# DAVID DUDLEY FIELD

DAVID DUDLEY FIELD, American jurist, one of the greatest lawyers that America has produced, was the son of the Rev. D. D. Field, a Congregational clergyman of Stockbridge, Mass. He was born at Haddam, Conn., Feb. 13, 1805, and died at New York, April 13, 1894. Educated at Williams College, he afterward studied law and, being admitted to the Bar in 1828, began the practice of his profession in New York city, where he soon won for himself a foremost place in the legal profession. He early took interest in the subject of law reform, and being appointed in 1847 one of a commission to reform legal practice in New York State, at once began the preparation of a civil and a criminal code of procedure. The civil code, when completed, was in the main adopted, not only by his own State, but by nearly thirty other States, and it now forms the basis of practice in several English colonies. In 1857, he was placed at the head of a commission to codify the whole law of his State. In 1865, this commission reported civil, penal, and political codes, almost wholly the work of Field, the codes covering the entire practice of common and statute law in the United States. At a meeting of the British Association at Manchester, England, in 1866, Mr. Field brought forward a proposition to frame an international code. In 1877, Mr. Field was a representative in Congress, and in 1890, having meanwhile retired from practice, he presided over a peace convention in London. His writings include "What Shall be Done with the Practice of the Courts?" (1847); "The Electoral Votes of New York" (1870); "Speeches, Arguments, and Miscellaneous Papers" (1890), and an earlier work, issued in 1872, entitled "Draft Outlines of an International Code"—which was translated into French and Italian and enjoyed a wide circulation.

## AN INTERNATIONAL CODE OF ARBITRATION

### AN ADDRESS BEFORE THE BRITISH SOCIAL SCIENCE ASSOCIATION AT MANCHESTER, OCTOBER 5, 1866

MR. PRESIDENT AND GENTLEMEN,—Standing for the first time before the members of this association I must begin by making my acknowledgments for the honor which you conferred upon me some years ago by electing me a corresponding member. Though I have not been able to take part in your meetings I have felt scarcely less interest in them than if I were present and even take to





myself a share of the self-congratulation which the actual participators must have felt. If I have not contributed to your transactions I have been a humble sharer in the fame which the contributions of others have won.

The distinction which your association has earned is, however, the least of its honors. The good which it has done in stimulating inquiry, concentrating opinion and combining efforts toward the improvement of the law and the education and health of the people would be a sufficient reward for all your labors even if no distinction had been obtained.

The scope of your labors is not confined to your own country; it extends to every part of Christendom. So intimate is now the connection between all Christian nations that the social progress of one is sure to be felt more or less in the others. More especially is this true of your country and mine. We are bound together by so many ties that, forgetting for the present all things else, I will only think of the good we may do each other and the spirit of kindliness we may both promote.

The particular subject to which I am to bespeak your attention is international law. In discoursing of it my purpose will be to answer, so far as I may be able, these questions: 1. What is that which is called international law? 2. Who made it? 3. Who enforce it? 4. Are any changes in it desirable? 5. If so, how can they be effected?

Law is a rule of property and of conduct prescribed by sovereign power. In strictness, therefore, there is no such thing as a human law binding the nations, since they have no human superior. They may however, as they have in part done, agree among themselves upon certain rules, both of property and of conduct, by which they will pledge themselves to regulate their own conduct toward each other and the conduct of their

citizens respectively. These rules form what is called sometimes international law and sometimes the law of nations.

Neither expression is precisely accurate. There is a body of rules more or less distinctly stated by which nations profess to comport themselves in their relations with each other; but they are not laws nor are they imposed upon nations nor yet are they international. They are laws only in each state so far as they are promulgated by the sovereign power of that state and they serve international purposes.

Take for example a treaty concluded between the United States and Great Britain; when ratified and promulgated by the treaty-making power in the two nations it becomes a rule for both by virtue of their compact, and a rule in each nation for its own citizens by virtue of the promulgation by its own sovereign authority.

For want however of a better designation and adopting the suggestion of Bentham, publicists and statesmen now generally refer to this body of rules as international law. If the word law is to be retained I should have thought the expression public law or the public law of the world a better one.

Who made these rules, or this international law if you so call it, is explained by the definition which I have given. It was made by the nations themselves either through express compact with each other or through general practice; that is to say by treaty or by usage. Publicists I know, looking beyond the rules so made or sanctioned, have sought, in those moral precepts by which nations not less than individuals ought to be governed in their intercourse with each other, for guides in other circumstances; and statesmen and diplomatists have often fortified their arguments by reference to such opinions and it has thus frequently happened that those precepts have been gradually adopted into the usage of nations.



These views of the publicists are however to be regarded rather as suggestions of what ought to be the conduct of nations in particular circumstances than as a statement of established rules. They are entitled to the same weight in the decision of a national dispute as a treatise on natural law is entitled to in the decision of a case by the courts of America or England.

Some writers are in the habit of treating the law of nations as if it were something above the nations and having an authority superior to their will. In our late civil war, for example, it became the practice of certain persons to speak of the law of nations as a guide or warrant for the Executive in the conduct of the war, beyond the constitution, and paramount to acts of Congress. This, I apprehend, was a mistaken view. The law of nations is only such because each individual nation adopts it, and so far only as it is thus adopted. It is legally, I do not say morally, or without just complaint from other nations, competent for any nation to reject the whole or any part of it as far as its own citizens are concerned. The Parliament of England might enact, if it would, that no English court should decide and no English subject act in a particular manner, even though that manner were enjoined by the law of nations as understood by the whole body of Christendom.

Who enforce the rules thus made or sanctioned and known as international law? The nations themselves, first by applying them as occasion requires to litigants in the national tribunals; and secondly, by punishing the nation which infringes them in such manner as nations may punish each other; that is to say, by non-intercourse, or by force.

The controversies respecting captures by land or sea and the questions concerning the responsibility of individuals for the

violation of private rights are of course determined by the courts, and where the municipal law is silent international usage is the rule of decision. When a question arises between nations it is debated and arranged between themselves, or submitted to arbiters, or decided by force.

The next question will lead us into a large discussion. Are any changes desirable in these rules of international obligation? The slightest acquaintance with the disputes which have arisen and do so constantly arise between nations will convince us that the rules themselves are full of uncertainty, and in many respects defective. If we make for ourselves an examination, even incomplete, of the subjects which fall within the scope of international law we perceive at once how many of them are uncertain or require revision. Within it are embraced all the rules which should govern the relations of states with each other in peace and in war. All of them spring from the intercourse of nations.

If a people shut themselves up from others, as the Chinese attempted to do, building a wall between themselves and their neighbors, there can be no international law as there can be no international relations. That condition, however, is unnatural and irrational.

Man is a social being and his nature impels him to intercourse with all the family of man. Whether this intercourse is demandable as a right, and if so when and by whom and upon what conditions and how it should be carried on, are the first questions which present themselves. From intercourse as from a source spring the rights and duties of those who carry it on, making it necessary to determine how far they who pass from one country to another retain their own nationality and to what extent they subject themselves to the jurisdiction of the country which they enter. Hence arise



the questions respecting the right of foreigners to liberty of religion, residence, and trade; their obligations to civil or military service; the liability of their property to taxation or other imposition, and its devolution when they die.

Traffic brings with it contracts. These are to be expounded and enforced in different nations and between the citizens of all. Thence comes that department of jurisprudence which, under the general title of the conflict of laws has engaged so many minds and led to such profound investigations.

The intercourse of nations is public or private. The former is carried on by embassies, legations, and consulates. Here is required a large body of rules declaring the rights and duties of public ministers and consuls, with their attendants, their reception, residence, functions, and immunities.

When private persons pass from one country to another they go either for transient purposes or for permanent residence. In the latter case there arise two opposite claims; on one hand that of expatriation and on the other that of perpetual allegiance. Fugitives from one country into another have certain privileges; hence the practice of extradition, as modified by that right of asylum which, older than Christianity, has been exalted by its spirit and precepts and which it is the honorable boast of your country and mine never to have violated or rejected.

The instruments of intercourse by sea; ships and those who navigate them; and they who pass and repass with them, and that which they carry; the control of them on the ocean and in port—all these are to be regulated by that body of rules of which I am speaking. Next are those rights of property which, acquired in one country, should be recognized and respected in another; the title to personal chattels and the title,

quite as good, in my opinion, to the products of the mind; inventions for which patents are commonly issued; and writings, for which the law of copyright provides, or should provide, a sanction and a guarantee. Then there are the subjects of weights, measures, money, and postal service, which fall within the scope of international regulation. Passing from direct intercourse between nations to their rights, exclusive or concurrent, to things outside of themselves, we come to the subjects of the free navigation of the ocean, the fisheries, the discovery and colonization of islands and continents, and the right of one nation to an outlet for itself through the close seas or rivers of another.

After these various topics regarding the relations of nations in a state of peace we come to those of a state of hostility. Force or constraint is applied in three ways—one by non-intercourse, another by reprisal, and a third by war. I will speak only of the relations in war. First, in respect to intestine or civil war: when and how far may other nations interfere, and when may interference go so far as to recognize a new nation out of the fragments of a broken one, and what is the effect of the separation upon the citizen of the different parts of the divided nation and upon the citizen of other states.

Then in respect to foreign war, when it is justifiable, what must be done to avoid it, and what formalities must precede it. And when it comes what must be the conduct first of the belligerents and then of neutral nations; and in respect to the former who may attack, who and what may be attacked, and in what manner may the attacks be made. Those questions being answered embrace the whole subject of belligerent rights. But into what an infinitude of subdivisions do these topics divide themselves; explaining to what extent



it may be truly said that upon the breaking out of a war all the citizens of one belligerent state become the enemies of all the citizens of the other; what may be done by one side to the citizens and property of the other, including the seizure and confiscation of debts or other property; how the persons and property of the enemy found in a country in the beginning of a war may be treated; whether private citizens, without commission from the government, may assail the enemy; whether it be lawful to take or destroy private property on land or sea; whether all kinds of public property may be taken or destroyed; how public buildings and monuments of art are to be treated; what is the effect of war upon pending contracts; and what future traffic may be carried on between the citizens of the belligerent nations.

Then, when we proceed to consider the conduct of armies toward each other, what are the rules of honorable warfare, what stratagems are allowable, the proper treatment of prisoners, the disposition of spies, the flag of truce, the armistice, and the exchange of prisoners of war—all these are subjects of international regulation.

Turning from belligerents to neutrals we come to consider what are the rights and what the obligations of the latter; what are the conditions of a true neutrality; what is a just blockade, and the effect of it; what things are contraband of war; and to what extent a belligerent may be supplied from neutral territory. When a state departs from its neutrality and becomes an ally, the rights which then attach to her and arise against her form another department of the rules which determine the relations and the rights of states.

This rapid and imperfect enumeration of the principal subjects embraced within the scope of international law will suggest to those who are conversant with them the uncertainty

which hangs about many of them and the need of numerous amendments. Let us refer to some by way of example.

Take the case of recapture at sea. America has one rule, England has another, while France, Spain, Portugal, Holland, Denmark, and Sweden have each a rule different from either and different from each other. It was in reference to such a case that Sir William Scott, the great admiralty judge, whose judgments command respect for their ability, even when they do not win assent to their conclusions, was obliged thus to speak:

"When I say the true rule I mean only the rule to which civilized nations according to just principles ought to adhere, for the moment you admit, as admitted it must be, that the practice of nations is various, you admit that there is no rule operating with the proper force and authority of a general law."

Take the question respecting the effect of a declaration of war upon the persons and property of an enemy found in the country at the time. How important that it should be settled beforehand by a uniform rule! And yet the practice of nations is various, more various even than the nations themselves; for in the same nation the practice has varied with the interest or caprice of rulers.

You had a controversy with the Great Frederick about the confiscation of the Silesian loan. The seizure of French ships in your ports, upon the rupture of the Peace of Amiens, and the detention by Napoleon of English subjects found in France, produced an immense amount of suffering, which might have been in great part avoided by the establishment beforehand of a proper rule. What articles are contraband of war ought to be settled and everywhere known. But you



do not agree with us respecting them; you do not agree with most of the continental nations.

There must, however, be some rule founded upon just principles to which intelligent and impartial publicists and statesmen would give their assent, could they but approach the subject in a time of peace undisturbed by passions and enmities.

The vexed questions respecting the right of neutrals to send goods by the ships of a belligerent, or to carry the goods of a belligerent in their own neutral ships—questions illustrated by the formulas, "free ships, free goods," and "enemies' ships, enemies' goods"—are matters in which the trade of the whole civilized world is interested, and yet how unsettled! The obligations of a true neutrality, what are they? Do they permit the supply to a belligerent of ships and munitions of war? Do they require a neutral to prevent the fitting out and sailing of ships? Do they require a neutral to disarm and arrest bands of professed travellers or emigrants who are seeking to pass the border, with the real intent of making a hostile incursion?

Take the case of the "Alabama," to which I refer for no other purpose than illustration. Here is an instance where the people of my country think that you are responsible for all the damage done by that vessel. Your own people, I am told, are of a contrary opinion. Ought such a question to be in doubt; or, rather, ought there to be any such question at all? The security of property and the peace of nations require that there should be none such hereafter. Then there are grave questions respecting the doctrines of expatriation and allegiance, which have given rise to some misunderstanding already and which may give rise to greater misunderstanding hereafter. . . .

Whatever those stipulations might be, whether providing for an arbitration before an appeal to arms or for some other means of adjustment, the same stipulations which would be inserted in a treaty between our two countries could be inserted also in treaties between them and others. Is it too much to hope that by this means the time may come when it would be held impious for a nation to rush into war without first resorting to remonstrance, negotiation, and offer of mediation?

Supposing, however, war to become inevitable and two nations at last engaging in actual hostilities, how much may be done in favor of humanity and civilization by adding to the rules which the usages of nations have established for mitigating the ferocity and distress of war!

Could not private war and war upon private property be forever abolished? Could not more be done in the same direction as that taken by the late conference at Geneva, which produced such excellent effect during the last contest in Germany in exempting surgeons and nurses from capture? Could not the sack of a captured city or the bombardment of a defenceless town be forever prohibited? Might not such transactions as the storming of Magdeburg and San Sebastian and the bombardment of Valparaiso be made violations of the laws of war? Could there not be a great improvement upon the rules which provide for the proper treatment and exchange of prisoners? What indeed might not be effected if an earnest effort were made to lessen to the utmost its evils before the passions become aroused by the actual conflict of arms? Discarding at once the theory that it is lawful to do everything which may harass your enemy, with a view of making the war as short as possible—a theory worthy only of savages and carried out to its logical conclusion leading to



indiscriminate fire and slaughter, even of women and children—the aim should be, while not diminishing the efficiency of armies against each other, to ward off their blows as much as possible from all others than the actual combatants.

How can these changes so desirable in themselves be effected? I answer, by the adoption of an international code. Every consideration which serves to show the practicability and expediency of reducing to a code the laws of a single nation applies with equal force to a code of those international rules which govern the intercourse of nations. And there are many grave considerations in addition. The only substitute for a code of national law—an imperfect substitute, as I think it—is judiciary or judge-made law. This is tolerable, as we know from having endured it so long, where there is but one body of magistrates having authority to make it.

But when the judges of each nation, having no common source of power and not acting in concert, make the laws they will inevitably fall into different paths and establish different rules. And when they do there is no common legislature to reconcile their discrepancies or rectify their rules. Indeed, if there is ever to be a uniform system of international regulations made known beforehand for the guidance of men it must be by a means of an international code.

How can such a code be made and adopted? Two methods present themselves as possible: one a conference of diplomatists to negotiate and sign a series of treaties forming the titles and chapters of a code; the other the preparation by a committee of publicists of a code which shall embody the matured judgment of the best thinkers and most accomplished jurists, and then procuring the sanction of the different nations. The latter method appears to me the more feasible.

The difficulties in the way will arise, not in the labor of

preparation but in procuring the assent; yet, great as are these difficulties, and I do not underrate them, I believe they would be found not insurmountable, and that the obstacles and delays which the rivalries of parties and the jealousies of nations might interpose would finally give way before the matured judgment of reflecting and impartial men.

The importance of the work is so great, and the benefits that will result from it in promoting beneficial intercourse, protecting individual rights, settling disputes, and lessening the chances of war are so manifest, that when once a uniform system of rules desirable in themselves is reduced to form and spread before the eye it will commend itself to favor and the governments, which after all are but the agents of the public will, must at last give it their sanction.

Let us suppose this association to make the beginning. There is no agency more appropriate and no time more fitting. You might appoint at first a committee of the association to prepare the outlines of such a code to be submitted at the next annual meeting. At that time subject this outline to a careful examination, invite afterwards a conference of committees from other bodies—from the French Institute, the professors of universities, the most renowned publicists—to revise and perfect that which had been thus prepared. The work would then be as perfect as the ablest jurists and scholars of our time could make it. Thus prepared and recommended it would of itself command respect and would inevitably win its way. It would carry with it all the authority which the names of those concerned in its formation could give. It would stand above the treatise of any single publicist; nay, above all the treatises of all the publicists that have ever written.

Is it a vain thing to suppose that such a work would finally



win the assent one by one of those nations which now stand in the front rank of the world, and which of course are more than others under the influence of intelligent and educated men? The times are favorable; more favorable indeed than any which have occurred since the beginning of the Christian era. Intercourse has increased beyond all precedent and the tendency of intercourse is to produce assimilation. When they who were separated come to see each other more and know each other better they compare conditions and opinions; each takes from each and differences gradually lessen.

Thus it has happened in respect to the arts and in respect to laws, manners, and language. In a rude state of society when men are divided into many tribes each tribe has a language of its own; but as time melts them into one a common language takes the place of the many. Your own island furnishes a familiar example of the influence of intercourse in blending together different elements and forming a united whole.

This tendency to assimilation was never before so strong as it is now, and it will be found a great help toward forming a uniform international code. The tendency toward a unity of races is another element of immense importance. Germany will hereafter act as a unit. Italy will do likewise. In America no man will hereafter dream of one public law for northern and another for southern States. Even the asperity which always follows a rupture between a colony and the mother country will give way before the influence of race, language, and manners, so far as to allow a large conformity of disposition and purpose, however impossible may be a reunion of governments. The relations between America and England are or were till lately softening under this influence; and if Spain is ever governed by wiser counsels she will

make friends of her ancient colonies instead of continuing to treat them as enemies, and will confer on them benefits rather than wage war against them.

Would it not be a signal honor for this association, rich in illustrious names and distinguished for its beneficent acts, to take the initiative in so noble an undertaking? Would it not be a crowning glory for your country to take it up and carry it on? Wearing the honors of a thousand years, and standing at the head of the civilization of Europe, England would add still more to her renown, and establish a new title to the respect of future ages, if she would perform this crowning act of beneficence.

The young Republic of the West, standing at the head of the civilization of America, vigorous in her youth and far-reaching in her desires, would walk side by side with you and exert herself in equal measures for so grand a consummation. She has been studying during all her existence how to keep great States at peace and make them work for a common object, while she leaves to them all necessary independence for their own peculiar government.

She does this it is true by means of a federated system which she finds best for herself, and which she has cemented by thousands of millions in treasure and hundreds of thousands in precious lives. How far this system may be carried is yet unknown. It may not be possible to extend it to distinct nationalities or to heterogeneous races.

But there is another bond less strict yet capable of binding all nations and all races. This is a uniform system of rules for the guidance of nations and their citizens in their intercourse with each other, framed by the concurring wisdom of each and adopted by the free consent of all. Such an international code, the public law of Christendom, will prove a



gentle but all-constraining bond of nations, self-imposed, and binding them together to abstain from war except in the last extremity, and in peace to help each other, making the weak strong and the strong just, encouraging the intellectual culture, the moral growth, and the industrious pursuits of each, and promoting in all that which is the true end of government, the freedom and happiness of the individual man.