United States. Many more states hold the potential to join that club; they have the intellectual, industrial, and managerial capability, as well as access to the necessary raw materials. Proliferation of nuclear weapons to additional countries (and, *a fortiori*, to terrorist organizations) could be calamitous, further destabilizing international political relations and empowering localized disputes to mushroom to global dimensions.<sup>127</sup>

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126. See *Strategy for Countering Weapons of Mass Destruction*, U.S. DEP'T DEF. (June 2014), available at [http://www.defense.gov/pubs/DoD\\_Strategy\\_for\\_Countering\\_Weapons\\_of\\_Mass\\_Destruction\\_dated\\_June\\_2014.pdf](http://www.defense.gov/pubs/DoD_Strategy_for_Countering_Weapons_of_Mass_Destruction_dated_June_2014.pdf) (last visited Dec. 18, 2014); see *Nuclear Posture Review Report*, U.S. DEP'T DEF. 3 (April 2010), available at <http://www.defense.gov/npr/docs/2010%20Nuclear%20Posture%20Review%20Report.pdf> (last visited Dec. 18, 2014) [hereinafter *2010 Nuclear Posture Review Report*] (discussing threat of nuclear proliferation and terrorism); PAUL BRACKEN, *THE SECOND NUCLEAR AGE: STRATEGY, DANGER AND THE NEW POWER POLITICS* (Henry Holt & Co. LLC 2012); MICHELLE BENTLEY, *WEAPONS OF MASS DESTRUCTION AND US FOREIGN POLICY: THE STRATEGIC USE OF A CONCEPT* (2014); MARK A. HARWELL, *NUCLEAR WINTER: THE HUMAN AND ENVIRONMENTAL CONSEQUENCES OF NUCLEAR WAR* (1984); Alan Robock & Owen Brian Toon, *Self-Assured Destruction: The Climate Impacts of Nuclear War*, 68 BULL. ATOMIC SCIENTISTS 66 (2012); Michael J. Mills et al., *Multidecadal Global Cooling and Unprecedented Ozone Loss Following a Regional Nuclear Conflict*, AGU PUBLICATIONS (Apr. 1, 2014), available at <http://climate.envsci.rutgers.edu/pdf/MillsNWeft224.pdf> (last visited Dec. 18, 2014).

127. See *Strategy for Countering Weapons of Mass Destruction*, *supra* note 126; see *Nuclear Weapons: Who Has What at a Glance*, ARMS CONTROL ASS'N (last updated June 23, 2014), available at <http://www.armscontrol.org/factsheets/Nuclearweaponswho> (last visited Dec. 18, 2014) (estimating the nuclear weapons stockpiles of nine countries: China 240; France fewer than 300; Russia 1512 deployed strategic warheads, plus 3000 others; United Kingdom 225; United States 4804; India up to 100; Israel 75-200; Pakistan 90-110; North Korea 4-8); *Status of World Nuclear Forces*, FED'N AMER. SCIENTISTS (last updated Apr. 30, 2014), available at <http://fas.org/issues/nuclear-weapons/status-world-nuclear-forces/> (last visited Dec. 18, 2014) (providing slightly different numerical estimates); Hans M. Kristensen & Robert S. Norris, *US Nuclear Forces, 2014*, 70 BULL. ATOMIC SCIENTISTS 85 (2014); *Press Release, Stockholm Int'l Peace Research Inst., Nuclear Forces Reduced Whole Modernizations Continue, Says SIPRI*, SIPRI (June 16, 2014), available at [http://www.sipri.org/media/pressreleases/2014/nuclear\\_May\\_2014](http://www.sipri.org/media/pressreleases/2014/nuclear_May_2014) (last visited Dec. 18, 2014); *Worldwide Threat Assessment of the US Intelligence Community: Hearing before the S. Armed Services Comm.*, 113th Cong. (2014) (statement of John R. Clapper, Dir. of National Intelligence),

Blocking the further spread of nuclear weapons has always been a top global priority, but it is a strenuous challenge. Nuclear weapons technology is now decades old; the very nature of technology is to propagate, and the basic secrets of bomb-building are now well-dispersed. The “trick” to avoiding further proliferation, therefore, must lie in politics, not in denial or force. As Jonathan Schell observed:

The world’s safety ultimately depends not on the number of nations that want to build nuclear weapons but cannot, but on the number that can but do not. If the spread of nuclear weapons is to be prevented over the long run, it cannot come through restrictions on nations’ capacity. Instead, it must come by influencing their will.<sup>128</sup>

Unfortunately, the world at the moment seems a bit “stuck” in its efforts to influence the most relevant nations’ respective willingness to reduce the dangers of nuclear possession and proliferation. The global stockpile of nuclear weapons has, blessedly, been greatly reduced: by the leading estimate, the world has produced some 125,000 nuclear weapons (ninety-seven percent manufactured by the United States and the Soviet Union/Russia) since 1945; today, approximately 10,000 remain in active military stockpiles, with thousands more awaiting dismantlement.<sup>129</sup> But the reductions process seems to have fallen into hiatus: there are no major nuclear arms control negotiations under way or in prospect, and several participants are currently ramping up and modernizing, rather than winnowing, their strategic forces.<sup>130</sup>

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available at [http://www.dni.gov/files/documents/2014%20WWTA%20SFR\\_SASC\\_11\\_Feb.pdf](http://www.dni.gov/files/documents/2014%20WWTA%20SFR_SASC_11_Feb.pdf) (last visited Dec. 18, 2014) (providing the U.S. intelligence community’s judgment that proliferation of weapons of mass destruction constitutes a major threat to the security of the United States and its allies); Edward A. Friedman & Roger K. Lewis, *A Scenario for Jihadist Nuclear Revenge*, FED’N AMER. SCIENTISTS (2014), available at <http://fas.org/pir-pubs/scenario-jihadist-nuclear-revenge/> (last visited Dec. 18, 2014); Matthew Bunn et al., *The U.S.-Russia Joint Threat Assessment of Nuclear Terrorism*, BELFER CENTER FOR SCI. & INT’L AFF. (2011), available at <http://belfercenter.ksg.harvard.edu/files/Joint-Threat-Assessment%20ENG%2027%20May%202011.pdf> (last visited Dec. 18, 2014). But see Kenneth N. Waltz, *Why Iran Should Get the Bomb Nuclear: Balancing Would Mean Stability*, 19 FOREIGN AFF. 2 (2012) (arguing that proliferation is inevitable and can be stabilizing).

128. Jonathan Schell, *The Folly of Arms Control*, 79 FOREIGN AFF. 22, 28 (2000); see also R. Scott Kemp, *The Nonproliferation Emperor has no Clothes: The Gas Centrifuge, Supply-Side Controls and the Future of Nuclear Proliferation*, 38 INT’L SECURITY 39, 39 (Spring 2014) (arguing that export controls and economic sanctions are insufficient to prevent a country from developing or acquiring the capability to develop nuclear weapons; political and cultural factors must play the leading roles).

129. Hans M. Kristensen & Robert S. Norris, *Global Nuclear Weapons Inventories, 1945-2013*, 69 BULL. ATOMIC SCIENTISTS 75, 75 (2013), available at <http://bos.sagepub.com/content/69/5/75.full.pdf+html> (last visited Dec. 18, 2014) [hereinafter *Inventories*].

130. See *id.* (reporting that Russia is undertaking a major transformation of its nuclear

The concept of complete nuclear disarmament has only episodically been on the front burner of international politics.<sup>131</sup> This iconoclastic notion experienced an abrupt resurgence with the publication, beginning in January 2007, of a series of vigorous advocacy columns in the *Wall Street Journal* penned by four of the most prominent senior U.S. statesmen, George P. Shultz, William J. Perry, Henry A. Kissinger, and Sam Nunn.<sup>132</sup> The momentum for “getting to zero” suddenly intensified, with a torrent of supportive opinion pieces, analytical conferences, books and articles; diverse countries and NGOs vigorously took up the cause.<sup>133</sup> President Obama

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posture and deploying fewer, but newer, weapons; China is likely to double its force of intercontinental ballistic missile warheads in the next fifteen years; and India and Pakistan are in an arms race to deploy new weapons types); see also Kristensen & Norris, *supra* note 127, at 88-92; Hans M. Kristensen, *Nuclear Weapons Modernization: A Threat to the NPT?*, 44 ARMS CONTROL TODAY 8 (May 2014), available at [http://www.armscontrol.org/act/2014\\_05/Nuclear-Weapons-Modernization-A-Threat-to-the-NPT](http://www.armscontrol.org/act/2014_05/Nuclear-Weapons-Modernization-A-Threat-to-the-NPT) (last visited Jan. 9, 2015); see Ray Acheson, *Modernization of Nuclear Weapons: Aspiring to “Indefinite Retention”?*, 68 BULL. ATOMIC SCIENTISTS 88, 88 (2012); *The NPT Action Plan Monitoring Report*, REACHING CRITICAL WILL 31-40 (2014), available at [http://www.reachingcriticalwill.org/images/documents/Publications/2010-Action-Plan/NPT\\_Action\\_Plan\\_2014.pdf](http://www.reachingcriticalwill.org/images/documents/Publications/2010-Action-Plan/NPT_Action_Plan_2014.pdf) (last visited Dec. 18, 2014) [hereinafter REACHING CRITICAL WILL] (assessing status of world nuclear forces); see generally *Assuring Destruction Forever: Nuclear Weapon Modernization Around the World*, REACHING CRITICAL WILL (Ray Acheson ed., 2012), available at <http://www.reachingcriticalwill.org/images/documents/Publications/modernization/assuring-destruction-forever.pdf> (last visited Dec. 18, 2014) [hereinafter *Assuring Destruction*].

131. At their summit meeting in Reykjavik, Iceland October 11-12, 1986, President Ronald Reagan and Soviet Union General Secretary Mikhail Gorbachev came astonishingly close to an agreement to abolish all their nuclear weapons; at the last minute, such a breathtaking accord dissolved, and was not subsequently pursued. See generally REYKJAVIK REVISITED: STEPS TOWARD A WORLD FREE OF NUCLEAR WEAPONS (George P. Shultz et al. eds., 2008); see generally IMPLICATIONS OF THE REYKJAVIK SUMMIT ON ITS TWENTIETH ANNIVERSARY (Sidney D. Drell & George P. Shultz eds., 2007); see Thomas Blanton & Svetlana Savranskaya, *Reykjavik: When Abolition Was Within Reach*, 41 ARMS CONTROL TODAY 46 (Oct. 2011), available at [http://www.armscontrol.org/act/2011\\_10/Reykjavik\\_When\\_Abolition\\_Was\\_Within\\_Reach](http://www.armscontrol.org/act/2011_10/Reykjavik_When_Abolition_Was_Within_Reach) (last visited Dec. 18, 2014).

132. George P. Shultz et al., *A World Free of Nuclear Weapons*, WALL ST. J., Jan. 4, 2007, at A15 (proposing “setting the goal of a world free of nuclear weapons and working energetically on the actions required to achieve that goal”). Additional op-ed pieces by this group followed in 2008, 2010, 2011 and 2013. See PHILIP TAUBMAN, *THE PARTNERSHIP: FIVE COLD WARRIORS AND THEIR QUEST TO BAN THE BOMB* (2012).

133. See GETTING TO ZERO: THE PATH TO NUCLEAR DISARMAMENT (Catherine McArdle Kelleher & Judith Reppy eds., 2011); RUSSIA AND THE DILEMMAS OF NUCLEAR DISARMAMENT, NUCLEAR THREAT INITIATIVE (Alexei Arbatov et al. eds., 2012); ELEMENTS OF A NUCLEAR DISARMAMENT TREATY (Barry M. Blechman & Alexander K. Bollfrass eds., 2010); CULTIVATING CONFIDENCE: VERIFICATION, MONITORING, AND ENFORCEMENT FOR A WORLD FREE OF NUCLEAR WEAPONS (Corey Hinderstein ed., 2010); STEVEN PIFFER AND MICHAEL E. O'HANLON, *THE OPPORTUNITY: NEXT STEPS IN REDUCING NUCLEAR ARMS*



famously endorsed the concept of nuclear abolition in his celebrated Prague speech on April 5, 2009,<sup>134</sup> and the Security Council of the United Nations did likewise in resolution 1887 on September 24, 2009.<sup>135</sup> But the bubble of enthusiasm for disarmament seems to have deflated in the past couple of years, as fickle international politics zigzagged toward other topics.<sup>136</sup>

(2012); NUCLEAR DISARMAMENT: REGIONAL PERSPECTIVES ON PROGRESS (P.M. Karnath ed., 2013); Ivo Daalder & Jan Lodal, *The Logic of Zero: Toward a World Without Nuclear Weapons*, 87 FOREIGN AFF. 80 (2008); Christopher Ford, *A New Paradigm: Shattering Obsolete Thinking on Arms Control and Nonproliferation*, 38 ARMS CONTROL TODAY 12 (Nov. 2008), available at [http://legacy.armscontrol.org/act/2008\\_11/ford](http://legacy.armscontrol.org/act/2008_11/ford) (last visited Jan. 9, 2015); ABOLISHING NUCLEAR WEAPONS: A DEBATE (George Perkovich & James Acton, eds., 2009) [hereinafter Perkovich & Acton]; Michael Krepon, *Ban the Bomb. Really.*, 3 AMERICAN INTEREST, at 88 (Winter 2008); NUCLEAR ABOLITION FORUM, MOVING BEYOND NUCLEAR DETERRENCE TO A NUCLEAR WEAPONS FREE WORLD (Rob van Riet ed., 2013); JAMES M. ACTON, LOW NUMBERS: A PRACTICAL PATH TO DEEP NUCLEAR REDUCTIONS (2011), available at [http://carnegieendowment.org/files/low\\_numbers.pdf](http://carnegieendowment.org/files/low_numbers.pdf) (last visited Dec. 18, 2014); TAUBMAN, *supra* note 132, at 338-40 (discussing non-governmental groups focused on nuclear disarmament, the Nuclear Threat Institute (headed by Sam Nunn) and Global Zero (headed by Bruce Blair, Matt Brown and Barry Blechman)); G.A. Res. 67/56, U.N. GAOR, 67<sup>th</sup> Sess., U.N. Doc. A/RES/67/56 (Dec. 3, 2012) (creating an “open-ended working group” to develop proposals for the achievement of a world without nuclear weapons); MIDDLE POWERS INITIATIVE, available at <http://www.middlepowers.org/about.html> (last visited Dec. 18, 2014) (collection of NGOs working with “middle” states to promote nuclear disarmament).

134. Barack Obama, President of the United States, *Remarks by President Barack Obama at Hradcany Square in the Czech Republic* (Apr. 5, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered/](http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered/) (last visited Dec. 18, 2014) (stating “America’s commitment to seek the peace and security of a world without nuclear weapons”); see also SIDNEY D. DRELL & JAMES E. GOODBY, A WORLD WITHOUT NUCLEAR WEAPONS: END-STATE ISSUES 1-2 (2009) (quoting 2009 joint statement by President Obama and Russian President Dmitry Medvedev pledging both countries to pursue a nuclear weapons-free world).

135. S.C. Res 1887, U.N. Doc. S/RES/1887 (Sept. 24, 2009), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1887%282009%29](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1887%282009%29) (last visited Dec. 18, 2014).

136. See William J. Perry, Commentary, *My Personal Journey at the Nuclear Brink*, EUR. LEADERSHIP NETWORK (June 17, 2013), available at [http://www.europeanleadershipnetwork.org/my-personal-journey-at-the-nuclear-brink-by-bill-perry\\_633.html](http://www.europeanleadershipnetwork.org/my-personal-journey-at-the-nuclear-brink-by-bill-perry_633.html) (last visited Dec. 18, 2014) (commenting that “in 2011 that progress and forward momentum [toward dealing with the nuclear legacy of the cold war] began to stall out and even reverse.”); George P. Shultz et al., *Next Steps in Reducing Nuclear Risks: The Pace of Nonproliferation Work Today Doesn’t Match the Urgency of the Threat*, WALL ST. J. (Mar. 5, 2013) (observing that “[t]he continuing risk posed by nuclear weapons remains an overarching strategic problem, but the pace of work doesn’t match the urgency of the threat.”); Ward Wilson, *The Myth of Nuclear Necessity*, in NUCLEAR ABOLITION FORUM, MOVING BEYOND NUCLEAR DETERRENCE TO A NUCLEAR WEAPONS FREE WORLD 1 (2013) (noting that “the abolition movement seems stalled.”); GEORGE PERKOVICH, DO UNTO OTHERS: TOWARD A DEFENSIBLE NUCLEAR DOCTRINE 2 (2013), available at

The International Court of Justice (“ICJ”), the successor under the U.N. Charter to the PCIJ as the leading global judicial institution for the resolution of international legal disputes,<sup>137</sup> has addressed nuclear weapons in depth once,<sup>138</sup> and is now poised to do so again. In 1994, the General Assembly requested an “advisory opinion” from the court on the question, “Is the threat or use of nuclear weapons in any circumstance permitted under international law?” Participating states’ disparate briefings and arguments on the matter, and the various ICJ judges’ voluminous separate opinions, reveal a stark array of contradictory perspectives on point, but several key principles stand out.<sup>139</sup> The ICJ determined that: a) traditional standards of the law of armed conflict apply fully to nuclear weapons, as to all others;<sup>140</sup> b) a threat to conduct an illegal use of force is itself illegal under the U.N. Charter, even before it is carried out;<sup>141</sup> c) because nuclear weapons carry such widespread, severe and long-lasting effects, their use is “scarcely reconcilable” with the legal requirements of proportionality and avoidance of civilian casualties;<sup>142</sup> and d) nevertheless, the court was unable to conclude definitively that all possible uses of nuclear weapons would be categorically illegitimate – perhaps a detonation against an isolated military target far removed from civilian areas, or in circumstances where a nation’s very survival depended upon the application of such overwhelming force could be legally tolerable.<sup>143</sup>

In 2014, nuclear weapons re-appeared on the ICJ docket. The

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[http://carnegieendowment.org/files/do\\_onto\\_others.pdf](http://carnegieendowment.org/files/do_onto_others.pdf) (last visited Dec. 18, 2014) (asserting that “progress stopped” on nuclear disarmament in 2012).

137. U.N. Charter, *supra* note 2, art. 92; Statute of the International Court of Justice, art. 1, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179.

138. *See also* Nuclear Tests, (N.Z. v. Fr.), Judgment, 1974 I.C.J. 457, 458 (Dec. 20) (concerning the legality of atmospheric nuclear tests conducted by France in the South Pacific); *see also* Nuclear Tests, (Austl. v. Fr.), Judgment, 1974 I.C.J. 97 (Dec. 20).

139. *See* Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226-28 (July 8) [hereinafter ICJ Advisory Opinion on Nuclear Weapons]; *see also* Dean Granoff & Jonathan Granoff, *International Humanitarian Law and Nuclear Weapons: Irreconcilable Differences*, 67 BULL. ATOMIC SCIENTISTS 53, 53-62 (2011); Charles J. Moxley, Jr., John Burroughs & Jonathan Granoff, *Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty*, 34 FORDHAM INT’L L. J. 595 (2011); Ken Berry et al., *Delegitimizing Nuclear Weapons*, MONTEREY INST. INT’L STUDIES 1, 30-33 (2010).

140. ICJ Advisory Opinion on Nuclear Weapons, *supra* note 139, para. 105(2)(C)-(D) (unanimously concluding that the provisions of the U.N. Charter and of international humanitarian law apply to the threat or use of nuclear weapons).

141. *Id.* para 47.

142. *Id.* para 95.

143. *Id.* para 105(2)(E) (by seven votes to seven, with the president of the court casting the deciding vote).

Republic of the Marshall Islands filed nine cases, one against each of the nuclear-weapons-possessing countries, alleging that they had failed in their obligations, pursuant to treaty and customary international law, to pursue nuclear disarmament.<sup>144</sup> Six of these cases, brought against countries that have not accepted the “compulsory jurisdiction” of the ICJ, have not been entered onto the court’s registry, and seem destined to go nowhere,<sup>145</sup> but the suits against India, Pakistan, and the United Kingdom may provide additional grist for nuclear arms control judicial machinery for years to come.<sup>146</sup>

Underpinning all these debates is a continuing dialectic about the “usability” of nuclear weapons. For some, a nuclear weapon is, basically, just a weapon like any other – it can be prudently deployed, brandished, and used against military targets to achieve desired warfighting goals.<sup>147</sup> Although nuclear weapons are immensely powerful, and they unleash a variety of novel and persistent types of effects, a clever design team could construct a very small, precisely-

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144. Press Release No. 2014/18, International Court of Justice, The Republic of the Marshall Islands files Applications against nine States for their alleged failure to fulfill their obligations with respect to the cessation of the nuclear arms race at an early date and to nuclear disarmament, April 25, 2014, available at <http://www.icj-cij.org/presscom/files/0/18300.pdf> (last visited Dec. 18, 2014).

145. To be amenable to suit under the “contentious case” docket of the International Court of Justice, a state must “accept” the jurisdiction of the court. Three of the relevant countries have done so in the broadest fashion, pursuant to Article 36 (2) of the Statute of the Court, *supra* note 47. See generally *Basis of the Court’s Jurisdiction*, INT’L CT. JUST., available at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=2> (last visited Dec. 18, 2014).

146. See *Cases*, INT’L CT. JUST., available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3> (last visited Dec. 18, 2014) (listing contentious cases on the court’s docket). Of these three countries, only the United Kingdom is a party to the 1968 Nuclear Non-Proliferation Treaty, so the claims against India and Pakistan are grounded in customary international law.

147. See Al Pressin, *Rumsfeld Endorses Research on Earth Penetrating Weapon*, VOICE AM. (April 27, 2005), available at <http://www.globalsecurity.org/wmd/library/news/usa/2005/usa-050427-327d6b1f.htm> (last visited Dec. 18, 2014) (quoting then-Secretary of Defense Donald Rumsfeld as advocating development of small, precise nuclear weapons for attacking an enemy’s hard and deeply buried targets, saying “The only thing we have is very large, very dirty, big nuclear weapons. So the choice is, do we want to have nothing and only a large dirty nuclear weapon, or would we rather have something in between. That is the issue.”); Ann Scott Tyson, *Nuclear Plan Changes Calculus of Deterrence*, CHRISTIAN SCIENCE MONITOR (Mar. 12, 2002), available at <http://www.csmonitor.com/2002/0314/p01s03-usmi.html> (last visited Dec. 18, 2014) (quoting defense expert Loren Thompson saying “Most of the nuclear options at our disposal now are so gross that their use is not credible . . . To deter, we must have options that the enemy believes we will use.”); Thomas Dowler & Joseph Howard III, *Countering the Threat of the Well-Armed Tyrant: A Modest Proposal for Small Nuclear Weapons*, 19 STRATEGIC REV. 34 (1991).

targeted nuclear weapon, which would occupy a range not very different from that of the largest conventional weapons, and the radiation and other unique effects could be tailored to particular types of combat missions.<sup>148</sup> For these advocates, it is a mistake to consider nuclear weapons to be categorically different from other ordnance; muddled thinking about a single, inviolable “nuclear threshold” simply impedes rational strategizing about deterrence in all its manifestations.<sup>149</sup>

Others, however, conclude that nuclear weapons are, indeed, “different,” and people should continue to think of them as lying outside the realm of usability. In this view, nuclear weapons are irrelevant for any task other than deterring another actor’s potential use of nuclear weapons.<sup>150</sup> For all other applications, they are simply too big

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148. See *Nuclear Posture Review Report*, U.S. DEP’T DEF., (2002), available at <http://www.stanford.edu/class/polisci211z/2.6/NPR2001leaked.pdf> (last visited Dec. 18, 2014) (calling for greater flexibility in U.S. nuclear forces, seeking “Nuclear attack options that vary in scale, scope, and purpose.”); Keith B. Payne, *The Nuclear Jitters*, 55.12 NAT’L REV. 22 (2003); Charles D. Ferguson, *Mini-Nuclear Weapons and the U.S. Nuclear Posture Review*, JAMES MARTIN CENTER FOR NONPROLIFERATION STUDIES (Jan. 8, 2002), available at <http://cns.miis.edu/stories/020408.htm> (last visited Dec. 18, 2014) (reporting controversy regarding concept of nuclear “bunker buster”); *Task Force Report: Resilient Military Systems and the Advanced Cyber Threat*, DEPT. DEF.: DEF. SCI. BOARD 8 (2013), available at <http://cryptome.org/2013/07/cyber-war-racket-0014.pdf> (last visited Dec. 18, 2014) (suggesting that a first use of nuclear weapons might be a suitable response to a cyber-attack); Julian Coman, *Pentagon Wants “Mini-Nukes” to Fight Terrorists*, TELEGRAPH (Oct. 26, 2003, 12:01 AM), available at <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1445165/Pentagon-wants-mini-nukes-to-fight-terrorists.html> (last visited Dec. 18, 2014).

149. See Michael S. Gerson, *No First Use: The Next Step for U.S. Nuclear Policy*, 35 INT’L SEC. 7, 12-13 (2010); see McGeorge Bundy, George G. Kennan, Robert S. McNamara & Gerard C. Smith, *Nuclear Weapons and the Atlantic Alliance*, 60 FOREIGN AFF. 753 (1982) [hereinafter Bundy et al.]; Barry Watts, *Nuclear-Conventional Firebreaks and the Nuclear Taboo*, CTR. STRATEGIC & BUDGETARY ASSESSMENTS 5-28 (2013), available at <http://www.esbaonline.org/publications/2013/04/nuclear-conventional-firebreaks-and-the-nuclear-taboo/> (last visited Dec. 18, 2014); Colin Powell, *Nuclear Weapons Are Useless*, THINK PROGRESS (Jan. 27, 2010, 5:30 PM), available at <http://thinkprogress.org/security/2010/01/27/175869/colin-powell-nuclear-weapons-are-useless/> (last visited Dec. 18, 2014) (quoting former Secretary of State Colin Powell as concluding that nuclear weapons were “usless.”); HERMAN KAHN, ON ESCALATION: METAPHORS AND SCENARIOS (2009) (regarding the concept of limited, winnable nuclear war and the possible multi-rung nuclear escalation ladder).

150. See PERKOVICH, *supra* note 136, at 45-52, 73-74; Bundy et al., *supra* note 149, at 757 (arguing that “no one has ever succeeded in advancing any persuasive reason to believe that any use of nuclear weapons, even on the smallest scale, could reliably be expected to remain limited.”); Daalder & Lodal, *supra* note 133, at 80, 81 (arguing that the sole purpose of U.S. nuclear weapons is to deter use by others; other functions “are no longer realistic or necessary for the United States.”); Watts, *supra* note 149, at 1-2 (presenting as conventional wisdom the perception that nuclear weapons are “special” and qualitatively different from other weapons); Berry et al., *supra* note 139, at 47-49 (reporting views of U.S. and other

militarily; their effects are legally too indiscriminate, disproportional and long-lasting; and politically, the stigmatization from crossing this brightest of “red lines” would be intolerable.<sup>151</sup>

*B. Efforts to Reduce the Threat of Nuclear Weapons.*

As noted above, the world has already undertaken numerous valuable, albeit limited, steps to abate the threat of nuclear Armageddon.<sup>152</sup> The most important multilateral instrument is undoubtedly the 1968 Nuclear Non-Proliferation Treaty (“NPT”).<sup>153</sup> Under it, the “non-nuclear-weapon states” (“NNWS”) (i.e., almost all of the treaty’s 189 parties) agree never to manufacture or acquire nuclear weapons; they promise additionally to submit to rigorous international inspection to verify their continued non-possession.<sup>154</sup> In return, the five “nuclear-weapon states” (“NWS”) (i.e., China, France, Russia, the United Kingdom and the United States) agree, among other commitments,<sup>155</sup> to rein in their own nuclear armadas. In particular, in Article VI, “[e]ach of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control.”<sup>156</sup>

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military leaders regarding utility of nuclear weapons).

151. See Ronald Reagan, President of the United States of America, *Address Before a Joint Session of the Congress on the State of the Union* (Jan. 25, 1984), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=40205> (last visited Dec. 18, 2014) (asserting that “A nuclear war cannot be won and must never be fought. The only value in our two nations possessing nuclear weapons is to make sure they will never be used. But then would it not be better to do away with them entirely.”); Sidney D. Drell & James E. Goodby, *What Are Nuclear Weapons For? Recommendations for Restructuring U.S. Strategic Nuclear Forces*, ARMS CONTROL ASS’N REPORT (Oct. 2007).

152. See *supra* notes 8, 78-85 and accompanying text; see also Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, Apr. 8, 2010, S. TREATY DOC NO. 111-5 (2010), available at <http://www.state.gov/documents/organization/140035.pdf> (last visited Dec. 18, 2014) [hereinafter New START Treaty].

153. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 168 [hereinafter NPT].

154. *Id.* arts. II, III.

155. The treaty also specifies the inalienable right of all parties to use nuclear energy for peaceful purposes, and commits all parties to facilitate the fullest possible exchange of equipment, materials and information for those purposes. *Id.* art. IV.

156. *Id.* art. VI. Note that four states, each of which possesses nuclear weapons, are not parties to the NPT: India, Israel, North Korea, and Pakistan. See David S. Jonas, *Variations on Non-Nuclear: May the “Final Four” Join the Nuclear Non-Proliferation Treaty as Non-Nuclear Weapon States While Retaining Their Nuclear Weapons?*, 2005

The profound global controversy eating at the heart of the non-proliferation enterprise – a challenge that has strained the NPT regime for decades – concerns the extent of NWS compliance with their Article VI obligations. Several NNWS have vigorously complained that the NWS have consistently failed to “pursue negotiations in good faith” on the most critical of the anticipated “effective measures” toward nuclear arms control and disarmament. NNWS cite the fact that more than forty years after the conclusion of the NPT, nuclear weapons still exist in the thousands; the Comprehensive Test Ban Treaty is not in force; other associated instruments are not even under negotiation; and the nine nuclear powers seem no closer to a complete and permanent abandonment of their privileged position.<sup>157</sup>

Several of the “review conferences” for the NPT, held at five-year intervals, have been roiled by vigorous disputes over the NWS fidelity to Article VI; some of them have virtually broken down in discord.<sup>158</sup> In 1995, when the original twenty-five year duration of the NPT was

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MICH. ST. L. REV. 417 (2005); DANIEL H. JOYNER, INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION 56-76 (2009) (discussing article VI and the NPT regime).

157. NPT Review Conference, U.N. Doc. NPT/CONF.2010/50 (Vol. I), para. 80-86 (June 2010) (noting concern about large number of nuclear weapons deployed and stockpiled, and calling for further progress in diminishing the role of nuclear weapons in security policies); NPT Review Conference, Apr. 24 – May 19, 2000, U.N. Doc. NPT/CONF.2000/28 (Vol. I), para. 2 (2000) (expressing deep concern about nuclear weapons policies and accomplishments) [hereinafter NPT 2000 Review Conference Final Document]; Acheson, *supra* note 130, at 92; Kristensen, *supra* note 130; George Bunn & Roland M. Timerbaev, *Nuclear Disarmament: How Much have the Five Nuclear Powers Promised in the Non-Proliferation Treaty?*, in JOHN RHINELANDER & ADAM SCHEINMAN, AT THE NUCLEAR CROSSROADS 11 (1995); Hans M. Kristensen & Robert S. Norris, *Slowing Nuclear Weapon Reductions and Endless Nuclear Weapon Modernizations: A Challenge to the NPT*, 70 BULL. ATOMIC SCIENTISTS 94 (2014).

158. See Alexander Kmentt, *How Divergent Views on Nuclear Disarmament Threaten the NPT*, 43 ARMS CONTROL TODAY 8 (Dec. 2013), available at [http://www.armscontrol.org/act/2013\\_12/How-Divergent-Views-on-Nuclear-Disarmament-Threaten-the-NPT](http://www.armscontrol.org/act/2013_12/How-Divergent-Views-on-Nuclear-Disarmament-Threaten-the-NPT) (last visited Jan. 9, 2015); George Bunn & Jean du Preez, *More Than Words: The Value of U.S. Non-Nuclear-Use Promises*, 37 ARMS CONTROL TODAY (July/Aug. 2007), available at [http://iis-db.stanford.edu/pubs/21935/Bunn\\_More\\_Than\\_Words\\_The\\_Value\\_of\\_U.S.\\_Non-Nuclear-Use\\_Promises.pdf](http://iis-db.stanford.edu/pubs/21935/Bunn_More_Than_Words_The_Value_of_U.S._Non-Nuclear-Use_Promises.pdf) (last visited Jan. 9, 2015) (reporting that “An acrimonious debate about security assurances was among the reasons for the failed 2005 NPT review conference.”); Gaukhar Mukhatzhanova, *Rough Seas Ahead: Issues for the 2015 NPT Review Conference*, 44 ARMS CONTROL TODAY 20 (Apr. 2014), available at [http://www.armscontrol.org/act/2014\\_04/Rough-Seas-Ahead\\_Issues-for-the-2015-NPT-Review-Conference](http://www.armscontrol.org/act/2014_04/Rough-Seas-Ahead_Issues-for-the-2015-NPT-Review-Conference) (last visited Jan. 9, 2015); Tom Z. Collina, Lance Garrison, & Daniel Horner, *Stage Set for 2015 NPT Review Conference*, 44 ARMS CONTROL TODAY 25 (Apr. 2014), available at [http://www.armscontrol.org/act/2014\\_06/News/Stage-Set-for-2015-NPT-Review-Conference](http://www.armscontrol.org/act/2014_06/News/Stage-Set-for-2015-NPT-Review-Conference) (last visited Jan. 9, 2015); John Burroughs, *International Law, in Assuring Destruction*, *supra* note 130, at 115.

extended indefinitely,<sup>159</sup> the NNWS insisted upon faster progress and greater accountability.<sup>160</sup> In subsequent sessions, a series of thirteen “practical steps” and a roster of sixty-four “action items” were negotiated, in the so-far-futile effort to specify time-bound implementation of the NWS progress on point.<sup>161</sup>

*C. No First Use Statements and Security Assurances.*

The principal vehicles through which the NWS move toward fulfillment of their Article VI obligations are the series of agreements and unilateral actions that directly limit and reduce their respective nuclear firepower. As noted above, substantial success has been registered in capping these inventories, although the process is so far from complete that the NNWS are, reasonably, unsated.

An important subsidiary or associated set of measures in pursuit of the “basic bargain” of the NPT therefore consists of a series of additional promises or declarations that the NWS make regarding their plans and commitments about the future possible use and threat of nuclear weapons. These prominently include “no first use” (“NFU”) pledges and related “security assurances.” An NFU declaration is simply a statement that the country will not be the first to initiate a use of nuclear weapons; it could be formed as a revocable statement of intention, a political commitment or a legally binding undertaking. NFU attestations could be phrased in varying ways; typically they would (explicitly or implicitly) reserve the right to use nuclear weapons “second,” if necessary to respond to an enemy’s prior exercise of

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159. The NPT had an initial duration of twenty-five years, so in 1995, the parties convened a conference to determine its fate. NPT, *supra* note 153, art. X.2. The conference decided to extend the treaty “indefinitely,” and in the process, generated a series of commitments and understandings, including those related to article VI and nuclear arms control. See THOMAS GRAHAM, JR., DISARMAMENT SKETCHES: THREE DECADES OF ARMS CONTROL AND INTERNATIONAL LAW 257-93 (2002).

160. 1995 U.N. Disarmament Y.B. 23-25, U.N. Sales No. E.96.IX.1 (decision of 1995 Conference on Principles and Objectives for Nuclear Non-Proliferation and Disarmament, including provisions on nuclear weapon free zones and security assurances) [hereinafter 1995 RevCon decision].

161. NPT 2000 Review Conference Final Document, *supra* note 157, para. 15 (recording conference’s agreement on thirteen “practical steps for the systematic and progressive efforts to implement Article VI of the Treaty.”); see REACHING CRITICAL WILL, *supra* note 130, at 6 (summarizing steps taken in pursuit of 64-point Action Plan agreed at the 2010 NPT Review Conference and assessing NWS performance as disappointing on nuclear disarmament); see Mukhatzhanova, *supra* note 158, at 21 (noting that the rate of implementation of the disarmament actions has been so disappointing that some NWS “are bound to ask whether the action plan only creates the appearance of progress and whether a new approach is needed.”).

nuclear weapons against the state (or its allies); other caveats might be added, too.<sup>162</sup>

Related are two types of security assurances. A “negative” security assurance (“NSA”) is a promise that the offeror will refrain from using nuclear weapons against a particular state (or collection of states), typically subject to provisos such as the condition that the offeree refrain from pursuing or possessing nuclear weapons itself and that it not engage in warfare against the offeror in alliance with another NWS.<sup>163</sup> A “positive” security assurance (“PSA”) is an avowal to come to the aid of a state that is victimized by another state’s use of nuclear weapons; again, it could be subject to a variety of non-proliferation or other conditions.<sup>164</sup>

All of these NFU, NSA and PSA declarations could be issued in the context of the NPT, as part of another treaty, or independently. They could be extended to all states or they could privilege NPT members (in order to provide an additional incentive for outliers to join that treaty).<sup>165</sup>

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162. Harold A. Feiveson & Ernst Jan Hogendoorn, *No First Use of Nuclear Weapons*, 10 NONPROLIFERATION REV. 90 (summer 2003); see Scott Sagan, *The Case for No First Use*, 51 SURVIVAL 163 (2009); see generally *London Conference on No First Use of Nuclear Weapons*, PUGWASH CONFERENCES ON SCIENCE & W. AFFS. (November 18, 2002), available at <http://pugwash.org/?s=no+first+use> (last visited Dec. 18, 2014) (collection of scientific and political papers on NFU).

163. See JEFFREY W. KNOPF, SECURITY ASSURANCES AND NUCLEAR NONPROLIFERATION (2012); Feiveson & Hogendoorn, *supra* note 162; Bunn & du Preez, *supra* note 158; JAMES D. FRY, LEGAL RESOLUTION OF NUCLEAR NON-PROLIFERATION DISPUTES 88-96 (2013).

164. S.C. Res. 984, U.N. Doc. S/RES/ 984 (Apr. 11, 1995), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/984](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/984) (1995) (last visited Dec. 18, 2014) (expressing intention to assist states victimized by aggression with nuclear weapons or the threat of nuclear weapons); S.C. Res. 255, U.N. Doc. S/RES/255 (June 19, 1968), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/255\(1968\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/255(1968)) (last visited Dec. 18, 2014).

165. 1995 RevCon decision, *supra* note 160, at 54-55; MOHAMED SHAKER, THE NUCLEAR NON-PROLIFERATION TREATY: ORIGIN AND IMPLEMENTATION 1959-1979, at 471-552 (Oceana, vol. II 1980); Richard H. Ullman, *No First Use of Nuclear Weapons*, 50 FOREIGN AFF. 669, 679-80, (1972); George Bunn & Roland M. Timerbaev, *Security Assurances to Non-Nuclear Weapon States*, NONPROLIFERATION REV. 11, 16-17 (1993) (suggesting a U.N. Security Council resolution as a mechanism for promulgating security assurances); see also Memorandum on Security Assurances in Connection with Ukraine’s Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, U.N. Doc. A/49/765 (Dec. 19, 1994), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/49/765](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/49/765) (last visited Dec. 19, 2014) (NSA and PSA extended by United States, Russia, and United Kingdom to Ukraine, when Ukraine gave up nuclear weapons and joined the NPT); G.A. Res. 68/58, U.N. Doc. A/RES/68/58 (Dec. 11, 2013), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/68/58](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/58) (last visited Dec. 18,



The strategy behind NFU, NSA and PSA undertakings is the calculation that NNWS are more likely to be content in their perpetual “second class citizenship” if they are reassured that their own national security will not unduly suffer thereby. If they are protected against the NWS threat or use of nuclear weapons, then eschewing the opportunity to acquire weapons on their own should be a more tolerable path. NNWS have therefore sought these commitments as a part of the NPT *quid pro quo*, and a frequent point of contention, at NPT review conferences and elsewhere, has been the precision, comprehensiveness and reliability of those NWS oaths.<sup>166</sup>

Outside the NPT context, the NWS have a checkered history with these commitments. During the Cold War, the Soviet Union issued a broad NFU pledge in June 1982, and challenged the United States to reciprocate. In contrast, because NATO feared that its conventional forces might then be insufficient to stem an envisioned Warsaw Pact invasion of Western Europe, the United States insisted that it might,

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2014) (requesting the commencement of negotiations on a treaty to prohibit the threat or use of nuclear weapons under any circumstances).

166. See John Simpson, *The Role of Security Assurances in the Nuclear Nonproliferation Regime*, in KNOPF, *supra* note 163 (surveying effectiveness of NSAs as a non-proliferation tool); Feiveson & Hogendoorn, *supra* note 162, at 91, 95-96 (noting that at the 1995 and 2000 NPT review conferences, NNWS strongly argued in favor of the NWS providing rigorous, legally binding NSAs and PSAs); New Zealand et al., *Security Assurances* (James Martin Ctr. for Nonproliferation Studies and King’s Coll. Ctr. for Sci. and Sec. Studies, Working Paper J-4, 2003), in Preparatory Committee for the 2005 Review Conference of the Parties to the Treaty on Non-Proliferation of Nuclear Weapons, NPT/CONF.2005.PC.II/WP.11 (May 1, 2003), available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=NPT/CONF.2005/PC.II/WP.11](http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2005/PC.II/WP.11) (last visited Dec. 18, 2014) [hereinafter CSSS Briefing Book]; REACHING CRITICAL WILL, *supra* note 130, at 12, 52-54 (assessing NWS progress on 2010 commitments regarding security assurances); 1995 RevCon decision, *supra* note 160, at 25, 50-64; Gerson, *supra* note 149, at 42; Bunn & Timerbaev, *supra* note 157, at 11, 13; Thomas Graham & Leonor Tomero, “Obligations for Us All”: NATO & Negative Security Assurances, 49 DISARMAMENT DIPL. (2000), available at <http://www.acronym.org.uk/49nato.htm> (last visited Dec. 18, 2014) (tracing the evolution of NSAs in the NPT context); Leonard S. Spector & Aubrie Ohlde, *Negative Security Assurances: Revisiting the Nuclear-Weapon-Free Zone Option*, 35 ARMS CONTROL TODAY 13 (Apr. 2005), available at [http://www.armscontrol.org/act/2005\\_04/Spector\\_Ohlde](http://www.armscontrol.org/act/2005_04/Spector_Ohlde) (last visited Jan. 9, 2015); *A New Look at No First Use*, STANLEY FOUND. 4 (Apr. 4, 2008), available at <http://www.stanleyfoundation.org/publications/pdb/NoFirstUsePDB708.pdf> (last visited Dec. 18, 2014); see also David S. Jonas, *General and Complete Disarmament: Not Just for Nuclear Weapons States Anymore*, 43 GEO. J. INT’L L. 587 (2012) (arguing that NPT article VI imposes obligations on all parties, not only the NWS, to pursue complete disarmament); G.A. Res. 68/28, para. 1, U.N. Doc. A/RES/68/28 (Dec. 9, 2013), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/68/28](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/28) (last visited Dec. 18, 2014) (reaffirming the urgent need for effective NSAs); Philipp C. Bleek & Eric B. Lorber, *Security Guarantees and Allied Nuclear Proliferation*, 58 J. CONFLICT RESOL. 429 (2013).

indeed, be the first to use nuclear weapons, if that were the only remaining bulwark against aggression. After the dissolution of the U.S.S.R., however, it was Russia, with its greatly diminished military prowess that felt the need for "strategic ambiguity" in its nuclear posture, and in 1993 it rescinded the no first use declaration.<sup>167</sup>

The U.S. NFU posture has likewise evolved. In the 1950s, the official policy explicitly endorsed the possibility of a first use, but by the 1970s, the turn of phrase favored an emphasis on restraint, subject to certain exceptions; these statements have been episodically tweaked and refined by successive administrations.<sup>168</sup> Under the current iteration, expressed in the April 2010 Nuclear Posture Review Report (the Department of Defense's highest-level strategy document), the United States "will not use or threaten to use nuclear weapons against non-nuclear weapons states that are party to the Nuclear Non-Proliferation Treaty ("NPT") and in compliance with their nuclear non-proliferation obligations."<sup>169</sup>

The most nearly concerted NWS position on NFU and NSAs came

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167. See Beatrice Heuser, *Warsaw Pact Military Doctrines in the 1970s and 1980s: Findings in the East German Archives*, 12 COMP. STRATEGY 437 (1993); Feiveson & Hogendoorn, *supra* note 162, at 92; Ullman, *supra* note 165, at 670-72; Yuri Fedorov, *Russia's Doctrine on the Use of Nuclear Weapons* (Pugwash Meeting No. 279, Working Paper, 2002).

168. See Feiveson & Hogendoorn, *supra* note 162, at 90-91 (highlighting the 2002 statements of the George W. Bush administration, reserving "the right to respond with overwhelming force – including through resort to all our options" to another state's aggression, and the 1953 policy of the Dwight D. Eisenhower administration that "In the event of hostilities, the United States will consider nuclear weapons to be as available for use as other munitions."); Bunn & du Preez, *supra* note 158; Bundy et al., *supra* note 149; John Steinbruner, *Looking Back: Carter's 1978 Declaration and the Significance of Security Assurances*, 38 ARMS CONTROL TODAY 57 (Oct. 2008), available at [http://legacy.armscontrol.org/act/2008\\_10/lookingback](http://legacy.armscontrol.org/act/2008_10/lookingback) (last visited Jan. 9, 2015); Gerson, *supra* note 149.

169. 2010 Nuclear Posture Review Report, *supra* note 126, at 15-16 (The report does not identify what the reference to "nuclear non-proliferation obligations" might consist of, other than the NPT. It also stresses that, while U.S. conventional forces would ordinarily be sufficient to respond to other severe provocations, such as an enemy's use of chemical or biological weapons, it is difficult to foresee how the catastrophic potential of bio-weapons might evolve in the future, so "the United States reserves the right to make any adjustment in the assurance that may be warranted by the evolution and proliferation of the biological weapons threat and U.S. capacities to counter that threat." The report also explains that the United States is not prepared at the present time to adopt a comprehensive NFU policy, "but will work to establish conditions under which such a policy could be safely adopted."); see also *Securing Britain in an Uncertain Future: The Strategic Defence and Security Review* (Oct. 2010), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/62482/strategic-defence-security-review.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62482/strategic-defence-security-review.pdf) (last visited Dec. 18, 2014); see also Gerson, *supra* note 149.

on April 6, 1995, in connection with the extension of the NPT. There, all five NWS issued national statements; four of these were basically identical, promising not to use nuclear weapons against NNWS parties to the NPT, “except in the case of an invasion or any other attack on [the particular NWS], its territory, its armed forces or other troops, or against its allies or a State towards which it has a security commitment, carried out or sustained by such a State in alliance or association with a nuclear-weapon State.”<sup>170</sup> China alone was considerably more generous, undertaking “not to be the first to use nuclear weapons at any time or under any circumstances” and “not to use or threaten to use nuclear weapons against non-nuclear-weapon States or nuclear-weapon-free zones at any time or under any circumstances.”<sup>171</sup> The contents of

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170. *Letter from the Permanent Representative of France to the United Nations Addressed to the Secretary-General* (Apr. 6, 1995), available at <http://globe.blogs.nouvelobs.com/media/01/01/40968903.pdf> (last visited Dec. 18, 2014). Substantially identical, contemporaneous letters (also including PSA commitments) were authored by Russia (*Letter from the Permanent Representative of the Russian Federation to the United Nations* (Apr. 6, 1995), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Disarm%20S1995261.pdf> (last visited Dec. 1, 2014)); the United Kingdom (*Letter from Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations* (Apr. 6, 1995), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Disarm%20S1995262.pdf> (last visited Dec. 1, 2014)) and the United States (*Letter from the Permanent Mission of the United States of America to the United Nations addressed to the Secretary-General* (Apr. 6, 1995), available at <http://globe.blogs.nouvelobs.com/media/01/00/1336803625.2.pdf> (last visited Dec. 18, 2014)); 1995 RevCon decision, *supra* note 160, at 51-64; see also CSSS Briefing Book, *supra* note 166, at 1-3 (excerpting prior NSAs from NWS).

171. *Letter from the Permanent Representative of China to the United Nations Addressed to the Secretary-General* (Apr. 6, 1995), available at <http://www.pircenter.org/media/content/files/10/13590930390.pdf> (last visited Dec. 18, 2014). China’s NFU and NSA commitments have traditionally been broad, but outsiders are sometimes skeptical about the sincerity of the undertakings. See CSSS Briefing Book, *supra* note 166, at 1; REACHING CRITICAL WILL, *supra* note 130, at 31-32; Kelsey Davenport & Marcus Taylor, *Assessing Progress on Nuclear Nonproliferation and Disarmament, Updated Report Card*, ARMS CONTROL ASS’N (2010-2013), available at [http://www.armscontrol.org/files/ACA\\_2013\\_Nuclear\\_Report\\_Card.pdf](http://www.armscontrol.org/files/ACA_2013_Nuclear_Report_Card.pdf) (last visited Dec. 18, 2014) [hereinafter *Assessing Progress*]; see Jeffrey Lewis, *China’s Nuclear Idiosyncrasies and Their Challenges 17-18* (IFRI Security Studies Center Proliferation Paper 47, Nov.-Dec. 2013), available at [www.ifri.org/downloads/pp47lewis.pdf](http://www.ifri.org/downloads/pp47lewis.pdf) (last visited Dec. 18, 2014); Ullman, *supra* note 165, at 669; *Annual Report to Congress on Military and Security Developments Involving the People’s Republic of China in 2014*, U.S. DEP’T DEF. at 28, available at [http://www.defense.gov/pubs/2014\\_DoD\\_China\\_Report.pdf](http://www.defense.gov/pubs/2014_DoD_China_Report.pdf) (last visited Dec. 18, 2014); see Gregory Kulacki, *Chickens Talking with Ducks: The U.S.-Chinese Nuclear Dialogue*, 41 ARMS CONTROL TODAY 15 (Oct. 2011), available at [http://www.armscontrol.org/act/2011\\_10/U.S.\\_Chinese\\_Nuclear\\_Dialogue](http://www.armscontrol.org/act/2011_10/U.S._Chinese_Nuclear_Dialogue) (last visited Jan. 9, 2015); see Rebecca Heinrichs, *China’s Strategic Capabilities and Intent* (Heritage Foundation Issue Brief No. 4111, Dec. 18, 2013); see also Bill Gertz, *Guess*

the various NFU and NSA postures of the NWS have ebbed and flowed since then.<sup>172</sup>

Similar drama has sometimes attended the NFU postures of other states, too. India, for example, has long asserted a declaration of no first use, either in blanket form or subject to limitations.<sup>173</sup> The maintenance of that tradition was briefly, but excitedly, called into question in April 2014, when the hardline Bharatiya Janata Party (“BJP”) was poised to win the national election and seemed to equivocate about nuclear policy. Following a flare-up of adverse international reaction, however, the BJP election manifesto backpedaled, and reaffirmed the country’s accustomed stance.<sup>174</sup>

In contrast, Pakistan’s nuclear doctrine has expressly reserved the right to use nuclear weapons first, and it has reportedly threatened to do so against India on at least four occasions.<sup>175</sup> Israel and North Korea are not known to have issued authoritative NFU policy statements.<sup>176</sup>

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*Who’s Coming to Dinner. Chinese General Who Threatened Nuclear Strike on U.S. Visits Washington This Week*, WASH. FREE BEACON (2013) (quoting Chinese generals threatening to use nuclear weapons against the United States in a conflict over Taiwan).

172. REACHING CRITICAL WILL, *supra* note 130, at 53-54; Simpson, *supra* note 166, at 69-75; *Assessing Progress*, *supra* note 171, at 6, 12; Bunn & du Preez, *supra* note 158.

173. P.M. Kamath, *Indian Nuclear Doctrine: Arming to Disarm*, in NUCLEAR DISARMAMENT: REGIONAL PERSPECTIVES ON PROGRESS 63, 65 (2013) (reporting that India had pledged not to use nuclear weapons “against states which do not possess nuclear weapons, or are not aligned” with other nuclear weapons states; subsequently, India modified the pledge to say “if a non-nuclear power uses biological or chemical weapons (BWC), India will keep the option of using nuclear weapons open.”); *Prime Minister Proposes No-First-Use of Nuclear Weapons*, INDIAN EXPRESS (Apr. 2, 2014, 2:26 PM), available at <http://indianexpress.com/article/india/india-others/prime-minister-proposes-no-first-use-of-nuclear-weapons/> (last visited Dec. 18, 2014); Manmohan Singh, *Inaugural Address on a Nuclear Weapon-Free World: From Conception to Reality* (Apr. 2, 2014); *India Call for Global “No First Use” Nuke Policy*, GLOBAL SEC. NEWSWIRE (2010), available at <http://www.nti.org/gsn/article/india-calls-for-global-no-first-use-nuke-policy/> (last visited Dec. 18, 2014); Feiveson & Hogendoom, *supra* note 162, at 92; *Assessing Progress*, *supra* note 171, at 29-30.

174. *Indian Party Backpedals on Provocative Nuclear Policy Remarks*, GLOBAL SEC. NEWSWIRE (Apr. 9, 2014), available at <http://www.nti.org/gsn/article/indian-party-backpedals-provocative-nuclear-policy-remarks/> (last visited Oct. 24, 2014); *BJP Puts No-First-Use Nuclear Policy in Doubt*, TIMES INDIA (Apr. 7, 2014), available at <http://newsindiatimes.com/bjp-puts-no-first-use-nuclear-policy-in-doubt/> (last visited Dec. 18, 2014); P.R. Chari, *India’s Nuclear Doctrine: Stirrings of Change*, CARNEGIE ENDOWMENT INT’L PEACE (June 4, 2014), available at <http://carnegieendowment.org/2014/06/04/india-s-nuclear-doctrine-stirrings-of-change> (last visited Dec. 18, 2014).

175. See Feiveson & Hogendoom, *supra* note 162, at 92; but see *Assessing Progress*, *supra* note 171, at 35 (discussing Pakistani NFU pledge).

176. See Feiveson & Hogendoom, *supra* note 162, at 92; *Assessing Progress*, *supra* note 171, at 38 (noting North Korean nuclear threats).

#### D. Nuclear Weapon Free Zones.

Another important forum in which NSAs have been expressed has been a series of regional “nuclear weapon free zones” (“NWFZs”). Typically, a zone of this sort is established by a treaty among the states in a particular geographic area; it reinforces the NPT by fostering additional non-proliferation undertakings that may be more precisely tailored to conditions in the particular region, and by engrafting additional, more intrusive verification arrangements that might be more acceptable among states that already know and trust each other relatively well.<sup>177</sup> Five such zones are currently in place, for Latin America (1967 Treaty of Tlatelolco);<sup>178</sup> the South Pacific (1985 Treaty of Raratonga);<sup>179</sup> Southeast Asia (1995 Treaty of Bangkok);<sup>180</sup> Africa (1996 Treaty of Pelindaba);<sup>181</sup> and Central Asia (2006 Treaty of Semipalatinsk).<sup>182</sup>

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177. See generally U.N. Report of the Disarmament Commission, U.N. Doc. A/54/42; GAOR, 54th Sess., Supp. No. 42 (1999), available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/54/42\(SUPP\)](http://www.un.org/ga/search/view_doc.asp?symbol=A/54/42(SUPP)) (last visited Dec. 18, 2014) (identifying criteria for establishing a regional NWFZ); *Nuclear-Weapon-Free Zones*, U.N. OFFICE FOR DISARMAMENT AFFS., available at <http://www.un.org/disarmament/WMD/Nuclear/NWFZ.shtml> (last visited Dec. 18, 2014); *Comprehensive Study of the Question of Nuclear-Weapon-Free Zones in All Its Aspects*, G.A. Res. 3472 (XXX) (1975), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/3472\(XXX\)&Lang=E&Area=RESOLUTION](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/3472(XXX)&Lang=E&Area=RESOLUTION) (last visited Dec. 18, 2014); *Nuclear-Weapon-Free Zones at a Glance*, ARMS CONTROL ASS'N (Sept. 2012), available at <http://www.armscontrol.org/print/2567> (last visited Oct. 24, 2014); *Nuclear Weapons Free Zones*, NUCLEAR AGE PEACE FOUND., available at [http://nuclearfiles.org/menu/library/treaties/nuclear-free-zones/trty\\_nuclear-free-zone-index.htm#](http://nuclearfiles.org/menu/library/treaties/nuclear-free-zones/trty_nuclear-free-zone-index.htm#) (last visited Dec. 18, 2014); NPT, *supra* note 153, art. VII (noting explicitly the parties' rights to develop regional non-proliferation measures); Jozef Goldblat, *Nuclear-Weapon-Free Zones: A History and Assessment*, NONPROLIFERATION REV. 18 (1997); *Assessing Progress*, *supra* note 171, at 6, 12; *REACHING CRITICAL WILL*, *supra* note 130, at 12, 56-66; *CSSS Briefing Book*, *supra* note 166, at sec. F; 1995 RevCon decision, *supra* note 160, at 25, 65-87.

178. Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 634 U.N.T.S. 326 [hereinafter Treaty of Tlatelolco].

179. South Pacific Nuclear Weapon Free Zone Treaty, Aug. 6, 1985, 1445 U.N.T.S. 177 [hereinafter Treaty of Raratonga].

180. Southeast Asia Nuclear-Weapon-Free Zone Treaty, Dec. 15, 1995, 35 I.L.M. 635 [hereinafter Treaty of Bangkok].

181. African Nuclear-Weapon-Free-Zone Treaty, Apr., 11, 1996, 35 I.L.M. 698 [hereinafter Treaty of Pelindaba]; 1995 RevCon decision, *supra* note 160, at 67-72.

182. Treaty on a Nuclear-Weapon-Free-Zone in Central Asia (Treaty of Semipalatinsk), Sept. 8, 2006, No. 51633 available at <http://disarmament.un.org/treaties/t/canwzfz/text> (last visited Jan. 9, 2015). In addition, Mongolia has declared itself to be a nuclear weapons free zone, and the leading nuclear weapons states have formally acknowledged that status. See Daryl G. Kimball, *Mongolia Recognized as Nuclear-Free Zone*, 42 ARMS CONTROL TODAY 6 (Oct. 2012), available at [http://www.armscontrol.org/act/2012\\_10/Mongolia-Recognized-as-Nuclear-Free-Zone%20](http://www.armscontrol.org/act/2012_10/Mongolia-Recognized-as-Nuclear-Free-Zone%20) (last visited

Each of the NWFZ agreements also includes protocols<sup>183</sup> in which the NWS are invited to affirm (in text that varies somewhat from treaty to treaty) that they will respect the non-nuclear status of the region, such as by not stationing or testing nuclear weapons in the area. In addition, these protocols ask the NWS to declare robust NSAs – promising that they will not use nuclear weapons against states that have joined the relevant treaty. In the Treaty of Tlatelolco, for example, the relevant protocol passage asserts “[t]he Governments represented by the undersigned Plenipotentiaries also undertake not to use or threaten to use nuclear weapons against the Contracting Parties of the Treaty for the Prohibition of Nuclear Weapons in Latin America.”<sup>184</sup>

In joining that protocol in 1971, however, the United States appended an understanding or declaration<sup>185</sup> that “the United States Government would have to consider that an armed attack by a Contracting Party, in which it was assisted by a nuclear-weapon state, would be incompatible with the Contracting Party’s corresponding

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Dec. 18, 2013). A proposal to make the Middle East a zone free of all weapons of mass destruction has also been developed. Mukhatzhanova, *supra* note 158, at 22; Kelsey Davenport, *No Date Set for Middle East Zone Meeting*, 43 ARMS CONTROL TODAY 32 (Nov. 2013), available at [http://www.armscontrol.org/act/2013\\_11/No-Date-Set-For-Middle-East-Zone-Meeting](http://www.armscontrol.org/act/2013_11/No-Date-Set-For-Middle-East-Zone-Meeting) (last visited Jan. 9, 2015). In addition, at least some nuclear weapons activities have been banned by treaty from Antarctica. See, e.g., Antarctic Treaty, art. V, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71; outer space (Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, art. IV, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205); and the ocean floor (Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, art. I, Feb. 11, 1971, 23 U.S.T. 701, 955 U.N.T.S. 115, T.I.A.S. No. 7337).

183. Under international law, there is no distinction between a treaty denominated as a “protocol” and any other. See Vienna Convention on the Law of Treaties, *supra* note 97, (defining “treaty,” noting that any “particular designation” is immaterial). Often, the term “protocol” is applied to a document that is attached to, or otherwise associated with, some other treaty; what is unusual in the NWFZ context is the fact that in each instance, the treaty and the protocol have completely non-overlapping sets of parties. See generally Marco Roscini, *Negative Security Assurances in the Protocols Additional to the Treaties Establishing Nuclear Weapon-Free Zones*, in OBAMA AND THE BOMB: THE VISION OF A WORLD FREE OF NUCLEAR WEAPONS 129 (Heinz Gartner ed., 2011).

184. Additional Protocol II to the Treaty for the Treaty of Tlatelolco, art. 3, Apr. 1, 1968, available at [http://disarmament.un.org/treaties/t/tlateloco\\_p2/text](http://disarmament.un.org/treaties/t/tlateloco_p2/text) (last visited Jan. 9, 2015).

185. See RICHARD F. GRIMMETT, CONG. RESEARCH SERV., S.PT.106-71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE (2001), available at <http://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf> (last visited Dec. 18, 2014) (noting different types of reservations, understandings, declarations and other conditions the Senate might assert in its consideration of a treaty; the vocabulary has been applied inconsistently).

obligations under Article 1 of the Treaty.”<sup>186</sup> With this reservation, the United States significantly restricted the scope of the original NSA, apparently excluding from the pledge a possible first use of nuclear weapons against an NNWS who was aligned in war with an NWS.<sup>187</sup> Other NWS have likewise sometimes reined in the scope of their NSA commitments in other NWFZ instruments.<sup>188</sup> The United States Senate is now considering providing advice and consent to the ratification of the protocols for the Pelindaba and Raratonga NWFZ treaties; it remains to be seen whether additional reservations to the NSA statements in those documents will be appended.<sup>189</sup>

### E. Assessment of the Non-Use Declarations.

Although the population of NFU, NSA, and PSA statements is now rather large, their overall efficacy is quite restricted. First, they are far from comprehensive or uniform in content. The United States and other NWS have frequently inserted distinct national caveats and subtle disclaimers that have undercut the potentially bold reach, reserving the

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186. GRAHAM, JR. & LAVERA, *supra* note 13, at 57 (quoting Richard Nixon, Ratification of Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America (1971)).

187. The content of this 1971 condition is somewhat more restrictive than the current global U.S. NSA policy, as reflected in the 2010 Nuclear Posture Review Report, *supra* note 126. See Bunn & du Preez, *supra* note 158.

188. See *Nuclear-Weapon-Free Zones*, U.N. OFFICE FOR DISARMAMENT AFFS., available at <http://www.un.org/disarmament/WMD/Nuclear/NWFZ.shtml> (last visited Dec. 18, 2014) (collecting NWS statements attached to ratification of protocols to NWFZ treaties); *Assessing Progress*, *supra* note 171, at 14, 17, 20, 22; see also Spector & Ohlde, *supra* note 166 (arguing that NWFZ protocols are superior to unilateral NSAs for entrenching legal protections); Roscini, *supra* note 183, at 134-38.

189. Peter Crail, *The Nuclear Weapons Free Zone Treaty Protocols and U.S. National Security*, ARMS CONTROL ASS'N ISSUE BRIEF, May 20, 2011; see also Feiveson & Hogendoorn, *supra* note 162, at 96 (discussing U.S. 1996 statement upon signing protocol to Treaty of Pelindaba). Notably, NWFZs seem to be one of the few arms control topics on which the NWS have recently been able to collaborate effectively, despite their other ongoing political difficulties. Regarding the Central Asia zone, for example, the leading countries had long been irreconcilably divided regarding one provision of the Semipalatinsk Treaty which appeared to give Russia a right to re-introduce nuclear weapons into the region. After five years of frustrated negotiations among the NWS, a solution to the problem was suddenly developed in April 2014, and the protocol was quickly signed by all five states. See Rachel Oswald, *Five Powers Agree to Respect Central Asian Nuclear-Free Zone*, GLOBAL SEC. NEWswire (Apr. 30, 2014), available at <http://www.nti.org/gsn/article/five-nuclear-powers-agree-sign-protocol-central-asian-nuclear-free-zone/> (last visited Dec. 18, 2014); Office of the Spokesperson, *United States Signs Protocol to Central Asian Nuclear-Weapon-Free Zone Treaty*, U.S. DEPT. ST. (May 6, 2014), available at <http://www.state.gov/t/pa/prs/ps/2014/05/225681.htm> (last visited Dec. 18, 2014).

right to use nuclear weapons first, even against an NNWS, in open-ended circumstances.<sup>190</sup> Second, many of the commitments are not global; they apply only to states in specified geographic regions, or who otherwise meet the designated criteria.<sup>191</sup>

Third, the NWS statements are of contested legal status. The NSAs inscribed in an NWFZ protocol are authoritative for the countries that have joined the instrument, but the pledges extended in the context of NPT review conferences are more dubious. NNWS contend that the commitments are key elements of a bargained-for exchange, but the NWS have waffled.<sup>192</sup> Fourth, the assurances consist solely of words on papers – there is no “operationalization” of the commitments, no concrete steps that the NWS must undertake to validate the seriousness of the undertakings. When nothing has to change in the real world regarding the number, status or treatment of the nuclear forces, the NNWS cannot be fully confident in reliability of the declarations. Certainly, even a naked verbal commitment counts for something, but it is equally clear that such a declaration is, as a practical matter, unverifiable and subject to being swiftly revised or even ignored as circumstances demand *in extremis*.

As a result, the existing NFU, NSA, and PSA statements have not been fully satisfactory to the NNWS. The undertakings have not provided sufficient reassurance that it is reliably safe to forego a possible nuclear weapons option, and have therefore not achieved the non-proliferation value the NWS anticipated. Viewed differently, the heavily qualified NFU, NSA and PSA rhetoric has not succeeded in communicating any diminished future importance for nuclear weapons. The NWS sought to convey a message of restraint, suggesting that nuclear weapons are not to be forever “the coin of the realm,” not the indelible badge of first-class national status in the world. But their collective slipperiness in declining to offer comprehensive assurances seems to implant precisely the opposite signal. If the NWS are unwilling to overtly and unconditionally agree not to use nuclear weapons first, why should the NNWS not emphasize and perhaps

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190. Simpson, *supra* note 166, at 64 (reporting dissatisfaction among NNWS because the NSAs were not uniform or issued jointly by all the NWS).

191. Spector & Ohlde, *supra* note 166 (comparing NWFZ and NSA approaches; also noting that the non-parties to the NPT (India, Israel, North Korea and Pakistan) are not allowed to join the protocols to the NWFZ treaties).

192. See Bunn & du Preez, *supra* note 158; Simpson, *supra* note 166, at 64; Feiveson & Hogendoorn, *supra* note 162, at 96; New Zealand Working Paper, in CSSS Briefing Book, *supra* note 166, at J-4; Graham & Tomero, *supra* note 166; Spector & Ohlde, *supra* note 166.



pursue those arms, too? If the NWS, with their enormous conventional weapons capabilities and elite army, navy, air force, and Marines, report that they cannot entirely dispense with the possibility that it might be necessary to use nuclear weapons first, how could other, smaller and less well-defended states ignore that same hawkish logic?<sup>193</sup>

In fact, nuclear weapons remain firmly lodged in a priority position in international relations. People sometimes observe that these arms have not been used since 1945, but in another, deeper sense, they are “used” every day – to deter, coerce, and intimidate – even without being detonated. And the United States has quite frequently considered the possibility of using nuclear weapons in the explosive sense, too. By one count, on at least twenty-five occasions, the U.S. leadership seriously contemplated a first application of the awesome power.<sup>194</sup> Sometimes, the perpetual threat of nuclear weapons is made overt, such as by communicating the ominous suggestion that “all options are on the table” for a response to a particular crisis – nothing could be a more vivid reminder that the United States retains the physical capacity and the legal right to flex its strongest muscles at will.<sup>195</sup>

Finally, it must be observed that the NWS are certainly not acting

193. Feiveson & Hogendoorn, *supra* note 162, at 95 (stating that “the continued reliance on hedged no-first-use policies by the United States and other nuclear powers is often one of the rationales nuclear weapons advocates from non-nuclear-weapons states offer as justification for abandoning NPT commitments and developing their own nuclear weapons.”); Bunn & du Preez, *supra* note 158; Gerson, *supra* note 149, at 41-42 (arguing that U.S. retention of the option to use nuclear weapons first “undermines the NPT regime by signaling that even the world’s most affluent and powerful nation continues to believe that nuclear weapons are important instruments of national power.”); see Graham & Tomero, *supra* note 166.

194. See Daniel Ellsberg, *Roots of the Upcoming Nuclear Crisis*, in *THE CHALLENGE OF ABOLISHING NUCLEAR WEAPONS* 45, 52-53 (David Krieger ed., 2009) (listing twenty-five occasions from 1948 to 2008 when the United States threatened or considered the first use of nuclear weapons).

195. *Id.* at 47 (citing examples of U.S. leaders emphasizing that “all options are on the table,” clearly including nuclear weapons); *id.* at 56-57 (highlighting the unspoken, but clear, threat to use nuclear weapons against Iraq in 1991 if Saddam Hussein used chemical weapons); see also Jeremy Bender, *The US is Conducting a Massive Nuclear Arms Drill Days After a Russian Nuclear Exercise*, *BUS. INSIDER* (May 12, 2014), available at <http://www.businessinsider.com/us-conducting-a-massive-nuclear-arms-drill-2014-5> (last visited Dec. 18, 2014) (noting that in the midst of the 2014 crisis over Ukraine, both the United States and Russia conducted nuclear weapons exercises); *Assessing Progress*, *supra* note 171, at 26 (noting that President Obama asserted that he “will take no options off the table” in responding to Iran’s nuclear program); see also *Russian General Calls for Preemptive Nuclear Strike Doctrine Against NATO*, *MOSCOW TIMES* (Sept. 3, 2014), available at <http://www.themoscowtimes.com/business/article/russian-general-calls-for-preemptive-nuclear-strike-doctrine-against-nato/506370.html> (last visited Dec. 18, 2014) (recent Russian rhetoric about preemptive military strike).

as if they intend to get out of the nuclear weapons business at any point in the foreseeable future. Even while the numbers of deployed, operational nuclear weapons are falling or stable for some of the nine possessing states,<sup>196</sup> there are other indicators of an emerging nuclear bull market. Russia is undertaking a substantial modernization of its strategic weapons, investing in new generations of land- and sea-based missiles.<sup>197</sup> China, India, and Pakistan are building up, too.<sup>198</sup> In the United States, there is no ongoing construction of additional nuclear weaponry, but medium-term plans call for a massive recapitalization of all three legs of the “triad” (land-based missiles, submarine-based missiles, and long-range bombers), and the imperative for indefinitely sustaining the infrastructure that supports, maintains, and operates the nuclear establishment is routinely stressed.<sup>199</sup>

196. See sources cited *supra* notes 129-30 and accompanying text.

197. REACHING CRITICAL WILL, *supra* note 130, at 34; Watts, *supra* note 149, at 44-45; Kristensen, *supra* note 130; Pavel Podvig, *Russian Federation, in Assuring Destruction, supra* note 130, at 59-66.

198. *Assessing Progress, supra* note 171, at vi, 29, 35; Hui Zhang, *China, in Assuring Destruction, supra* note 130, at 17-26; M.V. Ramana, *India, in Assuring Destruction, supra* note 130, at 34-43; Zia Mian, *Pakistan, in Assuring Destruction, supra* note 130, at 51-58; Tim Craig & Karen DeYoung, *Pakistan Is Eyeing Sea-Based and Short-Range Nuclear Weapons, Analysts Say*, WASH. POST (Sept. 21, 2014), available at [http://www.washingtonpost.com/world/asia\\_pacific/pakistan-is-eyeing-sea-based-and-short-range-nuclear-weapons-analysts-say/2014/09/20/bd9436a-11bb-11e4-8936-26932bcfd6ed\\_story.html](http://www.washingtonpost.com/world/asia_pacific/pakistan-is-eyeing-sea-based-and-short-range-nuclear-weapons-analysts-say/2014/09/20/bd9436a-11bb-11e4-8936-26932bcfd6ed_story.html) (last visited Dec. 18, 2014).

199. Amy F. Woolf, *Nuclear Modernization in an Age of Austerity*, 44 ARMS CONTROL TODAY 20 (Mar. 2014), available at [http://www.armscontrol.org/act/2013\\_03/Nuclear-Modernization-in-an-Age-of-Austerity](http://www.armscontrol.org/act/2013_03/Nuclear-Modernization-in-an-Age-of-Austerity) (last visited Dec. 18, 2014) (quoting Secretary of Defense Chuck Hagel regarding U.S. plans to “invest in the modernization we need”); Jon B. Wolfsthal et al., *The Trillion Dollar Nuclear Triad: US Strategic Nuclear Modernization Over the Next Thirty Years*, JAMES MARTIN CTR. FOR NONPROLIFERATION STUD. 28 (Jan. 2014), available at [http://cns.miis.edu/opapers/pdfs/140107\\_trillion\\_dollar\\_nuclear\\_triad.pdf](http://cns.miis.edu/opapers/pdfs/140107_trillion_dollar_nuclear_triad.pdf) (last visited Dec. 18, 2014) (concluding that the United States plans to spend approximately one trillion dollars maintaining its current nuclear missiles, submarines, bombers and other weapons, procuring replacement systems, and upgrading existing bombs); William J. Broad & David E. Sanger, *U.S. Ramping up Major Renewal in Nuclear Arms*, N.Y. TIMES (Sept. 21, 2014), available at [http://www.nytimes.com/2014/09/22/us/us-ramping-up-major-renewal-in-nuclear-arms.html?\\_r=0](http://www.nytimes.com/2014/09/22/us/us-ramping-up-major-renewal-in-nuclear-arms.html?_r=0) (last visited Dec. 18, 2014); Andrew Lichterman, *United States, in Assuring Destruction, supra* note 130, at 89-111; REACHING CRITICAL WILL, *supra* note 130, at 38-39; Kristensen & Norris, *US Nuclear Forces, supra* note 127; Acheson, *supra* note 130; Tom Z. Collina, *U.S. Nuclear Arms Spending Set to Rise*, 44 ARMS CONTROL TODAY 31 (Apr. 2014), available at [http://www.armscontrol.org/act/2014\\_04/U-S-Nuclear-Arms-Spending-Set-to-Rise%20](http://www.armscontrol.org/act/2014_04/U-S-Nuclear-Arms-Spending-Set-to-Rise%20) (last visited Dec. 18, 2014); Kristensen, *supra* note 130. *But see* Al Mauroni, *A Rational Approach to Nuclear Weapons Policy*, WAR ON THE ROCKS (Apr. 28, 2014), available at <http://warontherocks.com/2014/04/a-rational-approach-to-nuclear-weapons-policy/> (last visited Dec. 18, 2014) (arguing that a U.S. reinvestment in nuclear weapons is overdue and affordable).

## IV. A PROPOSED NEW TREATY

This section presents the draft text of a proposed new treaty,<sup>200</sup> together with annotations that explain the provisions and highlight key precedents. It is styled as a “Nuclear Kellogg-Briand Pact,” and attempts to provide the “nuts and bolts” that can build upon some of the lessons identified in Section II and address the problems highlighted in Section III.

Nuclear Kellogg-Briand Pact  
General Treaty for the Renunciation of Nuclear War as an  
Instrument of National Policy

The States Parties to this Treaty,

*Deeply sensible* of their solemn duty to promote the welfare of mankind,<sup>201</sup>

*Considering* the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples,<sup>202</sup>

*Sharing the view* that a nuclear war cannot be won and must never be fought,<sup>203</sup>

*Acknowledging* the obligations contained in article VI of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons, “to pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and

200. Compare the proposed treaty with N.Z., New Agenda Coal., *Security Assurances J-4 to -6* (Prep. Comm. for the 2005 Review Conf. of the Parties to the Treaty on Non-Prolif. of Nuclear Weapons, Working Paper, 2003), in CSSS Briefing Book, *supra* note 166, at J-5 (describing a draft treaty “on the prohibition of the use or threat of use of nuclear weapons against non-nuclear weapon states parties to the treaty on the non-proliferation of nuclear weapons”), and Bunn & Timerbaev, *supra* note 165, at 18 (presenting brief draft declaration and U.N. Security Council resolution on NSAs).

201. This paragraph copies the first preambular paragraph of the 1928 Kellogg-Briand Pact. Kellogg-Briand Pact, *supra* note 1.

202. This paragraph copies the first preambular paragraph of the NPT. NPT, *supra* note 153; see also sources cited *supra* note 124.

203. This passage comes from Ronald Reagan’s Third State of the Union Address in 1984. Reagan, *supra* note 151. It is reflected in the preambles to the Nuclear Risk Reduction Centers Agreement, *supra* note 82, 1530 U.N.T.S 387; second preambular paragraph and the Ballistic Missile Launch Notification Agreement, *supra* note 83, 27 I.L.M. 1200.

effective international control";<sup>204</sup>

*Recalling* the Advisory Opinion of the International Court of Justice of July 8, 1996, which affirmed that in view of the widespread, long-lasting and severe effects of nuclear weapons, the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and that nuclear weapons are generally subject to the same rules of international law applicable to all other weapons;<sup>205</sup>

*Recalling also* that, in accordance with the Charter of the United Nations, States must 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, and that the establishment and maintenance of international peace and security are to be promoted with the least diversion for armaments of the world's human and economic resources;<sup>206</sup>

*Persuaded* that the time has come when a frank renunciation of nuclear war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated;<sup>207</sup>

*Convinced* that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process and that no Party should promote its national interests by resort to nuclear war;<sup>208</sup>

*Hopeful* that, encouraged by their example, all the other nations of the world will join in this humane endeavor and by adhering to the present Treaty as soon as it comes into force, bring together their peoples within the scope of its beneficent provisions, thus uniting the nations of the world in a common renunciation of nuclear war as an instrument of their national policy;<sup>209</sup>

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204. NPT, *supra* note 153, art. VI.

205. See ICJ Advisory Opinion on Nuclear Weapons, *supra* note 139, at 266.

206. This paragraph is taken from the twelfth preambular paragraph of the NPT. NPT, *supra* note 153.

207. This paragraph is adapted from the second preambular paragraph of the original Kellogg-Briand Pact. Kellogg-Briand Pact, *supra* note 1. The comment about "peaceful and friendly relations now existing" is probably about as true today as it was in 1928.

208. This paragraph is adapted from the third preambular paragraph of the original Kellogg-Briand Pact and modified to avoid the 1928 treaty's insistence upon reciprocity; this document is intended to have global coverage. Kellogg-Briand Pact, *supra* note 1.

209. This paragraph is adapted from the fourth (final) preambular paragraph of the original Kellogg-Briand Pact. Kellogg-Briand Pact, *supra* note 1.

Have agreed as follows:

### Article I. Renunciation

The Parties solemnly declare in the names of their respective peoples<sup>210</sup> that they condemn and renounce recourse to nuclear war<sup>211</sup> for the solution of international controversies,<sup>212</sup> as an instrument of national policy, or for any other reason.<sup>213</sup>

### Article II. Dispute Resolution

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.<sup>214</sup>

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210. This reference to the “peoples,” instead of solely to the states or their governments, reflects the populist anti-war sentiment propelling the 1928 negotiations; it was included in the 1928 agreement, Kellogg-Briand Pact, *supra* note 1, but is no longer customary; *cf.* U.N. Charter, *supra* note 2, at preamble (stating that “We the peoples of the United Nations” are determined to achieve specified objectives; and “Accordingly, our respective Governments” establish the U.N. organization).

211. Like the 1928 Kellogg-Briand Pact, this proposed treaty does not confine the term “war” to the sense of formally declared war; it applies to all uses of nuclear weapons in international and non-international armed conflict. Note that the U.N. Charter, *supra* note 2, art. 2 para 4, refers to a “use of force,” in order to avoid any suggestion that states might escape some legal responsibility simply by fighting without officially declaring war. *See also* Kellogg-Briand Pact, *supra* note 1, art. 1.

212. This sentence omits “in their relations with one another” from the 1928 treaty, in order to ensure that the protections of the nuclear treaty are applicable to all countries, regardless of whether they join the agreement, as well as to non-state actors or any other target. This proposed treaty thus also exceeds the coverage of the existing Nuclear Weapon Free Zone treaties and associated protocols, *supra* notes 178-89, which provide non-use guaranties only to states in particular geographic regions.

213. *See* Kellogg-Briand Pact, *supra* note 1, art. 1. This sentence re-works the syntax of the original Kellogg-Briand passage, and adds “or for any other reason,” to avoid the criticism that the 1928 agreement might have been interpreted to permit a recourse to war that was somehow construed not to be “for the solution of international controversies” or “as an instrument of national policy.” *Id.*; *see also* sources cited *supra* note 25.

214. *See* Kellogg-Briand Pact, *supra* note 1, art. 2. This article is substantively identical to article II of the 1928 treaty. It does not specify any particular pacific means for settling or solving international disputes or conflicts, and neither this accord nor the 1928 original establishes any new institutions or organizations for those purposes. In the interwar period, the League of Nations and multiple other institutions contributed to peaceful resolution of disputes. *See* League of Nations Covenant, *supra* note 36. Today, the United Nations family offers even more possibilities. *See* U.N. Charter, *supra* note 2; *see also* sources cited *supra* note 11 (organizations created by arms control treaties). Unlike the

### Article III. Declarations

Each Party shall declare, upon entry into force of this agreement for it, that it renounces any right to use nuclear weapons<sup>215</sup> absolutely, under any circumstances, at any time, and against any target, or that it reserves the right to use nuclear weapons, subject to the laws of armed conflict,<sup>216</sup> in response to a first use of nuclear weapons against it, its armed forces, or its allies.<sup>217</sup> The Party may rescind or modify this

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Covenant of the League of Nations, this agreement does not specify a "cooling off period" for use of alternative dispute resolution forums prior to a recourse to force. See League of Nations Covenant, *supra* note 36, art. 12.

215. The treaty might offer a definition of the term "nuclear weapon," to exclude so-called "dirty bombs" (which use nuclear materials, but do not involve a nuclear explosion) and "peaceful nuclear explosions" (which would use nuclear explosive power for civil engineering purposes).

216. Many believe that, in view of the devastating power and long-term effects, a use of nuclear weapons can never conform to the law of armed conflict principles of discrimination and proportionality, but the ICJ has been unable definitively to reach such a conclusion. See ICJ Advisory Opinion on Nuclear Weapons, *supra* note 139, para. 105(2)(E).

217. The text of the 1928 treaty does not contain any overt limitation or exemption from the broad prohibition against recourse to war, but the negotiating history clearly establishes a distinction between aggressive or offensive war vs. defensive or responsive war. See sources cited *supra* note 29 and accompanying text. This proposed text makes the distinction explicit between "first use" of nuclear weapons and "second use," and allows each party to reserve the right to respond in kind against an attacker's initiating the use of nuclear weapons. Presumably, the NNWS parties to the NPT, who have given up the right to possess nuclear weapons, would opt for the "absolute" renunciation of nuclear weapons, while the NWS might retain the legal right to use nuclear weapons responsively. The distinction between aggressive and defensive conventional war can be quite elusive; the facts about who shot first or which state committed the first offensive action could be uncertain and contested under the 1928 Kellogg-Briand structure. In contrast, the line-drawing required by this proposed nuclear treaty should be simpler—it should ordinarily be relatively easy to determine whether a nuclear weapon has been used, and against whom, releasing a victim state from its formal renunciation of nuclear weapons. In some circumstances, perhaps, attribution of the nuclear explosion to a particular user might be contested. See *Understanding Nuclear Forensics in 5 Questions*, INT'L ATOMIC ENERGY AGENCY (2014), available at [https://www.iaea.org/sites/default/files/forensics070714\\_0.pdf](https://www.iaea.org/sites/default/files/forensics070714_0.pdf) (last visited Dec. 18, 2014) (discussing problems of determining the origin of nuclear materials and steps to improve that capability).

Under this proposed treaty, even a single use of one nuclear weapon would release the victim state from its non-use pledge. But that would not imply that there would then be "no limits" on its legally permitted nuclear response; the traditional law of armed conflict requirements (necessity, proportionality, discrimination, avoidance of unnecessary suffering) would still apply. See generally, GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* (2010); MARY ELLEN O'CONNELL, *INTERNATIONAL LAW AND THE USE OF FORCE: CASES AND MATERIALS* (2d ed. 2009); *The White House, Fact Sheet: Nuclear Weapons Employment Strategy of the United States*, WHITE HOUSE (June 19, 2013), available at [<https://surface.syr.edu/jilc/vol42/iss1/5>](http://www.whitehouse.gov/the-press-</a></p></div><div data-bbox=)

declaration at any time by providing notification to the Depository.<sup>218</sup>

#### Article IV. Threats

No Party shall, directly or indirectly, threaten a first use of nuclear weapons.<sup>219</sup> No Party shall engage in military or other preparations for the first use of nuclear weapons.<sup>220</sup>

#### Article V. Security Assurances

Each Party shall provide or support immediate, meaningful assistance to any state victimized by a first use of a nuclear weapon.<sup>221</sup> Each Party shall resist and reject any first use of a nuclear weapon by any state.<sup>222</sup>

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office/2013/06/19/fact-sheet-nuclear-weapons-employment-strategy-united-states (last visited Dec. 18, 2014) (official U.S. government statement that all plans for the possible use of nuclear weapons must be consistent with the fundamental principles of the law of armed conflict). The proposed treaty text would also prohibit any “pre-emptive” use of a nuclear weapon, even in circumstances of “anticipatory self-defense,” in which it was clear that an enemy was preparing to launch an imminent attack.

218. The states possessing nuclear weapons have occasionally altered their respective statements about “no first use” and “negative security assurances.” See *supra* Section III.C.

219. See ICJ Advisory Opinion on Nuclear Weapons, *supra* note 139, para. 47 (concluding that a threat to use force in an illegal manner is itself a violation of the U.N. Charter). Of course, the mere continued possession of nuclear weapons constitutes a type of ongoing tacit “threat” to use them. This provision is intended to bar overt threats, as well as implicit threats, such as an assertion that “all options are on the table” to respond to a particular crisis. See sources cited *supra* note 194-95.

220. Cf. CWC, *supra* note 8, art. I.1(c) (prohibiting military preparations to use chemical weapons). Note that some acts undertaken in preparation for a possible second use of nuclear weapons can be indistinguishable from acts that would be undertaken in anticipation of using those weapons first; treaty negotiators would have to assume the burden of drawing delicate lines in this area.

221. This provision is deliberately vague, not specifying the manner or extent to which the assistance must be provided. It is a weak form of Positive Security Assurance, not requiring, for example, any automatic use of armed force to defend the state victimized by a first nuclear strike. The assistance may consist of political, diplomatic, medical, scientific, humanitarian, or other aid.

222. This provision is likewise vague; it requires parties to oppose any first use of nuclear weapons, but does not specify the form in which that opposition will be registered. National decisions and U.N. Security Council measures containing particular reactions to any first use of nuclear weapons will depend heavily upon the immediate facts. Some have argued that the Kellogg-Briand Pact rendered the concept of “neutrality” moot, requiring all states to unite against aggression. See Baratta, *supra* note 43, at 702-03.

### Article VI. Accidents

The Parties shall cooperate to the fullest extent possible to prevent the possibility of nuclear war arising by accident, misunderstanding, miscalculation, unauthorized action, or in any other way.<sup>223</sup>

### Article VII. Consultations

The Parties shall consult, on an urgent and high-level basis, in the event of any accident, incident, or event that might lead to a threat or first use of nuclear weapons. They shall make every effort to resolve the problem without recourse to force.<sup>224</sup>

### Article VIII. Public Statements

Each Party shall moderate its official public statements<sup>225</sup> about

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223. See Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War Between The United States of America and The Union of Soviet Socialist Republics, U.S.-Russ., narrative, Sept. 30, 1971, 22 U.S.T. 1590, available at <http://www.state.gov/t/isn/4692.htm> (last visited Dec. 18, 2014) (observing “[t]he very existence of nuclear-weapon systems, even under the most sophisticated command-and-control procedures, obviously is a source of constant concern. Despite the most elaborate precautions, it is conceivable that technical malfunction or human failure, a misinterpreted incident or unauthorized action, could trigger a nuclear disaster or nuclear war.”); see generally Patricia Lewis, Heather Williams, Benoît Pelopidas & Sasan Aghlani, *Too Close for Comfort: Cases of Near Nuclear Use and Options for Policy*, CHATHAM HOUSE (Apr. 2014), available at <http://www.chathamhouse.org/publications/papers/view/199200> (last visited Dec. 18, 2014) (studying several cases of miscommunication, technical failure, or accidents that could have escalated into nuclear confrontation).

224. Cf. *supra* notes 78-86 (for a list of confidence-building treaties that require consultation during crises).

225. It is unusual for a treaty to commit the parties to constrain the rhetoric in their public policy statements. Partial precedents include the International Covenant on Civil and Political Rights, art. 20, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 386, which prohibits propaganda for war and advocacy of national, racial or religious hatred, and the International Convention on the Elimination of All Forms of Racial Discrimination, art. 2, 660 U.N.T.S. 195, 5 I.L.M. 352 (1966), which commits parties not to “sponsor, defend or support” racial discrimination. See Steven E. Miller, *The Utility of Nuclear Weapons and the Strategy of No-First-Use* (Nov. 15, 2002), available at [http://pugwashconferences.files.wordpress.com/2014/05/200211\\_london\\_nws\\_paper\\_miller.pdf](http://pugwashconferences.files.wordpress.com/2014/05/200211_london_nws_paper_miller.pdf) (last visited Dec. 18, 2014) (arguing that changes in public rhetoric alone will not convince the world that a no first use policy is firmly in place, but they can help send the message); see also *Russian General Calls for Preemptive Nuclear Strike Doctrine Against NATO*, MOSCOW TIMES, (Sept. 3, 2014, 5:40 PM), available at <http://www.themoscowtimes.com/business/article/russian-general-calls-for-preemptive-nuclear-strike-doctrine-against-nato/506370.html> (last visited Dec. 18, 2014) (illustrating



nuclear weapons and nuclear warfare, to emphasize the Parties' collective judgments that nuclear war must never be fought; that nuclear weapons must never be used; that nuclear weapons are categorically different from all other weapons; and that the only valid purpose for any continued possession of nuclear weapons is deterrence of a nuclear attack.<sup>226</sup>

### Article IX. Defense Plans

Each Party that possesses nuclear weapons shall modify its defense policy guidance, plans and doctrine<sup>227</sup> to eliminate the concept of launching a first use of nuclear weapons; to reduce or eliminate the concept of launching its nuclear weapons "on warning";<sup>228</sup> to eliminate any automatic or immediate reliance upon a doctrine of massive

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the kind of unhelpful recent rhetoric that this provision would restrict).

226. Each of these judgments reflects an effort to stigmatize nuclear weapons as being beyond the pale of what states tolerate, even in the extreme case of armed conflict, and to reinforce the longstanding international taboo against their use. See NINA TANNENWALD, *THE NUCLEAR TABOO: THE UNITED STATES AND THE NON-USE OF NUCLEAR WEAPONS SINCE 1945 2997* (2008); Daryl G. Press, Scott D. Sagan, & Benjamin A. Valentino, *Atomic Aversion: Experimental Evidence on Taboos, Traditions, and the Non-Use of Nuclear Weapons*, AM. POL. SCIENCE REV. 1 (Feb. 2013), available at [http://iis-db.stanford.edu/pubs/24013/FINAL\\_APSR\\_Atomic\\_Aversion.pdf](http://iis-db.stanford.edu/pubs/24013/FINAL_APSR_Atomic_Aversion.pdf) (last visited Dec. 18, 2014) [hereinafter Press et al.]; PERKOVICH, *supra* note 136, at 73-78 (arguing to strengthen the taboo against use of nuclear weapons); see also *supra* text accompanying notes 147-51 (summarizing debate about the usability of nuclear weapons).

227. Different countries have different types of military planning documents. For the United States, see *Report on Nuclear Employment Strategy of the United States, Specified in Section 491 of 10 U.S.C.*, U.S. DEPT. DEF. (June 19, 2013), available at [http://www.defense.gov/pubs/ReporttoCongressonUSNuclearEmploymentStrategy\\_Section\\_491.pdf](http://www.defense.gov/pubs/ReporttoCongressonUSNuclearEmploymentStrategy_Section_491.pdf) (last visited Dec. 18, 2014); *Fact Sheet: Nuclear Weapons Employment Strategy of the United States*, WHITE HOUSE (June 19, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/06/19/fact-sheet-nuclear-weapons-employment-strategy-united-states> (last visited Dec. 18, 2014) (announcing that the United States will "examine and reduce the role of launch under attack in contingency planning"); *National Security Strategy*, U.S. GOV'T (May 2010), available at <http://nssarchive.us/NSSR/2010.pdf> (last visited Dec. 18, 2014); 2010 Nuclear Posture Review Report, *supra* note 126; see also G.A. Res. 68/40, U.N. Doc. A/RES/68/40 (Dec. 5, 2013), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/68/40](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/40) (last visited Dec. 18, 2014) (calling for review of nuclear doctrines).

228. The concepts of "launch on warning," "launch under attack," and related doctrines are imprecise, but can be clarified in the negotiating history of the agreement. See Arbatov et al., *supra* note 133, at 193-96 (discussing doctrines of launch on warning and launch under attack; noting that only the United States and Russia have adopted these concepts); Actions Report, *supra* note 86, at 4-5 (declaring that the United States will reduce the role of launch under attack in nuclear planning).

retaliation,<sup>229</sup> and to emphasize reliance upon non-nuclear options.<sup>230</sup>

### Article X. Alert Status

Each Party that possesses nuclear weapons shall reduce the ordinary readiness and alert status of its nuclear weapons.<sup>231</sup>

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229. Sometimes, the doctrine of avoiding a full-scale, automatic, immediate nuclear response to a first strike is referred to as “no early second use.” Miller, *supra* note 225.

230. These elements are designed to promote movement away from any first use of nuclear weapons, as well as to signal a reduction in the overall importance, salience, and usability of nuclear weapons, and to diminish any sense that a use of nuclear weapons would automatically or inevitably follow from certain provocations. They also help promote additional time for mature reflection and consideration of non-nuclear options, even in a crisis or war. See *id.* (arguing that a policy of no first use “cannot be real if militaries develop war plans that include, or even depend upon, the expectation of first-use of nuclear weapons.”); *Fact Sheet: Nuclear Weapons Employment Strategy of the United States*, *supra* note 227 (discussing efforts toward “reducing the role of nuclear weapons in our security strategy.”).

231. This provision attempts to reduce the “hair trigger” status of nuclear weapons, to increase the decision-making time before they could be used. See REACHING CRITICAL WILL, *supra* note 130, at 39 (reporting that the United States and Russia have about 1800 strategic nuclear warheads on high alert on land- and sea-based ballistic missiles; France and the United Kingdom have respectively 80 and 48 of their weapons on submarines fully operational, but at a lower level of readiness than U.S. and Russian weapons; China does not maintain its weapons in fully operational status); Hans M. Kristensen & Matthew McKinzie, Reducing Alert Rates of Nuclear Weapons, U.N. INST. FOR DISARMAMENT RESEARCH (2012); *Assessing Progress*, *supra* note 171, at 5, 12 ((assessing readiness of states’ nuclear weapons), 13 (China), 16 (France), 18 (Russia), 21 (United Kingdom), 25 (United States), 29 (India), 31-32 (Israel), 35 (Pakistan)); see also Kamath, *supra* note 133, at 66 (describing steps to reduce alert status of weapons, to make a “no first use” pledge more reliable, such as removing warheads from missiles or pinning open the submarine missile ignition switches); 2010 NPT Review Conference Final Document, *supra* note 157, para. 90 (calling for reductions in operational status of nuclear weapons, to enhance confidence and diminish the role of nuclear weapons); Kulacki, *supra* note 171; John Burroughs, *A Global Undertaking: Realizing the Disarmament Promise of the NPT*, MIDDLE POWERS INITIATIVE BRIEFING PAPER (Jan. 21, 2010), available at [http://www.middlepowers.org/pubs/Atlanta\\_Briefing\\_Paper\\_2010.pdf](http://www.middlepowers.org/pubs/Atlanta_Briefing_Paper_2010.pdf) (last visited Dec. 18, 2014); *Actions Report*, *supra* note 86, at 4 (describing U.S. decision to continue the practice of keeping nuclear-capable bombers off day-to-day alert); Arbatov et al., *supra* note 133, at 196-204 (providing examples of steps that could be taken to reduce the readiness and alert level of nuclear weapons); Decreasing the Operational Readiness of Nuclear Weapons Systems, G.A. Res. 67/46, U.N. Doc. A/RES/67/46 (Dec. 3, 2012).

This provision does not specify how much reduction is required in alert status, nor does it require that all weapons be held at the same (lowered) level of alert; treaty negotiators will have to assume the challenge of working out these terms in additional detail. The provision applies to the weapons’ “ordinary” status, allowing a country to increase the alert status of weapons during a crisis or war. Some may object that increasing the response time before nuclear weapons could be used would increase a state’s vulnerability to a surprise “bolt from the blue” attack; others would respond that this type of instantaneous attack is now

### Article XI. De-Targeting

Each Party that possesses nuclear weapons deployed on ballistic or cruise missiles shall alter the deployments so that ordinarily a missile contains no targeting codes or is targeted by default toward unpopulated ocean areas.<sup>232</sup>

### Article XII. Training Exercises

Each Party that possesses nuclear weapons shall refrain from undertaking any military or other training exercises related to launching a first use of nuclear weapons.<sup>233</sup>

### Article XIII. Arms Reductions

The Parties that possess nuclear weapons shall cooperatively, promptly, and significantly reduce the number of nuclear weapons they possess and deploy.<sup>234</sup> They shall particularly reduce or eliminate the

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vanishingly unlikely, and that the contrary dangers of an accidental, unauthorized, or imprudent use of nuclear weapons now pose the greater threat. *See PDI Live Debate 5: De-alerting*, CENTER FOR STRATEGIC & INT'L STUD. (Nov. 5, 2009), available at <http://csis.org/event/pdi-live-debate-5-john-steinbruner-walter-slocombe-de-alerting> (last visited Dec. 18, 2014); Peter Huessy, *Should the U.S. De-Alert its Nuclear Missiles?* GATESTONE INST. (Aug. 10, 2012, 4:30 AM), available at <http://www.gatestoneinstitute.org/3266/us-nuclear-missiles-alert> (last visited Dec. 18, 2014).

232. *See Assessing Progress*, *supra* note 171, at 13, 16, 21, 25 (assessing states' practices in maintaining active targeting of nuclear missiles); *Actions Report*, *supra* note 86, at 4 (explaining that the United States will continue the practice of "open-ocean targeting" of all deployed strategic nuclear missiles); Kristensen & McKinzie, *supra* note 231, at 18-19 (noting de-targeting steps by United States, Russia, and China).

233. The purpose of this provision is to reinforce the previous measures by ensuring that parties do not practice or train to undertake the actions they have agreed not to do. *See Miller*, *supra* note 225 (noting the aphorism that militaries fight the way they train, so a NFU regime should ban military exercises that include practicing a first use of nuclear weapons). Many of the provisions of this proposed treaty are not subject to external verification of compliance, as most modern arms control treaties are, but fidelity to this provision can be at least partially corroborated, as remote sensors can observe large-scale training exercises.

234. The concept behind this provision is that countries will not need so many nuclear weapons, if the function of those systems is confined solely to the role of deterring the threat of a nuclear strike. Reductions of excess nuclear weapons could be undertaken unilaterally or pursuant to formal or informal agreements. The depth of NNWS dissatisfaction with NWS compliance with article VI of the NPT, *supra* note 153, requires that any "good faith negotiations" in this area should be brought to a successful conclusion quickly. Note also

types of nuclear weapons that would be most suitable for a first use or whose use would be incompatible with the law of armed conflict.<sup>235</sup>

#### Article XIV. Nuclear Disarmament

1. The Parties shall accelerate their efforts in pursuit of the total elimination of nuclear weapons.<sup>236</sup> They shall undertake immediate steps<sup>237</sup> toward that goal, and shall promote in a joint enterprise<sup>238</sup> the objective of the permanent, global, comprehensive, and verifiable abolition of all nuclear weapons.<sup>239</sup>

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that nuclear arms reductions can save parties a great deal of money. See DAVID KRIEGER, *THE CHALLENGE OF ABOLISHING NUCLEAR WEAPONS* (2009) (estimating that the United States has spent \$7.5 trillion on nuclear weapons and their delivery systems); *Atomic Audit: The Costs and Consequences of U.S. Nuclear Weapons Since 1940*, BROOKINGS INST. (June 29, 1988), available at <http://www.brookings.edu/research/books/1998/atomic> (estimating the cost of the nuclear arsenal at \$5.5 trillion through 1998) (last visited Dec. 18, 2014); Dana Priest, *Aging U.S. Nuclear Arsenal Stated for Costly and Long-Delayed Modernization*, WASHINGTON POST (Sept. 15, 2012).

235. See Miller, *supra* note 225 (arguing that under a no first use regime, countries would require far fewer weapons; forward-based and shorter-range nuclear forces would be unnecessary; and the key criterion would be the survivability of nuclear weapons, not their ability to be used immediately). Under this structure, countries would be especially encouraged to divest themselves of vulnerable systems that would be subject to "use it or lose it" calculations, forward-based systems that would be used very early in a war, weapons that would be intended to attack hardened or deeply buried command bunkers, and large, inaccurate weapons that would target population centers in a disproportionate or indiscriminate way. See, e.g., *B61-11 Earth-Penetrating Weapon Tested for First Time in Seven Years*, HOMELAND SEC. NEWSWIRE (Jan. 15, 2014), available at <http://www.homelandsecuritynewswire.com/dr20140115-b6111-earthpenetrating-weapon-tested-for-first-time-in-seven-years> (last visited Dec. 18, 2014); *U.S. Deploys Two More Nuclear-Capable Bombers to Europe*, GLOBAL SEC. NEWSWIRE (June 9, 2014), available at <http://www.nti.org/gsn/article/us-deploys-two-more-nuclear-capable-bombers-europe/> (last visited Dec. 18, 2014); Barry Blechman & Russell Rumbaugh, *Bombs Away: The Case for Phasing out U.S. Tactical Nukes in Europe*, 93 FOREIGN AFF. 163 (July/Aug. 2014).

236. Parties to the NPT are already committed to pursue negotiations in good faith toward this objective. See *supra* text accompanying notes 153-61.

237. See Shultz et al., *supra* note 132 (arguing that both a long-term goal of nuclear disarmament and a series of practical, short-term steps in pursuit of that goal are necessary, "Without the bold vision, the actions will not be perceived as fair or urgent. Without the actions, the vision will not be perceived as realistic or possible.").

238. See generally Max M. Kampelman & Steven P. Andreasen, *Turning the Goal of a World without Nuclear Weapons into a Joint Enterprise*, in REYKJAVIK REVISITED, 429, 429-47 (George P. Shultz, Steven P. Andreasen, Sidney D. Drell, & James E. Goodby eds., 2008); see James Goodby, *A World Without Nuclear Weapons is a Joint Enterprise*, 41 ARMS CONTROL TODAY 23 (May 2011), available at [https://www.armscontrol.org/act/2011\\_05/Goodby](https://www.armscontrol.org/act/2011_05/Goodby) (last visited Jan. 9, 2015) (arguing that all states, not just the United States and Russia, must participate in the effort to pursue nuclear disarmament).

239. See David A. Koplow, *What Would Zero Look Like? A Treaty for the Abolition of*

2. The Parties that possess nuclear weapons shall maintain the safety and security of those weapons for as long as they exist, but shall not consider this to be a permanent function.<sup>240</sup>

#### Article XV. Final Provisions<sup>241</sup>

1. This Treaty shall be open for signature by all states indefinitely.<sup>242</sup>

2. This Treaty shall be subject to ratification by signatory states according to their respective constitutional processes.

3. This Treaty shall enter into force 180 days after the deposit of instruments of ratification by twenty states.<sup>243</sup> For any state depositing

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*Nuclear Weapons*, 45 GEO. J. INT'L L. 683, 712-15 (2014) (presenting a draft of a nuclear weapons abolition treaty, specifying the "mantra" of criteria such an instrument must satisfy).

240. Preservation of the safety and security of nuclear weapons is critical. See Barack Obama, President of the United States, *Remarks by President Barack Obama at Hradcany Square in the Czech Republic*, *supra* note 134 (promising that as long as nuclear weapons exist, the United States will maintain a safe, secure, and effective arsenal), but the point of this provision is to underscore that the goal of nuclear disarmament is not simply an impossibly-distant goal and that nuclear weapons should not be a perpetual fact of life.

241. These provisions are traditionally split into several separate articles; they are combined here simply for convenience. For comparison, see START I, *supra* note 8, arts. XVII-XIX; CWC, *supra* note 8, arts. VIII-XXIV; and CTBT, *supra* note 8, arts. VII-XVII.

242. The 1928 Kellogg-Briand Pact was initially open for a select group of parties, whose participation was required before the treaty could come into force; other states were also invited to join. See *supra* notes 69-70 and accompanying text. In this proposal, the nuclear treaty would be open for all states on an equal basis.

243. There are several possible formulas for the entry-into-force provision of this treaty. As drafted, the instrument will become operational as soon as any twenty countries join. An alternative would be to require a higher number, and perhaps to require the participation of some or all nine countries currently possessing nuclear weapons, thereby ensuring a strong degree of consensus among the most affected states. However, the most demanding approach would also, in effect, give each nuclear weapons possessing country a "veto" over the treaty's entry into force for any state. That sort of provision has proven highly problematic for the CTBT, which names 44 countries whose ratification is required to bring the treaty into force. CTBT *supra* note 8, art. XIV.1, Annex 2. This provision has had the effect of blocking the treaty's execution, despite the ratification by 161 states. See *The Status of the Comprehensive Test Ban Treaty: Signatories and Ratifiers*, ARMS CONTROL ASS'N (2014), available at <http://www.armscontrol.org/factsheets/ctbtsg> (last visited Dec. 18, 2014). Alternatively, the nuclear treaty could establish a high threshold for entry into force, but also allow individual states to waive that requirement, bringing the Treaty into force sooner for them. Treaty of Tlatelolco, *supra* note 178, art. 28.2.

an instrument of ratification thereafter, the Treaty shall enter into force thirty days after the deposit.

4. This Treaty shall not be subject to reservations that are incompatible with its object and purpose.<sup>244</sup>

5. This Treaty shall be of unlimited duration.<sup>245</sup>

6. This Treaty shall be subject to amendment as follows<sup>246</sup>: Any Party may propose an amendment, which shall be submitted to the Depositary for prompt circulation to all Parties. If one-third or more of the Parties notify the Depositary within sixty days after its circulation that they support further consideration of the proposal, it shall be considered at an Amendment Conference. If the proposed amendment is adopted at the Amendment Conference by a majority vote of all Parties, with no Party casting a negative vote, the amendment shall enter into force for all Parties ninety days after the deposit of instruments of ratification by a majority of all Parties.

7. Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of the Treaty have jeopardized its supreme interests.<sup>247</sup> It shall give ninety days' advance notice<sup>248</sup> of such

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244. A "tougher" alternative would be to prohibit all reservations, or to permit some types of reservations, but not those that would be attached to the most important provisions. See, e.g., CWC, *supra* note 8, art. XXII; CTBT, *supra* note 8, art. XV.

245. Some arms control treaties are of unlimited (permanent) duration. See, e.g., CWC, *supra* note 8, art. XVI.1; CTBT, *supra* note 8, art. IX.1. Others have fixed terms. See, e.g., New START, *supra* note 152, art. XIV.2; NPT, *supra* note 153, art. X.2 (specifying an initial term of twenty-five years, after which a conference of parties determined an indefinite extension).

246. Modern treaties contain multiple variations regarding amendment; some also permit modification of technical or administrative provisions pursuant to an accelerated process. See, e.g., CWC, *supra* note 8, art. XV; CTBT, *supra* note 8, art. VII; see also *Natural Res. Def. Council vs. Envtl. Prot. Agency*, 464 F.3d 1, 9, 10 (D.C. Cir. 2006) (limiting ability to modify an international agreement via a process that does not involve presidential decision and Senate agreement).

247. This is the standard "supreme interests withdrawal" clause, common to arms control treaties. It provides an "escape hatch" from the obligations, making it safer for states to enter the agreement in the first place. See CWC, *supra* note 8, art. XVI; CTBT, *supra* note 8, art. IX; New START Treaty, *supra* note 152, art. XIV.3. Withdrawal from an arms control treaty has been rare, with only the 2002 U.S. withdrawal from the SALT I Anti-Ballistic Missile Treaty and the 2003 North Korean withdrawal from the NPT as precedents. Christer Ahlstrom, *Withdrawal from Arms Control Treaties*, STOCKHOLM INT'L

withdrawal, including a statement of the extraordinary events it regards as having jeopardized its supreme interests.

8. Nothing in this Treaty shall be interpreted as in any way limiting or detracting from the obligations of the Parties under other international law. A Party's withdrawal from this Treaty shall not in any way affect its obligations under other international law, including other arms control or disarmament treaties.<sup>249</sup>

9. Seven years after the entry into force of this Treaty, and at seven year intervals thereafter, the Parties shall assemble in a Review Conference to assess the operation and effectiveness of the Treaty, with a view to ensuring that the object and purpose of the Treaty are being realized.<sup>250</sup>

10. The Secretary-General of the United Nations is hereby designated as the Depositary of this Treaty, and shall perform all appropriate duties, including registering this Treaty pursuant to Article 102 of the Charter of the United Nations.<sup>251</sup>

11. The Arabic, Chinese, English, French, Russian and Spanish texts of this Treaty are equally authentic.<sup>252</sup>

In witness whereof, the undersigned, being duly authorized to that effect, have signed this Treaty.

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PEACE RESEARCH INST. YEARBOOK 763, 764 (2004), available at <http://www.sipri.org/yearbook/2004/19> (last visited Dec. 18, 2014). Alternatively, the treaty could depart from precedent and prohibit withdrawal (except, perhaps, in the case of material breach of the treaty by another party).

248. Alternatively, the time period specified for withdrawal could be shorter or longer. See START I, *supra* note 8, art. XVII.3 (six months); CTBT, *supra* note 8, art. IX.3 (six months); CWC, *supra* note 8, art. XVI.2 (ninety days). A longer notification period provides other parties additional time to react to the impending withdrawal, but in the case of nuclear weapons, parties may feel the need for an ability to respond very quickly to the most severe challenges.

249. This provision is designed to ensure the continuation in force of the 1928 Kellogg-Briand Pact. Cf. CWC, *supra* note 8, art. XVI.3 (specifying that withdrawal from the CWC would not affect a party's status under the 1925 Geneva Protocol, *supra* note 54).

250. See, e.g., CTBT, *supra* note 8, art. VIII (providing for review conferences every ten years); CWC, *supra* note 8, art. VIII.22 (providing for review conferences at five year intervals).

251. CTBT, *supra* note 8, art. XVI.1; CWC, *supra* note 8, art. XXIII.

252. CTBT, *supra* note 8, art. XVII; CWC, *supra* note 8, art. XXIV.

Done at (place) on (date).

## V. CONCLUSION

The underlying goal of this article, and the purpose of the extended thought exercise in drafting a nuclear version of the Kellogg-Briand Pact, is to try to prompt a social psychic shift. The treaty-makers in 1928 succeeded in that type of grand enterprise; they midwived an important, lasting alteration in the predominant paradigm of international warfare. Now it's time for governments and populations around the world to exert a similar bit of radically creative fresh thinking about nuclear war, in particular.

In today's security environment, we should no longer think of nuclear weapons as a normal, inevitable part of the global architecture; we should not contemplate them as "ordinary," usable implements in the military toolkit that can lawfully be wielded as a matter of unilateral national choice. Likewise, we should not deem nuclear weapons to be inherently essential to our national well-being, and we should definitely not perpetuate them as permanent fixtures in the defense firmament or as indelible badges of big power status.<sup>253</sup>

Instead, people in the United States, in the other NWS, and around the world, should appreciate that the era of nuclear weapons is historically anomalous and that the hypertrophy of sizes, types, numbers and sophistication of nuclear explosive devices was an artifact of the bizarre circumstances prevailing during World War II and the cold war. That absurd explosive Sword of Damocles need not hang over humanity's head forever; we can progress to a safer, more modern global society in which nuclear warfare no longer occupies a central place.<sup>254</sup>

The rationales for adopting a nuclear Kellogg-Briand today spring from multiple sources:

—*Legally*, almost any first use of nuclear weapons would violate the accepted conventional and customary law of armed conflict. The ICJ, in its 1996 nuclear weapons advisory opinion, was not quite able to conclude categorically that all uses of nuclear weapons would be *per se*

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253. See Berry et al., *supra* note 139, at 41-58 (emphasizing the importance of delegitimizing nuclear weapons and stigmatizing their use).

254. See Schell, *supra* note 128, at 30 (offering the comparison that "[i]f I carry a rifle on my shoulder during a war, it means one thing. If I continue to carry the rifle after the war has ended, it means something very different.").



illegal, but it is clear that in virtually all realistic applications, considerations of necessity, proportionality, and discrimination would rule out a legitimate first use.<sup>255</sup>

—*Militarily*, the United States no longer needs to dangle the threat of crossing the nuclear threshold; for all credible scenarios, the array of conventional munitions would suffice, without engaging the “overkill” of atomic power.<sup>256</sup>

—*Strategically*, abandonment of first use scenarios could reinforce deterrence, by making it perfectly clear that the nuclear armada has precisely one function: to deter a first use of nuclear weapons by anyone else; that the nuclear arsenal should be optimized to perform only that specified mission; and that conventional forces must be made adequate for all other types of applications.<sup>257</sup>

—*Politically*, retaining the existing strategic ambiguity undercuts our vital non-proliferation efforts, by degrading Article VI of the NPT; the NNWS want comprehensive, binding NSAs in order to validate their continued adherence to the most vital cornerstone of international security.<sup>258</sup>

—*Financially*, reducing and simplifying the nuclear weapons infrastructure would save untold billions.<sup>259</sup>

—*Prudentially*, de-alerting and de-targeting nuclear weapons would further reduce the likelihood of hair-trigger accidental or

255. Feiveson & Hogendoorn, *supra* note 162, at 94 (arguing that “a nuclear response to chemical or biological weapon use would in most instances be out of all proportion to the initial attack, and thus politically and morally indefensible”); PERKOVICH, *supra* note 136, at 49 (whether nuclear weapons could be used in compliance with international legal standards “remains highly problematic”).

256. Gerson, *supra* note 149; Bundy et al., *supra* note 149. *But see* PERKOVICH, *supra* note 136, at 9 (arguing for retaining the option of first use in selected circumstances).

257. Gerson, *supra* note 149, at 39-40; Graham and Tomero, *supra* note 166, at 4 (arguing that “Threatening to use nuclear weapons against an NPT non-nuclear-weapon state party undermines the credibility of a strong US and NATO conventional deterrent, and may incite proliferation by emphasizing our sole strategic vulnerability.”).

258. 2010 Nuclear Posture Review Report, *supra* note 126, at 7 (asserting that U.S. compliance with NPT article VI can help persuade NNWS to adopt measures needed to reinvigorate the non-proliferation regime); Feiveson & Hogendoorn, *supra* note 162, at 91 (arguing that “the use of nuclear weapons by the United States or another nuclear weapon state could shatter the NPT regime and lead to the rapid spread of nuclear weapons to several more countries”); Graham & Tomero, *supra* note 166, at 4 (arguing that maintaining the option to use nuclear weapons first “reduces US leverage to stem the proliferation of nuclear weapons”).

259. *See* sources cited *supra*, note 234 (regarding the financial costs of nuclear weapons programs).

unauthorized nuclear war.<sup>260</sup>

—*Reciprocally*, refraining from threatening to use nuclear weapons first would reinforce the global taboo against those arms, diminishing the portrait of them as weapons that are necessary and usable – including potentially usable against us.<sup>261</sup>

—Most of all, *psychologically*, creating and promoting a nuclear Kellogg-Briand could help shift global public and elite opinion away from the notion that these are “normal” weapons. Even if there is only an indirect, unreliable connection between public policy pronouncements and physical actions in the real world, where we have the possibility of nudging things in a safer direction, we should act.<sup>262</sup>

The version of a nuclear Kellogg-Briand presented here has some important similarities and as well as differences from the concept of the 1928 original, as those features were highlighted in Section II.D. In the realm of “lessons learned,” or at least analogies selected, the proposed nuclear treaty, like the template, would be legally binding, multilateral and public. It would also be, essentially, a “no first use” promise, although the difficulty of drawing lines between first and second uses should be appreciably simpler in the nuclear context. Like the original, the nuclear variant would reinforce parties’ commitment to non-violent means of alternative dispute resolution, although it would not, on its own, create new judicial, arbitral, or other institutions. Continuing with the similarities, the nuclear treaty would be permanent (but would have provisions for amendment and for “supreme interests” withdrawal) and would not deal with criminal prosecution of individuals or states.

Regarding the salient differences, the proposed nuclear treaty would include “operational” provisions, running well beyond a simple declaration of renunciation and condemnation, to include specific national action obligations. Notable among these undertakings would be de-alerting and de-targeting nuclear missiles; revision of national war plans, training exercises, and rhetoric; and a renewed commitment to immediate and long-term measures of disarmament. And unlike the *paterfamilias*, the undertakings in the proposed nuclear treaty would be global in scope, not confined by reciprocity.

The Kellogg-Briand Pact was, of course, a flawed instrument. Its authors’ ambition and rhetoric far exceeded their grasp; the treaty left as many questions unanswered and problems unaddressed as it resolved.

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260. See Lewis, *supra* note 171.

261. See Sagan, *supra* note 162, at 175 (arguing that “U.S. [behavior], including nuclear posture and doctrine, is in fact highly influential.”).

262. See Tannenwald, *supra* note 226; Press et al., *supra* note 226.

In such a concise format, it could hardly have succeeded as a lasting macro-scale reformation in international political affairs. Kellogg-Briand gained barely fifteen minutes of fame, and perhaps did not deserve much enduring influence after the cataclysm of German, Italian, and Japanese aggression and World War II.

This article's proposed draft treaty, likewise, is far from complete; it is hardly a ready-for-signature outlawry instrument. In particular, the absence of meaningful provisions on verification is highly contestable – the draft has none of the obligations regarding data reporting, inspections, enforcement, and the like, which have become *de rigueur* in modern arms control treaty practice. In fact, many of its provisions are so “internal” to each state's military structures that they are inherently unverifiable – the required revisions of war plans and national policy statements, for example, or the de-alerting and de-targeting of nuclear missiles, are probably not reliably subject to external corroboration. Moreover, the proposed document does not address fundamental political questions about how to persuade possibly reluctant NWS to jump aboard this bandwagon, or whether and how the United States and any “coalition of the willing” should proceed immediately with less than unanimous initial participation.

Most fundamentally, this proposal, like the original Kellogg-Briand, is subject to the valid criticism that there could be an important gap – perhaps a yawning chasm – between a country's publicly-announced “declaratory policy” and its possibly-covert “action policy.” That is, regardless of whether a sovereign says it renounces war in general, or nuclear war in particular, it may in practice still resort to the forbidden avenue when the chips are down. Public postures and unregulated treaties do not physically constrain countries – as long as a state possesses nuclear weapons, it may elect to employ them at will.<sup>263</sup> Just as Kellogg-Briand failed to prevent World War II, this article's version cannot guarantee that no state would be willing to pay the price

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263. Feiveson & Hogendoorn, *supra* note 162, at 97 (arguing that this continuing uncertainty about the reliability of a non-use pledge can be a benefit, providing an additional element of deterrence to the regime); Ullman, *supra* note 165 at 680-81 (arguing that a NFU pledge is “self-enforcing,” because if one nation violates its promise, the others are released from theirs); Gerson, *supra* note 149, at 45 (arguing that “Skeptics of the believability of NFU underestimate the international and domestic audience costs incurred by a clear NFU commitment.”); Sagan, *supra* note 162, at 177 (arguing that “declaratory policy is not about making ‘promises’ about future restraint; it is about signaling intent and therefore shaping the expectations of allies and adversaries alike.”); Pierce S. Corden, *Ethics and Deterrence: Moving Beyond the Just-War Tradition*, in *ETHICS AND NUCLEAR STRATEGY?* 156, 177 (Harold P. Ford & Francis X. Winters eds., 1977) (addressing ethics and strategy of declaratory and action policies).

of violating the nuclear agreement. Indeed, there are strong indications that the Soviet Union, for example, was acting in bad faith when it offered its “no first use” pledge during the cold war; it was cynically prepared to abandon that puffery at a moment’s notice, if need be.<sup>264</sup>

Still, that type of hypocrisy has its price, and a declaratory policy can make a difference. Public presentations, especially when clad in the garb of binding international treaty law, do help shape attitudes about what is legitimate, about how honorable people and countries behave. World public opinion is hardly all powerful, especially when dealing with authoritarian regimes, but it can exert influence.<sup>265</sup> Likewise, the proposed treaty’s “operational” provisions, going beyond the structure of Kellogg-Briand by engrafting additional required behaviors, such as progress toward nuclear abolition and constraints upon military plans and exercises, can play a role. Complex organizations will do best at the routines they have repeatedly practiced, and inhibitions upon training algorithms can have meaningful impact in functional settings.<sup>266</sup>

Certainly, there are risks from eschewing nuclear weapons, and a policy to legally abandon any possible first use of those arms can have potential costs. But there are risks on the other side of the ledger, too. In particular, our collective clinging to nuclear arsenals and our continued emphasis upon those arms as essential, indispensable components of our security posture, carry the inevitable danger of proliferation. The NNWS have made it clear that they will not permanently tolerate a two-tiered world in which a privileged few possess nuclear weapons that the vast majority of have surrendered; if the NWS fail to redeem the promise of Article VI of the NPT, the dangers will accelerate. A nuclear Kellogg-Briand, helping to move the world an important step away from nuclear weapons, nuclear war, and the fetish of all things nuclear, can make a contribution to that long-term

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264. Heuser, *supra* note 167; Feiveson & Hogendoorn, *supra* note 162, at 92. Some skeptics likewise doubt the sincerity and reliability of China’s NFU commitments. See Rachel Oswald, *China’s New Defense Paper Causes Stir Over No-First-Use Nuke Policy*, GLOBAL SEC. NEWSWIRE (Apr. 24, 2013); Kulacki, *supra* note 171; *China Reaffirms “No First Use” Nuke Rule*, GLOBAL SEC. NEWSWIRE (Jan. 6, 2011); Stephanie Spies, *China’s Nuclear Policy: (No) First Use?*, CTR. STRATEGIC & INT’L STUDIES, available at <http://csis.org/blog/chinas-nuclear-policy-no-first-use> (last visited Dec. 18, 2014).

265. See Iriye, *supra* note 34, at 68 (noting that the notion of “world public opinion” was a typically Wilsonian concept, connoting the existence of a moral force emanating from people everywhere, rather than from their leaders, which could be mightier than armed power and provided the best safeguard of peace and stability).

266. *A New Look at No First Use*, *supra* note 166, at 2 (emphasizing the importance of cultivating a “culture of nonuse” of nuclear weapons within the military).

pursuit of security and stability.

To some, the Kellogg-Briand Pact may seem obsolete, an antique remnant of a long-distant past. But in reality, it wasn't that long ago. The 1928 negotiation of Kellogg-Briand is closer to the 1968 NPT and the 1969-1972 negotiation of SALT I (both indisputably central elements in the modern cannon of arms control) than the NPT and SALT I are to us today. And even if Kellogg-Briand were "ancient history," sometimes there's something to be gained from "repurposing" those hoary sources.