The Future of International Law*

The breaches of international law have been so numerous and its violations so flagrant in character that many people have been led to think that international law must at best have been of little worth and may now be regarded as a thing of the past—of interest to historians but of no possible consequence to us today or in the future. Has it not been tried and found wanting? Why, then, waste time over an experiment that has proved itself a failure at the time when its successful operation was most needed?

There are not a few people who have always held the view that there is no such thing as international law, who have claimed that it was not law at all but at most a set of rules, originating partly in custom and partly in agreement, which the nations followed somewhat as individuals follow the conventions of society—and the binding force of these rules they regarded as of the same character as the conventions of society, to be obeyed so long as it was convenient but no longer.

John Austin, the famous founder of the modern English School of Jurisprudence, denied to international law the character of law in its proper sense; law he defined as the command of a political superior addressed to a political inferior, obedience to which will be enforced. He could not find among the states the political superior who gave commands to political inferiors nor the sanction of physical force, nor a judge, court or sheriff; so he was forced to deny to these rules the character of law. They were no more than the conventions of society or the moral laws.

Austin’s view became the prevailing English and American view and has been held with great tenacity by the members of the legal profession down to the present time, though since Sir Henry Maine’s day there has been a growing disposition among students of the history and science of law to regard Austin’s view as too

*The substance of a lecture delivered at the University of California in March, 1918.
narrow, as applicable to modern statute law, but as entirely contrary to the history of early law and law making processes.

As against the standpoint of those who have never thought that it was law and those who may have thought that the war has destroyed international law, it will repay us to turn our attention to some phases of the development of the so-called Family of Nations and of those rules, which, in the words of Hall, the states regard as binding upon them with a force comparable to that which binds the conscientious citizen to obedience to the law of the land.

Instead of regarding the present war as the destruction of international law we shall see rather that it is the vindication of that law; that as every attack which has been made in the past upon the existing basis of international law and world organization has been defeated, so that of the Central Powers will fail; that as every attempt to destroy, has been followed by an effort to strengthen international law, so after this war we look for renewed efforts to give it validity; that we ourselves are fighting in support of these rules and in behalf of a world order which rests fundamentally upon their existence and that victory for us means the establishment of a world organization which shall guarantee the existence and independence of the nations, large or small, and the observance of those rules which make possible the free development of free peoples.

In antiquity there was lacking the conception of a Family or Society of Nations. The states of Greece were city-states whose whole life centered about the city. In the intensive city life, the idea developed that each city-state should be self sufficient, that it should contain in itself all that was necessary for the highest development of its citizens. Among the Greek states there was recognition of a common quality which differentiated them from the non-Greeks, whom they called Barbarians and whom they regarded as inferior beings, and with whom no sort of equal social and legal relationships could exist. The only rules developed among the Greek states were religious rather than legal in character. The Amphictyonic Council proclaimed a few rules to be observed by the Greek States, for instance, that the Games should not be interfered with by war; that no lasting memorials of victory should be erected, and that the right of sanctuary should not be denied. But to maintain that these rules were law and that international law as we understand it
existed among the Greeks runs counter to their fundamental conception of the state as self-sufficient.

In the early days of the Republic, Rome entered into agreements with some of the Italian States on terms of equality. They called these agreements *foedera aequa*, but it was not long before these equal agreements became unequal through the domination of Rome. In the days of the Roman Empire the theory of its world-wide extent was definitely established and the facts corresponded reasonably well to the theory so far as the civilized world was concerned.

When the Roman Empire was divided into the Eastern and the Western Empires the latter, as was natural, fell heir to the traditions of ancient Rome since the City of Rome was in reality its center.

With the overthrow of the Western Empire through the barbarian invasions there ensued several centuries of conflict and readjustment, at the end of which, in 800 A.D., Charlemagne, King of the Franks, had himself crowned Emperor at Rome, thereby seeking to revive the traditions of ancient Rome. Throughout the middle ages the theory of the world-wide character of this new Roman Empire, which came to be called the Holy Roman Empire, persisted, though the theory was contradicted by the facts. The Society of Nations has grown up out of the disintegration of the feudal system and the development within the Empire of the modern national state. With the dissolution of the feudal bonds, many of the rulers of fiefs began to claim for themselves and for their territories, independence of the Empire. The process is seen very clearly in France. Since the days of Hugh Capet, the French kings, then rulers of a very small district around Paris, had been acquiring territory—by war, by marriage, by inheritance, by the falling vacant of a fief—till they were supreme over all persons within the territory and independent of all external control, whether of Pope or of Emperor.

By the last half of the 16th Century the process by which the kings of France became its real rulers had been completed and the jurists of the school of Roman Law at Paris began to apply to the king of France the expressions of the Roman Law originally applicable to the Roman Emperors. They spoke of the King as "*imperator in regno suo*", as emperor in his own kingdom.

Now this development of France is comparable to that which
took place elsewhere and marks the appearance of the modern national State. England, Spain, Portugal, The Netherlands and Sweden had likewise become independent states by the end of the 16th century.

The theory of the universal character of the Empire, nothing daunted by the development of independent states, still persisted, and declared that the individual states retained their independence only by permission of the Emperor, who was at liberty to withdraw it at any time. But at the Peace of Westphalia (1648), the death blow was given to the theory of the world-wide extent of the Empire, for at that time the Empire acknowledged the right of the states to declare war and make peace, to send and receive diplomatic representatives and to conclude treaties, rights which ever since have been regarded as inherent in every completely independent state.

As the Renaissance had destroyed the intellectual unity of the Middle Ages, so the Reformation destroyed its spiritual unity. With the destruction of the old basis of political and religious thought a new foundation was needed upon which the future could be built, and the great service performed by Hugo Grotius, the Father of International Law, was in furnishing this basis and in systematizing the principles which should govern the nations in their relations with one another. His justly famous work, entitled "Concerning the Law of War and Peace," was published in the year 1625. The Thirty Years War had then been raging for seven years and had already lost its original character of a religious uprising of certain Bohemian Christians and had assumed the character of a struggle of the princes within the Empire to secure recognition of their independent position. Religious principles, forms of church organization and independence of the princes were all involved in the struggle and tended to a destruction of the old order of things. The Universal Church and the Universal Empire were making their last stand against militant reformers and modern nationality.

In such a struggle of the old order with the new, there was a great loosening of the social, political and moral bonds which had hitherto placed restraint upon mankind, and no contest in modern history had produced such cruelties, barbarities and disregard for the laws of God and of man as did the Thirty Years War.
Previous to the outbreak of this war there had been an occasional attempt made to formulate the rules which should be observed in war, but Hugo Grotius for the first time attempted to formulate a system of rules for the guidance of states in their relationship with one another both in peace and in war.

It was impossible for Grotius to appeal to any common political or religious conception because the parties to the war were fighting about these very things. He might, to be sure, have appealed to Catholics on the old basis of one church, or to the Protestants on the basis of the principles of the Reformation, but there was nothing left from the Middle Ages, apparently, in the realm of religion or politics upon which an appeal to both parties could be based. In his search for a new common principle that might serve as a basis of appeal to all parties Grotius hit upon the natural law. Since the days of the Greek philosophers this notion of a natural law had been current. By them it was regarded as that law which was in force in the golden age when all men lived together in peace under a single system of law. This conception of a natural law was taken up by the Stoic lawyers at Rome and identified with that part of the law common to the nations of Italy which the Romans had found it necessary to adopt in order to carry on successfully their commercial operations with their neighbors. The idea of the law of nature continued to exist in the Middle Ages and was regarded as of a higher type than the ordinary law of the land. Hugo Grotius gave expression to this idea of the exalted character of the natural law when he declared that it was eternal and immutable and would exist even if there were no God. Here, indeed, was a foundation upon which he could build without reference either to old or new religious or political beliefs.

The law of nature, according to Grotius, was only the product of right reason and could be discovered, therefore, by each individual through his own powers of reasoning. This product of right reason embraced the essential moral principles which had come to be regarded as indispensable for the association of human beings in society. He regarded the independent states as individuals associated together in a society of states and to these members of this society he applied the principles of the natural law and also many principles from the Roman Law with which he and the learned world of the time were well acquainted.
From 1648 the old supremacy of the Empire was gone and in its place there was put a number of mutually independent states each recognizing the independence and equality of the others; a Society of Nations instead of the supremacy of a Universal Empire, and a system of rules to regulate their conduct toward each other.

This Society, or Family of Nations, was Western European in origin and the rules which were developed among them were called European International Law even down to the Congress of Vienna, though the United States had been admitted to membership in the society at least as early as 1783; and in the course of the 19th century new States in America, Asia and Africa were admitted until the whole civilized world was embraced within its membership.

The fundamental principle upon which the modern world order has rested has been the equality and independence of every member; not to be sure an equality of territory, population or wealth, but an equality in the eyes of the new system of law by virtue of which its protection was thrown about them. Their independence, their right to exist and to pursue their own national development irrespective of physical strength or weakness has, since the days of the peace of Westphalia, been regarded as the foundation of international association and state organization.

It would be a great mistake to suppose that this mutual recognition of equality and independence has gone unquestioned since 1648. The principle has been more than once contested and in this present war we see one of the most determined attempts to destroy it. In each instance the assault upon the world order has been instigated by selfish considerations, by desire for dynastic glory and national aggrandizement, and in each instance the medieval conception of universal Empire has been revived by a ruler whose authority was autocratic and who was dazzled by the prospect of world dominion.

At the close of the 17th century the seat of power in Europe had so far shifted that Austria, the remnant of the old Empire, was no longer dangerous but the threat to destroy the inde-ambition of the King of France, Louis the Fourteenth, who, had he been successful, would, indeed, have endangered the independent national existence and civilization of the other states of
Europe. To Louis XIV is attributed the saying, "L'état c'est moi," and whether or not he ever said it, the fact is that he was as completely the state as any individual can be. He was the source of all authority, honors, dignities and offices; his will was law, or rather the law was what he willed—and the theory of the divine right of kings was accepted without question. Bossuet, theologian and tutor to the Dauphin, declared that the king was in fact an image of the majesty of God himself and that in the king was embodied the whole people. So sublime was the majesty of a prince that it could be due to no human source; it could come only from God.

Louis XIV came to the throne in 1643 at the age of five. Richelieu, the great minister of his father, had brought France into the Thirty Years War and as a result of his policy and that of his successor Mazarin, France had gained a preeminent position in European politics. At the death of Mazarin in 1661, Louis declared that henceforth he would be his own minister and he took into his hands the entire control and direction of affairs; only his great capacity for work and his patient devotion to detail enabled him to carry it out.

In the course of his active management of affairs, Louis carried on four wars, no one of which had a just cause, but each of which sought the aggrandizement of France and the weakening or destruction of some less powerful state, and the last of which threatened the very existence of the newly established world-order.

The first of these wars was for the conquest of the Spanish-Netherlands and was concluded by the treaty of Aix-la-Chapelle in 1668. Louis XIV was married to a Spanish princess and upon the death of the King of Spain he asserted a claim through his wife to parts of the Spanish-Netherlands. The fact that his claim was without merit made not the slightest difference to him. An alliance was formed against him by England, Holland and Sweden to bring the war against the Netherlands to a close. Louis never forgave the temerity of the Dutch Republic in thus attempting to set limits to the power of the Grand Monarch and determined to punish the presumptuous republic as soon as he could detach her allies, particularly England. This he was able to do through Charles II. The war against the Dutch Republic resulted in defeat and humiliation for the French and was closed by the Treaty of Nymwegen in 1678.
His third war was against a coalition of powers under the leadership of William of Orange, who, in 1689, had become King of England and the head of the Protestant forces of the world. Defeated, Louis made peace in 1697 by the Treaty of Ryswick through which he sought to lay the foundation for success in a still greater venture which he had in mind. The King of Spain had already lived far longer than his delicate health had led any one to believe possible, and he had no children. It was Louis’ desire to make peace and to secure the nomination of his grandson to the Spanish throne. This he succeeded in accomplishing, but it brought upon him the War of the Spanish Succession, concluded by the Treaty of Utrecht in 1713. Though his grandson was permitted to retain the Spanish crown, it was upon the express stipulation that the crowns of France and Spain should never be united upon the same head.

His dream of Empire was ended, the peril of universal dominion was warded off and the European system of national and equal states was more firmly established than ever, for France, impoverished by the wars and magnificence of Louis XIV, was no longer able to threaten the peace of the world or the permanence of its order.

The eighteenth century witnessed the appearance upon the scene of two new powers which henceforth were to play important rôles in European affairs and which today have focused upon them the eager gaze of the world. In 1701 the Elector of Brandenburg secured from the Holy Roman Emperor the grant of the title of King of Prussia and by the end of the Seven Years war in 1763, Frederick the Great has established the position of Prussia as one of the strong powers of Europe. It was during this same half century that Russia, under the leadership of Peter the Great, had taken her place as a European power and must henceforth be counted a member of the Society of States.

The end of the Seven Years War found England at last mistress of the seas. Spain had contested with her for the honor but had gone down to defeat with the failure of Spanish Armada. Holland next sought to rival her upon the waters but found herself no match for the superior wealth and size of England. France, the third to essay the rôle, met final defeat in this Seven Years War, and with naval supremacy there went also supremacy in colonial settlements; but though mistress of the seas
and the chief colonial power, England never sought to make herself supreme over the states of Europe. It was reserved for France under the guidance of Napoleon to seek once more to predominate over the rest of the world.

Napoleon's career is too well known to need more than a passing reference. Consumed with ambition, he dreamed a dream of world conquest that far outran the limits of Europe or the ancient Roman State. Reviving for himself the title of Emperor, he sought to reestablish the conception of a world Empire under his sway, and for not a few years he came perilously near the realization of his ambition. Italy, Egypt, the Rhine Countries, Spain, Austria and Prussia felt the weight of the conqueror's heel. As actual ruler of half of Europe, he made and unmade kings at pleasure; he destroyed old states and created new ones without regard to history or nationality; independence and equality were but bars to his progress and in the attempt to carry out his plans, international law and treaties, national rights of independence and existence were disregarded with a ruthlessness that would have done credit to the Huns, ancient or modern. At his downfall, the Congress of Vienna was summoned to readjust the boundaries of Europe and to reestablish the principles of law. The conception of Empire was again vanquished, the modern national state vindicated again its right to existence as an equal and independent member of the Society of States, and recognition of the law of nations was once more secured.

For almost exactly one hundred years following the overthrow of Napoleon and his dream of conquest the Society of Nations steadily developed upon the basis of state equality without attacks from any side. In France, to be sure, under Louis Napoleon there was a revival of the title of Empire, but only for a few years and then without any possibility of France's again undertaking a career of conquest. Napoleon the Third gave the final blow to imperialistic ambition in France and for nearly fifty years the Republic of France has borne witness against Empire. But with the overthrow of Napoleon the Third there was created the new German Empire, which, in its turn, has sought to revive the old traditions of Empire both in name and in fact.

It has frequently been said since the present war began that Germany is living in the midst of medieval ideas and conceptions and that she has sought to revive the conception of empire and
world supremacy, the overthrow of which was recognized at the Peace of Westphalia in 1648. An interesting illustration of the German attitude toward the present Empire may be seen in that remarkable commemorative monument, the Kyffhäuser. There one sees the reawakened dream of empire connected immediately with the medieval tradition. The old Emperor Barbarossa, who, according to legend, would sleep until the Empire should come into its own again, is represented as reawakened in the person of Emperor William the First, crowned Emperor at Versailles in January, 1871.

The German Empire was founded on that policy of Bismarck so aptly characterized as one of "blood and iron." Kaiser and Princes, statesmen and professors, poets and playwrights have joined in an exaltation of this new German Empire and the civilization or Kultur which it represents. Science and romance have been united in building a foundation upon which its supremacy might be proclaimed. Bismarck and Nietzsche, Treitschke and Bernhardi, have contributed their part to this revival of medievalism. The biological theory of the survival of the fittest has been united with the theory of the Divine Right of Kings in an effort to destroy the basis of modern state life and international law, and to establish in its place the supremacy of Germany and the rule of might. The Kaiser has dreamed a dream of Empire as great as any of his predecessors. "From childhood," he declared, "I have been influenced by five men, Alexander the Great, Julius Caesar, Theodoric II, Frederick the Great and Napoleon. Each of these men dreamed a dream of world empire; they failed. I have dreamed a dream of German world empire and my mailed fist shall succeed."

To realize this dream he was willing to plunge the world into war; to invade and destroy Belgium; to crush France; to undermine and betray, and now to despoil, helpless Russia; to wreak his hate upon England and seek the mastery of the sea; to place the Balkan States in Teuton vassalage; to impose his imperious will upon Turkey and, stretching out his hand along the Berlin to Bagdad railway, to seize Persia and India; nor were the Americas too far removed to be brought within the vision of his dream.

Forward with God, is the impious cry of the war lord to whom liberty and justice, freedom and right, international law and treaties are meaningless, and in whose eyes nothing is sacred but German victory.
In each of the foregoing attempts to destroy the equality and independence of the states and to establish the predominance of a single state, there are certain common characteristics. Louis XIV and Napoleon were no less ambitious rulers than the German Kaiser; they, no less than he, used their power to advance by war their personal fortunes; neither they nor he hesitated to plunge the world into war, to violate treaties, to disregard international law, to outrage national independence; equally with him did they regard the state as incorporated in themselves; their Divine Right of Kings was only a trifle less blasphemous than his; the superiority of the civilization they sought to impose upon an unwilling world was proclaimed as loudly as German Kultur, and his dream of empire shall fail as ignominiously as did theirs.

The same conditions confront the world today that confronted it in the Thirty Years War, in the age of the Grand Monarch of France and in the age of the world's greatest military genius, the Corsican. Germany and its Kaiser have sought to dominate the world, to disregard the independence and equality of the states and in their wilder dreams to impose Kultur upon the rest of the world, and the great body of the Society of States has risen up in defense of its liberty, equality and independence, and there is no reason to fear, however long or desperate the struggle may be, but that in the end the pretentions of Kaiserism will be overthrown and that Germany will be made to take her place along with the rest of the world as a member of, and not a ruler over, the Society of States. Moreover, when this desired result has been achieved, we may, with equal confidence, look forward to the reestablishment of the old principles of international law that have been so ruthlessly disregarded and to the formulation of new principles and rules as a result of the new conditions produced by the war. Law and society go hand in hand. Only in a society, the members of which are slave-like in their condition, can there be an absence of law, and that part of the world to which we belong and with which we are in sympathy is determined that it shall not be a slave to German autocracy.

Edward Elliott.

Berkeley, California.