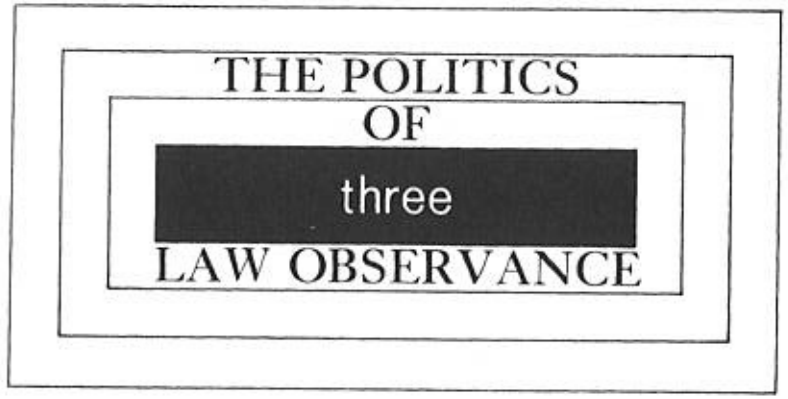
world of unequal and diverse states, law-making by majority vote will not be accepted by the big and the powerful, and indeed is usually resisted even by the small and the weak. Law-making will have to be by agreed compromise or by various forms of consensus, or will be limited to those who can agree:* 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.



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

controversy. That nations are the actors, the legislators, the executives, the judges of international law has led some international lawyers to see law not in terms of norms, standards, and obligations, but as a "policy-oriented," "comprehensive process of authoritative decision" made largely by the nations themselves.[1] Law, as they see it, is part of the political process; law is made and agreements are given meaning by the total political process—when governments act and other governments react, when courts (national or international) decide cases, when political bodies debate and pass resolutions and nations act in their light. The process is always going on, and the law which it is continuously creating is instinct with ambiguity. International law, then, has even less certainty than does law in domestic society, and there can be no confident assertion of what it is. It is not meaningful to ask simply what the law is or whether it has been observed or violated. That judgment, if it has to be made, can be made only after carefully weighing all the factors in a case, in the light of some basic value and dominant purpose, which ought to be the promotion of human welfare, dignity, and freedom.

This way of looking at the law provides important insights into the jurisprudence of international law, indeed of all law. But it is less relevant to an examination of how nations behave in regard to law. It seems to see the law *sub specie aeternitatis*, ever-changing, reflecting every action of every government. It seems to see law not as is but always as becoming, and to ask not what the law is but what it ought to be. For that inquiry, too, it seems to see the law from on high and in retrospect: the law is what God, or the United Nations, or History, or the Judge, or the Wise Man will say—later—in judging what nations had done in the light of context and consequences.[2]

This is not, however, the way nations commonly look at the law in deciding their own policy or in reacting to the behavior of others. Governments may be more or less aware that law is created, grows, changes, or withers within a political process that reflects, among other things, the policies and interests of individual nations. But the government formulating a policy or contemplating an action is not an eternal, retrospective judge or observer of either the legal or the political process. It is, and acts, within these processes, and it sees the law at a moment within them. It regards the law as having its own existence and validity within the political process. To say that—even to say that law is "policy-oriented"—is not to say that law depends on the policy of any particular nation[3] or that any nation is free to do as it likes, regardless of law.* Once law or agreement is made, the obligation to abide by it is independent of the wishes of any particular nation. A government contemplating action usually asks what the law has been, independently of what it proposes to do. It knows that ordinarily nations will judge and react to its action in the light of the law as it is deemed to be now. A government may sometimes seek escape from the law as it is, but it recognizes that in most instances there is no escape, and it, in turn, will usually deny escape to others. From its perspective, uncertainties of law are occasional and peripheral, change is small and slow and often to be resisted.

Admittedly, there are areas of international relations for which there are no relevant norms; there are issues on which the law is so uncertain that to speak of a "norm" is at least exaggeration; there are cases—including, alas, some that are very important for international order—where the law's uncertainties render it difficult to decide whether there has been compliance or violation.† Nations sometimes have to determine law for themselves from ambiguous precedents, in circumstances rendering objectivity difficult and where the area of permissible conduct is not obviously defined. These cases, however, are exceptional. In general, I assume what all nations assume in their foreign relations: that there are norms and that nations either observe or violate them. However disputed some of them are, others are generally accepted; however uncertain

*A nation ordinarily can decide that it will not observe a particular norm or understanding, but it will have to face the consequences of violation, much as an individual is ordinarily free to commit a crime and take the consequences. See p. 91.

†For example, the law on external "intervention" in civil wars (see Chapter 7), or the width of the continental shelf (Chapter 11); compare the consequences of uncertainties, both of fact and of characterizations, in Vietnam (Chapter 16).

many may be at the periphery, they have an established core; however ambiguous is language—say, in a treaty—it usually has a substantial area of clear meaning. However difficult it may be, in some instances, to determine what the law is and whether it has been violated, generally one may speak confidently of observance or violation. And, usually, what nations mean when they consider the lawfulness of an action (their own or that of another state) is not too far from the traditional determinant: whether a hypothetical impartial international tribunal would conclude that particular behavior violated some international rule, standard, or undertaking. That the action will never in fact be passed upon by such a tribunal, that some may question the very concept of impartiality of an international tribunal, that lawfulness is in fact determined for their own purposes by governments inevitably more-or-less partial, may modify but does not vitiate the basic conception of lawfulness or unlawfulness in the behavior of nations.

Nor is that conception fundamentally affected by the fact that in international affairs the action of a government may itself have substantial legislative impact.[4] In some cases, a government contemplating action inconsistent with what had theretofore been deemed the rule may be hoping to change the law. And sometimes—if the norm has been uncertain or has ceased to correspond to prevailing forces and concepts, if the acting government is influential, if other governments share its interest in changing the norm—the actor may succeed:* the new action does not evoke reactions as to a violation, and eventually our hypothetical international tribunal would also assert that the new action has come to represent the norm. Even in such cases, however, the actor took the risk that its "proposed norm" would not be accepted and its action would be treated as a violation. In any event, this is hardly a prevalent complication. It has particular relevance to major political issues (usually involving major political actors), some relevance in regard to some norms that are challenged or in flux, and almost no

* Consider the effect of unilateral extensions of their jurisdiction by coastal states, Chapter 11.

relevance to many established norms or to the mass of treaty obligations.

Usually it is meaningful to speak of violation or compliance. There are many instances where a state is admittedly in violation, as, for example, when the Congress of the United States purposefully imposes a tariff, discriminates against foreigners of a particular nationality, or subjects some aliens to military service, in derogation of earlier treaty undertakings;[5] or flouts a resolution of the U.N. Security Council to boycott Rhodesia, contrary to our commitment in the U.N. Charter.[6] The United States also virtually pleaded guilty to overflights in the U-2 incident.[7] While nations, generally, still deny that they are violating international law, often the denial merely falsifies the facts—as in 1950 when North Korea alleged that the South Koreans had initiated hostilities. At times, when a nation seeks to justify its action by asserting that international law is or ought to be something else, the justification in effect admits violation, especially when the nation cannot reasonably expect that its "proposed norm" would be acceptable. Sometimes, indeed, it might be quite unhappy if its action became a general norm.* Occasionally the justification for violating a treaty is a polite confession—for example, some clearly implausible reading of the agreement, or some far-fetched invocation of *rebus sic stantibus* (the principle that agreements are binding only so long as circumstances remain as they were, or as they were contemplated at the time of the treaty). The difficulty of judging compliance with law in exceptional cases does not prevent us from studying compliance or violation in the abundance of instances.

Of course, one should not deal with the influence of law in misleading simplicity. The whole body of the law, including the legal framework of international society, shapes and limits the behavior of nations and determines the alternatives available to them. Even as to the norms of the law, their influence on diplomacy is more subtle and more complex than merely to deter violation or induce

* One wonders, for example, whether France and Great Britain would accept the "norm" they asserted at Suez in 1956. See Chapter 13.

compliance. He contributed an important insight who first suggested a spectrum of compliance or violation. While international law does not divide neatly into degrees of crime with graduated penalties, or into felonies, misdemeanors and petty offenses, or even into crimes and torts, there are nevertheless norms and norms, obligations and obligations, and also violations and violations. Some may shake the foundations of international society—for example, a nuclear aggression. Some may seem minor on the world scene but loom very important in the eyes of the acting government (*e.g.*, the abduction of Adolf Eichmann by Israel in 1960), or of the "victim" (*e.g.*, the unlawful detention of a diplomatic officer). Some violations, say, in breach of a contract, may involve "only money." Some minor violations of an old treaty may raise objections "only in principle." Some violations are unintentional or technical, as when a friendly plane strays over foreign territory. Sometimes the law is more or less clear, the obligations more or less debatable. Some law or agreement is purposefully "loose," because states cannot or will not regulate by firm prescription, and the observance of such law is correspondingly loose, as in the General Agreement on Tariffs and Trade (GATT). In the various cases there would be important differences in the consequences of the violation, in the temptations to commit it, and in the influence of law to deter it.

The ways in which international norms affect governmental behavior are also less than simple. International law obviously influences behavior when it helps to deter violations. It may keep nations from doing what they may otherwise deem to be in their interests, say, from overflying foreign territory in search of intelligence or seizing valuable foreign property. Or obligations may impel nations to do what they might otherwise not do—say, come to the assistance of an ally or adopt sanctions at the behest of an international organization.* If an international norm does not completely deter, it may at least delay violative action until the needs are clear, until other alternatives are explored and rejected, or exhausted.

International norms will also determine choice among alternatives. With more than one way of achieving a desired policy, nations will not readily choose the one that violates, or more clearly or deeply violates, an international norm or obligation. They will tend to choose the lesser violation, sometimes at substantial sacrifice.

If international law affects what nations do, it will influence also what they say. We may be cynical about the rhetoric of nations and their proclamations of respect for law.[8] Even Hitler pretended that he was acting consistently with Germany's international obligations at the time of his most terrible violations. Still, we need not wholly dismiss rhetoric or justification. When a nation claims to observe international law to create an image of itself, either in its own eyes or in its neighbors' eyes, it is significant that this is the image which nations value. Even when a nation hypocritically invokes international law as a cover for self-interested diplomacy-as-usual, it is significant that it feels the need to pay this homage to virtue.[9] The rhetoric may still be the aspiration, the reach that exceeds the grasp. Rhetoric, moreover, is often employed in the hope that it will be believed; this can only be if, to an extent at least, it is consistent with the nation's behavior. The fact that nations feel obliged to justify their actions under international law, that justifications must have plausibility, that plausible justifications are often unavailable or limited, inevitably affects how nations will act. The choice of justification may also have important legal and political consequences, as I shall suggest in relation to the Cuban missile crisis.

E.g., Bolivia, Chile, and Uruguay complied with the resolution of the Organization of American States calling for severance of relations with Castro's Cuba, although they had voted against the resolution. 51 *Dep't State Bull.* 174 *et seq.*, 579 (1964); only Mexico, which claimed that the resolution contravened Article 96 of the U.N. Charter, refused to act upon it. *N.Y. Times*, Aug. 4, 1964, § 1, p. 9. (The OAS ended the Cuban embargo in 1975.) Compare the alternating compliance and violation by the United States of sanctions against Rhodesia.

HOW MUCH LAW IS OBSERVED?

To most of us, the world we read about in our journals is tense, troubled, and disorderly, and we assume that relevant law is being disregarded. In fact, some of the disorder we observe is wholly within states—massacres in Burundi or ruthlessness resulting in a million deaths in Cambodia, civil war in Angola or Lebanon, rioting in South Africa, terrorism in Argentina or Northern Ireland, political disorder in Portugal or Spain, crime in urban United States—and at least some of these disorders are not the concern of international law. Even in transnational matters, we know, there are serious lacunae in the domain of international law: the state of international law is still primitive, the relations and actions to which international law speaks are limited, and many deplorable acts are not violations because there is no relevant law—*e.g.*, the arms race or granting haven to hijackers.[10] Its adequacies are a weakness in the international order but, while intimately related, they differ in cause and in consequence from deficiencies in the observance of existing law. Sometimes, although there is relevant law, disorder reflects not clear violation but only different views about an uncertain law, or different versions of confused facts on which the law depends—as in regard to intervention in Vietnam, or the rights and wrongs of Kashmir. Sometimes we see violations because we wish to, in the actions of our non-friends. Sometimes, although there may be violations, they are not the cause of disorder or even its principal manifestation. In the ideological conflict after the Second World War, for example, any violations of law or agreement were incidental to the basic breakdown of cooperation between the world's dominant powers, the sharp divergence in their interests, their hard pursuit of antagonistic policies.

Even those who are aware of the law's limited reach often share the common impression that the field of international law is sown with violated norms and broken treaties. Although there are reasons for this impression, it is grossly mistaken. There is a tendency to judge law observance by counting the violations, or, without counting them, from a general sense that they are common. But the influence of international law can hardly be assessed by the number

of violations alone, even by the number of violations which are not suppressed, or rectified, or punished. Also relevant is the record of law observance—decisions not to commit violations, failures to do so, and decades of diplomacy in which a nation does not even consider violating some norm or obligation.

To judge the effectiveness of law one would have to examine not only the considered decisions of governments but, especially, the operation of law on the working levels of foreign ministries. Every day, legal counsel suppress or modify proposals that are deemed illegal before they reach the level of decision; political officers themselves stifle or fail even to think of measures which they know would probably be unlawful. In the life of a foreign office it is not uncommon that officers responsible for relations with Country *X* wish particularly that those relations remain friendly and untroubled; "desk officers" are even known to acquire special sympathies for their "clients." They would hardly propose policy that would violate law and roil relations, and would resist any such proposal by others. If a political officer were tempted to propose a violation of a norm or treaty, it is highly probable that the proposal would be sent to the office of the legal adviser for clearance, and it would be stopped or modified there. It would be the highly unusual case in which a decision were taken in the face of the lawyers' opinion that the proposed action would constitute a violation.

Violations of law attract attention and the occasional important violation is dramatic; the daily, sober loyalty of nations to the law and their obligations is hardly noted. It is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.* Every day nations respect the borders of other nations, treat foreign diplomats and citizens and property as required by law, observe thousands of treaties with more than a hundred countries.* Of course, violations are not fungible; they must be weighed as well as counted: one

*The number of agreements registered at the United Nations is more than ten thousand. There are thousands of agreements in effect which are not registered at the United Nations.

nuclear aggression by a major power might render meaningless all the observances of all norms and obligations by all the nations of the world. It is relevant, perhaps critical too, to ask why particular violations have not occurred. Obviously, non-violation is significant only if there is capacity to commit the violation, the interest to do so, perhaps even the temptation or provocation. The failure, say, of the United States to commit aggression against Canada "take place" every day of the year: I would not claim 365 observances of the U.N. Charter—any more than, as an individual, one would claim credit for being law-abiding every day that one does not steal or commit murder. Surely, to press the point, distant Yemen, without a major air force or missiles and without interest or interests in Canada, cannot meaningfully be said to be respecting the territorial integrity of Canada when it does not violate Canadian airspace. But where the capacity and the temptation exist, where in another day or another context armed attack or some other violation might have taken place, self-restraint surely owes something to international law. Law is involved, for example, when, especially during periods of hostility between them, the United States refrained from attacking Cuba, or the Soviet Union respected the borders of Iran. In less dramatic contexts it is relevant that, despite the continuing temptations in daily intercourse, unnumbered principles of customary law and thousands of treaties are regularly observed.

To assert that nations generally observe law, or even that they refrain from violating law, may imply an exaggerated and unproven claim of the law's influence. One can say that the behavior of nations, generally, is not inconsistent with law or obligation. That has at least negative significance; were this not so, it would be a self-deluding mockery to speak of international "law" at all. Affirmatively, it suggests at least that international law does not pretend too much, is not unviable, and bears substantial relation to the facts of international life. It suggests, too, that international law achieves—and reflects—a measure of order in the life of nations. One may still ask how much of this consistency of national behavior with law measures true observance of law. One must still consider the violations—what kind, between which nations, and with what effect on order. Again, evidence is difficult to obtain and to evaluate, but one may gain insights into the influence of law when one considers why nations observe law, and when and why they flout it.

WHY DO NATIONS OBSERVE LAW?

The impression that nations commonly violate international norms and undertakings may be due not only to incomplete observation, but also to erroneous *a priori* assumptions about how nations behave. Much is made, in particular, of the lack of executive authority to enforce international law and the lack of effective "sanctions" against the violator. The assumption seems to be that since laws and agreements limit the freedom of nations, governments will not observe these obligations, unless they are compelled by external authority and power. In fact, we know—although effective "sanctions," as that term is commonly used, are indeed lacking—that nations do generally observe laws and obligations. The preoccupation with "sanctions," then, seems largely misplaced. The threat of such sanctions is not the principal inducement to observe international obligations. At least, the absence of sanctions does not necessarily make it likely that nations will violate law. There are other forces which induce nations to observe law.[11]

A more sophisticated suggestion has it that since there is no body to enforce the law, nations will comply with international law only if it is in their interest to do so; they will disregard law or obligation if the advantages of violation outweigh the advantages of observance. Of course, if national interest and advantage are defined broadly enough, this formula may be true and may indeed be a truism. The cynic's formula, if I may call it that, is, however, out of focus. The fact is that law observance, not violation, is the common way of nations. It usually requires an expectation of important countervailing advantage to tempt a nation to violate law. Observance, one may conclude, appears to be generally "more advan-

tageous" than violation; indeed, nations seem to see advantage in law observance "in principle." At least, then, one would have to revise the judgment to state that barring an infrequent non-rational act, nations will observe international obligations unless violation promises an important balance of advantage over cost. Moreover, there are domestic as well as external costs of violation, and observance will be importantly affected also by internal forces and impulsions not strictly related to national cost or advantage.

To adopt some formula like that suggested is, of course, the beginning of inquiry, not the end of it. We must attempt to discover what are the costs and advantages nations consider in their international relations, what weights they might assign to different advantages and costs at different times. We may ask which norms or agreements, in what circumstances, are particularly observed; which are more likely to be violated. And we may ask how these considerations of international advantage or disadvantage are modified by domestic facts and forces.

Foreign Policy Reasons for Observing Law

That nations act on the basis of cost and advantage may seem obvious, but the notions of cost and advantage are not simple and their calculation hardly precise.* To explore any such accounting we must assume that nations act deliberately and rationally, after mustering carefully and weighing precisely all the relevant facts and factors. But foreign policy often "happens" or "grows." Governments may act out of pique, caprice, and other irrationality, as well as thoughtlessness and bad judgment. When they would act

*My concern in this chapter is with the cases where a government might see some advantage and be tempted to commit a violation. In the abundance of relations between nations, although there is law or agreement and violating them is theoretically possible, nations have no interest in doing so. In many instances the lack of interest to commit a violation may reflect acceptance of law and habits of law observance; or it may be due to the fact that the law reflects the mores of a society (see Chapter 4). But nations ordinarily have no benefit to gain from molesting an alien or interfering with consular activities. In such cases it is difficult to speak of the cost and advantage of law observance. Perhaps one can say that the advantages of violation are negligible because the cost of observance is negligible.

rationally, they may yet not have the time or the facilities or the data for careful policy-planning, and any "accounting" is wholly impressionistic and instinctive. Even in large, organized, and developed foreign offices, where the "policy paper" is common, it may not be read by those who actually make decisions. The best and most careful policy paper, moreover, may have to compare incomparables and weigh imponderables in attempting to reach a conclusion, giving due weight to conflicting interests, tangible and intangible, direct and indirect, immediate and long term. Still, some calculation of advantage and cost, more or less deliberate, more or less conscious, is no doubt determinative in the abundance of cases; and, without claiming precision about forces that can only be suggested, not measured, we can indicate the principal elements that go into the accounting.

For any nation, the cost and advantage of law observance or violation must be seen largely in the context of its foreign policy as a whole. This is obvious in regard to some laws, like the law against unilateral force, and in regard to some obligations, like those of the United Nations Charter or the North Atlantic Treaty or the European Community agreements. Although less obvious, it is no less true, say, in regard to laws pertaining to the treatment of aliens or agreements on consular activities. (Indeed, we can learn much about a nation's foreign policy by observing its behavior under traditional law in routine matters, by examining the pattern of its undramatic agreements—treaties of friendship, commerce and navigation, arrangements about trade, or aid, or cooperation.) At bottom, all norms and obligations are "political"; their observance or deliberate violation are political acts, considered as part of a nation's foreign policy and registering cost and advantage within that policy.

Nations observe law in part for reasons that are rarely articulated and of which government officials are often only faintly aware. That international law will be generally observed is an assumption built into international relations. Nations have a common interest in keeping the society running and keeping international relations orderly. They observe laws they do not care about to maintain others which they value, and to keep "the system" intact; a state

observes law when it "hurts" so that others will observe laws to its benefit.

Every nation's foreign policy depends substantially on its "credit" —on maintaining the expectation that it will live up to international mores and obligations. Considerations of "honor," "prestige," "leadership," "influence," "reputation," which figure prominently in governmental decisions, often weigh in favor of observing law.[12] Nations generally desire a reputation for principled behavior, for propriety and respectability.

Governments do not like to be accused or criticized. They know that violation will bring protest, will require reply, explanation, and justification. In our time, at least certain kinds of violations are likely to be brought to the United Nations (or the OAS, or OAU) and few governments would face that prospect with equanimity.

Law is commonly observed because nations desire their relations with other countries to be friendly. Any violation between two countries will disturb relations, in degree depending on the cordiality of relations and the nature of the violation.* Even when relations are not cordial and there is no interest in improving them, nations will refrain from violations that might create major dispute.

* Of course, "friendly relations" is not a single state of cordiality; every nation has special friends (and sometimes special "enemies"), and something of a spectrum of friendliness with other nations. Friendship or coolness, however, is not always decisive. Friendly nations, even close allies, have some adverse interests that can lead to violations or charges of violation. *E.g.*, at the height of their "special relationship" the United Kingdom charged that the United States was unlawfully applying its laws, and its administrative bodies were unlawfully issuing orders, to British companies. See *In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum*, 13 F.R.D. 280 288–91 (D.D.C. 1952). Compare *British Nylon Spinners, Ltd.* v. *Imperial Chemical Industries, Ltd.* [1953] 1 Ch. 19 (C.A. 1952). More recently, the United Kingdom charged that U.S. exclusion of the Concorde airplane violates international agreements. On the other hand, enemies, even during actual war, have common or reciprocal interests causing them to observe many obligations toward each other, *e.g.*, the Geneva Conventions on the Treatment of Prisoners of War. During the Cold War, the United States and the U.S.S.R. continued to carry out numerous agreements; the U.S. and Cuba even made and implemented a new agreement on hijacking. One may assume that between friends the violation will usually not be important enough to destroy the friendship; between enemies the compliance will not be in a matter important enough to be of major usefulness to the other side.

Law observance will have a different importance in the foreign policy of different nations and even of the same nation at different times. Since international law was developed largely by the nations of Western Europe and their offspring in the Americas, these nations learned to attend to this law in their foreign relations; they have also been more satisfied with their creation. Since law is generally a conservative force, it is more likely to be observed by those more content with their lot. Nations that believe they have a particular stake in world order will themselves attend to law, and their compliance will establish a comfortable position from which to insist that others do the same.* The United States—and the U.S.S.R. and the People's Republic of China—deeply engaged in competition for influence and leadership, for the good will of governments and peoples, would weigh carefully the cost of certain violations, say, the invasion of a neighbor's air-space. A nation's foreign policy may depend heavily on its reliability for living up to a particular obligation.[13] The United States labored for decades to gain credibility for its undertakings not to intervene in the internal affairs of Latin American countries. American policy to deter a Soviet attack on Western Europe has depended on persuading the Soviet Union that the United States will live up to its obligations to come to the assistance of NATO allies, even at risk of nuclear destruction in the United States. A nation may have particular concern to behave properly—*e.g.*, Germany, after Hitler left it with much to live down. A small nation, especially insecure and vulnerable, may be particularly cautious—*e.g.*, Greece, or Israel in its relations outside the Arab world. In special political contexts—say, for nations reluctant to take sides in the Cold War, or between Israel and the Arab states—scrupulous adherence to international law affords protection from pressure by either side.

* In turn, the climate of international order will influence law observance; an atmosphere of disorder will encourage violations, but they are less likely in stable times and areas.

Costs of Particular Violations

The forces for law observance mentioned are general, intangible, imponderable; they are not the less significant, and they are often determinative. Usually, the accounting includes also, perhaps principally, particular costs and advantages arising from the specific case. These, too, tend to favor observance. A main deterrent to violation is the realization that the anticipated cost is too high. The principal cost is usually the response of the victim, and such response may be anticipated for almost every breach, whether from a wish to punish, or to deter further violations, or to recoup what was lost, or from considerations of prestige, or "on principle," or because of domestic pressures.

The victim's response will vary with the violation and may range from mild protest to war; it will tend to be proportional, to "fit the crime," and will often be directly related to the violation. For that reason, in large measure, laws or obligations that operate symmetrically between nations—and as long as they continue so to operate—are rarely violated. A government may wish to arrest a diplomat who has flouted its laws, but it knows that, if it does so, its own diplomats may be arrested.[14] It will not confiscate the property of another government or of its nationals when it has property in that country and is not prepared to risk retaliatory confiscation.[15] Of course, the response of the victim is not limited to direct retaliation. For failure to protect an embassy there will be a claim for compensation. Planes that violate the territorial airspace of another nation may be shot down. From a myriad of arrangements and relations between two nations, a victim can always find some form of retaliation, even one more or less related to the violation. In 1952, when it was persuaded that Hungary had denied justice to the crew of an American airplane forced down in its territory, the United States forbade American tourists to travel to Hungary and closed two Hungarian consulates in the United States.[16] A would-be violator will also consider costs deriving from any special dependence on the victim. Nationalizations of American properties which the United States considered unlawful led to cancellations of economic aid, as in Ceylon in 1965.[17] Apart from how the victim government may respond, some violations bring

undesirable consequences in the world marketplace: nations will not violate the rights of aliens if they do not wish to discourage tourism and foreign investment.

Like customary law, treaty violations also have their spectrum of possible responses that tend to deter violation.* Even minor breaches of particular provisions may bring protest, and substantial breach of a treaty will generally result in its termination by the other party. A government generally observes the common treaty—of friendship, commerce and navigation, on extradition, or on avoidance of double taxation—because a breach would deprive it of the treaty's benefits. Breach of important treaties may bring other unwelcome consequences. Violation of the nuclear test ban or the agreements against nuclear weapons in outer-space or on the seabed, by either the Soviet Union or the United States, would mean that the other power would feel free to do likewise. It would mean an end to détente and a return to the Cold War; each side would accelerate the arms race, increase its military budget, step up research and development of new weapons, tighten its alliances. Obviously, only a major advantage from such a violation would seem worth the price. The breach of some new major disarmament agreement might cost even more—perhaps war.†

International agreements sometimes include special provision to deter violation. They may provide for inspection and procedures

*Some treaties are easier to observe than other because they demand less. Nations are less likely to violate "functional" or "technical" agreements than political ones, agreements that require a nation to follow certain procedures (arbitration, resort to the United Nations) than those that impose substantive limitations on conduct. International agreements also sometimes include imprecise, hopeful, hortatory undertakings (to "cooperate with," to "look with favor on"), which are easy to comply with, and the violation of which it is difficult to prove.

†The Nuclear Non-Proliferation Treaty is of sufficient importance to many states to engage their concern if it is violated. Although a multilateral treaty it is also an agreement among the few nuclear powers, and particularly between the U.S. and the U.S.S.R., not to export this weaponry. As such, it may be that there is so much concern to avoid or retard the proliferation of weapons, so much reluctance to see any additional nations in the "Nuclear Club," that, if one nation "violated" the understanding, another might still be reluctant to "respond" in kind. On the other hand, if one nuclear state should begin to give weapons to its allies or assist them in

for determining and dealing with violations. Some may make explicit the cost or consequences of a violation, sometimes providing an especially high price.* In olden days a breach of obligation might mean death to hostages. It has been suggested that hostages in various forms might be used today as an inducement to comply with important undertakings, but to give hostages in the ancient way would surely be deemed uncivilized. Still, hostages have in fact induced compliance with important arrangements, as when Greek minorities lived in Turkey and Turkish minorities in Greece.[18] In a different sense, American troops in Berlin serve as hostages to guarantee compliance by the United States with its undertakings to defend the city.†

Tacit Agreements

Some of the reasons inducing nations to perform their international agreements operate even as to "tacit agreements"[19] which, while not strictly "law," are not unlike law in their effects on national behavior.‡

The tacit agreement is not a new phenomenon; what is new

developing such weapons, there might be irresistible pressures on another major state to do likewise for its allies. "Third nations" might then also prove adroit at engendering a competition between the United States and the U.S.S.R. to sell them nuclear weapons. Compare the competition between exporters of nuclear reactors and materials.

*While usually the principal purpose of such provisions is to render response more nearly certain and violation therefore prohibitive, definition in advance may also serve to limit the response and thus avoid excessive reaction, counter-retaliation, and the breakdown of the treaty system.

†The United States "nailed itself" to its commitments to NATO and Berlin by solemn, repeated pledges and by various guarantees and "hostages," so that friends and enemies alike will recognize how costly it would be for the United States to fail to carry out its undertakings. United States troops are in Berlin principally to make it very difficult for the United States not to respond to Soviet aggression, and thus to make it likely that the Soviet Union would be deterred from any attack. See T. Schelling, "Deterrence: Military Diplomacy in the Nuclear Age," 39 *Virginia Quarterly Review* 531, 539 (1963).

‡Compare also non-legally binding agreements like the Final Act at Helsinki, 1975, which are not too different from binding agreements in the consequences of violation and in their deterrent effect. See Chapter 12.

perhaps is the recognition that it exists and that it has some of the characteristics of an expressed agreement. Nations have always recognized that their acts influence those of others. If one nation built up its armies, its neighbors might do likewise; if one raised tariffs, it could expect responding or corresponding barriers from others. In many circumstances it might be said that there were tacit agreements between particular nations not to enlarge armies or raise tariffs. Specifically, there was in effect a tacit agreement between the United States and Great Britain (later with Canada) not to fortify the frontiers between the United States and Canada. There was perhaps a tacit agreement during the Second World War that neither side would use chemical warfare. It is not unrealistic to say that there was a tacit agreement during the Korean War that the United Nations Command would not bomb across the Yalu River, and the Communist Chinese would not bomb United States bases outside Korea. For some years there was a tacit agreement between the United States and the Soviet Union not to aggravate tensions in Berlin and not to accelerate the arms race by major increases in military budgets. There are complex tacit understandings in operation about developing or deploying weapons during the extended SALT negotiations. Before the Nuclear Non-Proliferation Treaty, many believed there was a tacit agreement between the United States and the Soviet Union not to give nuclear weapons to other nations, including their respective allies.

New sophistication about tacit agreements may impel nations to rely on them more frequently. A tacit agreement does not entail difficult negotiation or drafting, needs no ratification or proclamation. Its very existence can be denied if that proves desirable for political reasons, foreign or domestic. It can be terminated by either side at will, without legal liability, political onus or sanction, or stigma in world opinion.* Even more than with formal agreements,

*In important instances, especially where a tacit agreement may represent a temporary substitute for a formal one, the differences between these and formal agreements may be less. The unilateral moratoria in 1958 on testing nuclear weapons while negotiations went on, which, while not wholly tacit, did not represent a "legal" agreement, were "violated" at the cost of considerable criticism.

then, the principal inducement to compliance is the desire to have the agreement continue.

Multinational Agreements and Multinational Response

Domestic law is often observed from fear not of what the victim will himself do but of the "response" of the community. For most international norms or obligations there is no judgment or reaction by the community to deter violation. The ordinary violation of law or treaty is not yet a "crime" against the society to be vindicated by the society. It is unusual for nations not directly involved to respond to a violation even of a widely accepted norm—say, Egypt's alleged violation of the immunities of French diplomats in 1961.[20] With important international agreements that are multilateral in character, however, violation may infringe on the rights and invite the response of many or all the participating states. For a few major norms and agreements, moreover, there may be communal reaction, especially through the United Nations, *e.g.*, for *apartheid* and other gross forms of racial discrimination.[21] Its adverse judgment and other possible response would have to be anticipated by any would-be violator of the law of the U.N. Charter outlawing war.

But the U.N. and regional and other organizations have sometimes cast their net wide and responded to what were basically violations between two states—*e.g.*, when Chile complained, in 1949, that Russia refused to permit the wives of Chileans to leave the country,[22] or when Israel was charged with abducting Eichmann from Argentina (Chapter 14). Where available, suit in the International Court of Justice or other third-party adjudication is a kind of international response that might deter a would-be violator.[23]

International "sanctions" and other multilateral inducements to observance may be particularly effective in the organs for cooperation for common welfare. This law, too, of course, is not all of a kind: there are differences in the institutional patterns and relations established—for example, between the World Health Organization and the European Economic Community—as well as in the nature

and onerousness of the undertakings involved. In some instances, undertakings are reciprocal and mutual, as in the Universal Postal Union; but the advantages of the arrangement may still be different for different nations. (The International Labor Organization, for example, has differing significance for the Soviet Union, for the United States, and for other countries with their diverse domestic institutions and economic structures.) There are arrangements that, while nominally equal and mutual, operate primarily for the benefit of the disadvantaged, as in the World Health Organization and the Food and Agriculture Organization. Others are explicitly designed to channel assistance from some nations to others, as in the International Atomic Energy Agency or the International Development Bank.

The special international law which these programs represent is also subject to an accounting of the cost and advantage of participation or non-participation, violation or compliance. But the accounting differs from that in regard to other international law; it is different too in the various cooperative arrangements described. Many involve interdependent programs, and a violation will involve other nations and evoke communal reactions—*e.g.*, in GATT, in the International Civil Aviation Organization, in the World Bank. Such organizations and their members are often particularly vigilant to detect violations and ready to respond effectively. It is difficult to conceive that any modern nation would find advantage in withdrawing from the Postal Union or in violating any of the undertakings involved and risking stern reactions from other members.

In another way, the members of the European Community have established patterns and institutions, which suggest interest in their continued existence and which could not be easily disentangled. The parties are closely interdependent, ever vigilant to preserve their rights; there is machinery for determining obligations and enforcing them; there is sure to be a strong response to violations.[24] With these and other forces to induce compliance, even individual violations of the undertakings involved are unlikely. Important violations could not be indulged without full appreciation of the con-

sequences, far beyond the immediate issue, for the institutions and for what they represent in the life of these nations and of Europe. On the other hand, while the costs to the United States or the Soviet Union of abandoning its commitments to the IAEA are indirect and subtle (and open to question by national "budgeteers," isolationists, and others), they too help deter violation.

The calculus that might determine compliance or violation of the special international law of human rights is considered in Chapter 12.

Domestic Influences in Law Observance

Although the principal reasons for observing international law are reasons of foreign policy, there are also internal forces, general and particular, which influence every government to observe international norms and the nation's undertakings.

Nations observe law, in part, for what may be called "psychological" reasons. There is an influence for law observance in the very quality of law, in the sense of obligation which it implies. Nations observe law from habit and in imitation of others. That a nation consented to an obligation inevitably generates some influence for its observance; that it caused others to rely on its undertaking sets in motion a sense of estoppel which helps to deter violation; that a nation has itself invoked a rule builds commitment to that rule when it is, in turn, invoked by others. Unlike an individual, whose "conscience" about law observance may be dissipated when he is anonymous, when he acts "in a crowd," nations generally have relations with all the other units in the society, cannot be anonymous, do not act in a crowd.

A major influence for observance of international law is the effective acceptance of the law into national life and institutions.[25] When international law or some particular norm or obligation is accepted, national law will reflect it, the institutions and personnel of government will take account of it, and the life of the people will absorb it. With acceptance comes observance, then the habit and inertia of continued observance. That the United States and Canada have accepted the border between them, and the principle that

it shall not be violated, is built into border arrangements, the regulations of immigration agencies, passport practices, and the expectations of the citizens of both countries. Violations of the border, or denunciation of international agreements about border control, would require uprooting these arrangements, changing laws and regulations and practices and habits. When, in the Headquarters Agreement with the United Nations, the United States agreed that members of foreign delegations to the United Nations should enjoy diplomatic immunity from arrest,[26] that agreement was built into the life of New York. The laws of New York reflect the agreement, police regulations provide for it, the individual policeman is taught it, the citizen—grumbling perhaps—acquiesces.[27] Systematic violations of this agreement could not take place without top-level decisions and deliberate, coordinated, and extensive modifications.

In more complicated ways, accepted international arrangements—whether of the Universal Postal Union, or NATO, or a fisheries convention—launch their own dynamism, their own inertia, their own bureaucracy with vested interests in compliance, their own resistances to violation and to interference and frustration. The European Community agreements are observed, in part, because they have been accepted in member countries and enmeshed in national institutions; there are national bureaucrats whose job it is to assure that the agreements are carried out; powerful domestic groups have strong interests in maintaining these agreements.

Attitudes toward international law reflect a nation's constitution, its laws and institutions, its history and traditions, its values and "style." Indeed, allowing for the dangers of metaphor and the particular inadequacies of analogy from individual to national behavior, it seems permissible to suggest that some nations are more law-abiding than others by reason of their national "morality" and "character."[28] Some governments seem especially sensitive to the stigma—the "guilt"—of violating international law.* Some have a

* Perhaps, even, governments that are concerned for their internal order may hesitate to set their citizens an example of an international violation.

stronger sense that national "honor" or "duty" requires the observance of law and of agreement. Whether or not one deems such attitudes appropriate, government officials are also human beings and cannot lightly do as officials what they would be reluctant to do as men or women, nor in a representative government can they lightly do what the people would deplore.

Through much of its history the conduct of the United States, I believe, has reflected internal forces impelling observance of international law. Conceived in "decent respect for the opinions of mankind," born in the heyday of the "law of nature," fathered and raised by men who respected law, the United States was the first modern "new nation" and sought protection for its independence in the law of nations. Geographic isolation, natural wealth, and the desire to be let alone to develop in its own way enhanced its respect for the conservative influence of law in support of international order. Federalism, separated branches of government, a written constitution, all helped to develop a respect for law, legalism even, which has pervaded national life. Whether it be virtue or vice, the people of the United States have had moral, perhaps moralistic, attitudes toward their relations with other nations, and respect for international law has been included in that morality.[29]

As a powerful and affluent nation, the United States may sometimes be restive under restraints; it may sometimes be reluctant to submit to new law (say, human rights covenants) or to international adjudication;[30] it may seek to transform legal questions into political ones to be determined in the light of its own foreign policy;[31] but it does not lightly violate accepted norms, customary or conventional. Major violations by the United States have been rare. It did not threaten the political independence or territorial integrity of others even while it had a monopoly of atomic power. Only under pressure of ideological conflict, for example, during the Cold War did the United States behave in ways that have been seriously challenged: it is accepted that the United States had some role in the deposition of President Arbenz of Guatemala in 1954 and assumed that it had some in the overthrow of Allende in Chile in 1973; it apparently committed some violation at the Bay of Pigs in

Cuba in 1961; many have condemned as unlawful the intervention in the Dominican Republic in April 1965; some question the lawfulness of various of its actions in Vietnam and Cambodia.[32] Even in such instances, however, the concern for law is not wholly absent. In the Bay of Pigs, United States ambivalence and restraint, induced in substantial measure by concern for law and obligation, limited its involvement;[33] later, the reaction to the enterprise, in and out of government, was one of guilt and penitence. In the Dominican Republic, the United States eagerly strove to extricate itself and sought legitimation of its actions by the OAS.

Particular national values and traditions will also mold attitudes toward law or toward a particular law or obligation. In general, Western-style democracies have tended to observe international law more than do others.* Free institutions make it more difficult for a government to risk violation in the hope that it will not be detected—say, mistreatment of an alien, or conducting a nuclear test in violation of an agreement not to do so. The United States in particular may be deterred by the recognition that it seems unable to do anything clandestine, to keep a secret (especially from its own people), or to deny a true accusation, as in the 1960 U-2 incident in Russia. Open societies are also less likely to be tempted into certain violations by any compulsion to maintain a curtain of secrecy. And a society in which individuals are valued is likely to treat aliens, too, at least as well as customary international law requires and to observe any human rights undertakings; and, such obligations apart, it will also wish to avoid possible retaliation against its citizens by other governments.

International law will also enjoy the support of those forces in a democracy that check the abuses of government. Separated branches of governments—as in the United States—may also prevent violations of international law. The President may veto a statute that contravenes international obligations;[34] Congress, or its

*In part, this may reflect that Western democracies are principally the Western European powers (and their colonial offspring), which created international law in their image and their interest.

committees, may resist or deter executive violations.[35] An opposition party, an independent and ubiquitous press, a scholarly community, various pressure groups—all vigilant to criticize the government—will also seize on violations of international law, particularly those of political import, for example, the unlawful use of force.[36] (Sometimes indeed, officials act from concern for "public opinion" although in fact the public may have no opinion on the issue.) Some international arrangements also enjoy the support of a special "constituency" that seeks to assure that the government will observe them; for example, the international trade community is concerned for good relations generally and for compliance with international law, particularly for the observance of commercial treaties and trade arrangements.

National constitutions and institutions will contribute to observance of international law. In the United States, for example, international law is part of the law of the land, without need for legislative or executive intervention to make it so. International law can be invoked in an appropriate case in the courts and the courts will give it effect.[37] Treaties too are, by the express terms of the Constitution, law of the land and, if self-executing, will be enforced by the courts on their own initiative.[38] Thus, the Supreme Court annulled a state's discrimination against a Japanese alien which violated a treaty provision.[39] Some principles of international law—for example, minimum rights for aliens and their property—coincide with guarantees of the Constitution, and the alien receives in the courts of the United States, even against the President and Congress, far more protection than international law requires.[40]

Political personalities, and their personal power and tenure, may exert an important influence for law observance in the degree of their commitment to international order.* Special commitment to a particular rule or agreement (by President Kennedy to the Nuclear

*They differ, of course, in their commitment to international order. President Johnson's handling of the U.S. intervention in the Dominican Republic in 1965 may reflect, in part, attitudes toward international law and obligation different from those evinced by President Kennedy in the Cuban missile crisis in 1962.

Test-Ban Treaty, for example) makes it to that extent less likely that the nation would breach it during that official's tenure or perhaps while his party continues in power. That important congressional leaders initiated, sponsored, and fought for NATO or the United Nations will help to assure their continued support for the obligations undertaken at least for some years.*

In the United States an important influence for compliance with international law is the role of lawyers in the life of the country. The spiritual fathers of the United States were principally lawyers, as were many of its leading presidents, and lawyers have usually dominated both houses of Congress. Many of the secretaries of state—the best and the worst of them—were trained in the law, and the Department of State has a legal adviser with a substantial staff. Major issues of foreign affairs come for discussion to the President's Cabinet, of which the Attorney General is a member and which usually has other lawyers as well. That principal participants in the policy-making process were trained in the law does not assure that they will cast their votes for law observance; it does mean that some knowledge of the law, some appreciation of its significance, and some attitudes and habits of respect for law find a place in the process of decision. Outside the government, particularly through professional associations, lawyers exercise important influence on their government and that influence tends to support international law.

The law officer, particularly the legal adviser to a foreign office, may be a potent influence for law observance.[41] All governments have legal counsel to advise them in their foreign affairs, obviously because their opinions are deemed relevant to the process of making national decisions. A skeptic might suggest that they are used merely to justify what the political officers wish to do, but even in that role lawyers help shape the policy so that it lends itself to plausible justification. Since the early days of the Republic the At-

*It has been suggested that the likelihood of compliance with important agreements can purposefully be enhanced by requiring heads of state personally to commit their prestige to the agreement.

torney General of the United States has rendered a substantial number of opinions on matters involving international law, and some of these opinions have told the Executive that he was not permitted to act as he wished.[42] The advice has usually been heeded. More numerous even are such opinions by the Legal Adviser of the State Department. In Great Britain there are volumes of opinions of the law officers of the Crown which include numerous instances in which the advice given was that the government could not take the proposed action, or had no grievance against the action of another government.[43]

The role and influence of the legal adviser are not, of course, the same in the various foreign offices. They may even differ importantly from time to time in the same office, principally with the personality and attitudes of the foreign minister and of the legal adviser himself. His significance for law observance is probably greatest in the United States, where organization, procedures, and practice give the Legal Adviser of the State Department an active and varied role. He regularly attends the staff meetings of the Secretary of State and takes full part in their deliberations. His staff of seventy lawyers daily advises and guides the political officers in the light of international law. A member of the Legal Adviser's office often participates in working-level meetings from which proposed policy may emerge. Lawyers see almost every outgoing instruction to diplomatic missions which might conceivably have legal implications. It is rare that policy-makers reach a decision without consulting the Legal Adviser, or at least giving him the opportunity to be heard. Rarely is a decision made against strong views by the Legal Adviser that it would constitute a violation of law or agreement.*

*The exceptions are principally in the realm of "intelligence activities," or the secret decision to take sudden action by force for "national security." Intelligence and some other covert activities are commonly treated as beyond the law. The Legal Adviser, I am guessing, did not participate in the decisions of the United States to send U-2 planes over Russia in 1960, or to dispatch Marines to the Dominican Republic in April 1965 or engage in some of the "dirty tricks" charged to the Central Intelligence Agency. Neither, I guess, were their legal officers consulted when Great Britain and France used force at Suez, or the U.S.S.R. in Hungary in 1956 or in Czechoslovakia in 1968. In some of these cases, perhaps the governments were aware, without advice of counsel, that their actions were probably unlawful, knew that their lawyers would say so, but had decided to act nonetheless.

The influence of the legal adviser may depend on how he and the policy-makers see his role. In some foreign offices the lawyer is a "technician," available to give advice whenever the minister decides that he wishes to have it, and is expected only to pass judgment whether some proposed action would be legal or not. Other policy-makers recognize that law, not least international law, is not wholly technical, that there is room for creative cooperation between legal and political officers to use the concepts, techniques, and instrumentalities of the law to develop more desirable policy. Some legal advisers and political officers appreciate, too, that in the policy-making process the legal adviser sometimes appears as the "conscience" of the foreign office, as the spokesman for a national interest often unrepresented—his country's long-term interest in legal order and stability—as against the claims of some immediate advantage.

Sometimes the political officer's perspective is that epitomized in the much-bruited attitude: "Don't tell me that we may not do it; tell me why (or how) we can."[44] The policy-maker, feeling responsible to act in the national interest as he sees it, often does not see any national interest in heeding legal niceties. Impatient with restrictions on his government's freedom to act, he may wish to see the law as wholly flexible, especially since there is no judge to reject any position that the legal adviser might perpetrate. Most legal advisers and some policy-makers, however, know that the law is not so flexible, that the honest lawyer cannot play that role, that if he did he would not be serving his government's interest since his advice would not accurately reflect the law which operates in international society and which will determine the reactions of other nations. Rather, they believe, the legal adviser should tell the political officers whether proposed action conforms to international norms or treaty obligations, how deep an inroad into law and order it would make, whether there is indeed uncertainty or ambiguity in

the law and how much, how plausible any available justification would be, how other nations involved are likely to view the law and the justification. He should consider alternatives and suggest where each might lie in a spectrum of violation. And the wise politician listens, because he knows that violations bring consequences—immediate and eventual, potent and subtle—that may not be worth the advantages to be gained.

I have been emphasizing forces for law observance in national life, as distinguished from the demands of a nation's foreign policy. This dichotomy, for emphasis and clarity, should not suggest that domestic and foreign considerations are nicely separable. A nation's foreign policy is intimately related to national qualities and domestic factors such as those considered. It would not be easy to determine how much it is due to national "character" and domestic influences, how much to foreign policy and the elements that contribute to it, that the United States could not violate its solemn unambiguous undertakings as easily, say, as could Stalin's Russia or Mussolini's Italy. On the other hand, the internal forces which impel a nation like the United States to comply with law may themselves in some measure be the result of a long history during which that nation learned to favor international law because the law supported its foreign interests.

WHY NATIONS VIOLATE LAW

While nations generally observe both customary international law and international agreements, all nations have violated them and, no doubt, will violate them again. Law observance is usually the rational policy, but nations do not always act rationally. Law observance usually has dominant advantages, but governments do not always act deliberately on the basis of a careful calculus of cost and advantage.* When, as in regard to most decisions, there is

* Sometimes a violation is unintentional, or committed for a nation by others than those principally responsible for its foreign policy; sometimes an important policy may involve incidental violations which did not receive careful attention, or which appeared only a minor consideration.

some rough, more or less explicit, weighing of all the considerations, there are cases when the cost of law observance seems too high, the cost of violation temptingly low. Occasionally there is uncertainty as to whether law will be enforced and whether there will be undesirable consequences. And there may be domestic forces that press for violation, and sometimes prevail.

Advantages of Violation

Usually a nation deliberately violates a norm or agreement because it expects that the advantages of violation will outweigh its costs. Faced with the temptation to act in disregard of law or obligation, the government will know what it hopes to gain.* By aggression it may hope to achieve prestige and power and wealth, to acquire territory, to improve its strategic position, to extend its political influence, or to change the political or economic policies of others. From unauthorized overflight of another country's territory it may obtain valuable intelligence. By unlawful seizure of the property of aliens it can obtain funds for important domestic programs. By breach of a treaty it seeks relief from a bargain that was bad or has turned bad. Sometimes a violation provides a special advantage—for example, the satisfaction or prestige that comes from slapping a bigger power, as when Castro nationalized American properties,[45] or Amin abused British subjects in Uganda.

Against such concrete and immediate advantages, the costs of violation are not always clear and decisive. The general advantages of law observance are unmeasurable and long-term, and their importance cannot be easily demonstrated. "Realists" in foreign offices sometimes do not see national advantage in maintaining law, especially when other countries seem to be flouting it.[46] Order and stability, they grant, are desirable, but some immediate, more tangible national interest should be preferred; besides, how much

* Sometimes, of course, a government may miscalculate the benefits anticipated from a violation, or prove unable to obtain or retain them; France and Great Britain had to withdraw their forces from Suez in 1956, retaining no advantage from their enterprise; Iran could not readily market the oil of the Anglo-Iranian company which it had nationalized in 1954 in alleged violation of law.

order is there anyhow, and will it be jeopardized by one violation? "Honor" and "duty" are unsophisticated considerations. "Morality" has no place in relations between nations, and national interest should not be sacrificed to a private ethic; violation of law, moreover, is not *per se* immoral. A particular violation may even appear just, because the norm or agreement broken was outdated or unfair. World opinion is largely myth. Credit, credibility, prestige, influence, leadership are real, but one cannot prove that they are seriously tarnished by ordinary violations of law; indeed, some violations, by displaying power and forcefulness, may enhance leadership and prestige. Violations may sometimes disturb relations with other countries, but most relations can readily survive them and some are not very cordial anyhow.

These arguments reflect common attitudes that help to explain why the general advantages of law observance do not always prevail. For some governments, in some cases, these advantages may be particularly weak or absent. While at the end of the Second World War, order seemed the principal concern of all nations, some now place it second to other values—for example, the end of colonialism, or radical economic and political transformations. The Communist nations in principle, and countries like the Soviet Union, Communist China, Castro's Cuba, Nkrumah's Ghana, Nasser's Egypt, at various times and by different means, actively sought instability as a prelude to a different international order, or sought to influence the shape of change in some country (*e.g.*, Angola). If some nations have a special interest in law observance, others may have very little—*e.g.*, Communist China during the time that it was content to be virtually outlawed. If the United States and the Soviet Union sometimes observe law from a special sensitivity to the opinion of other nations, others sometimes see their influence in actions that involve violation of law. The very competition for leadership which contributes to American and Soviet observance of law sometimes impels them to violate law, as in Hungary in 1956, and Czechoslovakia in 1968, or in the Dominican Republic in 1965. Fear of criticism in the foreign press or in the United Nations has meant little to Communist China in its isolation, to the Soviet Union during the time when it considered the United Nations a hostile bloc in the control of the United States, or to the Republic of South Africa after it had become inured to hostile world opinion. Even nations with special concern to obey law may find an issue where other interests seem more important—as Israel did when its agents abducted Eichmann from Argentina, as perhaps the United States did when it suspended convertibility of the dollar to gold in August 1971.

The specific, immediate costs of violation may also appear especially low and seem worth the price. The major cost in the response of the victim may not be very "costly," especially where violations are isolated and the victim wishes to continue friendly intercourse with the violator. Apart from the fact that the victim's responses are limited by law, nations do not go to war for minor infractions, or lightly rupture diplomatic relations, or treat the violator's citizens as hostages, or terminate commercial intercourse, or even denounce treaties unrelated to the violation. Since the principal response is usually retaliation to kind, obligations that do not operate reciprocally and do not lend themselves to simple retaliation may be violated without concern for this particular cost. That Communist countries, especially under "Stalinism," did not generally permit their citizens to travel abroad meant that their governments did not have to fear retaliation if they harassed Western visitors, or denied them justice or effective diplomatic protection. That in a country like the United States mob action against foreign embassies is unlikely meant that American embassies in some other countries did not enjoy the added protection that lies in the threat of retaliation. Concern for friendly relations will not deter violations when relations are not friendly, even nonexistent, as when North Korea seized the *Pueblo* in 1968, or Cambodia the *Mayaguez* in 1975. Again, human rights law gives rise to separate reasons for its violation.[47]

One kind of violation inherently enjoys enhanced advantage and limited cost—the action which is quickly done and presents a *fait accompli:* often, pressure cannot be applied to discontinue or undo the action, the purpose of the violation is achieved, its advantage

cannot be taken away. Opprobrium, censure, or sanction may follow; but unless the violation is serious enough to lead to war, even the "responses" are helpless to undo what is done, and are likely to be lighter, especially if repetition is unlikely. The circumstances which led to the act are probably extraordinary, and the violator, whether he denies or admits, justifies or apologizes, usually implies good behavior for the future. Examples might include the assassination instigated by a foreign government, whether of a government leader or of a refugee enemy (Trotsky, Galindez, Delgado, Ben Barka).[48] In modern times a nation might be tempted to make a single bombing attack to destroy a dam, a canal, an oil refinery, a nuclear center or a missile site, or refuse to extradite a terrorist and allow him to escape to a country of haven (as in the Daoud affair in France), or to accomplish some other political, economic or psychological effect.[49]

There is further encouragement to violation if the cost of a violation is uncertain and might prove low. Cost might be nearly discounted, for example, if there were substantial likelihood that the violation could not be detected. Despite modern publicity and communication techniques, mistreatment of an alien behind an iron or bamboo curtain might never be discovered; a government can deny death or disappearance or claim not to know a person's whereabouts; or it might be difficult to pin responsibility for his fate on the government.[50] Important arms control agreements might be violated if there were not effective verification to discourage violation by making detection probable.[51] Espionage, though usually entailing various violations of law, is common practice and always denied by governments; "dirty tricks" by intelligence agencies are also never admitted, difficult to prove, and are regarded by some governments as "extra-legal" (rather than illegal).

Inevitably, there are also uncertainties as to the consequences of being caught in a violation. That the victim will respond can usually be expected, but the form that the response will take and its effectiveness may be conjectural. Sometimes there are uncertainties as to the response of the victim's friends or allies; at least General de Gaulle used to question whether the United States would respond to Soviet aggression against Western Europe at risk of destruction to itself.[52] Communal reactions are even more problematic. Action by the United Nations (or by other political organizations) depends on votes, and necessary majorities cannot always be counted on. (Compare the failure of the General Assembly to adopt major resolutions after Israel's victory over the Arab states in June 1967.) In Korea, the U.N. reaction to Communist aggression in 1950 probably came as a surprise; had it appeared more likely, the violation might not have occurred. With the changed complexion of the United Nations, indeed, some violators can assume with confidence that the majority will not condemn their actions, *e.g.*, India's at Goa or Bangladesh, Uganda's expulsion of Asians, violations of human rights in Communist, Arab, or other Third World countries. When some community reaction is to be expected, its effectiveness is frequently uncertain; calls for economic sanctions, in particular, are often unheeded or unsuccessful because they hurt the nations imposing them as well as third countries.

At times whether there is a violation of law may depend on complex, ambiguous, or disputed issues about facts and how they may properly be characterized. (Compare Vietnam, Chapter 16.) In such circumstances, an acting government may genuinely believe one version of the facts although a court, upon careful investigation, would find the facts otherwise and conclude that there was a violation of law. Or, in less than good faith, the violator may take advantage of the factual ambiguities, knowing that it could deny the violation, that the uncertainties would infect and reduce the responses to the violation, even by allies of the victim, particularly responses that depend on decision in the United Nations or in a regional organization.

The uncertainties of "cost" and the likelihood of violation are increased when the norm or obligation itself is not wholly certain. An established rule is more likely to be observed than one in doubt, or in controversy, or in the process of change, or one outdated and different from what it "ought" to be. Where there are *bona fide* differences as to whether there was a violation, even a response by the victim is less likely or would be less strong—and

the threat of it less of a deterrent. Even if the law appears clear enough, a nation might risk violation in the hope of modifying the law. Sometimes, if an influential nation sets a precedent of deviation, others may even better the instruction: the United States claimed the continental shelf only for the limited purpose of exploiting its resources, but the action precipitated claims by other nations of wide fishing zones and even complete territorial jurisdiction to wide areas of sea.[53] Greek officials on Cyprus in 1974 thought they saw an opportunity to modify an arrangement they had not liked and which had become even more distasteful, and gave Turkey a plausible basis for more radical change to its own advantage.

Domestic Influences for Violation

Even when considerations of international advantage and cost dictate observance, there are domestic forces and impulses that might make a nation violate law. As there are "psychological" inducements to law observance, there may also be countervailing pressures to violate. A nation's sovereignty, and the absence of obvious external restraints, may give it a heady sense of freedom and power to do as it likes, regardless of law. The high stakes and the inherent instabilities in international relations may frighten a state into taking "pre-emptive" precautions for its security, sometimes at the expense of law. Official habits of mind tend to set up "legalism" in contradistinction to "national interest" to which legal obligation must yield.

Where national passions are engaged, opposition parties, impending elections, a hostile press, pressure groups, organized and vocal segments of public opinion may all be forces for violation of international law rather than compliance. Such domestic pressures, it is believed, helped to persuade the Indian government to take Goa by force.[54] It is generally accepted that recurrently opinion within the Arab states has inveighed for action against Israel, regardless of the United Nations Charter or any armistice agreements. (Opinion in Israel may impel governments to take strong measures against terrorism.) In the United States there were pressures to act against "international communism" which might have impelled the government to be less than scrupulous about law, as at the Bay of Pigs. National predilections, even principles, are not limited to major issues. In the United States, for example, one has found a reluctance to afford aliens better tax treatment than is enjoyed by citizens or to allow resident aliens to avoid military service obligations borne by citizens—sometimes even in the face of an earlier treaty provision.[55] Pressures from special economic interests are often behind violations of tariff or trade provisions, as in the occasional violations of the European Community agreements.

If some national institutions further the cause of compliance, others hinder it. In the United States, international law sometimes suffers from the separation of branches in the national government; the executive and the legislature, in particular, were separated and balanced in order to prevent tyranny, at some price in efficiency.[56] Unlike parliamentary systems,[57] the American system does not assure a single government policy, does not guarantee that President and Congress will look in the same direction, whether in domestic or foreign affairs.[58] Congress can refuse to enable the United States to live up to its obligations under a treaty by failing to enact implementing legislation or to appropriate the necessary funds.[59] Or Congress can pass legislation inconsistent with the international obligations of the United States.[60] A court also can render a decision which an international tribunal might deem a violation of international law and which the makers of foreign policy helplessly regret. Although it has not yet happened, a court can even find that a treaty violates the Constitution and cannot be carried out in the United States despite the international undertaking.[61]

Federalism too has its price. In the United States, in theory, there are no "states' rights" in regard to foreign affairs. International law and treaties are the law of the land for the states as for the nation. But in practice, states may sometimes infringe such obligations, and there is not always an effective remedy, juridical or practical, to make them comply.[62]

Any country, moreover, may find itself liable for violations (intentional or negligent) committed by local authorities—say, failure

to accord adequate protection or the requirements of justice to aliens.[63] Sometimes there are violations when governmental machinery is inadequate, when administration is ineffective, when departments responsible for carrying out undertakings are remiss in doing so. There have apparently been such violations even in the politically developed countries of the European Economic Community, despite all the forces making for observance of the Community agreements.[64]

Violations may also occur due to inadequacy of legal advice. Unlike the United States, even some established nations, whether from habit, shortage of personnel, organizational pattern, or methods of operation, do not subject all of their foreign policy to the scrutiny and counsel of legal advisers. (Where foreign policy is not developed in the foreign office but is made by an executive or his coterie, systematic legal consultation is even less likely.) The legal adviser may be only an *ad hoc* consultant, not a full-time officer of the government; he may not know of a proposed measure unless someone decides to consult him; consultation may be limited in time and form and hence in influence. His status or his personality may limit his intervention. Or the lawyer may not be consulted, owing to oversight, haste, or a desire to limit the number of persons knowing of a secret proposal.*

Violation of Treaties

Although the forces that lead to occasional violations apply generally to international agreements as well as to customary law, there are additional factors that may modify the calculation of cost and advantage in observing some treaties. Treaties are sometimes of indefinite duration or for a long term. An old treaty, though still technically in effect, may be outmoded; treaties of long duration, also, may no longer be reasonable or fair. If the advantaged nation

*Sometimes the policy-makers may decide to avoid counsel because they are determined to act regardless of legal considerations. There are reports that in a certain foreign office, when the policy-makers decided to act in a major instance in knowing contravention of law, the legal adviser was told to take a holiday.

will not renegotiate, the other may be tempted to terminate the treaty, even if our hypothetical court would not deem it a case in which a party could consider itself released from its obligation because of changed circumstances (the principle of *rebus sic stantibus*). An international agreement may represent a policy which a new regime, breaking with the past, may denounce (even when it cannot do so lawfully under the terms of the agreement).[65]

For many treaties one may anticipate that the response to a violation would be only termination of the agreement; sometimes that is not a sufficient deterrent. Often agreements involve a number of more-or-less interdependent provisions, some of greater interest to one party than to another. A government which does not highly value a particular provision may violate it in the belief that the response will be only termination of that clause. One party may not desire a particular provision in the first instance but acquiesces in order to obtain the rest of the agreement; that party is not likely to be deterred from violating that provision by any fear that the provision will not be maintained.

This is one of several lessons afforded by the Korean Armistice Agreement. In the armistice negotiations both sides sought an end to hostilities, and a provision to that effect is the heart of the Agreement.[66] If either side had reopened the fighting, the Agreement would of course have been destroyed. Because neither side wished to resume hostilities, the provisions ending the fighting continue in effect, having survived the failure of political negotiations,[67] breaches of the other provisions in the Agreement, and major political changes in the world around Korea.

The Armistice Agreement also provided for exchange of all prisoners that wished to be repatriated.[68] The Chinese Communists and the North Koreans (and presumably their "protector," the Soviet Union) long resisted the principle of voluntary repatriation but ultimately accepted it as the price of an armistice, and because it was a source of embarrassment to them.[69] Prisoners were repatriated immediately,[70] and there remained no question of continuing compliance. The United Nations Command later indeed accused the Communists of failing to account for many prisoners, particu-

larly South Koreans.[71] But the U.N. Command knew at the time the armistice was signed how many prisoners the Communists were prepared to return. In entering into the agreement, ending hostilities, exchanging the prisoners listed, the U.N. Command knew that the Communists could continue to withhold any other prisoners they might have without fear of costly disadvantage. The U.N. Command would have difficulty proving that there were in fact other prisoners; it had no prisoners left which could be detained in retaliation; it would not on this ground resume hostilities.

Different again is the lesson of a third provision in the Agreement, an undertaking by both sides not to introduce into Korea new personnel or equipment except as replacements; the provision was to be monitored by the inspecting body established in the Agreement.[72] For geographic, military, and political reasons, this provision did not operate symmetrically for both sides. The U.N. Command had far greater interest than did the Communists in maintaining that provision, as well as the effectiveness of the inspection system, and was also subject to greater political restraints deterring violation. For the Communist powers, the expectation that if they built up their forces in violation of the Agreement, the U.N. Command might eventually do likewise was no deterrent at all.* That if they frustrated the inspection system it might eventually cease to operate behind the U.N. lines as well was also no high "cost" to them.[73] The Communists might also have guessed, correctly, that for political reasons in the United States and within the United Nations, their breach of the provision against reinforcement would not lead to invalidation of the Armistice Agreement as a whole and resumption of hostilities. Nor did the Communist powers have reason to fear other sanctions; vis-à-vis most countries, both North Korea and Communist China were then already virtually outlaws, while they would surely continue to enjoy the assistance of the Soviet bloc. On the whole, then, there was little inducement to abide by this provision, and it soon appeared that they were not doing so.*

Some kinds of agreements are more susceptible to violation than others. Some agreements, for example, though cast as formal treaties, are primarily business arrangements, resemble private contracts, and suffer the special mores of the market place. While breach of agreement is not taken lightly in the market, some of the political reasons which compel law observance in other cases may be absent.†

Political Treaties

Forces that encourage violation are particularly telling where "political" law and agreements are concerned. The term should not

* Eventually, in response to Communist violations, the U.N. Command declared itself relieved of this obligation. See 12 U.N. GAOR, Annexes, Agenda Item No. 23, at 1, U.N. Doc. A / 3631 (1957).

The Korean experience teaches that an inspection system must not only be capable of detecting violations, but must also be "sabotage-proof." The Commission established in the Korean Armistice Agreement, by contrast, was "sabotage-prone," indeed, with hindsight, "sabotage-inevitable." (The Commission consisted of two Communist nations and two Western "neutrals." The former, it soon appeared, were fully prepared to cooperate with the North Koreans in frustrating the Commission's inspections behind Communist lines.) A verification system that can be readily sabotaged does not deter violations. Often, indeed, a nation can sabotage such a system without it even being clear that it is intentionally doing so and, therefore, without even the onus of having prevented verifications. See F. Iklé, D. Elliot, L. Henkin, H. Linde, R. B. von Mehren, C. Zoppo, report prepared for Advanced Research Projects Agency, *Alternative Approaches to the International Organization of Disarmament* 8–9 (The RAND Corporation, 1962).

* Of course, U.N. negotiators might have desired such a provision even if they had realized that there were few inducements for the other side to honor it—in the hope that it might be observed nevertheless, or, at least, that its existence will slow up "violations" by the other side. Perhaps such provisions were included also from a need to appear "untrusting" of the Communist adversaries—to an ally (*e.g.*, the Republic of Korea) or to congressional or public opinion in the United States.

It may be that U.S. negotiators accepted the Paris agreement ending Vietnam hostilities in 1973 with some hope but without any real confidence that it would be observed, because they wished to end the war at almost any cost.

† Occasional breach of contract does not carry opprobrium, is often considered legitimate, a sound business practice, and legal "penalties" for breach are often treated as a legitimate business expense. International society takes breach of treaty more seriously, because treaties usually deal with more than business transactions, have national and international consequences, and are often a vehicle for international legislation.

be misunderstood. All international law and agreements are political in that they are part of foreign policy and affect political relations between nations. There are, however, laws and agreements whose political character is paramount, in particular those which involve international peace and stability, or the security, integrity, and independence of nations. I refer to the law of the U.N. Charter outlawing war, to law (customary and by treaty) forbidding intervention in the affairs of other nations and particularly in their internal wars, and to various "political treaties," particularly treaties of peace, various treaties of "protection" and other special political relationships, and military alliances. This law is particularly vulnerable; often, the stakes—the cost of observance, the advantages of violation—are high; often there is uncertainty of law or obligation, and confusion and ambiguity of the facts and their evaluation. It is principally these laws and agreements, directly related to international order, that the student of foreign affairs may have in mind when he asserts that international law is widely disregarded.

The peace treaties at Vienna, Paris, Versailles, and those following the Second World War are treaties in form, and courts and lawyers have persisted in treating them as such. Political officers sense, however—and lawyers often forget—that at bottom many of them are not "agreements." The Treaty of Versailles, for example, was imposed by force and did not have those qualities of mutual consent and *quid pro quo* that characterize agreements and that support the principle that agreements should be observed. The terms of such treaties often reflect the emotions of victory and unexamined, even capricious, notions of "reparation." Although for lack of a better mold the treaty form is used, these arrangements are really an attempt by the victors to reap the fruits of victory and with other controlling powers to legislate rearrangement of international society.* As between victor and vanquished, though equally "parties"

*Peace treaties are often acceptable, even to the victims, because the alternative may be continued occupation by the victor to achieve the same ends. After World War II, for example, if the vanquished had not accepted and did not abide by

to the treaty, the forces that make for observance of treaties generally are not here applicable.

Among the victors, too, while peace treaties do not suffer the defect of duress, they still have special qualities. These agreements may in large measure be hegemonial, as when they redistribute empires. They may be legislative, as when they seek to rearrange the government of territories, reorganize institutions, and impose an order in a region or in the world. They may be deeply political in that the arrangements determine relations and rights among the victors themselves, and define their future policies. They may be capricious in the disposition of spoils among the victors and the imposition of burdens on the vanquished. They usually reflect the glow of victorious alliance, the assumption of continued cooperation, the desire to "settle things" quickly and to avoid issues, rather than any true consensus based on careful anticpation of the individual interests of the victorious nations in the years after the peace.

Peace treaties that do not follow an unconditional surrender may also have political qualities that reflect on their legal character and affect their observance. Take the Geneva Conventions of 1954 on Indochina, deeply relevant to subsequent events in Vietnam. The parties solemnly agreed to a "provisional military demarcation line" in Vietnam, with elections throughout the country to follow in short course.[74] As is well known, the partition remained, elections never took place, and a terrible war rent the country, with full-scale American participation designed to keep partition permanent. Although there were mutual recriminations and accusations of breach of agreement, many readily saw, at least in hindsight, that much in the agreements was not viable and perhaps was not what the parties really desired. It was important in 1954 to end the fighting; the agreement was designed in large part to permit France to extricate itself with "face." It is not clear that either side thought there could be mutually acceptable elections in either North or South Vietnam. As in other such cases (like the Korean Armistice),

human rights provisions in a treaty, the victors might have felt obliged to continue in occupation to ensure that human rights would be respected.

an agreement is written to achieve an immediate purpose on which there is consensus—the end of hostilities. More is written into it, reflecting mood, hope, gamble, temporary pressures, the need to soften blows and to buy time, and much of this fails.*

I am not suggesting that peace treaties are not "good law" or that they need not be observed.[75] International society is built on them, and the nations of today, the territories they occupy, the peoples they encompass, reflect the "compelled" treaties and "hegemonial" arrangements of an earlier day. As to the long past, surely, the binding character of these treaties must be accepted, unless voluntarily reordered. With the passage of time forces of inertia and stability, rights based on reliance and investment and prescription, weigh heavily in favor of continued observance. In such instances, generally, it is important that political determinations be accepted as settled, without asking whether they were rightly settled 100 or 300 years ago. And, in fact, except for die-hard irredentist movements, or other interests artificially kept alive (like the claims of the Arab refugees to "return to Palestine"),† the settlements of a receding past are generally accepted and raise no problems of compliance or violation.

Some kinds of provisions, however, often begin to erode—particularly, occupation arrangements, reparations, limitations on the behavior of the vanquished inside their territory (for example, disarmament requirements or human rights guaranties applicable only to the defeated countries, as in the treaties following both world wars).[76] Of such provisions, too, one might say that would-be violators will compute cost and advantage. But particular considerations I have mentioned look quite different. The assumption of *pacta sunt servanda* rings differently and *rebus sic stantibus* also has special meaning.[77] As Hitler showed, the vanquished will not tolerate provisions they consider Draconian when they feel able to do

* Compare the fate of the Paris Agreements of 1973, ending hostilities in Vietnam.

† The drive for a Palestinian "homeland" that began in 1970s had plausibility and support only insofar as it might be realized in territories occupied in the 1967 war, not in Israeli territory by undoing the State of Israel.

something about them. Other nations and "world opinion" will not support imposed regimes indefinitely, and even those who imposed them will not continue to maintain them and to respond to their violation. Political stakes in the maintenance or dissolution of such arrangements are so high that the influence of law and legal obligation is inevitably secondary. Such arrangements are maintained by the political forces that created them; the legal principle that "agreements should be maintained" will not support them when there are new forces calling for new arrangements. There are many reasons for condemning Hitler, but that he failed to live up to Germany's "legal obligations" in the Treaty of Versailles seems among the least of them. Even among the victors themselves, say, after the Second World War, despite the clear requirements of law and politics that arrangements must be observed, the postwar arrangements could not survive the basic conflict of interest. One side or the other in the Cold War may indeed have been the first to "violate the agreements," but compliance and violation began to lose meaning when the agreement to maintain order in Europe proved to have no foundation in common interest.

In Indochina, too, there is no doubt that the 1954 agreements were and should have been treated as binding law. That must be said even of those provisions which, I have suggested, were never viable and perhaps never quite wholly intended. There is no way in law of distinguishing these provisions from those terminating hostilities, which surely were intended as binding; any doubt cast on the legal validity of any of the provisions would cast doubt on the whole. (For some of the participants, at least, the agreement to stop fighting may have depended on inclusion—and observance—of the other provisions.) But it should not be surprising that some of these provisions were not observed, just as ancillary clauses in the Korean Armistice were destroyed. In Vietnam, the political evolution in both parts, in the nearby countries, in China, and elsewhere made the "violation" of these provisions by one side or another inevitable, and led to new hostilities between new parties.

In the decades after World War II, another group of political treaties, colonial arrangements, also suggested a different calculus

of compliance. These too have been less than mutual, in free consensus and in benefit, reflecting less than equal bargaining power and sometimes the use or threat of force. Treaties of protection and other quasi-colonial relationships (United Kingdom-Egypt, France-Tunisia) and treaties of capitulation and extraterritoriality (United States-Morocco) were agreements in which even the "ascendant" party has been compelled to recognize that these *pacta* were not *servanda*, whether because of a superseding principle of "self-determination," or some new doctrine denying enforceability to unequal treaties, or because *rebus* no longer *stantibus*. Among the things that are no longer so is an international opinion tolerant of colonial status. Even opinion in the metropolitan countries themselves rejected patent colonialism. Whatever our hypothetical court might say of the legal obligation to comply with these treaties, nations were unable to insist on compliance and have been compelled to abandon or renegotiate these agreements—in Morocco and Tunisia, in Egypt in 1954, in Panama in 1964–65 and again in 1977–78, and elsewhere in Asia and Africa.*

For different reasons, even in voluntary peacetime arrangements of political character, the influence of law tends to be subordinated and the forces for observance and violation have a special quality. Consider military alliances of the traditional kind, or even NATO, which is supported by impressive institutions long and carefully nurtured. They are created as responses to immediate danger, which causes nations to agree to arrangements that might otherwise be distasteful—for example, to commit themselves to war in defense of others, to subordinate national independence to collective judgment, to place national forces under foreign command, to permit foreign bases on home territory, to dedicate much national

*The end of colonialism also affected other laws as well. For example, the law of state succession—hardly agreed at best—was subjected to serious strains when new countries were asked to carry out obligations of their former colonial masters. See D. O'Connell, "Independence and Succession to Treaties," *British Yearbook of International Law, 1962*, at 84 (1964).

Colonial arrangements responded particularly to new forces in international relations in the postwar world. See Chapter 6.

wealth to extraordinary military expenditures. The agreements are often of indefinite duration or for a period deemed, conservatively, long enough to outlast the danger, as well as to make the political and financial investment worthwhile. Usually, as in the North Atlantic Treaty, these arrangements are in the form of a treaty to underscore the solemnity of the undertaking and to assure the parties as well as the potential enemy that the undertaking will be carried out.

For a period these agreements are scrupulously observed (although when the stakes are as high as those involved in NATO, the political reasons for maintaining the arrangements are so overwhelming as to render the additional influence of law almost supererogatory). Then, long before the term of the alliance expires, the original danger seems reduced, political forces begin to shift. The alliance itself, if it works, builds an effective deterrent and reduces the danger which created it. The need for the alliance then appears less; the cost of it—political as well as financial—begins to seem excessive. The sense of legal obligation is not sufficient to withstand the changes in a nation's political orientation, releasing political forces which replace those that supported the agreement and seek its dissolution or modification. One may suggest that despite a fixed long-term provision, there is in these cases an implied denunciation clause or a special application of *rebus sic stantibus*. In any event, even if a court might find that to do so would constitute a violation, a party might yet denounce the agreement or insist on its renegotiation under threat of denunciation. And erstwhile allies will not respond as to a violation. A new government bent on "nonalignment" took Iraq out of the Baghdad Pact in 1958. Changing roles and relationships in South Asia altered the character of Pakistan's participation in SEATO and in CENTO and led to their eventual demise. Although France continued to adhere to the North Atlantic Treaty, it left the Treaty Organization and denounced some agreements implementing the treaty. France, I note, was criticized for undependability as an ally, not for violating its treaty obligations.

Other peacetime arrangements, even those unrelated to security,

may also be subject to special political forces affecting their observance as law. The merger of states—as when Syria and Egypt became the United Arab Republic, or when the Federation of Malaysia was created—may have been by binding agreement, but the force of law often proves insufficient to maintain them against explosive centrifugal forces. Arrangements for welfare cooperation, like the European Community agreements, may also be deeply political, involving fundamental rearrangements within societies and in relations among them. The international law they establish is different, operating more like constitutional law in a federated state. The European Community can readily command observance of the various agreements in detail, but it could hardly survive, or remain recognizable, if, say, the France of President de Gaulle had turned her back on its basic philosophy.*

Violations of international law or agreements happen for many of the reasons that cause violations within domestic legal systems: an important immediate advantage outweighing less-measurable, long-term interests; the hope of not getting "caught," of escaping an adverse legal judgment, of avoiding or minimizing adverse consequences. Occasionally national behavior may even reflect a kind of "sociopathic" element, as between the Arabs and Israel. There are also the special factors contributing to violations in international relations—greater uncertainty in the law, deficiencies in judicial and executive aspects of the system. Many of the violations are of "political agreements," where legal forms are used to confirm spe-

*Perhaps, however, the law of the Community had been so deeply incorporated into French life and institutions that, even had they wished, General de Gaulle or his successors could not eliminate it.

While there are no meaningful analogies to these political arrangements in domestic society, what I have said about observance and violation of colonial relationships and military alliance echoes comparable attitudes in regard to special personal relationships. The law in many societies, for example, has long ceased to penalize breaches of promise to marry. Desertion, separation, divorce, even if the other side resists them and insists on maintaining the "marriage contract," are not treated like other breaches of contract. Colonial arrangements might be viewed also as a kind of agreement which society ceased to tolerate, and declared to be against public policy, like contracts or indentures for servitude or slavery in domestic society.

cial relationships, and nations more readily abandon observance of these arrangements when their political foundations disappear. In total, the violations are few: are they frequent or weighty enough to negate the existence of an international order?