

The Legal Character of International Law

It has often been said that international law ought to be classified as a branch of ethics rather than of law. The question is partly one of words, because its solution will clearly depend on the definition of law which we choose to adopt: in any case it does not affect the value of the subject one way or the other though those who deny the legal character of international law often speak as though "ethical" were a depreciatory epithet. But in fact it is both practically inconvenient and also contrary to the basic juristic thought to deny its legal character. It is inconvenient because if international law is nothing but international morality, it is not the whole of international morality, and it is difficult to see how we are to distinguish it from those other admittedly moral standards which we apply in forming our judgements on the conduct of states. Ordinary usage certainly uses two tests in judging the "rightness" of a state's act, a moral test and one which is somehow felt to be independent of morality. A state habitually commits acts of selfishness which are often gravely injurious to other states and yet are not contrary to international law; but we do not on that account necessarily judge them to have been "right". It is confusing and pedantic to say that both these tests must be applied. Moreover, it is the pedantry of the theorist and not of the practical man; for questions of international law are invariably treated as legal questions by the foreign offices which conduct our international business, and in the courts, national and international, before which they are brought; legal forms and methods are used in diplomatic controversies and in national and arbitral proceedings, and authorities and precedents are cited in argument as a matter of course. It is significant too that when a breach of international law is alleged by one party in a controversy, the act impugned is practically never defended by claiming the right of self-defence, which would be the natural defence if the issue concerned the morality of the act, but always by attempting to prove that no rule has been violated. This was true of the defence put forward even for such palpable breaches of international law as the invasion of Belgium in 1914, or the bombardment of Corfu in 1923.

But if international law is not the same thing as international morality, and if it is of an important respects at least it certainly resembles law, why should we hesitate to ascribe to it a definitely legal character? The objection comes in the main from the followers of writers such as Hobbes and Austin, who regard nothing as law which is not the will of a political sovereign. But this is a misleading and inadequate analysis even of the law of a modern state, and even for instance, unless we distort the facts so as to fit them into the definition, accounts for the existence of the English Common Law. In any case, even if such an analysis gave a satisfactory explanation of law in the modern state, it would require us to assume that that law is the true law, and not merely law at a particular stage of growth or one species of a wider genus. Such an assumption is historically unsound. Most of the characteristics which distinguish