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
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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 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
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’.

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.

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This book is dedicated to my parents, Brigitte and Bob Byers, with love.
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<tr>
<td>UKTS</td>
<td>United Kingdom Treaty Series</td>
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<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
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<tr>
<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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List of abbreviations

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