Series Editors’ Preface

The importance of understanding how international law comes into being is too obvious to dwell upon. However, this subject is usually approached in a rather formalistic fashion, focusing on the ‘sources’ of international law as traditionally understood with various ‘non-traditional’ modes of norm generation added as something of an afterthought. Alan Boyle and Christine Chinkin approach the generation of international law from a wholly different perspective, focusing on the actors, systems, and processes by whom and through which international law is generated rather than upon the forms into which that law is categorised. This approach unites norm creation with the interpretation, application, and development of international law, resulting in a more subtle, but far richer, vision of the making of international law. As such, this volume exemplifies the ambition of the Foundations of Public International Law series, which seeks to offer insightful expositions of key elements of international law which will inform and stimulate debate. There is no doubt that this agenda-setting work will do both.

Malcolm D. Evans
Phoebe N. Okowa

October 2006
Preface

This is a study of the principal multilateral processes and law-making tools through which contemporary international law is made. It does not seek to give an account of the traditional—and untraditional—sources and theories of international law, but rather to identify the processes, participants and instruments employed in the making of international law. It accordingly examines some of the mechanisms and procedures whereby new rules of law are created or existing rules are amended or abrogated. It concentrates on the UN, other international organisations, diplomatic conferences, codification bodies, NGOs and courts. Some of these bodies take decisions by majority vote, but more often consensus law-making has become the norm. We examine the implications of this development in an enlarged international community where law-making is no longer the exclusive preserve of states.

Every society perceives the need to differentiate between its legal norms and other norms of social, economic and political behaviour. But unlike domestic legal systems where this distinction is typically determined by constitutional provisions, the decentralised nature of the international legal system makes this a complex and contested issue. Moreover, contemporary international law is often the product of a subtle and evolving interplay of law-making instruments, both binding and non-binding, and of customary law and general principles. Only in this broader context can the significance of so-called ‘soft law’ and multilateral treaties be fully appreciated.

An important question posed by any examination of international law-making structures is the extent to which we can or should make judgments about their legitimacy and coherence, and if so in what terms. Put simply, a law-making process perceived to be illegitimate or incoherent is more likely to be an ineffective process. From this perspective, the assumption of law-making power by the UN Security Council offers unique advantages of speed and universality, but it also poses a particular challenge to the development of a more open and participatory process observable in other international law-making bodies. The range and diversity of these bodies provide another challenge to the coherence and systemic character of international law. While the specialised agencies, commissions and programmes of the United Nations illustrate the value of specialisation and expertise, they also contribute to the fragmentation of international law-making as a whole, through what Koskenniemi calls ‘functional differentiation’. The risk is that there may then be competition between different subsystems of law and the values promoted by different international law-making institutions. Courts provide the ultimate affirmation for law-making undertaken by international organisations, treaty conferences and the International Law Commission. They can bring
some measure of coherence to this fragmented institutional setting, insofar as they have to adjudicate on the inter-relationship of different norms, but they can do so only sporadically and are dependent on the establishment of jurisdiction. Moreover, the proliferation of international judicial tribunals creates its own problems. Most of these tribunals exercise specialised and limited jurisdiction outside any hierarchical structure and they do not necessarily have power to apply international law as a whole.

Understanding the character of contemporary international law-making is thus a complex and subtle undertaking. We do not pretend to have covered all of its aspects comprehensively. Our interest in the topic and some of our thinking reflect our own special interests, as well as the LLM teaching we both undertake in the subjects covered by this book. Our material has been chosen to illustrate the main themes, not to provide an encyclopedic treatment. A great many people in international organisations, NGOs, the International Law Commission and the United Kingdom Foreign and Commonwealth Office have been especially helpful and encouraging to us during our research for this book; their willingness to talk about international law-making and the experience of their own organisations provided us with a wealth of material, not all of which we have been able to use. Nevertheless, we cannot claim to offer the reader more than a selective snapshot of contemporary law-making processes. Their diversity and dynamics provide ample scope for further study and different points of view, but for anyone who reads this book from beginning to end the importance of understanding multilateral law-making in today’s world is plain to see. We hope that something of our enjoyment in thinking about the topic has survived the writing.

Alan Boyle and Christine Chinkin
Edinburgh
July 2006
Acknowledgements

A great many people have helped make this book possible. The Leverhulme Trust provided funding for the research, including several visits to the UN in New York and Geneva, the FAO in Rome, and the WTO. We are immensely grateful to them and to our referees, Vaughan Lowe, David Freestone and Colin Warbrick, for their indispensable support. Iain McLeod, Alice Lacourt and Susan Macrory of the British missions in New York and Geneva went out of their way to facilitate access to meetings and people, and were the source of a lot of useful information and ideas in the early stages of our work. Louise de La Fayette of the UN Office of Legal Affairs and Bill Edeson and his colleagues at FAO were equally invaluable in the later stages. Tony Aust, Elizabeth Wilmshurst and John Grainger, all serving or former FCO lawyers, responded patiently and effectively to our questions about law-making processes and saved us from various misconceptions. Vaclav Mikulka arranged access to several sessions of the International Law Commission in Geneva, where Ian Brownlie, P. S. Rao, John Dugard, Alan Pellet, Bob Rosenstock and Bill Mansfield were especially supportive and hospitable, although they may not necessarily share the views we express about the Commission. Ralph Zacklin of the UN Secretariat, Gabrielle Marceau of the WTO, Edward Kwakwa and Tom Takahashi of WIPO, Francis Maupain of ILO, Gian Luca Burci of WHO, Mojtaba Kazazi of the UNCC, Louise Doswald-Beck of the International Commission of Jurists, Jelena Pejic of the ICRC, Melinda Ching of Amnesty International, Frieder Roessler of the Advisory Centre for WTO Law, Martin Stanford of UNIDROIT, and Professor Sir Nigel Rodley of Essex University all gave us much to think about and helped focus our initial ideas. We have not shared our analysis or our conclusions with any of them, so they bear no responsibility for the outcome of our research. Several academic colleagues have given us the benefit of their specialist knowledge, and we are particularly indebted to Sir Roy Goode, Campbell MacLachlan, Lorand Bartels, Joost Pauwelyn, Jutta Brunée and Matthew Happold for their help. If we are still at sea on several issues the fault is not theirs. Our tireless research assistants, Sam McIntosh, Mark Gillespie, Felicity Stewart, Neil Craik, Neville Sorab and Emma Harling-Phillips have assembled material, drafted tables and remained cheerful and invaluable in innumerable ways. We are immensely grateful to all of them. Special thanks from Alan Boyle are owed to Drew and Simona Stirling for arranging the loan of an apartment in Geneva during his visits there, and to Bill Edeson and his wife for their hospitality at home on the shores of Lake Bracciano while visiting FAO. There can be few more delightful ways to appreciate the law relating to food and agriculture. Last but not least, John Louth of OUP has been supportive and above all patient in waiting for a manuscript that took rather longer to deliver than even he might have expected.
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# Abbreviations

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<td>AALCC</td>
<td>Asian–African Legal Consultative Committee</td>
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<td>Appeal Chamber</td>
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<td>African Court of Human and Peoples’ Rights</td>
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<td>Amnesty International</td>
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<td>AJIL</td>
<td>American Journal of International Law</td>
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<td>Am UJILP</td>
<td>American University Journal of International Law and Policy</td>
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<td>Butterworths Human Rights Cases</td>
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<td>BIT</td>
<td>Bilateral Investment Treaty</td>
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<td>BJIL</td>
<td>Brooklyn Journal of International Law</td>
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<td>BYBIL</td>
<td>British Yearbook of International Law</td>
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<tr>
<td>CACT</td>
<td>Central American Court of Justice</td>
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<td>Cardozo LR</td>
<td>Cardozo Law Review</td>
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<tr>
<td>CBD</td>
<td>Convention on Biological Diversity</td>
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<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
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<tr>
<td>CERD</td>
<td>Committee on the Elimination of Racial Discrimination</td>
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<tr>
<td>CESCR</td>
<td>Committee on Economic, Social and Cultural Rights</td>
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<tr>
<td>CHR</td>
<td>Commission on Human Rights</td>
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<tr>
<td>CITES</td>
<td>Convention on International Trade in Endangered Species of Wild Fauna and Flora</td>
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<td>CMI</td>
<td>Comité Maritime International</td>
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<td>Col HRLR</td>
<td>Columbia Human Rights Law Review</td>
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<tr>
<td>Col JIELP</td>
<td>Colorado Journal of International Environmental Law and Policy</td>
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<td>Col JTL</td>
<td>Columbia Journal of Transnational Law</td>
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<td>CONGO</td>
<td>Conference of Non-Governmental Organisations</td>
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<td>COP</td>
<td>Conference of the Parties</td>
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<td>COPUOS</td>
<td>Committee on Peaceful Uses of Outer Space</td>
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<td>CSW</td>
<td>Commission on the Status of Women</td>
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<td>CTR</td>
<td>Claims Tribunal Reports</td>
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<td>CYBIL</td>
<td>Canadian Yearbook of International Law</td>
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<td>DRC</td>
<td>Democratic Republic of the Congo</td>
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<td>DSB</td>
<td>Dispute Settlement Body</td>
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<td>Dispute Settlement Understanding</td>
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<td>EC</td>
<td>European Community</td>
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<td>Abbreviation</td>
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<tr>
<td>ECOSOC</td>
<td>Economic and Social Council</td>
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<td>ECOWAS</td>
<td>Economic Community of West African States</td>
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<td>EJIL</td>
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<td>Env Pol &amp; Law</td>
<td>Environmental Policy and Law</td>
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<td>EU</td>
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<td>EWCA</td>
<td>England and Wales, Court of Appeal</td>
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<td>FAO</td>
<td>Food and Agriculture Organisation</td>
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<td>FCTC</td>
<td>Framework Convention on Tobacco Control</td>
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<td>GAOR</td>
<td>General Assembly Official Records</td>
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<td>GATS</td>
<td>General Agreement on Trade in Services</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>GC</td>
<td>Grand Chamber</td>
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<td>Georgia JICL</td>
<td>Georgia Journal of International and Comparative Law</td>
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<td>GMO</td>
<td>Genetically modified organisms</td>
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<td>Harv HRYB</td>
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<td>HNS</td>
<td>Hazardous and noxious substances</td>
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<td>HRQ</td>
<td>Human Rights Quarterly</td>
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<td>IACHR</td>
<td>Inter-American Court of Human Rights</td>
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<td>IAEA</td>
<td>International Atomic Energy Agency</td>
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<td>IATA</td>
<td>International Air Transport Association</td>
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<td>ICAO</td>
<td>International Civil Aviation Organisation</td>
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<td>ICBL</td>
<td>International Campaign to Ban Landmines</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICISS</td>
<td>International Commission on Intervention and State Sovereignty</td>
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<td>International Court of Justice</td>
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<td>ICLQ</td>
<td>International and Comparative Law Quarterly</td>
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<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>ICSID</td>
<td>International Centre for the Settlement of Investment Disputes</td>
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<td>ICSU</td>
<td>International Council of Scientific Unions</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
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<td>IFRS</td>
<td>International Financial Reporting Standards</td>
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<td>IGO</td>
<td>Intergovernmental Organisation</td>
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<td>IJMCL</td>
<td>International Journal of Marine and Coastal Law</td>
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<td>Abbreviation</td>
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<tr>
<td>ILA</td>
<td>International Law Association</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>ILM</td>
<td>International Legal Materials</td>
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<td>ILO</td>
<td>International Labour Organisation</td>
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<td>International Law Reports</td>
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<td>IMO</td>
<td>International Maritime Organisation</td>
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<td>INB</td>
<td>Intergovernmental Negotiating Body</td>
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<td>Indian JIL</td>
<td>Indian Journal of International Law</td>
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<td>Institut</td>
<td>Institut de Droit International</td>
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<td>Int Org</td>
<td>International Organization</td>
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<tr>
<td>IPU</td>
<td>Inter-Parliamentary Union</td>
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<td>ISO</td>
<td>International Standards Organisation</td>
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<td>ITLOS</td>
<td>International Tribunal for the Law of the Sea</td>
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<td>IUCN</td>
<td>International Union for the Conservation of Nature</td>
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<td>IUU</td>
<td>Illegal, unreported and unregulated (fishing)</td>
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<td>JEL</td>
<td>Journal of Environmental Law</td>
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<td>JMLC</td>
<td>Journal of Maritime Law and Commerce</td>
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<td>JWT</td>
<td>Journal of World Trade</td>
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<td>LJIL</td>
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<td>MAI</td>
<td>Multilateral Agreement on Investment</td>
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<td>MARPOL</td>
<td>1973/78 Convention for the Prevention of Marine Pollution from Ships</td>
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<td>Max Planck</td>
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<td>Millennium Development Goals</td>
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<td>Multilateral Environmental Agreement</td>
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<td>Mich JIL</td>
<td>Michigan Journal of International Law</td>
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<td>MLR</td>
<td>Modern Law Review</td>
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<td>MNF</td>
<td>Multinational Force</td>
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<td>MOP</td>
<td>Meeting of the Parties</td>
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<td>MSC</td>
<td>Maritime Safety Committee</td>
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<td>NAFTA</td>
<td>North American Free Trade Area</td>
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<td>New Approaches to International Law</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organisation</td>
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<td>Non-Governmental Organisation</td>
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<td>NIEO</td>
<td>New International Economic Order</td>
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<td>Nig SCt</td>
<td>Nigerian Supreme Court</td>
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<td>NILR</td>
<td>Netherlands International Law Review</td>
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<td>Northwestern</td>
<td>Northwestern University Law Review</td>
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<td>NRJ</td>
<td>Natural Resources Journal</td>
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<td>NYBIL</td>
<td>Netherlands Yearbook of International Law</td>
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Abbreviations

NYU Environmental LJ
New York University Environmental Law Journal
NYU JILP
New York University Journal of International Law and Politics
OAS
Organization of American States
OAU
Organization of African Unity
ODIL
Ocean Development and International Law
OECD
Organisation for Economic Cooperation and Development
OHCHR
Office of the High Commissioner for Human Rights
OPCW
Organisation for the Prevention of Chemical Weapons
OSPAR
Convention for the Protection of the Marine Environment of the North-East Atlantic
Oxford JLS
Oxford Journal of Legal Studies
PCA
Permanent Court of Arbitration
PCIJ
Permanent Court of International Justice
Prepcom
Preparatory Committee or Commission
P5
The Five Permanent Members of the Security Council
RIIA
Royal Institute of International Affairs
SC
Supreme Court
SAARC
South Asian Association for Regional Cooperation
SARS
Severe Acute Respiratory Syndrome
SCCR
Scottish Criminal Cases Reports
S-G
Secretary-General of the United Nations
S-G SR
Secretary-General's Special Representative
SLO
Senior Legal Officer
SOLAS
1974 Convention on the Safety of Life at Sea
SPS
Sanitary and Phytosanitary Measures Agreement
Stan JIL
Stanford Journal of International Law
Swiss YBIL
Swiss Yearbook of International Law
TBT
Technical Barriers to Trade Agreement
TC
Trial Chamber
Texas ILJ
Texas International Law Journal
TNC
Transnational Corporation
TRIMS
Agreement on Trade-Related Investment Measures
TRIPS
Agreement on Trade-Related Aspects of Intellectual Property Rights
TWAIL
Third World Approaches to International Law
UDHR
Universal Declaration of Human Rights
UKHL
United Kingdom, House of Lords
UN
United Nations
UNAT
United Nations Administrative Tribunal
UNCED
United Nations Conference on Environment and Development
UNCITRAL United Nations Commission on International Trade Law
UNCLOS I First United Nations Conference on the Law of the Sea
UNCLOS III Third United Nations Conference on the Law of the Sea
UNCTAD United Nations Conference on Trade and Development
UNDP United Nations Development Programme
UNEP United Nations Environmental Programme
UNESCO United Nations Educational, Scientific and Cultural Organisation
UNGA United Nations General Assembly
UNHCR United Nations High Commissioner for Refugees
UNHRC United Nations Human Rights Committee
UNIDROIT International Institute for the Unification of Private Law
UNITAR United Nations Institute of Training and Research
University of Richmond LR University of Richmond Law Review
UNSC United Nations Security Council
USSR Union of Soviet Socialist Republics
UNTS United Nations Treaty Series
Vand JTL Vanderbilt Journal of Transnational Law
VCLT Vienna Convention on the Law of Treaties
VJIL Virginia Journal of International Law
V-P Vice President
WEDO Women’s Environment and Development Organisation
WHO World Health Organisation
WIPO World Intellectual Property Organisation
Wis ILJ Wisconsin International Law Journal
WLR Weekly Law Reports
WMO World Meteorological Organisation
WTO World Trade Organisation
Yale LJ Yale Law Journal
YBIEL Yearbook of International Environmental Law
YBILC Yearbook of the International Law Commission
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