



THIRD EDITION

AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW

A POLICY-ORIENTED PERSPECTIVE

LUNG-CHU CHEN

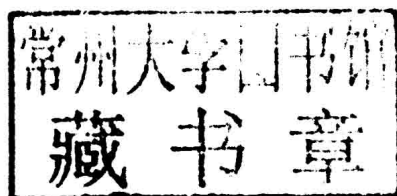
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AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW

In Affectionate Memory of
Myres S. McDougal (1906–1998)
and
Harold D. Lasswell (1902–1978)
Proponents of an International Law of Human Dignity

About the Author

DR. LUNG-CHU CHEN is an internationally recognized scholar and Professor of Law at New York Law School, specializing in international law, human rights, and the United Nations. He previously served as Research Associate, Senior Research Associate, and Senior Research Scholar at Yale Law School. He received his LL.B. with first-place honors from National Taiwan University, his LL.M. from Northwestern University, and his LL.M. and J.S.D. from Yale University. While still a junior at the National Taiwan University, he ranked first of some four thousand participants in Taiwan's national examination for judgeship and other high governmental posts—a unique distinction in Taiwan's history.

He is founder and chairman of the Taiwan New Century Foundation, founder and president of the New Century Institute (New York), and charter president and honorary president of the Taiwan United Nations Alliance (TAIUNA). He is a board member of the Policy Sciences Center, a former president of the Taiwanese Society of International Law, and a former national policy adviser to the president of Taiwan.

Formerly he was also chairman of the section on international law of the Association of American Law Schools, a member of the executive council of the American Society of International Law, a director of the American Society of Comparative Law, and a member of the editorial board of its journal (*American Journal of Comparative Law*). He was chief editor of *Human Rights*, published by the American Bar Association Section on Individual Rights and Responsibilities. In addition, he served as vice president and a member of the governing council of the International League for Human Rights and president of the North America Taiwanese Professors' Association. He was a principal

lecturer at the International Institute of Human Rights in Strasbourg, a training center for human rights experts founded by Nobel Peace Prize winner René Cassin.

His publications include *Membership for Taiwan in the United Nations: Achieving Justice and Universality* (editor), *An Introduction to Contemporary International Law, Human Rights and World Public Order* (with Myres S. McDougal and Harold D. Lasswell), and *Formosa, China, and the United Nations* (with Harold D. Lasswell). In addition, he has written and edited numerous books and articles in Chinese. Currently he is general editor of a series of books relating to the U.N. system published under the auspices of the Taiwan Institute for U.N. Studies, a project of the Taiwan New Century Foundation. He is also editor in chief of *New Century Think Tank Forum*, a quarterly in Chinese published jointly by the Taiwan New Century Foundation and the New Century Institute.

Preface to the Third Edition

THE PURPOSE OF the third edition of *An Introduction to Contemporary International Law: A Policy-Oriented Perspective* is to propose to readers an answer to the question: What is international law? The answer given follows in the tradition of the New Haven School, whose policy-science approach to international law has its origins in the works of Professors Myres S. McDougal and Harold D. Lasswell of Yale Law School. Beginning in the mid-twentieth century, Professors McDougal and Lasswell and their collaborators sought to understand and to describe the forces rapidly reshaping the global landscape after the end of World War II. According to them, international law is not static but is a *process* by which members of the world community attempt to clarify and secure their *common interests* through *authoritative decisions* and *controlling practices*. For students wishing to understand international law, I submit that there is no better place to start than with the New Haven School's systematic approach to world events and its accompanying set of intellectual tools for identifying and describing the factors that underlie international legal order.

With the twenty-first century well underway, every feature of this decision process is impacted by the ever-quickenning pace of globalization, technological change, and interactions among the world's peoples. Through the use of contemporary examples, the third edition aims to build on the previous editions by contextualizing and dramatizing these changes with reference to seven features that characterize the New Haven approach to international law: *participants, perspectives, arenas of decision, bases of power, strategies, outcomes, and effects*. As explained in chapter 1, these elements make up what

the New Haven School terms the *world constitutive process of authoritative decision*. It is this process that is the ultimate subject of this book.

By *participants* we mean both the states and non-state actors who take part in the process of authoritative decision. Traditionally, scholars believed that only states could properly participate in international law. However, this view has given way to a more nuanced perspective. The third edition aims to enlighten readers to the many ways in which states, non-state entities, and even individual people can take part in the international legal process. Chapter 2 explores the complex relationships among the concepts of statehood, self-determination, recognition, and international politics that animate the creation of new states, as dramatized by the example of Taiwan. Chapter 3 describes the increasingly important roles played by intergovernmental organizations such as the United Nations and its specialized agencies in the pursuit and maintenance of *minimum world order* and *optimum world order*—two outcomes by which the effectiveness of international legal processes may be measured. As of today, the United Nations has grown to include 193 member states, compared to 189 in 2000, owing to the inception of new states such as Timor-Leste (East Timor), Montenegro, Serbia, and South Sudan.

Chapter 4 describes the establishment of transnational nongovernmental organizations and associations and their growing influence in international arenas. These bodies include civil society organizations that promote human rights and other important objectives as well as multinational corporations, whose power to influence world order has increased tremendously as an outgrowth of the global pursuit and distribution of wealth. Meanwhile, individuals—acting on their own and as representatives of territorial communities or functional groups—have taken on new prominence globally. In chapter 5, individuals are presented as the ultimate actors in the international legal process. Furthermore, the third edition of this book places greater emphasis on the centrality of human beings in international law, as evidenced by an increased recognition of human rights and the expansion of individual criminal responsibility.

The term *perspectives* refers to the diverse viewpoints of members of the world community viewed in light of the pursuit of their common interests. The New Haven School posits that all individuals share an interest in both minimum world order—the minimization of unauthorized coercion and violence—and optimum world order—the widest possible shaping and sharing of values. As such, chapter 6 of the third edition emphasizes the notion of “human security,” a term that embraces both minimum and optimum world order.

Chapter 7 explores the various *arenas* of the international legal process. The term *arena* denotes the establishment of, and access to, international structures of authority. The trend in recent decades has been toward a higher degree of institutionalization as demonstrated by agencies such as the World Trade Organization (WTO). International bodies provide a forum where participants may deliberate and coordinate actions across borders. International bodies may also provide access to third-party decision making, as exemplified by the dispute settlement procedures under the Law of the

Sea Convention and the WTO. The introduction of international criminal tribunals, such as the International Criminal Tribunals for the former Yugoslavia and for Rwanda, represent the world community's condemnation of egregious human rights abuses. The International Criminal Court, established in 2002, now serves as a forum for the prosecution of individuals accused of perpetrating certain crimes under international law.

Bases of power, as outlined in chapters 8 to 14, encompass both nonhuman and human resources. Nonhuman resources include territory, the use and control of the sea, and other shareable and nonshareable resources. Since the Law of the Sea Convention went into effect in 1994, controversies have arisen over competing claims to the use of exclusive economic zones and ownership of territories in the South China Sea and other regions. Global warming has introduced a new dimension to such issues, as de-icing in the polar regions leads to geopolitical tensions, while some island nations face probable extinction from rising sea levels. Meanwhile, the overall well-being of the global environment has emerged as a focal concern, as leaders struggle to reach agreements necessary to limit pollution amid a rush toward industrialization and to deal with the growing problem of climate change.

Globalization and the effects of the attacks of September 11, 2001, have altered our thinking about human resources and the transnational movement of people. Simultaneously, the protection of people has taken on greater importance. Traditional notions of state sovereignty are giving way to the more urgent responsibility to protect human rights, and the number of issues that are of "international concern" is increasing as people recognize their deepening interdependence.

The term *bases of power* also refers to the authority held by states and non-state actors to make decisions within defined realms. Authority may be distributed vertically, as between the general community of states and individuals, or horizontally across groupings of states. The horizontal allocation of authority is becoming increasingly common as participants face challenges that defy the jurisdiction of singular nations.

The term *strategies* refers to the four primary instruments of policy: diplomacy, ideology, the economy, and the military. These instruments are employed alone or in various combinations in the pursuit of values, as explored in chapters 15 to 19. Issues arising under the diplomatic instrument—for example, the protection of nationals abroad—highlight the interplay of international law and domestic law. International agreements, which are the outcome of diplomatic interactions, deserve special attention and study in recognition of their traditional role as a source of international law. In light of this importance, the third edition offers the reader a more detailed analysis of international agreements in relation to domestic law and U.S. constitutional principles. The ideological instrument has been enhanced by the dissemination of science-based technologies such as personal computers and mobile phones. Communications technologies, including the worldwide Internet, permit us to be better informed more quickly and to interact easily with counterparts everywhere. The emerging information society presents both challenges and opportunities and highlights the conflict between the desire for the free

flow of information and governmental control of media. Use of the economic instrument is oriented pragmatically to the goal of human development, as exemplified by the Millennium Development Goals (MDGs). The recent global economic crisis has brought with it new challenges and dynamics among the developed and developing nations. Finally, the aftermath of 9/11 has forever changed our understanding of the military instrument. The resulting “preemption doctrine” and the proliferation of weapons such as unmanned aerial drones have pushed the boundaries of the law of war as traditionally understood. At the same time, the desire and necessity for increased humanitarian intervention has led many to accept a larger role for militaries in the defense and protection of mass human rights.

Outcomes refer to the seven functions that make up the international process of authoritative decision. These functions, which are highlighted in chapters 20 to 26, are divided into *intelligence*, *promotion*, *prescription*, *invocation*, *application*, *termination*, and *appraisal*. Information gathering and dissemination has been strengthened by the impact of technology and by the fact-finding activities of both officials and nonofficials. Promotion by nongovernmental organizations and individuals plays an increasingly influential role in the international decision-making process and the prescriptions adopted by both domestic and international bodies. Chapter 24 acknowledges the difficulties of ensuring compliance with international norms, while putting such challenges in perspective by reference to six sanctioning goals: *prevention*, *deterrence*, *restoration*, *rehabilitation*, *reconstruction*, and *correction*. The appraisal function has evolved democratically thanks to the dissemination of technologies that permit a wide range of participants to assess the outcomes of various actions.

The cumulative effects of the decision functions, described in chapters 27 to 29, can be observed in a trend toward greater accountability for states and individual decision makers under international law. As highlighted in chapter 28, events such as the Arab Spring must be understood in relation to the right to self-determination and states’ responsibility for promoting the well-being of their peoples. In the realm of individual criminal responsibility, the importance of the establishment and operation of the International Criminal Court cannot be overemphasized. The third edition includes a new chapter 29 that explores the vital role individual responsibility plays in the emerging field of international criminal law. Individuals—notably representatives of states—can and must be held accountable for conduct that is inimical to fundamental human rights and dangerous to world order.

Chapter 30 of the third edition ends with a call for a “grand strategy of simultaneity.” International law matters because it can help us build a stronger world community based on the notion of human dignity for all people. Individuals are the driving force behind this positive change. However, individuals must be educated about how international law shapes the world around them in order to serve effectively as citizens and decision makers. I hope that this fresh edition of *An Introduction to Contemporary International Law: A Policy-Oriented Perspective* supplies a new generation of students with the interest, insights, and intellectual tools needed to do their part.

Where possible, contemporary examples have been used to illustrate key principles, with many examples current as of 2013. In some cases, references are made to events taking place in 2014. The treatment is admittedly brief, as the purpose of the text is not to provide a history of world events, but to help readers understand the nature of international authoritative decision. Therefore, readers are encouraged to consider these examples in light of more recent events and to notice new examples on their own in the years to come.

I remain indebted to my mentors—Myres S. McDougal and Harold D. Lasswell. In writing the third edition of this book, I hope to contribute, however modestly, to their ongoing legacies as founders of the New Haven School of international law, from which countless scholars, students, practitioners, and other members of the world community have benefited and will continue to benefit.

Throughout my years at New York Law School, I have received much support from both the faculty and student body. I wish to thank Dean Anthony Crowell, former Dean Richard Matasar, former Interim Dean Carol Buckler, and Associate Dean Deborah Archer for their continued support of my scholarly works, as well as the colleagues who have offered their assistance and generous feedback over the years. I am also indebted to the staff of the New York Law School library, especially Associate Dean Camille Broussard, Senior Reference Librarian Michael McCarthy, and their teams. From the student body, I would like to acknowledge my research assistants, Manny Alicandro, Eduardo Blount, Vanessa Craveiro, Joshua Eidsvaag, Corey Gaul, Neil Giovanatti, Timothy Han, Jennifer Lin, Jeffrey Liu, Rebecca Eunhye Moon, Samuel Newbold, Joan O'Hara, Agata Ratajczyk, Halina Schiffman-Shilo, James Tai, and Jessie Tang for their help and diligence throughout the researching, writing, and editing process. In particular, I would like to thank Matthew Goodro, whose efforts contributed significantly to the first draft of the third edition, and Nicholas Turner, who remained dedicated to the project to the end and whose editorial and organizational skills were instrumental to its completion.

At Yale Law School, I am thankful to Dean Robert C. Post and former Dean Harold H. Koh for encouragement and support. At Oxford University Press, I wish to extend sincerest thanks to Blake Ratcliff, whose efforts were essential to the publication of the third edition. I also wish to thank John Louth for his support. The production team, Alden Domizio, Balamurugan Rajendran, and Mary Rosewood, deserve special praise for their superlative expertise and efficiency.

I also extend my appreciation to the New Century Institute for support and to the board members and staff of the Taiwan New Century Foundation for their professional assistance. In particular, I wish to thank Dr. Lung-Fong and Joanne Chen and Dr. Wen-Hsien Chen for their encouragement and support.

And last but not the least, I wish to thank my dear wife, Judy, our children, our children-in-law, and our grandchildren for their affection, patience, and enduring support.

Preface to the Second Edition

INTERNATIONAL LAW IS a continuing process of authoritative decision by which members of the world community identify, clarify, and secure their common interests. These common interests consist of minimum world order and optimum world order. *Minimum world order* refers to the minimization of unauthorized coercion and violence—in other words, the maintenance of international peace and security. *Optimum world order* refers to the widest possible shaping and sharing of values, for example, respect, power, enlightenment, well-being, wealth, skill, affection, and rectitude, popularly expressed in terms of human rights, self-determination and self-governance, education and global communication, health and environmental protection, trade and development, transfer of technology, human solidarity and diversity, and social justice.

The end of the Cold War did not put international law out of business. On the contrary, although the threat of a nuclear holocaust might have been reduced for the time being, the need for maintaining minimum world order and for securing optimum world order has become ever more pressing.

As humankind ushers in a new millennium and a new century of knowledge and power, the degree of global interdependence has deepened, and the amazing frequency of transnational interactions continues to accelerate. The global village is real in fact and in perception. “Globalization” has become a catch word of the new era. As an ongoing process of authoritative decision, international law is as dynamic as ever and constitutes a distinct part of the globalizing process. Taking one another into account, all actors—nongovernmental as well as governmental—have intensified their transnational interactions, generating ever-increasing and interpenetrating transnational effects.

Since the publication of the first edition in 1989, there have been many changes in the world, and so many significant events have happened in the field of international law. Just to name a few: the fall of the Berlin Wall and the end of the Cold War; the disintegration of the Soviet Union and the formation of the Commonwealth of Independent States; the breakup of Yugoslavia and the conflicts in the Balkans; the establishment of the International Criminal Tribunals for the former Yugoslavia and for Rwanda; the transition from apartheid government to a nonracial democracy in South Africa; the Rio Earth Summit and the adoption of Agenda 21, a comprehensive plan for global action in all areas of sustainable development; the entering into force of the U.N. Convention on the Law of the Sea and the concomitant establishment of the International Seabed Authority and the International Tribunal for the Law of the Sea; the establishment of the World Trade Organization to replace the General Agreement on Tariffs and Trade (GATT) as the only international body overseeing international trade; the creation of the office of the U.N. High Commissioner for Human Rights and the operation of the U.N. Convention on the Rights of the Child; the adoption of the Rome Statute of the International Criminal Court; and U.N. and U.S. responses to the Iraqi invasion of Kuwait and the continuing struggle with Iraq over enforcing the U.N. ceasefire resolutions.

All these and other developments are reflected in this edition. In updating and preparing the second edition, I benefited a great deal from the comments and suggestions received from many people who have used the first edition of the book and from the assistance and support rendered by many. My deep appreciation to all of them.

The inspiration of my mentors—Myres S. McDougal and Harold D. Lasswell—was as present for this edition as for the original edition. The recent passing of Professor McDougal meant the loss of a great mentor, counselor, and friend to me. It also meant the loss of one of the great international legal scholars of all time, but his legacy to humankind will live forever. Both Mac and Harold will be missed dearly.

W. Michael Reisman was wonderful and helpful in many ways. Jordan J. Paust was thorough in reviewing an early draft of the entire revised manuscript and was generous in offering numerous and invaluable suggestions and comments.

Throughout the years my students at New York Law School have been, in the practical sense, participants in the ongoing enterprise and have offered many helpful suggestions. I especially wish to thank Maria-Alana Recine and Stephanie McQueen for outstanding research assistance. Thanks also go to Ken Ayers, Susan Hennigan, Celena Mayo, and Cliff Scott for their assistance.

At New York Law School I am indebted to Dean Harry H. Wellington and Associate Dean Ellen Ryerson for their strong and continued support, including summer research grants. Professor Joyce Saltalamachia and her library staff were consistent and efficient in rendering profession service; Reference Librarian Marta Kiszely, my faculty library liaison, was ever cheerful, diligent, and efficient in meeting a flow of requests for assistance.

At Yale Law School, I am grateful to Dean Anthony T. Kronman for encouragement and support. At Yale University Press, Jane Zanichkowsky was excellent in her role as copy editor.

In Taiwan, I wish to thank Law Professor Chao-Yuan Huang of Taiwan University and Dr. Yann-huei Song of Academia Sinica for their invaluable suggestions and assistance. At the Taiwan New Century Foundation, my thanks go to En Wei Lin, Hsueh Chin Chen, Su Mei Chiu, and Chien Shou Lu for their assistance.

For this edition, as for the first, the affection, patience, and support of Judy and our family were a constant source of comfort and strength.

Preface to the First Edition

INTERNATIONAL LAW IS perhaps the most dynamic area of law today and one of the most important, as global interdependence deepens and the transnational movement of people, ideas, goods, and services continues to grow. It is an ongoing process of decision through which the members of the world community identify, clarify, and secure their common interests—both minimum world order (in the sense of minimizing unauthorized coercion and violence) and optimum world order (in the sense of fostering the widest possible shaping and sharing of all values). In this process, nation-states have played and continue to play the dominant role. But non-state participants—international governmental organizations, nongovernmental organizations, and private associations—are playing increasingly significant roles. The individual, in particular, acting both alone and as a group representative, is the ultimate participant, performing all the functions relevant to making and applying law.

As one who is identified with the policy-oriented approach developed by Myres S. McDougal and Harold D. Lasswell and their associates (dubbed by some the New Haven School), I have sought as author to bring the essence and insights of the approach to bear on major international legal problems in the rapidly changing context of the earth-space arena.

Unlike conventional works in international law, this book is organized and structured in terms of the process of decision by reference to participants (nation-states, international governmental organizations, nongovernmental organizations and associations, and the individual), perspectives (minimum world order and optimum world order), arenas of decision (establishment and access), bases of power (authority and effective

control over people, resources, institutions, and events), strategies (diplomatic, ideological, economic, and military), outcomes, and effects.

As humankind grapples with a host of transnational problems—armed conflicts and the control of armaments, trade and investment, the use and control of the sea and outer space, global environment, illicit drug trafficking, transnational flows of information, technology transfer, human rights, refugees, religious warfare, and so on—it becomes evident that international law is too important to be left to international lawyers and decision makers alone. Individual citizens must rise to the challenge of contemporary international law in the search for a world public order of human dignity. They must:

- Think globally to meet the ever-present challenge of global interdependence and interdetermination.
- Think temporally not only about the present generation but about posterity.
- Think contextually to relate decision making to all community levels and all value sectors of social interaction.
- Think and act creatively in the common interest, mobilizing all available problem-solving skills and resources in the pursuit of both minimum and optimum order.

I hope that not only students of international law but other citizens concerned with law and world affairs will find this book helpful. As an introductory treatise, it seeks to be comprehensive in scope yet selective in emphasis; and the notes are kept to an absolute minimum.

My debts to Professors McDougal and Lasswell, long proponents of an international law of human dignity, are enormous and apparent—the book is dedicated to them. As a member of the New Haven School, I have drawn freely on prior collaborative work with them (especially *Human Rights and World Public Order*, published by Yale University Press in 1980) and also, in the words of McDougal, “on a great variety of past contributions, jointly planned, discussed, and written by members of a large group who regard their work as common property.” I am most grateful to Mac, who, with his characteristic generosity, has read the entire manuscript and made many valuable criticisms and suggestions.

I am also deeply grateful to Professors Richard A. Falk of Princeton University, Rosalyn Higgins of the London School of Economics and Political Science, and Jordan J. Paust of the University of Houston Law Center for having read the entire manuscript and offered numerous valuable criticisms and suggestions for improvement. My thanks also go to Professor Gunther F. Handl of Wayne State University Law School and Siegfried Wiessner of St. Thomas University School of Law for helpful comments and suggestions in connection with chapters 27 and 11, respectively.

Thanks are also due my students at New York Law School, especially my outstanding research assistants Raymund Johansen and Gary Gross. The assistance of Frances