

FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS



LexisNexis Law School Publishing Advisory Board

William Araiza

Professor of Law

Brooklyn Law School

Ruth Colker

*Distinguished University Professor & Heck-Faust Memorial Chair in
Constitutional Law*

Ohio State University Moritz College of Law

Olympia Duhart

Associate Professor of Law

Nova Southeastern University Shepard Broad Law School

Samuel Estreicher

Dwight D. Opperman Professor of Law

Director, Center for Labor and Employment Law

NYU School of Law

David Gamage

Assistant Professor of Law

UC Berkeley School of Law

Joan Heminway

College of Law Distinguished Professor of Law

University of Tennessee College of Law

Edward Imwinkelried

Edward L. Barrett, Jr. Professor of Law

UC Davis School of Law

Paul Marcus

Haynes Professor of Law

William and Mary Law School

Melissa Weresh

Director of Legal Writing and Professor of Law

Drake University Law School

FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS

Oona A. Hathaway
*Gerard C. and Bernice Latrobe Smith
Professor of International Law
Yale Law School*

Harold Hongju Koh
*Martin R. Flug '55 Professor of International Law
Yale Law School*



ISBN: 9781422498859

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis, the knowledge burst logo, and Michie are trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc. Copyright © 2006 Matthew Bender & Company, Inc., one of the LEXIS Publishing companies. All Rights Reserved.

No copyright is claimed in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material exceeding fair use, 17 U.S.C. § 107, may be licensed for a fee of 10¢ per page per copy from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

NOTE TO USERS

To ensure that you are using the latest materials available in this area, please be sure to periodically check the LexisNexis Law School web site for downloadable updates and supplements at www.lexisnexis.com/lawschool.

Editorial Offices
121 Chanlon Rd., New Providence, NJ 07974 (908) 464-6800
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
www.lexisnexis.com

(Pub.3336)

PREFACE

Until recently, international law and international politics have been two disciplines divided by a common subject matter. International law rarely found its way into the curriculum of political science departments. Law school courses only occasionally touched upon international relations. Scholarship in the two disciplines proceeded on separate tracks. In recent years, the chasm between these disciplines has narrowed as international law and international relations theorists have finally begun to share insights. This book seeks to cement these gains and to provide a foundation for further interchange between the disciplines. We present the readings in this book with two main aims: first, to lay out several of the most central and current theoretical approaches found in international law and international relations scholarship, with an eye toward creating a common framework upon which both sets of scholars can build; and second, to offer a series of practical applications to spark discussion and debate.

To those ends, the first seven sections of this book provide an introduction to the core scholarly debate and survey the primary schools of international theory: what we call the “interest-based” and “norm-based” approaches to international studies. In the theory subsections, we include writings by both political scientists and legal scholars to convey a sense of the different ways in which the two sets of scholars perceive and use their theories. The final six sections provide a series of applications of the theories. In each of the applications, we seek to provide at least two contrasting perspectives on the subject matter. Our goal is to enrich discussion by demonstrating how the broader theoretical disagreements outlined in the earlier, theoretical parts generate contrasting approaches to, and predictions about, particular areas of state behavior.

Of course, this introduction to current theoretical scholarship in international law and politics remains just that: an introduction. It is intended only to serve as a starting point for those seeking to learn about international law and politics. Of necessity, many important works are omitted from the text (though virtually all schools of thought are touched upon somewhere in the volume, particularly in the Notes and Comments sections).

We intend for this book to be used in a variety of ways. It might serve as a companion volume to a book of case materials in an introductory course in international or transnational law. It could also serve as the central reader in a more advanced law school course or

seminar on international law. Finally, it could be used in political science departments in a variety of courses to add legal content to the study of international relations or globalization in the 21st Century.

Over time, this field will only expand, and we expect to update this volume to address the changes. We welcome suggestions as to how the volume might be improved to incorporate new developments. More than half a century ago, our predecessors here at Yale, Myres McDougal and Harold Laswell, pioneered the modern collaboration between international law and international relations and founded the “New Haven School of International Law.” We are pleased, in this new millennium, to continue their worthy efforts to work from New Haven to promote this critical dialogue between two burgeoning sibling disciplines.

OONA A. HATHAWAY

HAROLD HONGJU KOH

ACKNOWLEDGEMENTS

We are grateful to many for their assistance at every stage of this book's preparation. Dean Anthony Kronman, who served as Dean of Yale Law School from 1994–2004, gave us warm encouragement and unstinting support in our research efforts. Kris Kavanaugh and Deborah Sestito provided excellent administrative assistance, and Gene Coakley of Yale Law School's library staff was immensely creative and helpful in collecting the materials for the book. Our colleague Roberta Romano, the general editor of this series, and our publisher Steve Errick guided the book to publication with grace and patience and provided a great deal of encouragement and immensely helpful feedback along the way. Keith Darden offered generous feedback on the reader as it developed and cotaught a class with Oona Hathaway that formed a starting point for part of this reader. Several Yale students served as the first readers of the book manuscript and offered detailed assistance in its revision, including Aditi Banerjee, Rebecca Charnas, Dennis Clare, Anver Emon, Christian Ford, Seth Green, Heloisa Griggs, Joshua Hawley, Gretchen Hoff, Ellen Jooyeon Kang, SatKartar Khalsa, Eunice Lee, Felicia Medina, Christine Parker, Dakota Rudesill, Joanne Savage, and Boris Sokurov. We also benefited immensely from the thoughtful help of several diligent research assistants, including Ivana Cingel, David Newman, Galit Sarfaty, Derek Smith, and Natalie Wigg. Nor could this book have been completed without the superb assistance of Ariel Lavinbuk and Elizabeth Nathan, whose scholarly skill and knowledge are evident throughout the book.

Finally, it should be noted that as we worked on this volume, Harold Koh was named Dean of Yale Law School, and Oona Hathaway assumed the vast bulk of the responsibility for bringing this work to completion.

There should be no mistaking, then, that as editors, we are listed in an order that reflects not just the alphabet, but also our relative substantive contributions to this volume.

O. A. H.
H. H. K.

FOUNDATIONS OF LAW SERIES

ROBERTA ROMANO, GENERAL EDITOR

Foundations of Administrative Law

Edited by Peter H. Schuck, Yale Law School

Foundations of Contract Law

*Edited by Richard Craswell, Stanford Law School and
Alan Schwartz, Yale Law School*

Foundations of Corporate Law

Edited by Roberta Romano, Yale Law School

Foundations of Criminal Law

*Edited by Leo Katz, Michael S. Moore and Stephen J. Morse, all of the University of
Pennsylvania Law School*

Foundations of the Economic Approach to Law

Edited by Avery Wiener Katz, Columbia Law School

Foundations of Employment Discrimination Law

Edited by John Donohue, III, Stanford Law School

Foundations of Environmental Law and Policy

Edited by Richard L. Revesz, New York University Law School

Foundations of Intellectual Property

*Edited by Robert P. Merges, University of California Berkeley and Davis Schools of
Law and Jane C. Ginsburg, Columbia University School of Law*

Foundations of International Income Taxation

Edited by Michael J. Graetz, Yale Law School

Foundations of International Law and Politics

Edited by Oona A. Hathaway and Harold Hongju Koh, Yale Law School

Foundations of Labor and Employment Law

*Edited by Samuel Estreicher, New York University Law School and Stewart J.
Schwab, Cornell Law School*

Foundations of the Law and Ethics of Lawyering

*Edited by George M. Cohen, University of Virginia School of Law and Susan P.
Koniak, Boston University School of Law*

Foundations of Tort Law

Edited by Saul Levmore, University of Chicago Law School

CONTENTS

Preface, iii

Acknowledgements, v

I. International Law and International Relations: An Introduction, 1

Peter J. Katzenstein, Robert O. Keohane, and Stephen D. Krasner, *International Organization and the Study of World Politics*, 52

INTERNATIONAL ORGANIZATION 645 (1998), 3

Harold Hongju Koh, *Why Do Nations Obey?*, 106 YALE LAW JOURNAL 2599 (1997), 12

Notes and Comments, 19

II. Interest-Based Theories of State Behavior, 26

A. Realism, 27

E.H. CARR, *THE TWENTY YEARS' CRISIS* (NY: Palgrave 2001) (1939), 28

H.J. MORGENTHAU, *POLITICS AMONG NATIONS* (5th ed. 1978) (1948), 31

KENNETH WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979), 42

Notes and Comments, 47

B. Institutionalism, 49

Robert O. Keohane, Jr., *Institutional Theory and the Realist Challenge After the Cold War*, in *NEOREALISM & NEOLIBERALISM* 269 (David A. Baldwin ed., 1993), 51

Andrew Guzman, *International Law: A Compliance-Based Theory*, 90

CALIFORNIA LAW REVIEW 1823 (2002), 58

Notes and Comments, 74

C. Liberal Theory, 78

Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INTERNATIONAL ORGANIZATION 513, 513 (1997), 79

Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94

AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 240 (2000), 95

Jose E. Alvarez, *International Law: Comment*, 94 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 249 (2000), 103

Notes and Comments, 108

III. Norm-Based Theories of State Behavior, 111

A. Constructivism, 112

Martha Finnemore, *NATIONAL INTERESTS IN INTERNATIONAL SOCIETY* (1996), 112

John Gerard Ruggie, *What Makes the World Hang Together: Neo-Utilitarianism and the Social Constructivist Challenge*, 52

INTERNATIONAL ORGANIZATION 855 (1998), 120

Alexander Wendt, *Anarchy is What States Make of It: The Social Construction of Power Politics*, 46 INTERNATIONAL ORGANIZATION 391 (1992), 127

Notes and Comments, 132

B. Theories of Fairness and Legitimacy, 135

H.L.A. Hart, *International Law*, in *THE CONCEPT OF LAW* (rev. ed. 1994), 136

Ian Hurd, *Legitimacy and Authority in International Politics*, 53

INTERNATIONAL ORGANIZATION 379 (1999), 144
THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995),
152
Notes and Comments, 168

C. Legal Process Theories, 173

1. Managerial Theory (“Horizontal Legal Process”), 173
ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY (1995),
174
George W. Downs, David M. Rocke, and Peter N. Barsoom, Is the Good News
About Compliance Good News About Cooperation?, 50 INTERNATIONAL
ORGANIZATION 379 (1996), 183
Notes and Comments, 188
2. Transnational Legal Process Theory (“Horizontal and Vertical Legal
Process”), 190
Mary Ellen O’Connell, New International Legal Process, 93
AMERICAN JOURNAL OF INTERNATIONAL LAW 334 (1999), 191
Harold Hongju Koh, Why Do Nations Obey?, 106 YALE LAW JOURNAL 2599
(1997), 195
Harold Hongju Koh, Bringing International Law Home, 35 HOUSTON LAW
REVIEW 623 (1998), 200
Notes and Comments

IV. Applications, 205

A. Human Rights, 205

Andrew Moravcsik, The Origins of Human Rights Regimes: Democratic
Delegation in Postwar Europe, 54 INTERNATIONAL ORGANIZATION 217 (2000),
206
Margaret E. Keck and Kathryn Sikkink, ACTIVISTS BEYOND BORDERS (1998), 217
Oona Hathaway, The Promise and Limits of the International Law of Torture, in
TORTURE: PHILISOPHICAL, POLITICAL AND LEGAL PERSPECTIVES, (Sanford
Levinson ed., forthcoming, 2004), 228
Notes and Comments, 238

B. The Environment, 242

Peter Haas, Banning Chlorofluorocarbons: Epistemic Community Efforts to
Protect Stratospheric Ozone, 46 INTERNATIONAL ORGANIZATION 187 (1992),
243
Detlef Sprinz and Tapani Vahtoranta, The Interest-based Explanation of
International Environmental Policy, 48 INTERNATIONAL ORGANIZATION 1
(1994), 251
Daniel Bodansky, The Legitimacy of International Governance: A Coming
Challenge for International Environmental Law?, 93 AMERICAN JOURNAL OF
INTERNATIONAL LAW 596 (1999), 263
Notes and Comments, 269

C. Trade, 272

Jeffrey Michael Smith, Three Models of Judicial Institutions in International
Organizations: The European Union, the United Nations, and the World
Trade Organization, 10 TULSA JOURNAL OF COMPARATIVE AND INTERNATIONAL
LAW 115 (2002), 273

- Susan Esserman and Robert Howse, *The WTO on Trial*, 82 *FORGEIGN AFFAIRS* 130 (2003), 275
- Joost Pauwelyn, *Enforcement and CounterMeasures in the WTO: Rules are Rules—Toward a More Collective Approach*, 94 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 335 (2000), 282
- Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 *JOURNAL OF LEGAL STUDIES* 179 (2002), 293
- Notes and Comments, 305
- D. Humanitarian Intervention, 307
- Louis Henkin, *Kosovo and the Law of “Humanitarian Intervention,”* 93 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 824 (1999), 308
- Jules Lobel, *Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter*, *CHICAGO JOURNAL OF INTERNATIONAL LAW* 19 (1999), 314
- Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 361 (1999), 324
- Notes and Comments, 337
- E. International Criminal Law, 339
- Payam Akahavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 7 (2001), 340
- Jack L. Goldsmith and Stephen D. Krasner, *The Limits of Idealism*, 132 *DAEDALUS* 47 (2003), 350
- Notes and Comments, 360
- F. War, 366
- John Yoo, *International Law and the War in Iraq*, 97 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 563 (2003), 366
- Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 607 (2003), 376
- Harold Hongju Koh, *On American Exceptionalism*, 55 *STANFORD LAW REVIEW* 1479, (2003), 387
- Notes and Comments, 391