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"*Everything is what it is, and not another thing.*"[1]—Bishop Joseph Butler

FROM time to time, devotees of international law appear to be afflicted with a fit of anxiety as to whether international law is really law. Provoked by the occasional publicist who challenges the legal character of international law, we are sent scrambling to assemble all the bits of evidence to the contrary, beginning with the fact that people sometimes get paid pretty good money to teach "international law" in *law* schools. Such a momentary attack of professional insecurity may have prompted the planners of the 2009 Annual Meeting of the American Society of International Law to include a panel on the subject, in which panelists prefaced their comments by disclaiming any need to discuss the subject before proceeding to an insightful discussion of it.[2] The premise of this Article is that if you want to know what (if anything) makes international law *law* you need to examine what makes law *law*. It approaches the understanding of international law as law by first seeking to explicate law as one kind of system of rule-governed conduct. (It does this not because there is a big need to rush into Quixotic combat with a few international law deniers, but because it might modestly help to sharpen one's understanding of the peculiar nature of international law and its role in human affairs, and that seems a job worth doing.)

I. A CLUTTER OF RULE-GOVERNED SYSTEMS

Our lives are littered with systems of rule-governed conduct of all imaginable shapes and sizes, from the grand and complex to the simple and ephemeral, from the meticulously memorialized and recorded to the merely intuitively understood: parliamentary bodies, competitive games of various stripes from the impromptu and informal to organized professional sports, systems of accounting, commonplace practices infused with an underlying notion of property like gathering firewood on a beach or groceries for one's cart in a supermarket, standing in line, or parking a car, some of which shade imperceptibly into, or form bits and pieces of, large domains of human experience like manners and ethics. Law cer-

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1. JOSEPH BUTLER, FIFTEEN SERMONS PREACHED AT THE ROLLS CHAPEL, Preface § 39 (2d ed., London, W. Botham 1729).

2. *See* Symposium, *In What Sense Is International Law Law?*, 103 AM. SOC'Y INT'L L. PROC. 155 (2009).

tainly has a place in this motley collection, together with all the multifarious rule-governed subsystems rooted in it, from governments to corporations and other business organizations to domestic relationships to international organizations. Such systems order much of our conduct, and we can reasonably speculate that the capacity to generate rule-governed systems in emerging human societies, far in excess of that of other animal species—and even leaving aside that most fundamental of rule-governed systems, language—must have had something to do with our becoming, for better or worse, the dominant species on our planet.

This Article will explore some of the characteristics that a legal system shares with some of the many other systems of rule-governed conduct of common experience and examine features (such as legislative mechanisms) that are often found in a legal system even if not necessarily essential to its being a legal system, as well as some that seem essential.

What I am principally concerned with in this Article is the *formal* characteristics of rule-governed systems of conduct, including international law—what kinds of rules it contains, what they require or permit, their implications among themselves within the system. As to legal systems, I am not mainly concerned with how well a system works, *except*—and this is a big exception—to the extent that how well the system works may be directly affected by its formal characteristics. How well a legal system works is determined by much more than the system's formal characteristics as a body of rules. At least equally important are the existence and vitality of a culture of law within the community of participants in the system—the body politic for which it is a legal system. There appear to be many legal systems in the world with exemplary formal credentials that do not work very well.

II. VIABILITY AND THE ROLE OF CLAIMANT

But sometimes the formal characteristics of a system of rule-governed conduct do importantly affect how well it works—its efficacy. Indeed they can affect the system's very viability—its capacity to keep going despite the occasional disinclination of a participant to continue participation according to the rules.

Consider a kids' game called "War," in which children divide themselves into competing military units, spread out and conceal themselves, and with toy weapons at the ready lie in wait for the enemy. (When I was growing up during WWII, kids played this game; from my observation, I am afraid they still do, busily acculturating themselves to the ethos of their future adulthood.) The game has no written rules, but it does have rules, which one must understand in order to participate: whoever is discovered and audibly shot before he or she can shoot is dead—there are no surviving wounded—for the remainder of the game, the object of which is to kill all of your enemies before they kill all of you. The side with the last kid standing wins. As General MacArthur declared, "War's very object is victory!"

It is in the nature of any system of rule-governed conduct that its rules may sometimes be asserted to require doing what a particular participant would strongly prefer not to do, giving rise to the question whether the best available course might be simply to stop participating. This threatens a breakdown of the system, at least as to that one participant and perhaps more generally. There is always a kid who will claim more than what some other kid thinks is his or her allotted share of immortality, giving rise to a dispute about what the rules are, or what they require in a particular case. When this occurs, the system has no way to cope: the game must be suspended while the players argue it out, not as players but just as rational kids, leaving it uncertain whether reason, buttressed by the sheer fun of playing, will prevail to crank the game up again.

A legal system need not stop at that point, for it provides *within the system* ways to hear and determine claims as to what the rules are and what they require in a particular instance. The system may continue because the participants on either side of the question automatically fall into the new role of *claimant,* and in that role—perhaps as plaintiff, defendant, or prosecutor in a full-fledged public legal system—continue participating in the system until the existence and applicability of the contested rule is determined. A legal system thus has formal features that contribute toward its own preservation in the face of the recurring pathological situation of a participant who is disinclined to follow its rules.

We might give the children's game a similarly self-protective feature by adding a referee, transforming it into its own mini-legal system. Adding a referee or adjudicator in these circumstances will embellish the system in two ways: First, a referee must know and be able to apply the criterion for what counts as a rule for this system. For this kids' game the criterion may be nothing more than "follow the way we've always done it before" (which sounds something like the basic criterion in customary international law), but that rule can serve the purpose at hand well enough. If a recalcitrant kid objects that "that's not a rule," the referee is authorized to determine whether it is or not. Second, with that done, the referee has authority to determine what the rules, once identified, permit or require in particular circumstances.

Adding such a protective feature to a system of rule-governed conduct is what John Locke was describing in 1690 in his notion of appending the role of a common judge to the social rules that exist in a state of nature (which rules for him apparently strongly resembled the rules of English common law shorn of their legal character), thus transforming the state of nature into a "civil" or "political" society governed by law.[3] Two hundred seventy-one years later, H.L.A. Hart, in his path-breaking 1961 book *The*

3. *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, 44-75 (Thomas P. Peardon ed., The Liberal Arts Press 1952) (1690). Locke says, "[W]herever any two men are who have no standing rule and common judge to appeal to on earth for the determination of controversies of right betwixt them, there they are still in the state of nature . . . ." *Id.* at 51. In emerging from the state of nature,

Concept of Law, articulated the same notion.[4] Hart's central concept was that a legal system is a set of what he called primary rules of obligation to which have been appended secondary rules of recognition (rules for determining what counts as a rule of the system) and rules of adjudication (rules for determining when a particular primary rule has been broken)—both of which are necessarily embodied in Locke's notion of a common judge. Also necessary, for Hart, were rules of change—rules for generating new rules within the system.[5] Hart's position was that all that is necessary for a legal system to exist is for primary rules that are valid according to the rule of recognition to be generally obeyed by the relevant population, and the secondary rules to be accepted as common public standards by the officials of the system.[6] He put this analysis forward as a part of his debunking of the notion that the essence of law is commands of a sovereign authority backed by the threat of punishment and habitually obeyed,

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> all private judgment of every particular member being excluded, the community comes to be umpire by settled standing rules, indifferent and the same to all parties, and by men having authority from the community for the execution of those rules decides all the differences that may happen between any members of that society concerning any matter of right . . . .

Id. at 49.

Having thus taken due note of the fundamental role of an adjudicative office in political society, Locke went on, perhaps not entirely consistently, to issue a ringing declaration that having a legislature, established by consent of the society, is essential to having law, apparently giving no thought to the possibility of legal rules being generated by the decisions of the "common judge." Locke writes:

> [T]he first and fundamental positive law of all commonwealths is the establishing of the legislative power; as the first and fundamental natural law which is to govern even the legislative itself is the preservation of the society and, as far as will consist with the public good, of every person in it. This legislative is not only the supreme power of the commonwealth, but sacred and unalterable in the hands where the community have once placed it; nor can any edict of anybody else, in what form soever conceived or by what power soever backed, have the force and obligation of a law which has not its sanction from that legislative which the public has chosen and appointed; for without this the law could not have that which is absolutely necessary to its being a law: the consent of the society, over whom nobody can have a power to make laws, but by their own consent and by authority received from them.

Id. at 75.

Locke did not include the judicial power in his inventory of the powers of a commonwealth (which he identified as legislative, executive, and what he called "federative"). In this stated position on the essential role of the legislature he anticipated Jeremy Bentham, who reached the same conclusion for a different set of reasons a century later.

4. H.L.A. HART, THE CONCEPT OF LAW 92-96 (1961). Professor Sean Murphy provides a thoughtful analysis of Hart's views in the American Society of International Law's Annual Meeting, during a panel on international law as law, referred to in Sean D. Murphy, *The Concept of International Law,* 103 AM. SOC'Y INT'L L. PROC. 165, 165-69 (2009).

5. *See* HART, *supra* note 4, at 92-96.

6. *See id.* at 113.

propounded by the early Bentham and Bentham's protégé John Austin, and espoused by later writers.[7]

The object of a legal system. Whatever other features might be thought to be required for a system of rule-governed conduct to qualify as a legal system, rules for determining claims within the system occupy a special place. This can be understood by asking what, if anything, is the *object* of a legal system—not in the sense of why people bother to have legal systems in the first place, but in the sense in which games are said to have an object. The object of a game, in this internal sense, is that particular achievement under the rules that all the other rules of the system are designed to make possible. In competitive games, the object is often to score points in greater quantity than one's opponent. The rules of American football provide various moves within the system by which this ultimate move can be achieved, including making a "touchdown." The object of the kids' game of War, if perhaps no longer of war itself in the current age, is victory by eliminating all opposing participants. The object of the rules of a system of accounting might be said to be producing a proper balance sheet at the end of the period. The object of a legal system in this internal sense—the ultimate move that all the rules of the system including its primary rules collectively make possible—is the determination of claims of entitlement under those rules. This is a defining characteristic. In a purely metaphorical sense, law is the claim-game.

III. VIABILITY AND ROLES FOR RECALCITRANTS

So a legal system may continue to operate quite normally even in the face of a serious disinclination on the part of some participants to respect the rules as perceived by other participants. It does so by providing roles as competing claimants within the system into which these contesting parties will necessarily fall, which, if actively pursued, may resolve the problem. But what if this process of adjudication does not suffice to sustain the objectors' inclination to continue participating—what if they just thumb their noses at the referee's determination and prepare to quit the system? An informal game, even with someone appointed referee, is likely to be at the end of its rope when the disinclination to play by the rules becomes a disinclination to play *at all*, and the game will end at least for those players. It has no means of making the very act of getting mad and going home a move in the system.

7. *See id.* at 18-25. For one exposition of Bentham's command theory, see JEREMY BENTHAM, THE LIMITS OF JURISPRUDENCE DEFINED: BEING PART TWO OF AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 101-12 (Charles Warren Everett ed., Columbia Univ. Press 1945) (1789). Austin's account is laid out in his best-known work, published in 1832, THE PROVINCE OF JURISPRUDENCE DETERMINED. *See generally* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE (Weidenfeld and Nicolson 1954) (1832) (including introduction by H.L.A. Hart).

Some legal systems, however, do this. They can add a further tier of roles within the system for such recalcitrant participants, so that by the very act of defying the authoritatively determined requirement of the rules, they involuntarily fall into a role provided within the system just for these recalcitrants. Such roles, moreover, are characteristically designed to be relatively disagreeable—in criminal law in a public legal system, the means of doing so are called "punishment." Many complex games do this, by rules for meting out individual or group sanctions or penalties for participants who have been determined to have violated a rule, and these are often described—instructively—as in response to "illegal" moves within the system. Clubs suspend your right to vote if you do not pay your dues or attend any meetings.

IV. VIABILITY AND THE RULE OF PARTICIPATION WILLY-NILLY

These arrangements for keeping a legal system functioning while it tries to sustain or restore a flagging inclination to participate rest on the premise that there are criteria for being a participant, and that if you meet those criteria, you cannot avoid the unwanted application to you of a system rule by declining to participate when the question arises: participation is not optional. We may call this the rule of participation willy-nilly. "Sorry, I'm not participating in the legal system anymore" is not a defense against any plaintiff, policeman, or prosecutor. (Those who doubt this should try this defense the next time they are pulled over for running a red light.) We are likely to associate this feature only with a full-fledged public legal system or order—one that covers a substantial community of persons, and does the standard, basic work of providing security, defending the sanctity of contracts, collecting taxes, and the like. But the rule of participation willy-nilly can be and is a feature of other systems of rule-governed conduct, including legal systems that are of a much humbler scale. The rule is an unspoken fundamental premise of any system of rule-governed conduct, however rudimentary, even those altogether lacking any adjudicative office, because it is a necessary implication of the concept of a rule and of a system of rule-governed conduct.

Consider: The body politic in the legal system of the game of basketball consists of the players and their coaches on either side; so long as you fall into one of these groups, you are stuck in the system: subject to its penalties, bound by its obligations, and entitled to its rights. There probably is no rule in the system that you can invoke to evade that condition. The same is true of a public legal system. The difference between the two in this respect is not in the internal requirements of the system, but in the practical ease or difficulty with which one can cease meeting the criteria of membership in the class of participants in it. A basketball player can walk out of the game or resign from the team (possibly thereby stumbling into the role of contending claimant within the applicable public legal system). But for a public legal system it is much harder, if possible at all in the

individual case, for a participant to put himself or herself *legally*—as distinguished from practically—beyond the reach of the legal system.

V. VIABILITY AND RULES FOR GENERATING NEW RULES

Many systems of rule-governed conduct, including legal systems, provide the means internally for changing or adding to their rules. This feature can make its own contribution to the viability of the system by enabling it to respond deliberately to potential sources of disaffection with the system, through altering or supplementing its rules to counter or avoid such threats and otherwise responding to changed conditions. But is some mechanism for doing this an essential ingredient of a genuinely legal system? Hart was not the first to answer this question in the affirmative. As already noted, Locke held this view.[8] Jeremy Bentham, who incidentally coined the terms "international" and "international law," spent years in the last decades of the eighteenth century explaining how the common law was not a genuinely legal system because it contained no commands of the sovereign, and moreover, it was riddled with "fictitious entities" like rights and duties.[9] More fundamentally for Bentham, the problem with the common law was that it was hopelessly incapable of being deliberately turned to doing the social jobs that law needed to do: there was no way to take charge of it. Therefore, what was really necessary for a genuine legal system was a legislature, which, if guided by the detailed owners' manual for legislatures that he had formulated (mainly in the form of his best-known work, *The Principles of Morals and Legislation*), would correct the built-in deficiencies of the common law and of English law generally. (Bentham was important in generating the process of law reform through legislation in nineteenth century Britain and the United States that continues to this day and has its analog in the "codification"—another of his neologisms—of international law.)

So what Locke, Bentham, and Hart thought necessary for a genuinely legal system was not just *any* mechanism for generating new rules, but a legislative mechanism, by which new rules can be produced deliberately and with relative efficiency and precision. But the fact that a legislative mechanism carries these potential advantages does not imply that a system consisting only of primary rules based on custom, together with an adjudicator, but lacking a legislature (as was the case for common law and customary international law as stand-alone systems), would not be really legal. The rules of such systems do get changed and added to, but only by the slow process of accumulated decisions reflecting the interpretive inclina-

8. *See* LOCKE, *supra* note 3.

9. Substantial parts of this argument are found in both THE PRINCIPLES OF MORALS AND LEGISLATION and THE LIMITS OF JURISPRUDENCE DEFINED. *See generally* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Oxford at the Clarendon Press 1907) (1789); BENTHAM, *supra* note 7.

tions of individual and substantially autonomous adjudicators, which Bentham found anathema.

VI. INTERNATIONAL LAW AS A SYSTEM OF RULE-GOVERNED CONDUCT

So what do these formal features look like in international law, and how do they work, and how well? On this question it is worth noting that when Hart applied his analysis to international law, he was not all that impressed with it. While he defended the obligatory character of international law, he found it lacking in a "basic rule of recognition," nor, apparently, did he see any legislative or adjudicative function. He concluded that it was not a *system* of rules but a mere *set* of rules, and in that respect was like the "simple form of social structure" of a community having "primary rules of obligation" but none of the other features of a legal system.[10] Now half a century later, with the explosive proliferation of busily functioning treaty-based law and institutions and the putative intrusion of international law into virtually every domain of international concern, this seems an altogether too facile dismissal of international law as law.

A. *Rules for Identifying Rules and Determining Claims*

Consider first the apparatus that international law provides for determining claims within the system. This consists of rules for determining what the rules are (Hart's rules of recognition), together with rules and modes of action for determining what the rules require or permit in particular cases—both of which are necessarily implied in Locke's notion of a common judge, Hart's rules of adjudication, and the idea of a referee in an impromptu game of hide-and-seek in the park. International law does not lack for rules for identifying the rules of the system. Article 38(1) of the Statute of the International Court of Justice, while by its terms a statement of the rule governing law-finding by the Court, is a fair approximation of a universally accepted "rule of recognition" for the whole of public international law, aside perhaps for the relic incorporating the "teachings of the most highly qualified publicists." There is nothing seriously deficient about this rule, now elaborated upon by the Vienna Convention on the Law of Treaties, in comparison (say) to the corresponding rules of recognition of the legal system of the United States. Admittedly, customary international law can be a thicket of imprecision and subjectivity, and may strike the uninitiated as a bit shamanistic, but perhaps only a little more so than the common law. Both of these customary systems have been progressively subjected to piecemeal reformulation by legislation. At any rate, people who *do* international law, not bothering to ponder whether what they are doing is really law, know quite well what counts as a rule of international law and where to find such rules when needed for particular cases.

10. *See* HART, *supra* note 4, at 209, 228-31.

It is with the rules of adjudication—the system's mechanisms for hearing claims and determining what the rules require or permit—that international law finds itself on shakier ground as a legal system. It is not as if international law lacked such mechanisms: there are of course the International Court of Justice itself and the Security Council, each of which has a qualified latent capacity to compel determination of competing claims under the rules of the system, broadly applicable to most or all participants in the system. Beyond these one of the system's cardinal features is a plethora of dispute-settlement mechanisms, especially in the form of treaty regimes with their own dispute-settlement apparatuses.[11]

Often these free-standing regimes are so specialized in the scope of their primary rules and/or limited in the breadth of participation in the regime that their main and possibly only consequential role in or connection with the system as a whole is likely to be via the law of treaties. They depend for their existence on the law of treaties, which also tethers them to the system like a sort of umbilical cord but leaves them free to do their own independent thing. In their content they collectively cover virtually the entire gamut of currently perceived transnational interests, from the fundamentals of trade and commerce to the ephemeral, and on the whole serve as at least a major factor in ordering the conduct of their parties in the areas they cover. Their viability may be aided by the greater or at least more readily apparent mutuality of interests that is likely to be engendered by any specialized contractual arrangement among self-selected participants. As to adjudging compliance with the rules, some regimes have the capacity to compel determination of competing legal claims among parties to the regime. These may develop bodies of specialized jurisprudence within the confines of their own constituent instruments, analogous to that developed within the regulatory regimes of administrative agencies in the American system, and from time to time they will contribute to the further elaboration of general treaty law through individual decisions. The latter benefits, however, are harvested—if at all—only through the diligent searches of lawyers (now increasingly assisted by digital technology) rather than more-or-less automatically through the rationalizing scrutiny of a centralized hierarchical judicial system.

The latter is also true of arbitral decisions based on international law, in which international law stands to the arbitration as *Robert's Rules of Order* stands to the neighborhood garden club—a handy but perhaps dispensable tool. In such dispute settlement it is the substantive or primary rules, rather than the rules of adjudication, that are provided by international law, except to the extent that procedural rules for arbitration may be embodied in a treaty regime. The rules of adjudication, from whatever source, are temporarily grafted onto international law on an ad hoc basis,

11. See Murphy, *supra* note 4, at 169, for a comment on the extent to which contemporary international law exhibits Hart's "secondary rules."

in dispute-settlement cases that may arise by mutual consent or pursuant to pre-existing legal obligation between the parties.

Throughout, the distinguishing feature of international law in this respect is that, in a high proportion of instances, the employment of rules of adjudication in particular cases of competing claims turns out to be *optional* at the discretion of the participant seeking to avoid the application of a primary rule of the system, although in some specialized circumstances resolution is compulsory. This state of affairs is in sharp contrast to a national legal order in which the default rule is that the resolution of competing claims under the rules can be compelled, even though many are resolved formally or informally by mutual consent. But this state of affairs is not necessarily a bad thing—far from it—or, given the nature of the community served, one that could be radically different in the short term. It is indeed an important fact about international law that any two or more states with competing claims under the rules of the system can, and very frequently do, obtain resolution of their differences through invoking readily available procedures by mutual consent (and incidentally generally respect the outcome). Overall, the array of disparate dispute-settlement mechanisms often provides the most efficient way available of getting the practical work of that community done on a very wide range of practical concerns.

B. *Roles for Recalcitrants in International Law*

Still, international law of course faces the challenge of protecting itself by providing effective roles for recalcitrants against the system. To understand what international law can do to this end we need to look first at the rule of participation willy-nilly as it exists within it. One can make a good case that this implicit rule is accepted as an underlying premise of the system by the entire community of states (leaving aside individual human beings, which are also cast in the role of potential recalcitrants by the law of war and of human rights and the newly institutionalized international criminal law). No state, so far as I am aware, now claims not to be bound as a participant in the international legal order. This may be because governments feel they do not really need to do so in order to avoid significant consequences from occasionally bucking the rules, and perhaps also because even rogue states would be reluctant to relinquish the ability to hold other states to fundamental obligations concerning territorial integrity and treaty relations. Even certain less radical expressions of disaffection with international law, such as the claim once common among states newly minted by decolonization that international law was a tool of western imperial interests, are no longer very fashionable, perhaps in part as a result of the major codification efforts since the middle of the twentieth century in which all states have had the opportunity to participate.

It might be thought that that peculiar feature of customary international law that permits a "persistent objector" to a particular rule of cus-

tomary law to avoid being bound by that rule would negate the existence of a rule of participation willy-nilly in international law. On the contrary, the persistent objector rule is itself a rule of the system. In invoking it, a state is necessarily participating in the system, and to do so successfully must demonstrate that it has met criteria prescribed by the system.

The more important question, however, is: if the system manages to surmount the formal and political obstacles to arriving at an adjudication of serious non-compliance, what does this putatively universal acceptance of participation in the international legal system count for in practice? The answer, I believe, is that it is more likely to affect a recalcitrant state's formulation of its exculpatory argument than to induce compliance with the judgment. To the extent that a government perceives serious interests at stake, spokespersons in foreign offices will find a way to justify the state's continued non-compliance, but without implying any diminution of its commitment to international law or, even less, any doubt as to the existence of an international legal system—positions which it is understood would entail a certain political cost in reputation within the international community.

What international law, like any legal system, needs in each such case is the capacity to affect the recalcitrant state's calculation of costs by making the role into which it has fallen materially disagreeable, as by authorizing actions by other states such as military operations or economic sanctions or countermeasures, and it is notoriously the case that international law often lacks this capacity. The instances where this can be done in the absence of more specific obligations undertaken through treaty or other agreement are statistically pretty rare (the Korean and Gulf Wars come to mind). Most matters before the Security Council do not produce enforcement action by the Council even where non-compliance is manifest, either because the Council could not bring itself to determine that law had been violated and impose legal obligations by acting under Chapter 7 of the Charter in the first place, or because, having done so, it could not agree on enforcing them. A state successfully sued in the International Court of Justice stands a substantially better chance than an unsuccessful litigant in a U.S. court of being able to defy the judgment without consequences sufficiently onerous to induce a change in its calculus of costs and benefits.

Large cases of failure, or less frequently of success, in bringing a recalcitrant state into compliance with determinations of a violation of fundamental legal obligations such as the prohibition on the use of force tend to be taken as the paradigm in judging the efficacy of international law as a whole and, by some, its very legal character. In making such judgments, however, it is important to allocate blame or credit accurately as between the formal characteristics of the legal system that may act as barriers to effective action and the political milieu in which the institutions of the system operate. The United Nations Charter provides the veto—one such

formal constraint on effective action—but *using* the veto to constrain action is a matter of political choice, just as is filibustering a bill in the United States Senate to impede the legislative process. And while it is true that if the Charter did not provide the veto, the Security Council would probably act more frequently to determine violations of law and deal with them with the appearance of greater stringency, whether that would mean greater compliance with the Charter is debatable, to say the least. Similar skepticism is justified about the practical benefits, in terms of the general level of lawless conduct among states, of conferring universal mandatory jurisdiction on the International Court of Justice or any combination of international courts.

In any event, for an accurate account of the methods of international law in dealing with recalcitrants, and a fair assessment of their efficacy, we must look closely at the various more-or-less self-contained treaty regimes discussed earlier that include (or make available at the participant's option) modes of determining what the rules of the regime require in particular cases, and, for some regimes, some form of sanction applicable to recalcitrants for non-compliance. And certainly we must take account of what is being done in national courts. Assessments will vary radically from entity to entity: treaty regimes would be found to cover the whole gamut from mandatory and otherwise strong to voluntary and otherwise flimsy, but this is where much of the most rigorously legal action in the international legal system is to be found. Such international law skeptics as may remain might be surprised to see the wide array of forums in which law is being routinely done in a way that looks much more like law being done in other legal systems than they might suppose, and with a much better record of ultimate compliance, considering the basic differences between the international legal order and a highly developed national system.

VII. GENERATING NEW RULES IN INTERNATIONAL LAW

Finally, what about international law's mechanisms for introducing new rules into the system?

I have already taken issue with the proposition, espoused by Locke, Bentham, and Hart, that a system lacking a legislative function would not qualify as "legal." However one wishes to resolve this taxonomic issue as to customary international law by itself, it is clear that international law, including customary international law, is well-supplied with the means to generate new rules. While international law has no general legislative office, the multilateral treaty-making power can serve as a reasonable approximation of it, depending on the breadth of states' participation on each occasion in which it is employed and in the resulting agreement. This is particularly true in a few instances where the treaty-making process is buttressed by a reasonable supposition that the rules generated by a broad-based codification effort have become, by operation of the principles by which customary law evolves, reflective of the general practice of

states and thus a part of the body of general international law. Beyond this, treaty-making has been used to generate those many specialized regimes of rules among limited groups of self-selected participants, as we have seen, and within some of these regimes has been further used to create something more nearly resembling a genuine legislative function by which new rules can be introduced without fully invoking the treaty-making function. And of course, customary international law, though shrunken by the inroads of codification, still plods ahead along its evolutionary course, and judicial decisions at every level are lively contributors to the development of general international law, despite whatever ambivalence there may be in the international system about the role of judicial precedent.

So international law has ample rule-making mechanisms, albeit vastly less efficient and less easily employed than that of parliaments in national constitutional systems (not that they themselves are always models of efficiency). Codifying international law is more akin to amending the United States Constitution than to adopting an act of Congress. But these mechanisms should be understood as probably all that the traffic will be able to bear for the international legal system as a whole for a long time to come, considering the fractious and fragmented nature of the international body politic.

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We may conclude that, as Bishop Butler would remind us, the system of rule-governed conduct that we know as international law is what it is and not another thing. It is like other systems of rule-governed conduct, including legal systems, in important respects, usually differing from them more in degree than in kind, and is in the end unique. It is a legal system for the same reasons that the legal systems of Belgium, imperial Rome, and the Commonwealth of Massachusetts are (or were) legal systems. But its legal character is not worth much fretting over, for those working in the system understand perfectly well not only how to find the law in the system, as already noted, but how to advise governments or other clients as to the likelihood of success or frustration in their attempts to pursue their interests through legal means, and which institutions work well and which do not—precisely the same set of understandings that are the working tools of any practitioner of law. They understand the system—its strengths and limitations, its high degree of fragmentation, and its underlying linkages, both internally and to national systems—and go about doing what people similarly positioned do in any other working legal order.