This book sets out to explain the most foundational aspect of international law in international relations terms. By doing so it goes straight to the central problem of international law – that although legally speaking all States are equal, socially speaking they clearly are not. As such it is an ambitious and controversial book which will be of interest to all international relations scholars and students and practitioners of international law.

Michael Byers is a Fellow of Jesus College, Oxford and Visiting Fellow, Max-Planck-Institute for Comparative Public Law and International Law, Heidelberg.
Custom, Power and the Power of Rules

*International Relations and Customary International Law*

Michael Byers
It is true that politics are not law, but an adequate notion of a body of law cannot be gained without understanding the society in and for which it exists, and it is therefore necessary for the student of international law to appreciate the actual position of the great powers of Europe.

John Westlake, *Chapter on the Principles of International Law* (Cambridge: Cambridge University Press, 1894) 92

Law is regarded as binding because it represents the sense of right of the community: it is an instrument of the common good. Law is regarded as binding because it is enforced by the strong arm of authority: it can be, and often is, oppressive. Both these answers are true; and both of them are only half truths.

Edward Hallett Carr, *The Twenty Years’ Crisis* (2nd ed.) (London: Macmillan, 1946) 177
# Contents

Foreword by James Crawford ix  
Preface xi  
Acknowledgments xiv  
Table of cases xvi  
Table of treaties xix  
List of abbreviations xxi  

## Part 1  An interdisciplinary perspective

1 Law and power 3  
   Some working assumptions 13  
   Power and the study of international law 15  
   *Opinio juris*, the customary process and the qualifying effects of international law 18  

2 Law and international relations 21  
   Regime theory and institutionalism 24  
   The ‘English School’ 31  

3 Power and international law 35  
   Power and the debate about whether resolutions and declarations constitute State practice 40  
   Power and the scope of international human rights 43  
   Power and critical legal scholarship 45  
   Power as a threat to international law? 46  

## Part 2  International law and the application of power

4 The principle of jurisdiction 53  
   Jurisdiction and customary international law 55  
   Internal rules 57  
   Boundary rules 60  
   External rules 65  
   Jurisdiction by analogy 69  

5 The principle of personality 75  
   Diplomatic protection 79  
   The ‘international minimum standard’ 82  
   Stateless persons and refugees 84  
   Non-governmental organisations 86  
   vii
6 The principle of reciprocity
   Reciprocity and the making of claims 90
   The Truman Proclamation 90
   The Arctic Waters Pollution Prevention Act 92
   An Act to Amend the Coastal Fisheries Protection Act 97
   Reciprocity and negative responses to claims 101
   Reciprocity and persistent objection 102

7 The principle of legitimate expectation
   Legitimate expectation, acquiescence and customary international law 106
   Legitimate expectation and international institutions 107
   Legitimate expectation and relative resistance to change 109
   Legitimate expectation and mistaken beliefs in pre-existing rules 110
   State immunity from jurisdiction 110
   The breadth of the territorial sea 114
   Legitimate expectation and judgments of the International Court of Justice 120
   Legitimate expectation and treaties 124

Part 3 The process of customary international law

8 Fundamental problems of customary international law
   The chronological paradox 130
   The character of State practice 133
   The epistemological circle 136
   Inferred consent 142

9 International relations and the process of customary international law
   The determination of ‘common interests’ 151
   ‘Cost’ and the identification of legally relevant State practice 156
   Repetition and relative resistance to change 157
   Time and repetition 160
   The conspicuous character of some common interests 162

10 Related issues
   Customary international law and treaties 166
   The persistent objector 180
   Jus cogens 183
   Jus cogens and erga omnes rules 195

11 Conclusions
   Distinguishing the ‘New Haven School’ 207
   A response to Koskenniemi 210
   The interdisciplinary enterprise 214
   Reconsidering the ‘realist’ assumptions 216

Bibliography 222
Index 247
Foreword

The subject of customary international law as a general phenomenon is hardly more suitable for graduate research students in international law than Fermat’s last theorem used to be for their counterparts in mathematics. The central puzzles of a discipline, which generations of its senior professionals have failed to solve, are usually better approached from the edges, and indirectly. Light may thus be shed on the centre, but there is less risk of complete failure. So when Michael Byers came seeking to work on custom it seemed sensible to look not frontally at the ‘problem’ as such, but at a number of examples of different kinds of custom in transition, at different contexts where, we could be relatively sure from the communis opinio, a particular customary rule existed and had changed. What were the factors that had produced the change; how had they interrelated; what influence did the ‘structure’ of the particular problem exercise – for example, what difference did it make on the evolution of a particular institution or custom that the issue characteristically arose in one forum (national courts in the case of state immunity, foreign ministries in the case of the breadth of the territorial sea)? At least it was a starting point.

It says much for the energy and initiative of its author that the resulting book tackles these particulars within the framework of a study seeking to show the ways of international lawyers to the scholars of international relations. Of course international relations has been studied within the disciplines of history, ethics and law for as long as those disciplines have existed. But there was a particular point in focusing on ‘international relations’. As a self-conscious academic discipline it is of recent origin and has its own special history and orientation. The history is tied up with the failure of idealism, legalism and the League of Nations. So far as international law is concerned, its orientation is, or at least was, strongly influenced by the fact that early exponents such as Hans Morgenthau were versed in the subject and saw themselves as reacting from it – not so much in its lower reaches, those parts of the routine conduct of diplomatic and inter-state relations which the first generation scholars rarely
reached, and which could safely be left to be ‘influenced’ by international law, but in the great affairs of state, and in particular in relation to the use of force. There was tension between the claim of international law, as embodied in the Charter and in decisions of the International Court, to regulate the use of force and the assertions of certain most powerful States, and of certain of their scholars, that force could be used in international relations as a matter of policy on any sufficient occasion, and that the language of diplomacy on those occasions was merely cosmetic. A further feature of the international relations literature has been its dominant focus in and on the United States. True, the involvement of the United States as superpower in any case can always be presented as involving a difference of kind, and it may indeed do so. But the combined emphases on the use of force and on the United States produced, at least until recently, a view of the world amongst international relations scholars which had a quite different feel – as if arising from a studied determination to grasp only one part of the elephant.

For a variety of reasons this situation is changing, and more balanced appraisals of the links between international law and international relations are becoming possible. Dr Byers’ study is one such appraisal; but it also makes a contribution to an understanding of the process of international law, a process which is something more than a flux. While doing more than he started out to do, it also demonstrates, on modest assumptions as to the underpinnings of international law, its distinct character and power – though not by any formal proof. One result is to suggest a need to recast the tradition of realism itself in more realistic, that is to say in more comprehensive and representative, terms.

JAMES CRAWFORD
Whewell Professor of International Law
Lauterpacht Research Centre for International Law
University of Cambridge
Preface

At the beginning of his or her career, every international lawyer has to grapple with the concept of customary international law, with the idea that there are informal, unwritten rules which are binding upon States. This is because there remain important areas of international law, such as the laws of State responsibility and State immunity, where generally applicable treaties do not exist. And despite the lack of an explicit, general consent to rules in these areas, no international lawyer doubts that there is a body of law which applies to them.

I stumbled into the quagmire of customary international law very early in my legal career, in the autumn of 1989. It was during the second year of my law studies when, as a member of McGill University's team in the Jessup International Law Moot Court Competition, I was assigned to write those sections of our memorials that concerned customary international law. Having written what I thought was a thorough analysis of 'opinio juris' (i.e., subjective belief in legality) and State practice concerning the issue of maritime pollution in the Antarctic, I was struck by how difficult it was to explain this 'law' to my teammates. They, quite rightly, were concerned about how to present our arguments in a convincing manner, and theoretical discussions of subjective belief seemed far too amorphous to take before judges. In the end, we decided to focus on what States had actually done – i.e., State practice – rather than what States may or may not have believed they were required to do. Not surprisingly, this incident left me convinced that there was something wholly unsatisfactory about traditional explanations of customary international law.

At the same time, the problems of customary international law seemed related to a more general problem that I had already encountered. Having come to the study of law after a degree in international relations, I soon began to identify the distinction between 'opinio juris' and 'State practice' with the distinction between international law and international politics, between what States might legally be obligated to do, and what they actually did as the result of a far wider range of pressures and opportunities. Moreover, the lack of interest in international law among most of the
international relations scholars I had encountered, combined with the apparent lack of interest among most international lawyers in the effects of political factors on law creation, suggested to me that there was something unsatisfactory in this area as well.

In the intervening decade, thinking about the relationship between international law and international politics has advanced significantly, to the point where interdisciplinary studies now constitute an important part of both academic disciplines. Relatively few international relations scholars still doubt whether international law actually exists. Instead, they are increasingly interested in regimes, institutions, the processes of law creation, and in why States comply with rules and other norms.

International lawyers, for their part, are demonstrating an increasing interest in international relations theory. Regime theory and institutionalism, in particular, are now being applied by a number of legal academics in their work on international law. Yet, though a vast amount has been written about customary international law, relatively few writers have examined the relationship between law and politics within this particular context. In an area of law that is constituted in large part by State practice, and which would therefore seem particularly susceptible to the differences that exist in the relative affluence or strength of States, this would seem to be a serious omission. Fortunately, calls are now being made to remedy the situation, with Schachter, among others, writing that the ‘whole subject’ of the ‘role of power in international law ... warrants empirical study by international lawyers and political scientists’.1

The time may be particularly ripe for such an investigation of the role of power in customary international law. The international situation has changed profoundly in recent years, not only as a result of the end of the Cold War, the disintegration of the Soviet Union and the demise of most command economies. The earlier process of decolonisation, the acquisition by non-industrialised States of a numerical majority in many international organisations, and the economic resurgence of Western Europe and the Pacific Rim have all contributed to reducing and rearranging relative power advantages and disadvantages. As a result of these new power relationships, new ideas such as the concept of democratic governance in international law are appearing, and the extreme politics of East–West, North–South confrontation have at last given way to a more complex situation which may be more conducive to objective academic analysis.

These dramatic changes may also be at least partly responsible for the increasing interest that many international relations scholars have in international institutions and international law. Numerous new interna-

1 Schachter (1996) 537.
tional institutions are appearing at the same time that many old institutions are becoming more effective. The international system is, arguably, becoming more refined, complex and less dependent on applications of raw power. As we reach the turn of the century, international relations scholars clearly find themselves having to address such new complexities.

Within this new environment, this book seeks to provide a balanced, interdisciplinary perspective on the development, maintenance and change of customary international law. By doing so, it hopes to assist both international lawyers and international relations scholars better to understand how law and politics interact in the complex mix of 'opinio juris' and 'State practice' that gives rise to customary rules.

This book is a substantially revised version of a PhD thesis that was submitted to the Faculty of Law at the University of Cambridge on 1 May 1996. The thesis was supervised by Professor James Crawford and examined by Dr Vaughan Lowe and Professor Bruno Simma in Munich, Germany on 16 July of that same year. An earlier attempt at expressing some of the ideas developed in the thesis was published in November 1995 in the *Michigan Journal of International Law*. That article, entitled 'Custom, Power and the Power of Rules: An Interdisciplinary Perspective on Customary International Law', represented an early state of my thinking on the interaction of law and politics within the context of customary international law. Many of my ideas have changed since that article was published and my thesis submitted: some have been developed further, several have been abandoned and a few have been replaced. This book is also a much more extensive treatment of the issues.

MICHAEL BYERS
Jesus College, Oxford
Acknowledgments

The writing of a doctoral dissertation and its subsequent modification is often portrayed as a lonely experience, as much a test of one’s fortitude in dealing with intellectual seclusion as a test of academic ability. Fortunately, this has not been my experience. I benefited greatly from the assistance, encouragement and friendship of many individuals, only a few of whom I am able to thank here.

During the course of writing my dissertation and in subsequently seeking to improve upon it my work received much needed criticism from the following people: Philip Allott, Blaine Baker, Ian Brownlie, Bob Byers, James Crawford, Deborah Cresswell, Anthony D’Amato, Anne Denise, Carol Dixon, Emanuela Gillard, Peter Haggenmacher, Benedict Kingsbury, Martti Koskenniemi, Heike Krieger, Claus Kress, Susan Lamb, Vaughan Lowe, Susan Marks, Frances Nicholson, Georg Nolte, Geneviève Saumier, Jayaprakash Sen, Bruno Simma, Stephen Toope, Thomas Viles and Arthur Weisburd. I thank them all.

Of these individuals, several deserve special mention. First and foremost, James Crawford provided everything a doctoral student could want from a supervisor. In particular, I wish to thank him for his patience during my first year and a half in Cambridge, when I had little idea as to where my work was taking me.

In addition to James Crawford, I wish to thank Philip Allott, Blaine Baker and Peter Haggenmacher for being outstanding role models. Their commitment to excellence in teaching and scholarship is humbling.

Stephen Toope deserves special thanks for directing me to Cambridge, and for his belief that a PhD was something I could do, and would enjoy doing.

Jayaprakash Sen provided friendship and intellectual stimulation. I benefited greatly from his brilliance.

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Sylvie Scherrer and Geneviève Saumier have been particularly good friends.

Although I never asked him to comment on my work, Venkata Raman allowed me to read his own doctoral thesis on customary international law and to test my amateurish lecturing skills on his students.

I also wish to thank the many people who participated in the graduate seminar on the History and Theory of International Law in the University of Cambridge from 1992 to 1995, as well as my undergraduate and graduate students in Cambridge from 1994 to 1996, and in Oxford since then. They have taught me a great deal.

Last but not least, Vaughan Lowe and Bruno Simma were critical yet constructive examiners whose many suggestions have, I hope, enabled this book to be an improvement on the thesis. The same may be said of the international lawyers and international relations scholars who anonymously reviewed the manuscript for Cambridge University Press.

I am grateful for the financial or logistical support provided by the British Secretary of State for Education and Science, the Cambridge Commonwealth Trust, Cambridge University’s Faculty of Law, the Canadian Centennial Scholarship Fund, Jesus College (Oxford), the Kurt Hahn Trust, the Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, McGill University, Queens’ College (Cambridge), and the Social Sciences and Humanities Research Council of Canada.

This book is dedicated to my parents, Brigitte and Bob Byers, with love.
### Table of cases

<table>
<thead>
<tr>
<th>Case</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Air Services Agreement of 27 March 1946 (France v. United States)</td>
<td>172</td>
</tr>
<tr>
<td>Al-Adsani v. Government of Kuwait</td>
<td>72</td>
</tr>
<tr>
<td>Alcom Ltd v. Colombia</td>
<td>112</td>
</tr>
<tr>
<td>Anglo-Norwegian Fisheries Case</td>
<td>134, 180</td>
</tr>
<tr>
<td>Asylum Case</td>
<td>130, 135, 176, 180, 199</td>
</tr>
<tr>
<td>Austria v. Italy (South Tyrol Case)</td>
<td>199</td>
</tr>
<tr>
<td>Barcelona Traction Case (Second Phase)</td>
<td>3, 59, 124, 195–7, 203</td>
</tr>
<tr>
<td>Berizzi Bros v. SS Pesaro</td>
<td>112</td>
</tr>
<tr>
<td>Borg v. Caisse Nationale d'Epargne Française</td>
<td>111</td>
</tr>
<tr>
<td>Case 9647 (United States–Inter-American Commission of Human Rights)</td>
<td>186, 199</td>
</tr>
<tr>
<td>Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide</td>
<td>185, 196</td>
</tr>
<tr>
<td>The Charkieh</td>
<td>111</td>
</tr>
<tr>
<td>Chorzow Factory Case</td>
<td>189</td>
</tr>
<tr>
<td>Chrisostomos et al. v. Turkey</td>
<td>199</td>
</tr>
<tr>
<td>Cia Introductora de Buenos Aires v. Capitan del Vapor Cokato</td>
<td>111</td>
</tr>
<tr>
<td>Colt Industries v. Sarlie (No. 1)</td>
<td>73</td>
</tr>
<tr>
<td>Compania Naviera Vascongada v. SS Cristina</td>
<td>111</td>
</tr>
<tr>
<td>Congo v. Venne</td>
<td>113</td>
</tr>
<tr>
<td>Consular Premises Case</td>
<td>111</td>
</tr>
<tr>
<td>Controller and Auditor-General v. Sir Ronald Davison</td>
<td>72</td>
</tr>
<tr>
<td>Cutting’s Case</td>
<td>64</td>
</tr>
<tr>
<td>Danzig Legislative Decrees Case</td>
<td>36</td>
</tr>
<tr>
<td>Das sowjetische Ministerium für Aussenhandel</td>
<td>111</td>
</tr>
<tr>
<td>De Haber v. Queen of Portugal</td>
<td>111</td>
</tr>
<tr>
<td>Delimitation of the Continental Shelf (United Kingdom/France)</td>
<td>180</td>
</tr>
<tr>
<td>Dessausses v. Poland</td>
<td>113</td>
</tr>
<tr>
<td>Dickson Car Wheel Company Case</td>
<td>84</td>
</tr>
<tr>
<td>East Timor Case</td>
<td>186, 196, 198, 201</td>
</tr>
<tr>
<td>Eastern Greenland Case</td>
<td>107</td>
</tr>
<tr>
<td>Effect of Awards of Compensation made by the UN Administrative Tribunal, Advisory Opinion</td>
<td>189</td>
</tr>
</tbody>
</table>
Table of cases

Eichmann Case, 62, 64
l’Etat du Pérou v. Kreglinger, 111
Etat roumain v. Société A. Pascalet, 111
Ex Parte Republic of Peru, 112
Filartiga v. Pena-Irala, 73
Fisheries Jurisdiction Case, 61
Flota Maritima Browning de Cuba SA v. SS Canadian Conqueror, 113
Gulf of Maine Case, 10, 12, 121–2, 138
Guttières v. Elmilik, 111
Hartford Fire Insurance Co. v. California, 67
Hazeltine Research Inc. v. Zenith Radio Corp., 66
I Congreso del Partido, 112
The Ibai, 111
Iran–United States, Case No. A/18, 80
Isbrandtsen Tankers v. President of India, 112
Island of Palmas Case, 53
Jackson v. People’s Republic of China, 103
Kadic v. Karadžić, 73
K.k. Österreich. Finanzministerium v. Dreyfus, 111
Libya/Malta Case Concerning the Continental Shelf, 122–3
Lotus Case, 8, 61–2, 65, 102, 119, 130–1, 142–3, 169
Maharanee of Baroda v. Wildenstein, 73
Mannington Mills v. Congoleum Corporation, 66
Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility), 142
Maritime Delimitation in the Area between Greenland and Jan Mayen, 122
Mavrommatis Palestine Concessions Case (Jurisdiction), 80
Mergé Claim, 80
Monetary Gold Case, 201
Monopole des Tabacs de Turquie v. Régie co-intéressée des Tabacs de Turquie, 111
Namibia Advisory Opinion, 173, 177–8
National City Bank of New York v. Republic of China, 113
Nationality Decrees in Tunis and Morocco Case, 80
Nicaragua Case (Preliminary Objections), 36
Nicaragua Case (Jurisdiction), 171
Nicaragua Case (Merits), 8, 107, 132–3, 135–7, 142, 164, 167, 171–2, 184, 188, 203
North Sea Continental Shelf Cases, 37–8, 91, 121, 130–1, 133, 160–1, 167, 171–2, 181, 184
Nottebohm Case, 80
Table of cases

Nuclear Tests Cases, 107, 148, 156, 165, 196
Ocean Transport v. Government of the Republic of the Ivory Coast, 113
Österreichische-ungarische Bank v. Ungarische Regierung, 111
Panevezys-Saldutiskis Railway Case, 80
The Philippine Admiral v. Wallen Shipping Ltd, 111
Planamount Ltd v. Republic of Zaire, 112
The Porto Alexandre, 111
The Prins Frederik, 111
The Ramava, 111
Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 81, 138
Republic of Mexico v. Hoffman, 112
Right of Passage Case, 130
Rights of Nationals of the United States of America in Morocco Case, 135
Rio Tinto Zinc Corp. v. Westinghouse Electric Corp., 66
River Meuse Case (1937), 177, 189
Roberts Claim, 83
Rocha v. US, 64
Schooner Exchange v. McFaddon, 112
Smith v. Canadian Javelin, 113
South West Africa Cases (Second Phase), 160–1, 196
Soviet Republic Case, 111
Tadic Case (Appeal on Jurisdiction), 163
Temple of Preah Vihear Case (Preliminary Objections), 107, 173
Temple of Preah Vihear Case (Merits), 66
Timberlane Lumber Co. v. Bank of America, 111
Trendtex Trading Corp. v. Central Bank of Nigeria, 111
Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India, 72
United Euram Corp. v. USSR, 103
US v. Aluminum Co. of America, 65–6
US v. Alvarez-Machain, 62
US v. Arlington, 113
US v. General Electric Co., 66
US v. Timken Roller Bearing Co., 66
US v. Watchmakers of Switzerland, 66
Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 113
Zodiak International Products v. Polish People’s Republic, 113
# Table of treaties

Agreed Minute on the Conservation and Management of Fish Stocks (20 April 1995), 99
Articles of Agreement of the International Bank for Reconstruction and Development (World Bank), 36
Articles of Agreement of the International Monetary Fund, 36
Australia–United States: Agreement relating to Cooperation on Antitrust Matters, 67
Brussels Convention for the Unification of Certain Rules Relating to Penal Jurisdiction, 62
Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, 73
Canada–United States Memorandum of Understanding on Antitrust Laws, 67
Charter of the United Nations, 67
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 84, 168
Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, 97
Convention on the Rights of the Child, 6, 136
European Convention on State Immunity, 69–71
Geneva Convention on the Continental Shelf, 91, 173–4
Geneva Convention on the High Seas, 62, 174
Geneva Convention on the Territorial Sea and the Contiguous Zone, 96
Geneva Convention relating to the Status of Refugees, 85
Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, 116
<table>
<thead>
<tr>
<th>Table of treaties</th>
</tr>
</thead>
<tbody>
<tr>
<td>International Covenant on Civil and Political Rights, 84, 168–9</td>
</tr>
<tr>
<td>International Convention on the Suppression and Punishment of the Crime of Apartheid, 195</td>
</tr>
<tr>
<td>Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 73</td>
</tr>
<tr>
<td>Marrakesh Agreement Establishing the World Trade Organization, 78</td>
</tr>
<tr>
<td>Montevideo Convention on Rights and Duties of States, 176</td>
</tr>
<tr>
<td>Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 176</td>
</tr>
<tr>
<td>Protocol Relating to the Status of Refugees, 85</td>
</tr>
<tr>
<td>Statute of the International Court of Justice, 10, 33, 93, 121–4, 130, 148, 166, 172, 188, 191</td>
</tr>
<tr>
<td>Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, 61, 64</td>
</tr>
<tr>
<td>Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, 61</td>
</tr>
<tr>
<td>Vienna Convention on Consular Relations, 28</td>
</tr>
<tr>
<td>Vienna Convention on Diplomatic Relations, 27–8</td>
</tr>
<tr>
<td>Vienna Convention on the Law of Treaties Between States and International Organizations or between International Organizations, 172, 179, 184</td>
</tr>
<tr>
<td>Abbreviation</td>
</tr>
<tr>
<td>--------------</td>
</tr>
<tr>
<td>AC</td>
</tr>
<tr>
<td>All ER</td>
</tr>
<tr>
<td>CTS</td>
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<td>DLR</td>
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<tr>
<td>F. 2d</td>
</tr>
<tr>
<td>F. Supp.</td>
</tr>
<tr>
<td>FAO</td>
</tr>
<tr>
<td>FSIA</td>
</tr>
<tr>
<td>GAOR</td>
</tr>
<tr>
<td>GATT</td>
</tr>
<tr>
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</tr>
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</tr>
<tr>
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</tr>
<tr>
<td>ILM</td>
</tr>
<tr>
<td>ILR</td>
</tr>
<tr>
<td>Keesing’s</td>
</tr>
<tr>
<td>LNTS</td>
</tr>
<tr>
<td>Moore</td>
</tr>
<tr>
<td>NAFO</td>
</tr>
<tr>
<td>NZLR</td>
</tr>
<tr>
<td>PCIJ</td>
</tr>
<tr>
<td>QB</td>
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<tr>
<td>S. Ct</td>
</tr>
<tr>
<td>SC</td>
</tr>
<tr>
<td>SCR</td>
</tr>
<tr>
<td>Stat.</td>
</tr>
<tr>
<td>UKTS</td>
</tr>
<tr>
<td>UNGA</td>
</tr>
<tr>
<td>UNHCR</td>
</tr>
</tbody>
</table>
xxii  List of abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNTS</td>
<td>United Nations Treaty Series</td>
</tr>
<tr>
<td>USC</td>
<td>United States Code</td>
</tr>
<tr>
<td>Whiteman</td>
<td>Whiteman, <em>A Digest of International Law</em></td>
</tr>
<tr>
<td>WLR</td>
<td>Weekly Law Reports</td>
</tr>
</tbody>
</table>