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.