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THE MAKING OF
INTERNATIONAL LAW

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The Making of International Law

ALAN BOYLE
and
CHRISTINE CHINKIN

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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

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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

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Abbreviations

AALCC	Asian–African Legal Consultative Committee
AC	Appeal Chamber
AfCHR	African Court of Human and Peoples’ Rights
AI	Amnesty International
<i>AJIL</i>	American Journal of International Law
<i>Am UJILP</i>	American University Journal of International Law and Policy
ASIL	American Society of International Law
<i>Australian YBIL</i>	Australian Yearbook of International Law
BHRC	Butterworths Human Rights Cases
BIT	Bilateral Investment Treaty
<i>BJIL</i>	Brooklyn Journal of International Law
<i>BYBIL</i>	British Yearbook of International Law
CACT	Central American Court of Justice
<i>Cardozo LR</i>	Cardozo Law Review
CBD	Convention on Biological Diversity
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CHR	Commission on Human Rights
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CMI	Comité Maritime International
<i>Col HRLR</i>	Columbia Human Rights Law Review
<i>Col JIELP</i>	Colorado Journal of International Environmental Law and Policy
<i>Col JTL</i>	Columbia Journal of Transnational Law
CONGO	Conference of Non-Governmental Organisations
COP	Conference of the Parties
COPUOS	Committee on Peaceful Uses of Outer Space
CSW	Commission on the Status of Women
CTR	Claims Tribunal Reports
CW	Committee of the Whole
<i>CYBIL</i>	Canadian Yearbook of International Law
DRC	Democratic Republic of the Congo
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice

ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
EEZ	Exclusive Economic Zone
<i>EHRLR</i>	European Human Rights Law Review
EHRH	European Human Rights Reports
<i>EJIL</i>	European Journal of International Law
<i>Env Pol & Law</i>	Environmental Policy and Law
EU	European Union
EWCA	England and Wales, Court of Appeal
FAO	Food and Agriculture Organisation
FCTC	Framework Convention on Tobacco Control
GAOR	General Assembly Official Records
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GC	Grand Chamber
<i>Georgia JICL</i>	Georgia Journal of International and Comparative Law
GMO	Genetically modified organisms
<i>GYBIL</i>	German Yearbook of International Law
<i>Harv HRYB</i>	Harvard Human Rights Yearbook
<i>Harv ILJ</i>	Harvard International Law Journal
<i>Hastings ICLR</i>	Hastings International and Comparative Law Review
HNS	Hazardous and noxious substances
<i>HRLJ</i>	Human Rights Law Journal
<i>HRLR</i>	Human Rights Law Review
<i>HRQ</i>	Human Rights Quarterly
IACHR	Inter-American Court of Human Rights
IAEA	International Atomic Energy Agency
IATA	International Air Transport Association
ICAO	International Civil Aviation Organisation
ICBL	International Campaign to Ban Landmines
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
<i>JCLQ</i>	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICSID	International Centre for the Settlement of Investment Disputes
ICSU	International Council of Scientific Unions
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IFRS	International Financial Reporting Standards
IGO	Intergovernmental Organisation
<i>IJMCL</i>	International Journal of Marine and Coastal Law

ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation
<i>ILR</i>	International Law Reports
IMO	International Maritime Organisation
INB	Intergovernmental Negotiating Body
<i>Indian JIL</i>	Indian Journal of International Law
<i>Institut</i>	<i>Institut de Droit International</i>
<i>Int Org</i>	International Organization
IPU	Inter-Parliamentary Union
ISO	International Standards Organisation
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for the Conservation of Nature
IUU	Illegal, unreported and unregulated (fishing)
<i>JEL</i>	Journal of Environmental Law
<i>JMLC</i>	Journal of Maritime Law and Commerce
<i>JWT</i>	Journal of World Trade
<i>LJIL</i>	Leiden Journal of International Law
MAI	Multilateral Agreement on Investment
MARPOL	1973/78 Convention for the Prevention of Marine Pollution from Ships
<i>Max Planck</i>	
<i>UNYB</i>	Max Planck Yearbook of United Nations Law
MDGs	Millennium Development Goals
MEA	Multilateral Environmental Agreement
MEPC	Marine Environment Protection Committee
<i>Mich JIL</i>	Michigan Journal of International Law
<i>MLR</i>	Modern Law Review
MNF	Multinational Force
MOP	Meeting of the Parties
MSC	Maritime Safety Committee
NAFTA	North American Free Trade Area
NAIL	New Approaches to International Law
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
NIEO	New International Economic Order
Nig SCt	Nigerian Supreme Court
<i>NILR</i>	Netherlands International Law Review
<i>Nordic JIL</i>	Nordic Journal of International Law
<i>Northwestern</i>	
<i>UnivLR</i>	Northwestern University Law Review
<i>NRJ</i>	Natural Resources Journal
<i>NYBIL</i>	Netherlands Yearbook of International Law

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	Convention for the Protection of the Marine Environment of the North-East Atlantic
<i>Oxford JLS</i>	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
S Ct	Supreme Court
SAARC	South Asian Association for Regional Cooperation
SARS	Severe Acute Respiratory Syndrome
SC	Security Council
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
<i>Stan JIL</i>	Stanford Journal of International Law
<i>Swiss YBIL</i>	Swiss Yearbook of International Law
TBT	Technical Barriers to Trade Agreement
TC	Trial Chamber
<i>Texas ILJ</i>	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
1982 UNCLOS	United Nations Convention 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
<i>University of Richmond LR</i>	University of Richmond Law Review
UNSC	United Nations Security Council
USSR	Union of Soviet Socialist Republics
UNTS	United Nations Treaty Series
<i>Vand JTL</i>	Vanderbilt Journal of Transnational Law
VCLT	Vienna Convention on the Law of Treaties
<i>VJIL</i>	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
<i>Wis ILJ</i>	Wisconsin International Law Journal
WLR	Weekly Law Reports
WMO	World Meteorological Organisation
WTO	World Trade Organisation
<i>Yale LJ</i>	Yale Law Journal
<i>YBIEL</i>	Yearbook of International Environmental Law
<i>YBILC</i>	Yearbook of the International Law Commission

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1907

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