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Putting the war out of law. The problem of peace in international relations before and after the First World War

Abstract

For centuries, conducting war was regarded as one of the most important attributes of state sovereignty. With the development of international relations, technology and human capabilities, which repeatedly led the fate of humanity to the end, the approach to the conduct of war as foreign policy began to evolve into a pacifist outlook.

The achievement of the moment of 1928 was when the Brianda-Kellog Pact was for the first time enacted, and an absolute prohibition of aggressive warfare was preceded by stages in which the states formed, in small steps, the awareness of the need to change their approach to war.

The very fact of introducing its prohibition did not save the world from the outbreak of World War II, but it allowed the prosecution of war criminals, and forever changed the approach to war.

Since then, although the world is not free from armed conflict, the states resorting to the use of force must find a justification for their actions on the basis of norms of international law.

Key words: war, condemnation of war, prohibition of the use of force, pacific settlements of disputes

The international community is decentralized. This means that, among other things, it did not develop a uniform system of executive power which would execute the law effectively. The consequence of this was that next to the attributes of statehood - *ius contrahendi* and *ius legationis*, there was also *ius ad bellum*.

From the very beginning of the existence of even the most primitive social structures, man was entangled in the struggle for existence and made territorial expansion in order to gain the wealth of other nations. Wars were a constant element of social life and the coexistence of tribes, ethnic groups and entire nations, and influenced the shaping of social structures, and their modification or destruction. It is man who, under the influence of various factors, built social reality thanks to strength, power and expansion.[1]

In history, efforts have been made repeatedly to outline the limits of the use of armed force and to eliminate war from international relations. On the other hand, one should point to the existence of pacifist movements, which have always signalled their presence in the international arena. However, it was very difficult for states to give up the right to wage war. The progressive development of technology, and the cruelty of the First World War meant that postulates had to be exchanged for *"law"*.

The main purpose of this article is to indicate the efforts of the international community to eliminate war from international relations during the period around the outbreak of World War I.

The creation of the first binding norms in this matter can be observed in the XX century. Firstly, the Hague Convention of 1907 (Drago-Porter Convention) should be mentioned. The convention introduced the primacy of peaceful methods in the settlement of disputes related to the enforcement of obligations that existed on the side of a given state in relation to the citizens of another country. Next were the Bryan Pacts – bilateral agreements concluded by the United States from 1913. The parties undertook to submit disputes between them to conciliation commissions and not to commence military operations before the committee's report. At the outbreak of World War I international law did not contain any legal norm prohibiting aggressive warfare.

The League of Nations Treaty of 1919 only partially limited the possibility of resorting to war in relations between members of the League (Articles 10-16). However, it did not prohibit waging war at all. The restrictions of the League of Nations Pact included:

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1 M. Bodzian (ed.), *Społeczeństwo a wojna. Paradoks wojny we współczesnym ładzie międzynarodowym*, Wrocław 2013, p. 6.

- introducing the obligation to settle disputes using peaceful methods first,
- the introduction of a ban on resorting to war within 3 months from an arbitration or court decision made in a given dispute, or a report of the League of Nations Council,
- the introduction of a ban on resorting to war with a state which complied with a court or arbitration ruling made in a given dispute, or with a unanimous report of the League Council.

The legal act that deserves special attention is the 1926 Briand-Kellogg Pact. Often referred to as the anti-war pact, it contained the renunciation of war by state parties as a political instrument in mutual relations. The State Parties also undertook to settle all disputes with peaceful methods. For the first time in the history of international law the states signed an international agreement that included the absolute prohibition of aggressive war.

Unfortunately, apart from the solemn renunciation of war, this pact did not contain any preventive and repressive mechanisms, and did not meet the hopes placed in it. It did not prevent the outbreak of World War II.

"War" before World War I

Until the end of the First World War the problem of the possibility of initiating a war concerned the issue of the morality of international relations. In literature, wars were described as just, unjust, legal or illegal. It was even pointed out that legal rules for starting a war could not be created. Therefore, international law must accept war regardless of whether it is fair or not.[2] The states not only claimed the right to conduct wars freely, but also recognized whether the war they were fighting was a war in a formal sense *(state of war doctrine)*.[3]

It should be emphasized that the idea of condemning war as a crime against humanity, and the dream of peace was not a discovery of the international community of the 20th century. It also has a long history, like the history of wars. Until the nineteenth century, it was the work of individuals and did not influence on the policies of states. The situation changed after the creation of the peace movement. The first mass organizations of a peaceful nature appeared in North America and Europe in the 1820s as the Associations of Peace. In 1824, they were united in the American Peace Society, and as early as 1830 an international association of peace defenders was founded. In the work of these organizations war was condemned as a means of conducting international policy, but no legal instruments were established to eliminate it. It has often been emphasized that

2 A.S. Hershey, *The Essentials of International Public Law*, New York 1912, p. 351-353.
3 P. Grzebyk, *Odpowiedzialność karna za zbrodnię agresji*, Warszawa 2010, p. 19.

wars can be avoided, that this is an unfortunate habit without which one can exist.[4] There were opinions that wars cost more than the benefits they gain. For almost 5600 years of human existence, about 15,000 wars have broken out, which statistically gives the result of three wars a year, with different range and character.[5] The international community needed to focus attention on the efforts to establish lasting peace by developing the norms of international law.

In the second half of the nineteenth century we can find the assumption that only the replacement of the rule of force by the rule of law can provide lasting peace. And what is more, it found supporters not only in legal environments, but also in public opinion. [6]

The turn of the twentieth century brought an increase in the importance of public opinion, in which the view prevailed that the beginning of war does not belong only to the decision of the authorities. The opinion that war was the final means of resolving conflict became more and more popular. States first had to use all possible peaceful methods of dispute resolution. The use of force was to be acceptable as an act of self-defence or a measure ensuring the survival of the state.[7] The first bilateral and multilateral agreements emerged in which states committed themselves to resolving disputes by peaceful methods, such as arbitration.[8] Arbitration began to transform itself from an auxiliary diplomacy into a natural way of resolving international disputes. Successful settlement of other international disputes using the conciliation procedure favoured the consolidation of such a belief.[9] The idea of expanding the use of arbitration was reflected in the Inter-Parliamentary Union formed in 1889. It was the initiator of the „organization of good services", which was later proven by the establishment of the Permanent Court of Arbitration in The Hague.

Several documents were signed, such as the Geneva Conventions on the care of the wounded (1864), and the Petersburg Declaration (1868) on the prohibition of the use of weapons that „would unnecessarily increase people's suffering or cause their inevitable death". At the end of the 1880s in almost all European countries there were organizations formed whose aim was to promote arbitration. In the Anglo-Saxon countries, the International Arbitration and Peace Association had been operating since 1880, and in France, the French

4 J. Łaptos, *Pakt Brianda-Kelloga*, Kraków 1988, p. 13.
5 M. Bodzian, op. cit., p. 6.
6 J. Łaptos, op. cit., p.14.
7 A few conflicts at that time were solved by peaceful methods (the case of the Alabama – 1872 ship, deserters from Casablanca – 1909).
8 P. Grzebyk, op. cit., p. 22.
9 The American-British dispute over the right to catch seals in the Bering Strait, the Anglo-Venezuelan dispute over the borders of British Guyana, the dispute between Argentina and Chile on the border in the Andes.

Arbitration Society was founded in 1889. Scandinavian Peace and Arbitration associations had been regularly meeting on this issue since 1883.[10]

In 1898 Tsar Nicholas II of Russia invited the leaders of 59 of the world's sovereign States to participate in a peace conference. It was called not to resolve a war or conflict, or to divide territory after a conflict, but to ensure "to all peoples the benefits of a real and lasting peace". [11]

In 1899, the first Hague Convention was adopted, in which the parties agreed that in the event of a dispute, if possible, they would use mediation or the good offices of mediation. On the basis of this convention the Permanent Court of Arbitration in the Hague was established. Disarmament was one goal of Convention I[12]. Its preamble also expressed the desire to extend "the empire of law" and to strengthen "the appreciation of international justice". By providing for the Permanent Court of Arbitration, the parties believed they had found an effective means to those ends.[13]

Unfortunately, the Convention did not introduce obligatory arbitration in disputed matters. States were failing to live up to many of the goals and commitments of the 1899 Conference. A few years later, in 1907, the Convention Respecting the Limitation of the Employment for Recovery of Contract Debts was adopted. Its character was limited because it allowed the possibility of initiating a war if the debtor did not want to submit to arbitration or did not comply with its decision. An important point is the fact that it was the first international agreement in which an illegal reason for initiating a war was indicated.[14] The second of the 13 documents adopted during the conference in 1907 was the Convention relative to the Opening of Hostilities[15]. The war between Russia and Japan, which broke out in 1904 without a declaration of war, caused a movement for the adoption of some written rules on the commencement of war. The Institute of International Law adopted a resolution to that end in 1906, and the Second Hague Conference of 1907 developed the present Convention.[16] On the basis of the Convention, legal steps should not be taken without prior and precise notification. The notification should contain a motivated notification or an ultimatum with a conditional declaration of war. The purpose of the convention

10 J. Łaptos, op. cit., p. 14-17.

11 B. Baker, *Hague Peace Conferences (1899 and 1907),* Max Planck Encyclopedia of Public International Law, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e305

12 https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0230.pdf

13 J.B. Scott (ed), *The Hague Conventions and Declarations of 1899 and 1907,* New York 1915. p. 41.

14 F Kalshoven (ed.), *The Centennial of the First International Peace Conference: Reports and Conclusions* (Kluwer Boston 2000), p. 56., A. Eyffinger 'A Highly Critical Moment: Role and Record of the 1907 Hague Peace Conference' (2007) 54 NILR 197-228.

15 Dz.U. 1927, nr 21, poz. 159.

16 https://ihl-databases.icrc.org/ihl/INTRO/190?OpenDocument.

was to minimize the possibility of waging war without declaring and creating certain legal requirements for its beginning. Unfortunately, none of the Hague conventions outlawed the war. [17]

Slight progress was also introduced by the IV Hague Convention (Laws and customs of war on land)[18] on the repression of those who break the law. It did not introduce a border from which the use of force would become lawless.[19] Instead, it provided means that could alleviate the disputes that arose. It was mainly about situations when diplomatic negotiations did not bring the expected effect, and the risk of an armed conflict increased.

Success was seen in two institutions that appeared in international practice at the beginning of the 20th century - in research commissions and in conciliation commissions. The first Hague Convention of 1899 recommended the introduction of such "international research commissions" to resolve disputes that did not concern either honour or vital interests, but were impossible to be dealt with by diplomatic means. The convention of 1907 strengthened the formula of "recommendation" considering the appointment of research commissions as "desirable". The Convention proposed a number of procedural provisions, reserving to the parties the possibility of different wording. It also allowed the parties the freedom to decide on the facts requiring examination, the manner and timing of the creation of the committee, its scope of activity, seat, language, date of factual assessment, determination of the composition of the commission and the scope of their competence.[20]

At the beginning of the 20th century, many bilateral agreements could be observed for the purpose of the peaceful resolution of international disputes. The most famous include the so-called Bryan treaties, concluded from 1913 on the initiative of American secretary of state William Jennings Bryan. The treaties introduced a conciliation procedure between the United States and the conflicted state. The committee appointed by states was to investigate the facts and develop a report that was not binding on the parties. By the time the report was finalized the states committed themselves to refrain from military action. Bryan's treaties did not enforce a ban on war, but for the time in which the states awaited the commission's report, one could count on calming the situation and overcoming the conflict.[21]

The Hague Conventions also introduced 'good services', which means the assistance that a third country could give to settle a dispute. The first Conventions,

17 P. Grzebyk, op. cit., p. 23.

18 https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0631.pdf.

19 H. Dembliński, *Wojna jako narzędzie prawa i przewrotu*, Lublin 1936, p. 58.

20 A Eyffinger A Highly Critical Moment: Role and Record of the 1907 Hague Peace Conference, 54 Netherlands International Law Review, 2007 201-204.

21 P. Grzebyk, op. cit., p. 24.

from 1899 and 1907, stated that contracting parties in the event of a dispute, before they take up arms, ask for "good services"or the "brokerage" of one or several partner sites. They also considered it positive and desirable that one or more disinterested powers in a dispute would offer the countries – the parties to the dispute – their good services or mediation, if circumstances permitted. On the basis of the convention, the states also allowed the possibility of offering good services during the conflict. It did not consider it an unfriendly act, either. The Hague Conventions were considered an important achievement in the fight to eliminate war from the life of nations. They provided indications for further action by states to guarantee peace in international relations. Unfortunately, on the day of the outbreak of the First World War, international law did not have any universally binding law prohibiting war. At that moment hopes of signing a universal treaty that would oblige all states equally to submit only some disputes to international courts remained in the realm of pacifist dreams.[22]

"War" after World War I

World War I was a shock to the international community. The use of new types of weapons, and above all the use of airspace to carry out military operations, the number of mobilized soldiers and losses in people, introduced the international community to a new track in the field of thinking about war.[23] The First World War played a crucial role in the development of international cooperation. Before 1914, politicians seemed to ignore the surrounding „technical world". Forced by the war, state interventionism facilitated and simplified economic and military cooperation within the prevailing systems. Common goals, loans, credits, supplies, etc. were mutually dependent on countries that were more willing to talk about future cooperation. Dynamically developing technical, economic and military cooperation pushed political cooperation towards new paths. A lot of issues stopped being just the internal matter of states. The war contributed to an immense increase in the importance of several states at the expense of others. The new political order introduced by the Versailles Treaty brought hope for great changes both in Europe and in the world.

This was reflected in the peace treaties, where the division of countries into "main" and those having "limited interests" appeared.[24]

In response to all this, the reaction of the international community was the establishment of the League of Nations – the first collective security system. One of the main aims of this organization was to protect the world against armed

22 C. Berezowski (red.*), Prawo międzynarodowe publiczne*, Warszawa 1970, p. 471-473.
23 R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne*, Warszawa 2005, p. 245.
24 S. Sierpowski, *Geneza Ligi Narodow*, Dzieje Najnowsze, 31/1 19-45, Poznań 1999, p. 27.

conflicts through multilateral, peaceful cooperation.[25] Unfortunately, the League of Nations Pact did not introduce the absolute prohibition of an aggressive war. Although, in the introduction, there was a commitment not to wage war, there were no specific legal norms in this area. In certain circumstances, an aggressive war still remained a legal war.[26] With the adoption of the League of Nations Pact, the expectations of the international community in the field of warfare increased considerably. Hopes for bringing order and justice between states became widespread. The League of Nations pact significantly limited the state's right to initiate war. in the Preamble states committed themselves to the peaceful settlement of disputes and not to resort to war. According to art 10, members of the League undertook to respect and maintain territorial integrity against the external aggression and political independence of all members of the League. In the case of aggression or its threat, the League Council was to advise on the measures to be taken to fulfill this commitment.

States had a right to initiate a war after the dispute settlement procedure set out in Articles 12-15 of the League Pact had been exhausted. States could not lead a war in the following cases:

1. If the dispute had been referred to arbitration or legal proceedings, and if the other party complied with the decision.

2. if the dispute was referred to the League Council, and the Council adopted the report unanimously, and the other party complied with the conclusions.

3. if the dispute was referred to the League Assembly at the request of the Council or one of the parties, and the Assembly's report was adopted by the members of the Council and by the majority of other members of the League, and if the other party complied with the conclusions contained in the report.

Under Article 12, the states undertook not to take the decision to initiate a war before the expiry of three months from the conciliation or judicial decision or the Council report.

Many authors point to the problem that the provisions of art. 10 did not correspond with the provisions contained in Articles 11-15 of the Pact.

It is worth paying attention to art. 16, which supplements the system of prohibiting certain wars by introducing sanctions in relation to the state breaking the provisions of the Pact. The sanctions were divided into economic and military ones. The first of these meant the breaking of commercial and financial relations and the disruption of trade relations between its citizens and all states, and concerned all members of the League to the same extent. In relation to military sanctions, the principle of applying collective sanctions against a sovereign state violating the international order was introduced. It would be the duty of the

25 S. Sierpowski, *Kontrowersje dotyczące harmonizacji Paktu Brianda-Kelloga z paktem Ligi Narodów,* p. 1, https://repozytorium.amu.edu.pl/handle/10593/12387.

26 W. Góralczyk, P. Sawicki, *Prawo międzynarodowe publiczne w zarysie*, Warszawa 2003, p. 393.

Council to recommend to the various governments concerned which military, naval and aviation contingent each of the members of the League was to have in the armed forces intended to enforce respect for the League's obligations. The adoption of the principle of applying collective sanctions against a sovereign state violating the international order was an important stage in creating a collective security system and progress in the development of international law.

The analysis of the provisions of the Pact is conducive to the statement that it was a "Bryan pact". It introduced a procedure that had to be followed so that war would be legal. It did not forbid war.[27] No matter the assessment of the League of Nations Pact, one thing is certain – earlier, international cooperation involving only certain areas of the activity of states had been replaced by a specially appointed organization. All nations were to be bound by its general aims by removing the domination of force and arbitrariness in matters most important to humanity.[28]

In the years following the end of the First World War, efforts were made to impose further obligations on states regarding the renunciation of war. The first attempt was the Geneva Protocol of 1924 (Protocol for the Pacific Settlement of International Disputes), which assumed the introduction of amendments to the Pact of the League of Nations excluding cases of legal war. In addition, it was assumed that the states would accept the jurisdiction of the Permanent Court of International Justice or the committee of arbitrators. Unfortunately, the protocol did not enter into force because of the lack of a sufficient number of ratifications.[29] The fact of the obligation of states submitting disputes to decide to the Permanent Court of International Confirmation or arbitration in doctrine finds the term "legal totalitarianism"[30]. The protocol forbade all aggressive wars and the threat of aggression, and offensive war was considered an international crime. The justification for waging war was only the refutation of aggression based on the provisions of the League of Nations Pact and Protocol.

In the work on the renunciation of wars, the work of French and American diplomacy was successfully completed. The Paris Pact on the renunciation of war, signed in 1928, was called the Briand-Kellogg Pact. This document appeared next to the League of Nations Pact, which was supposed to secure the world against armed conflicts through the development of multilateral, peaceful cooperation. It also identified the peaceful hopes of many people. The Briand-Kellogg Pact was an open agreement, binding in 1939 about 60 countries, and thus almost all

27 M.P Leffler, *The Elusive Quest. America's Pursuit of European Stability and French Security 1919–1933*, Chapel Hill 1979;

28 S. Sierpowski, *Kontrowersje*..., op. cit., p. 27.

29 J. F. Williams, *The Geneva Protocol of 1924 for the Pacific Settlement of International Disputes*, "Journal of the British Institute of International Affairs", Vol. 3, No. 6 (Nov., 1924), p. 289.

30 R. Kolb, *Ius contra bellum, Le droit international relative aux maintain de la paix*, Brussels 2003, p. 36.

states existing at that time (including later aggressors Germany, Italy and Japan). The emergence of the Pact created a dualism of obligations for its signatories. The Briand-Kellogg Pact in art 1 confirms that States "*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*[31]". However, on the ground of the League of Nations Pact it was possible to run a so-called "legal war". The atmosphere accompanying the signing of the Pact was sublime. Great hope was bound up with the Briand-Kellogg Pact. Reinforcement was to become illegal and unnecessary.[32] The problem of harmonizing the two Pacts was difficult and complex. Over time, the emphasis on their harmonization clearly decreased. It was assumed that these were two parallel legal instruments that were intended to secure peace.[33]

The complement of art. 1 about the renunciation of war is art. 2 of the Covenant, which states 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". The Paris Pact prohibited aggressive war, but it did not exclude self-defence. It also allowed collective assistance for the victim of the assault. The Pact allowed the collective action of the League of Nations, the so-called sanctions war.[34]

The Pact was an international act condemning, for the first time, aggressive war and forbidding resorting to it as a national policy measure, without specifying what should be understood. The basic weakness of the pact was the lack of sanctions guaranteeing the signatory's compliance with the pact of accepted obligations and, if necessary, applying it against the state which had violated collective coercive measures.[35]

The Briand-Kellogg pact, regardless of the intentions with which individual states acceded to it, and to what extent they adhered to the provisions contained therein, did not lose its basic legal significance. The force of the pact was indicated by Great Britain and France in September 1939 when declaring war on Germany, guilty of breaking its provisions. In accordance with the indisputable interpretation principle of international law, the legal force of an act is not determined by whether it was obeyed. Law is a system of norms. Unpunished breaking of the law does not mean that the law has been abolished.[36]

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31 United States Statutes at Large, Vol 46, Part 2, Page 2343.

32 S. Sierpowski, *Kontrowersje*..., op. cit., p. 7.

33 See more, R.H.Ferrel, Frank B. Kellogg – Henry L. Simson, New York 1963.

34 W. Góralczyk, p. Sawicki, op. cit., p. 394.

35 A.M. Brzeziński, *Zagadnienie bezpieczeństwa zbiorowego w stosunkach międzynarodowych (1919––1939),* „Przegląd Nauk Historycznych" 2002, R. I, nr 2, p. 140.

36 J. Łaptoś, op. cit., p. 244.

The purpose of this article was to show the efforts of the international community to eliminate war in the period in the forefront and after the First World War. The time in which the first standards were created in this respect was very difficult, because it was all about a thorough change of approach to the very fact of waging war. The pacifist movements of the time were too much in the minority to effectively push through their arguments. The pacifists' contribution was in showing war's atrocities and propagating a world without violence. This certainly influenced changes in the field of war as legal foreign policy. Starting from the introduction of peaceful methods in the settlement of disputes (Hague Convention), through the bilateral agreements under which states were to submit disputes between them to the conciliation commissions, we can indicate concrete activities to limit the possibility of resorting to war. Further steps had been taken within the League of Nations with limitations and conditions on resorting to war.

Currently, no one is considering the issue of the right to conduct aggressive war; in those days it was treated as an attribute of a sovereign state. Consistent steps taken over the years have led to the development of the principle of prohibition of warfare. The role of the Briand-Kellogg Pact is the most important one on this path. From that moment, the catalogue of attributes of state sovereignty changed. And although the Pact did not save the world from the outbreak of World War II, thanks to its three articles war criminals could be tried. It was also possible to further develop the norms of international law in this area. It is well known that the Briand Kellogg Pact did not stop the efforts of States in the elimination of war in international relations. Putting a war out of law and confirming it in a normative act did not protect the world from the outbreak of World War II.

Not forgetting all the conflicts that have been and are carried out in the majesty of international law with the United Nations Charter in the background.

The use of force, whether in the context of self-defence or humanitarian intervention in the name of protecting human rights, or the protection of humanitarian convoys, is always a form of war.

The idea of the Responsibility to Protect, announced at the beginning of the 1990s, was to organize the use of force on three levels: prevention, reaction and rebuilding.

Unfortunately, we will never eliminate war from our lives, but thanks to the efforts of the international community, we can theoretically have the possibility of penalizing actions that are considered incompatible with international law. Fortunately, the mentality of states has changed over the years. In this, hope should be sought for the further development of the norms of international law.

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Summary

Putting the war out of law. The problem of peace in international relations before and after the First World War

The article covers the subject matter of the right of states to conduct aggressive war in the period before and after the end of the First World War.

Attempts to outline the limits of the permissibility of resorting to the use of armed force had been undertaken in the doctrine for centuries, but it was only in the twentieth century that they began to acquire the character of binding legal norms. The author points to several important stages in the formation of *ius contra bellum*: the Hague (II) Convention of 1907, introducing the primacy of methods of peaceful dispute settlement, and the Bryan Treaties, in which states undertook to submit disputes between them to conciliation commissions.

The Covenant of the League of Nations partially limited the admissibility of recourse to war. Currently, no one is subjected to doubt the prohibition of aggressive war. We owe this to the consistent actions taken by states over many years. The Kellogg Briand Pact categorically changed the approach to warfare, and modified the catalogue of the attributes of sovereignty.