INTERNATIONAL LAW AND ARBITRATION. THE ANNUAL ADDRESS, DELIVERED BEFORE THE AMERICAN BAR ASSOCIATION. SARATOGA SPRINGS, THURSDAY, AUGUST 20, 1896

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CHARLES RUSSELL

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THE ANNUAL ADDRESS

DELIVERED BEFORE THE

AMERICAN BAR ASSOCIATION,

AT

Saratoga Springs, Thursday, August 20, 1896,

BY

LORD RUSSELL OF KILLOWEN, G. C. M. G., LL.D.

(LORD CHIEF JUSTICE OF ENGLAND.)

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INTERNATIONAL LAW

AND

ARBITRATION.

Mr. President:

My first words must be in acknowledgment of the honor done me, by inviting me to address you on this interesting occasion. You are a Congress of Lawyers of the United States met together to take counsel, in no narrow spirit, on questions affecting the interests of your Profession; to consider necessary amendments in the Law which experience and time develop; and to examine the current of judicial decision and of legislation, State and Federal, and whither that current tends. I, on the other hand, come from the judicial Bench of a distant land, and yet I do not feel that I am a stranger amongst you, nor do you, I think, regard me as a stranger. Though we represent political communities which differ widely in many respects, in the structure of their constitutions and otherwise, we yet have many things in common.

We speak the same language; we administer Laws based on the same juridical conceptions; we are co-heirs in the rich traditions of political freedom long established, and, we enjoy in common a literature, the noblest and the purest the world has known—an accumulated store of centuries to which you, on your part, have made generous contribution. Beyond this, the unseen "crimson thread" of kinship, stretching from the mother Islands to your great Continent, unites us, and reminds us always that we belong to the same, though a mixed, racial family. Indeed the spectacle which we, to-day, present is unique. We represent the great English-speaking communi-

ties—communities occupying a large space of the surface of the Earth—made up of races wherein the blood of Celt and Saxon, of Dane and Norman, of Pict and Scot, are mingled and fused into an aggregate power held together by the nexus of a common speech—combining at once territorial dominion, political influence and intellectual force greater than History records in the case of any other people.

This consideration is prominent amongst those which suggest the theme on which I desire to address you—namely, International Law.

The English-speaking peoples, masters not alone of extended territory but also of a mighty commerce, the energy and enterprise of whose sons have made them the great Travellers and Colonizers of the world—have interests to safeguard in every quarter of it, and, therefore, in an especial manner it is important to them, that the Rules which govern the relations of States *inter se* should be well understood and should rest on the solid bases of convenience, of justice and of reason. One other consideration has prompted the selection of my subject. I knew it was one which could not fail, however imperfectly treated, to interest you. You regard with just pride the part which the Judges and writers of the United States have played in the development of International Law. Story, Kent, Marshall, Wheaton, Dana, Woolsey, Halleck and Wharton, amongst others, compare not unfavorably with the workers of any age, in this province of jurisprudence.

International Law, then, is my subject. The necessities of my position restrict me to, at best, a cursory and perfunctory treatment of it.

I propose briefly to consider what is International Law; its sources; the standard—the ethical standard—to which it ought to conform; the characteristics of its modern tendencies and developments, and then to add some (I think) needful words on the question, lately so much discussed, of International Arbitration.

I call the Rules which civilized nations have agreed shall bind them in their conduct *inter se*, by the Benthamite title, "International Law." And here, Mr. President, on the threshold of my subject I find an obstacle in my way. My right so to describe them is challenged. It is said by some that there is no International Law, that there is only a bundle, more or less confused, of rules to which nations more or less conform, but that International Law there is none. The late Sir James F. Stephen takes this view in his History of the Criminal Law of England, and in the celebrated "Franconia" case (to which I shall hereafter have occasion to allude) the late Lord Coleridge speaks in the same sense. He says: "Strictly speaking, 'International Law' is an inexact expression and it is apt to mislead if its inexactness is not kept in mind. Law implies a Lawgiver and a Tribunal capable of enforcing it and coercing its transgressors." Indeed it may be said that with few exceptions the same note is sounded throughout the judgments in that case. These views, it will at once be seen, are based on the definition of Law by Austin in his "Province of Jurisprudence determined," namely, that a Law is the command of a superior who has coercive power to compel obedience and punish disobedience. But this definition is too narrow; it relies too much on force as the governing idea. If the development of Law is historically considered, it will be found to exclude that body of customary law which in early stages of Society precedes Law which assumes, definitely, the character of positive command coupled with punitive sanctions. But even in Societies in which the machinery exists for the making of Law in the Austinian sense, rules or customs grow up which are laws in every real sense of the word, as for example, the Law Merchant. Under later developments of arbitrary power Laws may be regarded as the command of a Superior with a coercive power in Austin's sense: *Quod placuit principi legis vigorem habet.* In stages later still, as government becomes more frankly democratic, resting broadly on the popular will, Laws bear less and

less the character of commands imposed by a coercive authority, and acquire more and more the character of customary law founded on consent. Savigny, indeed, says of all law, that it is first developed by usage and popular faith, then by Legislation and always by internal silently-operating powers, and not mainly by the arbitrary will of the Lawgiver.

I claim, then, that the aggregate of the Rules to which nations have agreed to conform in their conduct towards one another are properly to be designated "International Law."

The celebrated author of "Ecclesiastical Polity," the "judicious" Hooker, speaking of the Austinians of his time, says: "They who are thus accustomed to speak apply the name of Law unto that only rule of working which superior authority imposeth, whereas we, somewhat more enlarging the sense thereof, term every kind of rule or canon whereby actions are framed a Law." I think it cannot be doubted that this is nearer to the true and scientific meaning of Law.

What, then, is International Law?

I know no better definition of it than that it is the sum of the Rules or Usages which civilized states have agreed shall be binding upon them in their dealings with one another.

Is this accurate and exhaustive? Is there any *a priori* rule of right or of reason or of morality which, apart from and independent of the consent of nations, is part of the Law of Nations? Is there a Law which Nature teaches, and which, by its own force, forms a component part of the Law of Nations? Was Grotius wrong when to International Law he applied the test "*placuit-ne Gentibus*"?

These were points somewhat in controversy between my learned friends, Mr. Phelps and Mr. Carter, and myself before the Paris Tribunal of Arbitration in 1893, and I have recently received from Mr. Carter a friendly invitation again to approach them—this time in a judicial rather than in a forensic spirit. I have reconsidered the matter, and, after the best consideration which I can give to the subject, I stand by the proposition which in 1893 I sought to establish. That proposition

was that International Law was neither more nor less than what civilized nations have agreed shall be binding on one another as International Law.

Appeals are made to the Law of Nature and the Law of Morals, sometimes as if they were the same things, sometimes as if they were different things, sometimes as if they were in themselves International Law, and sometimes as if they enshrined immutable principles which were to be deemed to be not only part of International Law, but, if I may so say, to have been pre-ordained. I do not stop to point out in detail how many different meanings have been given to these phrases —the Law of Nature and the Law of Morals. Hardly any two writers speak of them in the same sense. No doubt appeals to both are to be found scattered loosely here and there in the opinions of Continental writers.

Let us examine them.

What is the Law of Nature?

Moralists tell us that for the individual man life is a struggle to overcome nature, and in early and, what we call natural or barbarous states of Society, the arbitrary rule of force and not of Abstract Right or Justice is the first to assert itself. In truth, the initial difficulty is to fix what is meant by the Law of Nature. Gaius speaks of it as being the same thing as the *Jus Gentium* of the Romans, which, I need not remind you, is not the same thing as *Jus inter Gentes*. Ulpian speaks of the *Jus naturale* as that in which men and animals agree. Grotius uses the term as equivalent to the *Jus stricte dictum*, to be completed in the action of a good man or state by a higher morality, but suggesting the standard to which Law ought to conform. Pufendorf in effect treats his view of the rules of abstract propriety, resting merely on unauthorized speculations, as constituting International Law and acquiring no additional authority from the usage of nations; so that he cuts off much of what Grotius regards as Law. Ortolan, in his "Diplomatie de la Mer," cites with approval the following