THE POLITICS OF two LAW-MAKING

To understand why international society has produced the law we have, and how nations behave with respect to that law, one might begin by considering why nations make law and enter into international agreement.

WHY NATIONS MAKE LAW

Much international law was there "from the beginning." From "natural law," from widespread influences of Roman and Canon law, from laws common to all "civilized" countries and legal systems reaching back before history, early relations between communities reflected notions of property, contract, and tort that are basic to international as to domestic law. Even notions of territorial and ethnic identity, and an individual's links to a territory or a "people," long antedated the modern nation-state and the concepts of territorial sovereignty and nationality in modern international law.

The use of "ambassadors" and the practice of granting them extraordinary respect also have ancient roots and came nearly full-blown into modern international law.[1]

Some principles of customary international law are centuries old, among them the principle that international agreements shall be observed. On entering international society, new nations find these obligations (and corresponding rights) upon them, and few purport to reject them or even to seek jurisprudential answers as to why they are subject to them. Especially at times of great flux, like those that have followed the Second World War and the proliferation of states resulting from the end of colonialism, new nations (and some old ones) may find a common interest to challenge a particular norm or standard—*e.g.*, the obligation to compensate for nationalized alien properties (see Chapter 6). But there has not been a major challenge to the system of international law as a whole, to the bulk of its content, to its major norms. Nations old and new also accept or help to develop new law and enter into new international agreements.

Every nation derives some benefits from international law and international agreements. Law keeps international society running, contributes to order and stability, provides a basis and a framework for common enterprise and mutual intercourse. Because it limits the actions of other governments, law enhances each nation's independence and security; in other ways, too, by general law or particular agreement, one nation gets others to behave as it desires. General law establishes common standards where they seem desirable. Both general law and particular agreement avoid the need for negotiating anew in every new instance; both create justified expectation and warrant confidence as to how others will behave.

All these advantages of law and agreement have their price. Law limits freedom of action: nations are "bound" to do (or not to do) other than they might like when the time to act comes. Political arrangements legitimized by law are more difficult to undo or modify. Stability and order mean that a particular nation is not free to be disorderly or readily to promote external change. To promote its own independence and security and the inviolability of its terri-

tory, to control the behavior of other governments, a nation may have to accept corresponding limitations on its own behavior. For the confidence bred by law, one pays the price of not being free to frustrate the expectations of others.

More or less consciously, more or less willingly, all governments give up some autonomy and freedom and accept international law in principle as the price of "membership" in international society and of having relations with other nations. For that reason, too, they accept basic traditional international law, undertaking to do (or not to do) unto others what they would have done (or not done) unto them. Since much of its foreign policy is reflected in international agreements, bilateral or multilateral, every nation accepts the legal principle that agreements shall be observed. For the rest, whether a nation desires more law or less and whether it will desire some new law or agreement are also questions of foreign policy, and nations accept or refuse new law—universal, multilateral, or bilateral—in terms of their national interest, as they see it. Nations may have "attitudes" in regard to the desirability of extending the domain of law. At different times they see greater or less interest in self-limitation and cooperation than in the freedom of "no law" and the flexibility of negotiation and improvisation. Nations differ in regard to how much "freedom" they are prepared to sacrifice for some common enterprise or to some supranational institution. They differ too as to how much confidence they have in law as a means to achieve peace, security, order, justice, welfare. The amount and kind of law which international society will achieve will depend, of course, on the degree of homogeneity of the political system and the degree of common or reciprocal interest.

Periodically—particularly after major disorder, like a world war—nations dedicate themselves anew to increased order, make an extraordinary sacrifice of their freedom, and accept law in the common interest (*e.g.*, the United Nations Charter). At any time a nation's foreign policy may include a desire for some particular law: a revised definition of the coastal states' jurisdiction out to sea, a treaty against proliferation of nuclear weapons, a prohibition against racial discrimination, or a new regime for international

trade. While willingness to accept a law or agreement will depend on what it provides, powerful nations often see less interest in curtailing their own freedom. Even the rich and the mighty, however, cannot commonly obtain what they want by force or dictation and must be prepared to pay the price of reciprocal or compensating obligation. Even they, moreover, seek legitimacy and acceptance for their policies, desire order and dependability in their relations and the conservative influence of law. Sometimes, even, they seek protection in the law from the will of majorities and the "tyranny of the weak." And they may agree to limit themselves in order to achieve corresponding limitations on competing powerful nations, as, for example, in the Nuclear Test-Ban Treaty of 1963, or the later Strategic Arms Limitations Talks (SALT).

Other nations, too, see advantage in law. They adhere to old law as a mark of their acceptance in international society; or because they approve of its objectives; or because they desire its advantages; or because they would assert their adherence to laudable principles. In new law they may seek codification or clarification to eliminate uncertainties. Governments feel freer, of course, to accept law which may in fact not hinder them seriously, in order to see such law accepted by others (*e.g.*, the non-proliferation treaty, for states that can have little hope of becoming nuclear powers), perhaps also to satisfy world or domestic opinion (*e.g.*, international human rights covenants).

A foreign-policy decision whether to accept new law involves considerations very different from those which determine whether a nation will observe existing law. Refusal to accept new law does not usually bring "sanctions" or other undesirable consequences.* Nations which are reluctant to undertake new obligations may be

*There are exceptions in special cases: the founding nations were determined that all nations had to abide by the law of the United Nations Charter outlawing the use of force [Article 2(6)]; the foreign relations of France have suffered because it failed to honor the limitations of the nuclear test ban of 1963; there would be sharp reaction if wealthy nations refused to contribute to development and other assistance programs; the Federal Republic of Germany would not dream of abstaining from the Genocide Convention.

scrupulous about honoring those which they accepted. In fact, a nation particularly concerned to observe law may be more hesitant about accepting new law in the first instance. Occasionally, however, a government will agree to a law with little intention of observing it, in order to gain some kudos and perhaps the advantage of observance by others, especially if it believes that its violations might not be detected. Hitler accepted the Munich Pact, probably without intention to observe it, perhaps to lull the Allies into a false sense of security; the United States has feared that the Soviet Union might enter into disarmament agreements it had no intention to keep, unless its compliance could be verified. Some believe that a number of states have adhered to international covenants on human rights because it is "the thing to do," because there are pressures to do so, without seriously expecting to honor them fully. But these are exceptional cases in exceptional situations for exceptional kinds of international law. Generally, nations seek law they wish others to observe and are prepared to observe it themselves.

HOW LAW IS MADE

The character, shape, and content of international law—as of national law—are determined by prevailing political forces within the political system,* as refracted through the way law is made.

*The scope and the content of international law are commonly credited to (or blamed upon) lawyers. That is error. For international as for national law, law-making is a political act, the work of politicians; lawyers, *qua lawyers*, contribute to that process only peripherally and interstitially—when they advise and provide technical assistance to policy-makers engaged in law-making; when they interpret and apply the law in advising political actors, or in handling claims between their government and others.

International judges get few opportunities to make law by adjudication, and on those infrequent occasions they tend to be restrained. Even national judges with "activist" traditions (*e.g.*, those of the United States) are restrained in developing international law by its international character and by deference to the political branches of their government. Compare *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964).

"Publicists" made important contributions to customary international law in past centuries and are still recognized as a "subsidiary means for the determination of rules of law." Statute of the International Court of Justice, Article 38(1)d. Their influence in law-making has decreased, especially as new law is increasingly made and customary law is being codified and developed by treaty, but they contribute indirectly through the codification and development activities of the International Law Commission and other bodies.

The core of traditional international law and its principal assumptions and foundations have been unwritten "customary law," made over time by widespread practice of governments acting from a sense of legal obligation. Increasingly, however, customary law is being codified and modified, and new universal and regional law is also made by formal international agreement negotiated at international conferences. In some measure, law is made also by resolutions or declarations of international organizations, notably the U.N. General Assembly, and some, too, by the actions of such organizations interpreting existing law.

International law has been built on the "principle of unanimity": no state is bound by any proposed norm or regulation without its consent, though consent once given is binding and cannot be withdrawn at will.[2] The principle of unanimity has been justified on the ground of the sovereign equality of states.* But the equality of states in constitutional theory does not imply that all states are equal in their influence in the making of law. While the law that emerges, moreover, may apply equally to all, it will often not be even-handed in fact: a norm requiring "justice" for aliens and their property, for example, applies equally everywhere; but, obviously, it has favored states that export people and capital, and has been an obstacle to governments seeking to divest foreign holdings as a basis for social revolution. (See Chapters 6 and 10.)

Emerging law will depend on the interest of influential states to

*In domestic societies, even where the principle of the equality of individuals was accepted, it did not lead to the principle of unanimity, but to equal vote and majority rule—perhaps from the ancient lineage of majority vote, perhaps because the individual did not acquire the aura and trappings of "sovereignty," perhaps from the practical difficulty of governing growing numbers by unanimity, or of allowing dissenters not to participate.

Unanimity does not imply veto, the ability to prevent others from taking a decision. The consenting states can make law for themselves, but it is not binding on the dissenters.

espouse it, a common interest in developing it, and the inability, or lack of interest, of others to resist it. Political influence in law-making, however, does not lie exclusively, or even primarily, where it is commonly assumed to be—that is, with militarily or economically powerful states. Even when war and threats of force were not unlawful, military power did not necessarily determine the law, for force could not be used or threatened lightly or frequently for less-than-compelling purposes.* Economic pressure or persuasion, too, was not always available and effective to obtain the consent of a resisting state. In our day, "power" (*i.e.*, influence, both in law-making and elsewhere in international relations) belongs also to small developing states, joined in blocs, adroit at exploiting the competition of the powerful, and armed with ideas claiming their time has come. (See Chapter 6.)

Because the process of making customary law is informal, haphazard, not deliberate, even partly unintentional and fortuitous, the resulting law may also suffer these qualities. While influence in the formation of customary law is of the same stuff as elsewhere, here it is not readily focused. Some principle, norm, or standard may result from the fortuitious initiative of a statesman, the coincidence of need and opportunity, and acquiescence or lack of care by others. Consent or acquiescence can be "bought," or compelled by political pressure from other states, or by the press of circumstances; it may go on in one corner while others are unaware, unconcerned, or not mobilized to act.

The process being unstructured and slow, there is opportunity for modifying the law and adjusting to it. Over centuries, of course, customary norms have responded to changed circumstances and interests and new configurations of influence. Whether in the same or in a modified form, moreover, norms that are originally imposed or one-sided, may become widely acceptable. For example, one can surmise that some particular powerful prince early asserted sovereign or diplomatic immunity, and his lawyers provided conceptual underpinning for it. But the example and precedent thus provided doubtless prompted similar claims even by the less-powerful. In time the norms of immunity found appeal with officials of all governments as being important to effective and smooth international relations.[3] Similarly, that freedom of the sea for navigation became the governing principle reflected the prevailing balance of naval power and the inability of any one nation to assert and maintain hegemony over the large seas against all others during the years when the law was being formed. In fact, freedom of the seas proved generally acceptable in time of peace as the basis of intercourse, and of competition in discovery and commerce. The growth of an exception to freedom of the seas in a narrow band of "territorial sea" reflected a common concern of coastal states for their security against military enemies, marauders, or smugglers. Powerful maritime states, while chafing at such limitations on their freedom, did not challenge the authority even of weaker coastal states, or were unwilling to bear the cost of challenging it by force. In time the maritime states, themselves also coastal states and concerned to protect their coasts, came to appreciate the "territorial sea" and were generally content with the "trade-off." (See Chapter 11.)

The politics of law-making is less dis-orderly and more comprehensible when general law is made by formal multilateral agreement,* the dominant method of law-making in our time.[4] Nego-

*Traditional international law did not question a state's consent on the ground that it was coerced, and for special reasons international law accepted even the wholly fictitious consent of a state to a peace treaty imposed on it upon defeat in war and unconditional surrender. See p. 80, below.

*A treaty between two states also makes law, for the parties, and will be the result of what each desires from the other, and their comparative bargaining power; it will not be impervious to other interests of the parties, or to their relations with other nations. A traditional treaty of friendship, commerce and navigation may be reciprocal in form, granting each other the same privileges; in fact, of course, a provision, say, in a treaty between the United States and a small undeveloped country that guarantees the investment of each against expropriation by the other is only speciously reciprocal. But even a powerful state cannot impose its will, at will, in peaceful negotiation: it cannot take all and give little; it cannot lightly discriminate in its relations with different states; it cannot disregard standards that prevail between other states.

tiated at a particular time, with virtually all states participating, any emerging treaty will reflect what the participants perceived as their interests as regards the matter at issue, in the context of the system at large. But with ever more governments participating, with their interests often varied and complex, the process is confused and the result often not only impossible to predict but even difficult to explain when it appears. It may help to perceive both process and result with mathematical analogy or metaphor: when vectors of different magnitude and direction are brought to bear at one point, a vector of particular force and direction results. To be sure, political influence cannot be measured, and neither its magnitude nor direction is firm; both respond to other forces, to the bargaining situation, to conference procedures, strategy, personalities, to other issues in negotiation, to political interests and forces beyond the conference and the subject. In the large, however, the law that comes out of a conference can be seen as the result of the various directions in which different participants pulled and the magnitude of the influence they were able to bring to bear in support of their preferences. (I study the process and the result in the major contemporary effort to remake the law of the sea in Chapter 11.)

The emphasis on international law-making as a process of interaction among national policies of particular influence, as well as the metaphor that sees them as forces producing a resultant vector, both risk giving the impression that every nation's policy on law-making is monolithic, firm, and straightforward. The process of developing national policy itself, in fact, often brings to bear a complex of forces with the resultant policy also inviting the vector metaphor.

A government's policy as to whether some activity of international interest should remain unregulated, or what form regulation should take, is a political decision like others made by policy-makers in the light of national interest as they see it. But national interest is not a single or simple thing; and often various national interests are implicated, and policy-makers must attempt to balance, compromise, or choose among them.

The process of deciding, and the difficulty of decision, will be different for different governments on different issues. For the United States, for example, a single issue may involve competing political, military, economic, and other public interests, as well as the interests of particular citizens or national companies. The process of developing policy will often reflect the size and complexity of the executive branch; the constitutional dependence of the executive on the Senate for consent to treaties, and on Congress as a whole for implementing them; the influence of private interests and public opinion on the executive branch and on Congress; and, inevitably, the bureaucratic and personal interests of a host of individual participants. Smaller, oligarchic governments can decidce more simply, but they too will often suffer internal differences, as well as the difficulty of deciding what their national interest requires, and which of competing national interests they should prefer or how these should be accommodated.

FAILURES TO MAKE LAW

An international political system of sovereign states is inherently "laissez-faire," resisting regulation by law. Surely, norms curtailing national autonomy in any important respect are not likely to be adopted unless the need for them is commonly seen as compelling and the result promises compensating advantage. Often, the absence of control by international law is purposeful, and many would say desirable: for states, too, there is an area of "privacy," *i.e.*, autonomy, that is not the law's business.[5] Even law commonly seen as desirable, however, is prevented or delayed by the diffuse law-making process.

No doubt, law-making in the international system is seriously hampered by "the principle of unanimity," which prevents a majority from making law binding on dissenters. Efforts to circumvent that principle, particularly in international organizations which use majority vote for other purposes, occasionally have small successes, as majorities devise means to make law in other guises while pretending not to. (See Chapters 6, 7, 9.) But surely in a

world of unequal and diverse states, law-making by majority vote will not be accepted by the big and the powerful, and indeed is usually resisted even by the small and the weak. Law-making will have to be by agreed compromise or by various forms of consensus, or will be limited to those who can agree:* nothing prevents the like-minded from making law for themselves when less-than-universal agreements serve some purpose.

*The international system, of course, is not alone in failing to achieve desirable law. Even the most enlightened society, surely democratic societies, suffer the difficulties of law-making due to conflicting interests, disagreements about the desirability of regulation by law, or about what law is desirable, failures of will, perception and understanding, or inadequate legislative process. Indeed, even the most totalitarian of societies, governed effectively by a single powerful legislator, is often hampered in law-making by competing values and interests, by the need to accommodate conflicting "constituencies," by external pressures.

THE POLITICS OF three LAW OBSERVANCE

That states have made international law for hundreds of years, that all governments devote considerable effort to law-making every day, surely testifies that in their view international law matters, governing in meaningful measure how governments behave. For professors and practitioners of international law the reality and importance of what they profess and practice is beyond question. The lay newspaper reader, by contrast, and many a practitioner of diplomacy commonly carry the impression that governments pay little attention to law. Why the stark difference in impression, and which corresponds more accurately to fact?

DO NATIONS OBSERVE INTERNATIONAL LAW?

For this inquiry, I largely avoid special perspectives on international law which are the subject of contemporary jurisprudential