

# BOOK REVIEW

CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM. By NOYES E. LEECH, COVEY T. OLIVER, AND JOSEPH MODESTE SWEENEY. Mineola, New York: The Foundation Press, 1973. Pp. lxxxiii, 1372. \$20.00.

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## I. INTRODUCTION AND OVERVIEW

Professors Leech, Oliver and Sweeney have given us a masterfully simple and artistic set of teaching materials.<sup>1</sup> The work is masterful in sustaining their view that the use of international law in decisions always involves individuals directly, in one way or another, in various domestic and international settings. In purporting to be pragmatic and realistic, it is artistic because—like all good art—it never says all it knows.

By the authors' own modest claims, the work would succeed if it found a place mainly as a teaching tool in the context of a modern law school curriculum. Its intellectual assumptions, however, are not so completely instrumental. We find three important working premises of the casebook revealed in the authors' preface. First, the work uses analysis of decisions in many different contexts to aid in understanding the international legal system. Second, it shuns commentary laden with authoritative citations, using cases, events, notes, and problems instead to move inside decisions that demonstrate how principles of international law are used to make a difference in results. Third, it assumes that speculation about, or analysis of, international law at a theoretical level cannot take place without prior vicarious experience of particular decisions.

The work's major objective is to get the attention of today's law student who will in turn influence the future direction of decisions in and about the international legal system. The means used are pragmatic and analytic; the book is concerned mostly with how lawyers use concepts, principles, norms, values, and interests to affect decisions within the system.

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<sup>1</sup> N. LEECH, C. OLIVER, & J. SWEENEY, *CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM* (1973).

The authors deserve high praise for the clarity with which the organization of the book proceeds. The beginning contains a vision of the whole; the first chapter moves rapidly through the entire international legal system. It requires one to move inside the system and to survey the simplest points of decision before courts, agencies, foreign offices, and international tribunals.

The most important juridical concepts are found in Parts I, II, and III, roughly one-half of the entire book. These parts deal with three distinct aspects of jurisdiction: the allocation of competence within the international system to nation-states; the limitations on the exercise of jurisdiction, as in the state immunity and the act of state doctrines; and the application of international standards of fairness and justice to the exercise of a state's capacity to administer a national legal system, looking to the consequences of applying domestic law contrary to international law.

Part IV encompasses the structure of the international legal system, beginning with the organizational concept of statehood and problems of recognition of states and governments. It proceeds to discuss the diplomatic and consular immunities which protect national representatives in the orderly relations between states, and international organizations in terms of their functions and the use and protection of international civil servants as their representatives. The Leech, Oliver, and Sweeney casebook is a major departure from the tradition, represented by Hudson's and Briggs' casebooks, that first structures the international community conceptually through states and their existence before examining jurisdictional concepts.<sup>2</sup> Under the approach of Leech, Oliver, and Sweeney, the allocation of jurisdiction is independent of the concept of the nation-state and its administration.

Part V uses various sources of international law as guides to decision within national systems. Only at this juncture, in Part VI, do the authors introduce theories about the international legal system. While the chapter is by no means adequate to cover contemporary trends and theories about international law, it does introduce enough speculative material for students to be well on their way toward developing, as the authors frame it, their own criteria for theories about international law.<sup>3</sup>

Part VII analyzes the use of self-defense, the provisions of the United Nations Charter, the challenges to the use of force

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<sup>2</sup> H. BRIGGS, *THE LAW OF NATIONS, CASES, DOCUMENTS, AND NOTES* (2d ed. 1952); M. HUDSON, *CASES AND OTHER MATERIALS ON INTERNATIONAL LAW* (3d ed. 1951).

<sup>3</sup> Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL L. REV. 362 (1971), is of particular help in formulating criteria against which theories may be tested.

short of war, the newer means of violence such as conflicts less than civil war, and, finally, intervention of the United Nations under the Charter for peacekeeping purposes. The analysis of the use of force is better understood following the chapter on theory, especially since all other aspects of the system have been covered by the time the most difficult questions are presented. The practical and the theoretical collide when organized violence becomes likely; problems in controlling the use of force are ways of perceiving the limits of law and the beginnings of pure power. All that precedes the final chapter is necessary for an understanding of the limits of law in controlling violence.

On completion of the book's highly successful first year,<sup>4</sup> and having taught a basic course twice with the materials, I should like to interpret the work's underlying biases (as Holmes would say, the *praesudicia*). My focus is on context, jurisdiction, and the collision between economics and human rights. The authors show that public international law involves and affects individuals through judicial and official decisions in specific disputes. These disputes between individuals and among peoples mainly arise from either an economic (scientific) or a humanistic mode of thought. The question for jurisprudence on an international level is whether there might be a reconciliation of these two ways of thinking.

## II. THE CURRENT STATE OF THE ART

After World War II, a most creative period of international legal scholarship transformed the study of international law from a field which centered on general rules governing the conduct of states in their mutual relations, to one which focused on the policy sciences of the processes of power. Bishop, whom the authors acknowledge as their spiritual father, began experimenting with his first set of materials at the University of Pennsylvania Law School. Hudson's cases and materials were revised, drawing upon contemporary materials as well as upon his scholarship in the thirties. Briggs' *The Law of Nations* integrated law and political science in the best of the nonlegalistic tradition. Those who studied or taught international law in the fifties used these materials.

Simultaneously, the secure conception of a European-American family of nations was increasingly being shaken by Kelsen's insistence on purity in distinguishing the subjective qualities of justice from the positive legal order.<sup>5</sup> Even more

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<sup>4</sup> See Book Review, 15 HARV. INT'L L.J. 187 (1974); Book Review, 68 AM. J. INT'L L. 776 (1974).

<sup>5</sup> H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW (1952).

penetrating was the impact of McDougal's comprehensive policy-oriented attacks on the comfortable image of a family of nations with rules, which rules neither clarified global perspectives nor clearly stated an explicit set of international assumptions about law adequate to a rapidly changing world.<sup>6</sup> Jessup's works more simply said the same thing to us: that transnational forces were pulling away from nationalism;<sup>7</sup> nation-states would need to cooperate.

The rise of the Third World and super powers, the spread of science and technology, and the increase of complex violence presented onerous problems for international law. New scholars such as Falk, Lillich, Weston, Franck, and Fatouros sought broader sources and experience for claims to an adequate conception of the international legal order. Friedmann, Lissitzyn and Pugh incorporated much of this experience in a new, thoroughly annotated casebook in 1969,<sup>8</sup> building a theme of international cooperation for international welfare, by using general principles of law adopted by civilized nations. Ominously, the humane reasonableness of Friedmann ended with his violent death on the streets not far from Columbia University. No amount of philosophizing about the nature and sources of international law could resurrect the departed image of a secure family.

Bishop's 1971 edition of his casebook<sup>9</sup> reiterated his limited claims for the central position of law in international affairs. In taking this stance, he continued an American perspective of the practical lawyer. Appearing in turbulent times, its tone of restraint was in sharp contrast to Friedmann's more ambitious proposals for international welfare through international cooperation. The central questions continued to revolve around whether the international legal system could be rationalized into a humane unity. Could autonomous principles extracted from state practice, custom, and agreement maintain their coherence when directly applied to individuals to replace nationalism and yet contain forces unleashed by the breakdown of old customs, old regimes, old myths, and old tribal perspectives?

This question seemed to be answered in the negative as a

<sup>6</sup> McDougal, *Some Basic Theoretical Concepts About International Law: A Policy-Oriented Framework of Inquiry*, IV J. CONFLICT RES. 337 (1960); McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959).

<sup>7</sup> P. JESSUP, *A MODERN LAW OF NATIONS* (1948); *TRANSNATIONAL LAW* (1956); *THE USE OF INTERNATIONAL LAW* (1959).

<sup>8</sup> W. FRIEDMANN, O. LISSITZYN & R. PUGH, *CASES AND MATERIALS ON INTERNATIONAL LAW* (1969).

<sup>9</sup> W. BISHOP, JR., *INTERNATIONAL LAW: CASES AND MATERIALS* (3d ed. 1971).

resurgent nationalism reflected a new attempt at reallocating primary and secondary resources. The poorer nation-states sought international welfare when they no longer could satisfy the needs of their people. The formerly legitimate exercise of coercive force by the powerful states was challenged and held hostage to vital resources controlled by states theretofore less powerful. The comfortable doctrines of international law as the means by which international relations were to be regulated seemed obsolete.

Cynicism about the study of international law increased as realism in international law turned into the exaltation of raw power. Plans for comprehensive human dignity and pure normative logic were dismissed as too obscure. Forceful attempts to pursue an unenlightened self-interest led to a suspicion that there was no international legal system strong enough to transform a formal "rule of law" into realized international welfare through cooperation. The need for international law as a unifying force could not be met by decentralized measures of self-help. Jurisprudential questions and policy alternatives both seemed in disarray.

Concern finally shifted to necessity, to the possible, to practical models, to the immediate needs in particular systems. Patterns of order were sought in which particular decisions on concrete disputes could be effected through domestic courts and internal discipline. *Cases and Materials on the International Legal System* appears in the midst of such upheavals, showing how national and international institutions apply international law to disputes as they are brought by public and private individuals.

As the casebook catches us up with a real world, just as the American legal realists did in other law subjects, it chides us for having accepted a comfortable conception of the international system which is simply not adequate. It tells us that we need better answers to the ravages and injustices among peoples of the world. Rather than an improved conception of the system, we need new ways of seeing and thinking.

In banishing the theoretical writings on the nature of international law from their traditional prominence in casebooks at the beginning to a short chapter near the end of the book, the authors create a structure in which new ways of seeing and thinking will be fostered. Creative thinking about international law must be freed from ties to the notion of a European "family of nations" into whose secure embrace other peoples may be initiated if they follow club rules. The old view does not correspond to the present world. By replacing the traditional beginning with an introduction to the system for decisionmaking, the

authors increase the need for intellect and craft. The demands on students increase because the authors remove the convenient theoretical crutches for a conclusion that international law does not exist.

The result is an analysis of a variety of contemporary legal events. The study of custom, practice, writing, and agreements is implicitly a part of a larger study of problems of decision. A serious student faced with such concrete issues cannot easily dismiss the international legal process, which now becomes alive with importance and as difficult to master as contemporary law from a national perspective. The requirements of understanding a global system become equally rigorous and practical.

The legal events which the authors use from many perspectives and contexts illustrate this process. Most familiar casebooks study the coherence of rules and their relation to power. The present work examines how principles of international law applied in the context of decision in many different human institutions may conflict in result but still achieve a unifying process. As Karl Friedrich has explained, the lost unity of natural law reappears in the unity of process, but not necessarily in uniform patterns of general principles of justice, custom and practice.<sup>10</sup> Does this unity of process reflect the realities of global conflict, or is it a mythical construct aimed at psychic security? The impasse quickly develops even if unity is sought in a system rather than in rules. All this worry is artfully suspended in the book, however, until after the variety of legal events is presented for analysis. The separation of subjective preferences of right from objective norms and the collision of rules or doctrine with behavioral science are also suspended, pending a better understanding of the legal system proposed for study. In the meantime, the materials are rich in paradox and dilemma, for international law has to be worked out in context, decision by decision.

By postponing theory, we learn not to take the irrational conflicts too seriously, although we realize that clarity about assumptions is required later if not sooner. Moreover, psychological interpretations of effective law, as in Scandinavian legal realism, especially that of Ross and Langstedt, show how the irrational in law is brought home to human beings through effective decisions and not just through rules.<sup>11</sup> The casebook is sprinkled interestingly with references to psychological consider-

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<sup>10</sup> C. FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* 183 (1958).

<sup>11</sup> A. HÄGERSTRÖM, *INQUIRIES INTO THE NATURE OF LAW AND MORALS* 274 (Olivetona ed. 1953); A. LUNDSTEDT, *LEGAL THINKING REVISED* (1956); A. ROSS, *ON LAW AND JUSTICE* 18, 277 (1958).

ations, which lead to deeper waters where newer interpretations of behavior might be integrated in decision. For example, Ehrenzweig's *Psychoanalytic Jurisprudence*, which has received scant attention in international legal literature,<sup>12</sup> explains the natural law-positive law conflict in Freudian and post-Freudian terms.<sup>13</sup> Behaviorists such as Barkun and Gould, seek explanations in experimental social sciences,<sup>14</sup> more reminiscent of Lasswell's methodology. Fascinating adventures though they may be, if we began with these behavioral theories, quarrels would begin and we should never get to see the system as a whole. The skeptical student could easily mistake serious intellectual effort for meaningless banter confirming what was suspected all along—that international law has no concrete reality, that it is only therapy for power.

The authors have simply and convincingly avoided that dilemma by forcing us to agonize for our own explanations. They naturally have hedged their bets with a short chapter on theories ending with McDougal's framework for a configurative or policy-oriented jurisprudence.<sup>15</sup> Despite their modest disclaimers about theory, the authors surely have not relegated theory to a secondary posture; they have imbedded theory in the structure of their materials. While they do not say so, I should think they would agree with Holmes and Llewellyn that more, not less, theory is needed.<sup>16</sup>

The theoretical significance of the work dwells in what is not said about assumptions—the implicit freeing of inquiry from the dogmas of schools of intellectual thought, but without denying value to any of them. We are freed from the laborious initial task of tracing the religious transcendence of natural law and the autonomy of rules protected by the positive power of the secular state. We are given chance to infuse newer, more creative ideas on world order. We are permitted to consider that international law is not locked into the policy-sciences, behaviorism, or pure norm. Drawing on the book's structure for analysis and on other creative powers, we may seek a way of perceiving, thinking, and

<sup>12</sup> Harold Lasswell did a brief review in 68 AM. J. INT'L L. 145 (1974).

<sup>13</sup> A. EHRENZWEIG, *PSYCHOANALYTIC JURISPRUDENCE* 185-94 (1971).

<sup>14</sup> W. GOULD & M. BARKUN, *INTERNATIONAL LAW AND THE SOCIAL SCIENCES* (1970). This excellent work seeks theory in the findings available from experimental social scientists in the international law area. The authors do not mention this work or its literature.

<sup>15</sup> The authors use McDougal's Hague lectures for theory, while his later work on criteria for a configurative jurisprudence is not mentioned.

<sup>16</sup> "We have too little theory in the law rather than too much." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1907). See Llewellyn's lecture on theory, in W. TWING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 512 (1973).

acting in a world whose reality corresponds closely to its actual legal system.

### III. THE DISCUSSION OF JURISDICTION

#### A. *A General View*

The importance given to jurisdiction—the power to act in relation to certain people, things, events, or places—is basic to all else in the book. Analytically, the concepts and limitations of jurisdiction are simple: are the power and interests of the state sufficiently related to the ends sought to prevail over interests of other states? Is the connection sufficient to make rules, and to enforce those rules once prescribed? The treatment of jurisdiction provides a juridical basis for decision by implying that the international legal system permits limiting prescriptive power through limiting the enforceability of decisions.<sup>17</sup> The casebook and the *Restatement (Second) of Foreign Relations Law*<sup>18</sup> both view jurisdiction from the same analytic structure. The jural definition adopted by each work is identical: jurisdiction as a function of power is the allocation of competence to prescribe or to enforce rules regulating the conduct of persons, places, events and things. The authors note that the *Restatement's* work was *lex lata*, while the casebook is more speculative.

From this starting point, the two works diverge in form, but not substance. The *Restatement* uses its definition as a tool to analyze the different bases of jurisdiction, in particular: territory,<sup>19</sup> nationality,<sup>20</sup> and the protection of interests.<sup>21</sup> The

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<sup>17</sup> If the antitrust laws of the United States are to be enforced, to give a well-used example, what limits are there to breaking up conglomerates in other countries controlled by corporations also doing business in the United States? If the foreign corporations are too remotely connected to a base of power exercised in the antitrust laws, the system will act to place limits on state action even if there may well be economic effects of a minor nature. There are other equally interesting conflicts in jurisdiction explored in the book, but only after considerable attention is given to the analytic concepts of jurisdiction to prescribe and jurisdiction to enforce through national systems.

<sup>18</sup> RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW (1965) [hereinafter cited as RESTATEMENT]. The *Restatement* takes care to clarify the meanings of jurisdiction as used differently in conflict of laws and international law—two highly related legal areas. In conflicts, jurisdiction presents the issue “whether the application of the law of the state in creating or affecting legal interests is reasonable, so as to result in recognition of such application in cases involving suits on its judgments in other states or raising questions in choice of law.” RESTATEMENT, *supra*, Introductory Note §§ 6-93, at 19. The casebook, on the other hand, clarifies a distinction which is apt to be bothersome to a law student—distinguishing the meaning of jurisdiction between the national legal system and the international legal system. LEECH, OLIVER, & SWEENEY 109-10.

<sup>19</sup> RESTATEMENT, *supra* note 18, §§ 11-25.

<sup>20</sup> *Id.* §§ 26-32.

<sup>21</sup> *Id.* §§ 33-36. The *Restatement* divides the protections basis into two areas: the



casebook focuses upon understanding the component parts of jurisdiction to prescribe and jurisdiction to enforce, and treats the bases of jurisdiction separately within each function.<sup>22</sup>

The authors begin with an analysis of the territorial basis of jurisdiction to prescribe,<sup>23</sup> and develop as sub-bases conduct within the territory which has effect outside of it, and conduct outside the territory but causing an effect within it.<sup>24</sup>

As an example of the latter sub-base, the authors use the famous *Cutting* case,<sup>25</sup> in which Mexico attempted to enforce its libel laws against defamatory statements aimed at a Mexican national and published and circulated in the United States. The *Restatement* treats this case as an attempt by a state to prescribe laws with respect to injuries to its citizen from outside the territory, the so called "passive personality" principle.<sup>26</sup> In reality, these are two ways of communicating the same idea: Whatever the fictional base for the assertion of jurisdiction may be, such an assertion always requires a close connection to a state interest, and is tested against the conflicting interests of another state. On the question whether the international system allocates jurisdiction first by reference to authority or first by limitations on power, the familiar case of the *S.S. Lotus*<sup>27</sup> fits the authors' structure for handling jurisdictional concepts of statehood. The *Cutting* and *Lotus* cases, both old friends, are needed for the transition to better ways of thinking. Whether international law only limits, or must also authorize, a state's assertion of jurisdiction is not as important to the authors as the fact patterns showing a relationship to persons, things, and events.

The principle of jurisdiction to prescribe rules to protect state security or governmental functions is obviously developing into a substantial base for jurisdiction, even though the acts may take place outside the national territory. *United States v.*

protective principle as regards state interests and protection of certain universal interests such as piracy, collision, and salvage on the high seas, and fisheries conservation.

<sup>22</sup> LEECH, OLIVER, & SWEENEY 109-305. Within the jurisdiction to prescribe, the following bases are treated: conduct within the territory, conduct outside the territory causing effect within, and conduct affecting governmental interests. Within the enforcement function of jurisdiction: dependence of jurisdiction to enforce upon jurisdiction to prescribe and the territorial character of jurisdiction to enforce.

<sup>23</sup> Cases cited are *J.H.G. v. Public Prosecutor*, 26 INT'L L. REP. 158 (1963) (Cl. App. Arnhem, Netherlands 1958); *Re Penati* [1946] Ann. Dig. 74 (No. 30) (Court of Cassation, Italy).

<sup>24</sup> LEECH, OLIVER, & SWEENEY 116-32.

<sup>25</sup> Letter, Secretary of State to United States Ambassador to Mexico, [1887] FOREIGN REL. U.S. 751 (1888); Report on Extraterritorial Crime and the *Cutting Case*, *id.* 757; 2 J. MOORE, 2 INTERNATIONAL LAW DIGEST 228 (1906).

<sup>26</sup> RESTATEMENT, *supra* note 18, comment e, at 88.

<sup>27</sup> [1927] P.C.I.J., ser. A, No. 9.

*Rodriguez*<sup>28</sup> is cited to show that this protective principle applies when an alien makes false statements outside the United States while applying for immigration. The authors use the case to show the use of the fiction of territorial effects.

By substantially adopting the *Restatement's* approach, they subscribe to the view that jurisdiction to enforce rules of law depends upon jurisdiction to prescribe.<sup>29</sup> Such dependency is traced in all the bases of jurisdiction except territory. The territorial character of jurisdiction to enforce, being the most important of the enforcement bases, is separately treated in its own subchapter.<sup>30</sup>

The decision to adopt the *Restatement's* analysis may have created additional problems about fictions and their use, but it has shown that prescribing rules and enforcing them are at the heart of how the system allocates the power to decide. While lawmaking activities through international conferences and agreements may create international regimes, the exercise of power to make such regimes effective will be through the institutions and agencies of nation-states for some time to come. As jurisdictional claims are based less on the fictions of territory and nationality and more on functions expected of states (including state interest), the affirmative actions of states in promoting goals of economic and social welfare will lead to a wider range of legitimate conflicts between states at the jurisdictional level; the domestic courts of several nation-states may be inclined to sit in judgment. The system must then be able to provide principles by which nation-states may either limit the exercise of jurisdiction or refer certain disputes to the political process which is better suited than the courts to balancing legitimate state interests in conflict. In this context, the chapters on jurisdictional immunities and acts of state become a key component of the authors' proposed process of decision.

### B. *Sovereign Immunity and the Act of State Doctrine*

The law of sovereign immunity and the act of state doctrine each properly have a separate chapter. In each, the central problem is who within the domestic system decides whether another state or its property is immune from jurisdiction. United States law and practice provides much working material, but comparable problems in other countries are also explored.

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<sup>28</sup> 182 F. Supp. 479 (S.D. Cal. 1960), *rev'd on other grounds sub nom. Rocha v. United States*, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961).

<sup>29</sup> LEECH, OLIVER, & SWEENEY 139-51.

<sup>30</sup> *Id.* 144.

Goods and services always are produced and distributed by individuals, in business groups or as state agents. The question is the extent to which the state owned business agencies are immune from the jurisdiction of another state under international law. Worthy of note is the departure from the *Restatement* in favoring a delegation to courts rather than foreign offices for determining such limitations. The authors explain their choice by using foreign cases to show the value of an independent domestic judiciary in the determination when immunity should be granted.

The chapter omits any extensive historical prologue, moving first to an examination of the absolute theory of immunity with materials from English<sup>31</sup> and Eastern European sources,<sup>32</sup> and then to an analysis of the restrictive theory which subjects certain commercial acts of state to foreign jurisdiction. Chosen as a focal point is an exemplary case from Austria,<sup>33</sup> which lays the groundwork for an in-depth study of the pending United States legislation codifying and extending the restrictive theory.<sup>34</sup> The Austrian decision uses the same objective standard for determining whether an act performed by a representative of a foreign government is immune as the bill before Congress. The courts must determine only that the act itself (irrespective of the governmental purpose for which the act is performed) is commercial in nature.<sup>35</sup> Upon such a finding, there is no immunity.

The authors then trace the United States' policy on sovereign immunity from the days of the famous Tate letter.<sup>36</sup> While the letter is evidence that the restrictive theory had been adopted by the State Department to subject foreign states to jurisdiction, state-owned assets could not be sold and the policy itself was not always observed. Such failure is a consequence both of placing the primary responsibility for determining the applicability of the doctrine in the Executive and of the courts'

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<sup>31</sup> *Krajina v. The Tass Agency* [1949] 2 All. E.R. 274; *The Porto Alexandre* [1920] P.30 (C.A.); *The Cristina* [1938] A.C. 485.

<sup>32</sup> *Aldona S. v. United Kingdom*, 90 *Journal du Droit International* 191 (1963) (Sup. Ct. Poland 1948).

<sup>33</sup> *Collision with Foreign Government Owned Motor Car*, 40 *INT'L L. REP.* 73 (1970) (Sup. Ct., Austria 1961).

<sup>34</sup> S. 566, introduced on January 22, 1973 and referred to the Committee on the Judiciary. 119 *CONG. REC.* 1297 (daily ed. Jan. 26, 1963). See H.R. 3493 and *Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser. 10 (1973) [hereinafter cited as *Hearings*].

<sup>35</sup> *Collision with Foreign Government Owned Motor Car*, 40 *INT'L L. REP.* 73 (1970) (Sup. Ct., Austria 1961).

<sup>36</sup> Letter from the legal adviser of the Department of State to the Department of Justice, May 19, 1952. 26 *U.S. DEPT. OF STATE BULL.* 984 (1952).

perpetual abdication.<sup>37</sup> The Executive, free from the binding restraints of judicial precedent and plagued by endless pressures on changing policy officers and legal advisers, is highly susceptible to decisions based less upon the policy of the Tate letter than upon circumstances of the moment. While the Tate letter may have appeared to express "unqualifiedly" a new and restrictive State Department policy in 1952,<sup>38</sup> in fact it reflects a serious defect of process—a failure of trust that courts can handle the limited concept to conclusion. The policy subsequent to the Tate letter in effect is the same in process and meaning as it was before.<sup>39</sup> States engaging in commercial activity are subject to jurisdiction for the purpose of suit, but not for execution.

The chapter offers an interpretation of how the American version of the restrictive theory of sovereign immunity led to present distortions and misconceptions of the original guidelines. It is a study requiring the use of civil law conceptions.<sup>40</sup> The restrictive theory's origins are described as a natural outgrowth of the civil law distinctions between acts of individuals done in the "public domain" and those within a "private domain." These distinctions, alien to the nature of one immersed in the Anglo-American legal tradition, repeatedly have been misinterpreted in the United States and have been reformulated in the far less encompassing differentiation between "public acts" and "commercial acts."<sup>41</sup> The contributions of Dean Sweeney in the development of this distinction and in the move toward the restructuring of theory are well-known. The most recent and belated attempt to make sense out of civil law distinctions modified by United States case law is the proposed legislation, drafted in the Legal Adviser's office, now before the Congress. American court decisions following the Tate letter are incorporated into that proposal.

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<sup>37</sup> R. LILlich, *THE PROTECTION OF FOREIGN INVESTMENT* 3-44 (1965). See also Dobrovir, *A Gloss on the Tate Letter's Restrictive Theory of Sovereign Immunity*, 54 VA. L. REV. 1 (1968); Comment, *International Law: Sovereign Immunity: The First Decade of the Tate Letter Policy*, 60 MICH. L. REV. 1142 (1962); Note, *The American Law of Sovereign Immunity Since the Tate Letter*, 4 VA. J. INT'L L. 75 (1964).

<sup>38</sup> See *Chemical Natural Resources, Inc. v. Republic of Venezuela*, 420 Pa. 134, 215 A.2d 864, cert. denied, 385 U.S. 822 (1966); LEECH, OLIVER, & SWEENEY 354-57.

<sup>39</sup> R. LILlich, *supra* note 37, at 3-44.

<sup>40</sup> The authors note with interest that "[i]t cannot be entirely an accident that states whose courts led the development of the restrictive theory, or eventually adopted it, are also, in the main, those where French administrative law was followed or acquired influence." LEECH, OLIVER, & SWEENEY 323. See casebook sections entitled "Relevance of French Administrative Law Concepts," *id.*; "Reflection in the Restrictive Theory of Civilian Concepts of Administrative Law," *id.* 324.

<sup>41</sup> *Id.* 336.

Through comparative analysis within a functional setting, two possible lines of development are examined in the materials. The first is the natural extension of the chaotic situation presently exemplified by the *Rich* case<sup>42</sup> and a recent Fifth Circuit decision.<sup>43</sup> These cases reflect complete judicial abdication in ruling upon suggestions of immunity, in deference to Department of State recommendations. The authors are surely correct in stressing that the Department's role, the relation to the courts, and the political reality of the situation, account for our practical inability to maintain the purity of the principles expressed in the Tate letter. The Tate letter doctrine in effect has been replaced by a case-by-case approach involving an "informal hearing" before the legal adviser's office.<sup>44</sup>

The second possible line of development emphasizes the role of the courts. While the current informal Department of State procedures were established to aid in assessing the litigants' positions when a foreign sovereign claimed immunity directly through diplomatic channels,<sup>45</sup> such procedures are, at best, an inferior substitute for fair opportunity for all litigants to be heard in court.<sup>46</sup> Whether or not the Department of State is "singularly ill-equipped to render impartial decision on whether a state should be granted immunity," the authors admit a policy preference toward the elimination of any role for the Executive in granting immunity.<sup>47</sup> They agree with the conclusion of the letter of transmittal accompanying the bill on sovereign immunity now pending before Congress, that "[a] transfer of this function to the courts will also free the Department of State from pressures by foreign states to suggest immunity. . . . Plaintiffs, the Department of State, and foreign states would thus benefit from the removal of the issue of immunity from the realm of discretion and making it a justiciable question."<sup>48</sup>

The sovereign immunity chapter, in promoting the codification of American law on sovereign immunity, adds a needed

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<sup>42</sup> *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24 (4th Cir. 1961). See also Note, *International Law—Sovereign Immunity—The Last Straw in Judicial Abdication*, 46 TUL. L. REV. 841 (1972).

<sup>43</sup> *Spacil v. Crowe*, 489 F.2d 614 (5th Cir. 1974). For background on the case, see Rovine, *Contemporary Practice of the United States Relating to International Law*, 68 AM. J. INT'L L. 309 (1974). See also Comment, *Sovereign Immunity—The Case of the "Imias"*, 68 AM. J. INT'L L. 280 (1974). For documents, see 13 INT'L L. MATERIALS 120-63 (1974).

<sup>44</sup> See, Statement of Hon. Charles N. Brower, Acting Legal Adviser, Dept. of State, in *Hearings*, *supra* note 34, at 14-18.

<sup>45</sup> *Id.*

<sup>46</sup> LEECH, OLIVER, & SWEENEY 366.

<sup>47</sup> *Id.* 367.

<sup>48</sup> *Id.*

perspective on domestic lawmaking involving international legal questions. Yet an opportunity is missed: we are given no process for proposing and appraising policy alternatives. Such alternatives must be constructed and are not exhausted in the legislative proposal. Empirical, law-related research is required to determine whether decisions by courts will further a sound stability in trade more than Executive discretion. What would the empirical consequences be, for example, of the outright abolition of sovereign immunity as a legal concept? A considerably less ambitious modification of the present system would be to create an improved, formal hearing procedure within the Department of State. While the list of such alternatives is limited, the inclusion of additional options would aid the creative development of actions requiring far more than a knowledge of rules. A greater emphasis upon alternative thinking would require skills of analysis and synthesis of a highly sophisticated nature regarding the international system, skills which we do not teach very well. Law-related empirical research has not yet found firm roots in law school programs of international law, although schools of international affairs have succeeded in developing such competence. The evaluation of proposed alternatives for jurisdictional immunities can provide an excellent starting point. But even in its present form, the chapter is a vastly improved tool to spur thinking about state immunity in its functional setting.

The material on the act of state doctrine, that courts defer to the Executive when the validity of an act of a foreign state done in its own territory is before a domestic court, is included in the second of the two chapters concerning limitations on the exercise of jurisdiction. It is a companion, the other side of the coin, to state immunity. Analytically, the act of state doctrine is not a limitation on jurisdiction to the nation-state; it is a judicially imposed domestic restraint which has force because it is an exercise of domestic jurisdiction. The chapter belongs where it is, though, because most courts will not pass adverse judgments on a public act of a foreign state, notwithstanding the existence of jurisdiction, where to do so would require the balancing of a foreign state's interest in, say, nationalization of foreign corporations and a principle of international law regarding fairness and compensation in order to determine the validity of the official act of the foreign state.<sup>49</sup>

The underlying structure of the materials lets us see clearly that domestic courts defer both to the Executive and to settle-

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<sup>49</sup> R. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 6-7, 137 (1964).

ment by negotiation in disputes about economic activities where there is a question about the validation of an act of a foreign state in its own jurisdiction. If the attention given to rights of individuals is to be taken seriously, however, the courts should not close their doors where human rights are violated, even if an act of state is in question. The act of state doctrine should be used as an analytic tool, as the line of demarcation between judicial deference to the diverse elements of economic regulation on the one hand, and the protection of fundamental human rights on the other.<sup>50</sup> The struggle between these two powerful forces—human dignity and economic efficiency—reappears in many guises in the work.

#### IV. HUMAN RIGHTS AND ECONOMIC EFFICIENCY: THE DIFFERENT STANDARDS

Professors Leech, Oliver, and Sweeney have derived two distinct branches from the law of state responsibility for injuries to aliens: economic regulation and protection of human rights. The first branch includes the rights and duties of business enterprises as they are regulated under standards of international law.<sup>51</sup> The second covers the rights and duties of individuals under international law.<sup>52</sup>

The distinction between a process to regulate economic concerns and a process for individuals is not easily constructed. The use of minimum standards of international law has to be reconciled with the need for social and economic development, and hence with the need for equal treatment under national standards. Both sets of standards have emerged from the same body of practice and decisions. Business entities and individuals traditionally have been viewed as having the same legal standing for diplomatic protection by the countries to whom they owe allegiance of nationality. At the heart of the problem are three issues. To what extent are states which are entitled to espouse claims on behalf of business enterprises responsible for the activities of those enterprises? Similarly, should states hold their individual nationals accountable for international crimes (and how), as well as protect them from human rights deprivations? Finally, is there a difference in standards for individuals and for enterprises in function or process?

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<sup>50</sup> *Id.* 9-10. See also Laylin, *Justiciable Disputes Involving Acts of State*, 7 INT'L LAWYER 513 (1973).

<sup>51</sup> LEECH, OLIVER, & SWEENEY 480-518.

<sup>52</sup> *Id.* 519-725.

In sorting out the law of state responsibility into the two functional branches, each drawing on broad material for both rights and duties, the authors use standards of international law to treat individuals and business enterprises differently. The values protected, the law, and even the processes and institutions for deciding the questions are different.

In the section on regulation of economic activities, the authors show that the interests of states are adjusted, with standards varying according to purpose. The function of economic regulation is no longer the nineteenth century view of the liberal state's protecting commercial enterprises against intrusions of state power and prescribing international standards for reparation in case a state overstepped its bounds. The contemporary function is the sharing of wealth as efficiently as possible and allocating the risk of wealth loss. Whether the risk is allocated through decentralized measures of self-help with "just" compensation being the fiction for adjusting economic interests, through divestment schedules, through lump-sum settlements, or through a policy of nonespousal for all foreign nationalization measures, the function of law is the same. The system of economic regulation presented by the authors cuts through these nineteenth century labels, but it does not go far enough either in theory or in showing the value of empirical research to illuminate the policy preferences embodied in the functional analysis of international economic regulation.

The implications of the *Sabbatino* decision, although strongly disputed by international lawyers such as McDougal and Lillich, support the authors' tacit preference for economic diversity and negotiation among governments to regulate economic activity. When diversity is preferred, the international law questions are transferred to the political and economic level where interests are accommodated by negotiation or market mechanisms. Questions of international law remain, but it is the proper role of the domestic tribunal to defer deciding them. The Supreme Court's decision in the *First National City Bank* case<sup>53</sup> might be interpreted to mean that deference to the standard of diversity and market economics is not absolute, and might be relieved by a letter from the Executive. A better doctrine would be to agree with the absolute bar for economic questions suggested in Brennan's dissent,<sup>54</sup> but for the court itself to assert judicial

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<sup>53</sup> *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); see, e.g., Lowenfeld, *Act of State and the Department of State*, 66 AM. J. INT'L L. 795-814 (1972).

<sup>54</sup> *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 776 (1972) (Brennan, J., dissenting).



jurisdiction in human rights questions. The economic equilibrium required is not so easily adjusted by courts, and deference tends to promote the integrity of the judicial system.

Judicial deference, however, does not always prove the best course. It would not be inconsistent for the domestic courts to refuse to defer when there is a question of fundamental human rights at issue. A wide range of possible cases may present themselves in which a domestic court may be under a duty to prescribe minimum standards to a foreign state for treating an individual within its own jurisdiction, but as a practical matter, minimum standards are more effectively applied in favor of individuals against their own governments.

Diversity in national social and economic policies is important for the promotion of international welfare and requires affirmative, not just negative, standards. The authors seem to take issue with any distinction between "economic" and "noneconomic" human rights, which serves to reinforce the emphasis on the welfare function. There are some aspects of economic deprivations which can threaten values of individuals as conclusively as physical coercion. For example, in the two *Bernstein* cases<sup>55</sup> it was clear that Nazi measures were directed against human beings through economic measures of extermination. Destroying a person's livelihood through economic measures such as the confiscation of a family farm, raises a fundamental human rights question. It should be resolved by an international minimum standard and not deferred to the Executive for negotiation. The problem is how to draw the line. The authors build on an act of state and state responsibility framework to move into a functional examination of both rights and responsibilities of individuals and of enterprises in relation to states.

Others have made the same distinctions recently, with new theoretical overtones. Roberto M. Unger argues that the rule of law, which refers to a system of autonomous rules which are administered impersonally and supported by the majority of society,<sup>56</sup> is being rendered obsolete because the conditions that produced it have changed. These conditions included the Euro-

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<sup>55</sup> *Bernstein v. Van Heyghen Frères Société Anonyme*, 163 F.2d 246 (2d Cir.), cert. denied, 332 U.S. 772 (1947), where suit was brought to recover from an assignee property allegedly taken by Nazi government because the plaintiff was Jewish. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F.2d 71 (2d Cir. 1949).

<sup>56</sup> Dr. Unger, an assistant professor of law at Harvard University, expressed his opinions during an "Evening Dialogue" held at the Woodrow Wilson International Center for Scholars, Smithsonian Institution, on June 27, 1974, in which the reviewer participated. This dialogue dealt with the question, "Can the rule of law survive the transformation of modern society?"

pean liberal state, which arose by compromise between middle class and king, and its unique combination of interest group pluralism and transcendent religion, as opposed to the communal law which it displaced. Now this religious liberal state has been replaced by a new corporate-welfare state, casting off its claims of liberality. A liberal state is interested in protecting individuals against state interference with personal freedom or economic activity. A corporate-welfare state is concerned with affirmative goals for public welfare, such as the duty to provide food, jobs, and economic security. The question is whether the rule of law can survive in this new climate. After all, the act of state doctrine itself is a means of protecting economic intervention to promote national welfare. When welfare on an international scale is also becoming a reality, we no longer have the luxury of avoiding systematic thought about the international distribution of wealth and resources. Here again, empirical, law-related research and alternative thinking is required of law schools purporting to teach international law in a contemporary world.

At the same time, jurisprudential questions arise about reconciling the communal and the transcendent with a notion of law drawing on objective values shared by an interdependent community process rather than a religious one. Alternatively, we might return, in a circular fashion, to primitive law and reliance on tribal norms of welfare by using customary international law.

Just how the transcendental and the immanent elements of law are to be merged has long bothered philosophers. This problem is a crucial one for the academic community. I would suggest that it is impossible to achieve a doctrinal synthesis between economic welfare through diverse state practices and universal human rights. In this sense, I agree with the casebook's distinctions. However, there is room for both the immanent and the transcendent within a process such as the authors propose. The immanent element, the communal action of economics, seeks cooperation and international welfare through the widest possible sharing of goods and services. The fundamental value of human protection relies on the transcendent, which implies a conflict model since individual liberty is always at odds with state power being exercised for welfare. The immanent elements are the affirmative, even ideological, sharing of wealth; the transcendent is the universal rule of law derived from denying states the right to interfere with human dignity. Deference, in form of the act of state doctrine or non-conflict models, may be expected to achieve a utilitarian solution. The question is whether international law can limit the powers of efficiency and

utilitarian egalitarianism when necessary to protect human rights. I doubt it.

Using economic analysis, Robert Bork<sup>57</sup> and Richard Posner<sup>58</sup> seem to have come to much the same conclusions. If most law-related decisions are left to the economic marketplace, including the political arenas, interests will be accommodated through utilitarian negotiation in a cooperative process of self interest adjusted by give and take. The only time the rule of law should intercede universally is when there is a lack of sufficient rational information about what the system is being required to allocate. When basic human rights are at stake, however, law (through the courts) should intervene. Domestically, this distinction may be feasible. Internationally, it is more difficult. Using the international welfare model, when redistribution is needed for human welfare, how can the process intervene to disrupt efficient economic relationships providing food, jobs and security? What alternatives to an international legislative process are there?

It may also be useful to look at processes which support the functional differences between economic and human rights. On the domestic side, there are numerous agencies which may participate in decision when a citizen or corporation suffers deprivations abroad, or an alien is injured in the United States. The State Department legal adviser's office, the courts, the Office of the Attorney General, congressional committees, and the states themselves may be involved; the casebook provides ample exposure to such processes. The main recourse for an injured American is to persuade the State Department, either directly or by means of the agencies noted, to take up the matter diplomatically and negotiate a settlement. The process rests on the espousal theory of state responsibility: injury to an individual is an injury to the state.<sup>59</sup> The inherent shortcoming of this fiction is that it is the state, through its representatives, which decides whether the state is injured. The individual or entity likewise is faced with another procedural barrier, this one perhaps more difficult than the first: he must show the exhaustion of local remedies and the denial of justice in the country alleged to have injured him. Individuals have greater need for protection, but

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<sup>57</sup> Solicitor General of the United States. Mr. Bork's views were also expressed at the "Evening Dialogue" at the Smithsonian, *supra* note 56.

<sup>58</sup> See generally, R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972).

<sup>59</sup> The decision whether to espouse a claim is entirely within the Department of State. See R. LILlich & G. CHRISTENSON, *INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION* 89 (1962); I. M. WHITEMAN, *DAMAGES IN INTERNATIONAL LAW* 165 (1937); *RESTATEMENT, supra* note 18 §§ 206-10.

seem to find greater frustration (except after settlement, when they are preferred by absolute priority in getting paid). Again the problem of reasonableness of classifying emerges as significant. On the economic front, it is perhaps easier to raise the question in a domestic court favorable to a business enterprise, but the effects of the sovereign immunity and act of state doctrines place barriers to recovery for an alleged wrong such as wealth deprivations. The enterprise is expected to sustain a greater risk of ultimate loss in the process, but it frequently finds more ardent representation of its interest than do individual claimants.

At the central level, a functional system might be developed which would provide remedies for classes in international law disputes. Nation-states could allocate limited jurisdiction to international tribunals established to determine rights and duties imposed upon individuals under international agreement, and then enforce such judgments against individuals. An international criminal court for the prosecution of international criminal acts, for example, might try cases prosecuted by a state and then turn convictions over to the state for enforcement purposes. The authors' structural treatment easily leads to such an alternative proposal. Such a process might offer distinct advantages over national obligations for trial and enforcement of individual responsibilities, particularly in cases of terrorism, war crimes, and crimes against humanity. The utility of direct access lies in its creation of an institutional device to bring social and political factors into the process at two points: in the general jurisdiction of the tribunal, and in the procedures for deciding a particular dispute.

Jurisdiction of an international tribunal over economic disputes in which individuals have direct standing may be conferred by international agreement for various purposes.<sup>60</sup> Most common, and by far the easiest to negotiate, is the creation of a tribunal to handle damage or injury claims after they have arisen. The function of the tribunal is to compensate for international wrongs which the countries concerned agree ought to be paid. Most often these direct access procedures have been successful after vast economic disruptions—such as wars, territorial settlements, or nationalization.

Several attempts and much writing have sought the creation of international claims tribunals to handle claims of individuals

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<sup>60</sup> I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (1973). See also SUMMER CONFERENCE ON INTERNATIONAL LAW, *HUMAN RIGHTS: PROTECTION OF THE INDIVIDUAL UNDER INTERNATIONAL LAW* 66 (Cardozo ed. 1964) (5th Conference, Cornell Law School).

against governments. The old prize court proposal would have let persons wronged by illegal captures of their vessels appeal from the prize court proceeding in the first instance. Similarly, the Central American Court of Justice consented generally to hear suits by individuals against governments, provided local remedies were exhausted. Sohn has explicitly spelled out a proposal for regional and special claims tribunals.<sup>61</sup> Stone has argued for a less formal and cheaper kind of international court for commercial matters similar to the old English Court of Piedpoudre.<sup>62</sup> He urged pluralization through the assize circuit for small regional cases either by changing the International Court of Justice statute or by creating other tribunals. Jencks echoes the creation of international claims courts for individuals to sue governments.<sup>63</sup> Numerous other proposals have been heard, all the to same effect.

It is one thing for governments to consent to be sued internationally by injured persons who want direct remedies for previous wrongs. It is quite another to permit individuals to challenge the authority of a government, or a functional international community, to act to achieve some economic objective of the community. The European Economic Community and the Coal and Steel Community provide not just an international claims forum for persons damaged in tort or contract by the communities, but also a forum to review decisions of those communities affecting the interests of a real or juridical person. The direct access procedure is not created after the economic disruption. Rather, it is created to anticipate economic conflicts and displacements which the functional economic community causes in its common quest to reduce trade barriers and tariffs, control prices and cartels, and promote a common economic policy. The procedure for the Court of Justice to review acts of the community's institutions permits a balancing of community, state and individual interests. *The International Legal System* has given a superb perception of a legal system that will allow such creativity. But it must go further itself in promoting a creative role for international lawyers by suggesting methodologies by which functional analysis can lead to sustained alternative thinking on how new creations enter.

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<sup>61</sup> Sohn, *Proposals for the Establishment of a System of International Tribunals*, in *INTERNATIONAL TRADE ARBITRATION* 63 (M. Domke ed. 1958).

<sup>62</sup> J. STONE, *THE INTERNATIONAL COURT AND WORLD CRISIS* 54-55 (International Conciliation No. 536, 1962).

<sup>63</sup> C. JENCKS, *THE COMMON LAW OF MANKIND* (1958).

## V. THE NEXT STEP: INTERNATIONAL JURISDICTION

In taking the book's analytic structure to its logical conclusion, my view is that its major contribution is to demonstrate that individuals, as well as states and enterprises, are ultimately participants in the international law process. Whether the issue is protecting or enforcing international human rights and duties, or deciding functional or substantive economic disputes that have reached the international level, we need a realistic conception and implementation of international jurisdiction. We need to promote new central institutions, as well as to explain the role of national and regional institutions in the legal order. We need special jurisdiction for individuals, enterprises, and states in justiciable international cases. The allocation of international jurisdiction by functional treaties, to carve out a special limited process geared to special disputes with proper classes, is realistic. The casebook readily builds the foundation for both realism and creativity. Whether it be a trade dispute between the United States and the Soviet Union settled through arbitration techniques, or a regional court such as the EEC, the defunct American Court of Justice, an international criminal court, or a mixed claims tribunal, the process should consciously seek a demarcation between a justiciable question and that which is an economic or political question. The process should allow individuals direct access to invoke international law in their disputes before international tribunals in those proper cases. The lawmaking allocation of competence itself should be designed to accommodate the inherent conflicts between market economy and human rights among states, enterprises, and individuals. Jurisdiction over subject matter should be allocated to an international tribunal only when its function and purpose is clear.

It is essential that the nation-state be removed from its position as *pater familia* in justiciable disputes between its citizenry and other governments that are tied to functional purposes. Following the thesis of the casebook, it is possible to construct a functional theory of international jurisdiction in which the rule of law can be made directly applicable to the individual with the state then being the enforcement agent. The law-creating function would be exercised by states. Economic disputes could be negotiated to allocate risks of loss, using valuation theories<sup>64</sup> and

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<sup>64</sup> General principles such as "prompt, adequate and effective" compensation have proved all too often to be of little utility—the real issue in most cases being not whether compensation should be paid, but rather, the determination of the amount. The problem of valuation is always the problem of the allocation of loss and the process of espousal is the process by which the risk of loss is allocated. For a discussion concerning a policy

divestment strategies,<sup>65</sup> but with international tribunals deciding the applications. Until we begin to shape international jurisdiction and permit a rule of law directly available to individuals to serve various functions and concrete purposes, as we have done in federal jurisdiction, there will be no alternative to Unger's pessimism about the meaning of the rule of law. If allegiance to the nation-state is not enough for survival, it must—in limited but important purposes—be transferred to a growing international rule of law. We have sufficient technique and instruments. We lack only vision, ingenuity, and moral courage.

Our needs can be met if the functions for central adjudication are specific and based on mutual self-interest, allowing limited jurisdiction. Disputes as to allocation of economic risks thus could be removed to a nonpolitical international jurisdiction instead of being left to the political organs. With such an arrangement, central international institutions could aid in the settlement of disputes under policies of the common global good, rather than exacerbating them. The lawmaking force of treaty would serve the self-interest of states by regulating processes of risk allocation. Instead of negotiating state-to-state reparation payments, to be distributed by national commissions (as is presently done), a settlement agreement could be transferred to an international level, allowing governments and anyone else to defend suits brought by individual claimants within the narrow scope of the treaty. The international tribunals would decide only whether the individual or enterprise has a valid claim under international law, as limited by the terms of the functional inter-

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oriented approach toward the valuation of foreign aid held enterprises, see Weigel & Weston, *Valuation upon the Deprivation of Foreign Enterprise: A Policy-Oriented Approach to the Problem of Compensation Under International Law*, in 1 *THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW* 3-39 (R. Lillich ed. 1972). For the practice of the Foreign Claims Settlement Commission, see Lillich, *The Valuation of Nationalized Property by the Foreign Claims Settlement Commission*, in *id.* 95-116. The search for guiding rules by the International Court of Justice is discussed in White, *The Problems of Valuation in the Barcelona Traction Case*, in *id.* 43-63. Payment of reparations can be done in a number of ways, particularly when countries need to settle claims to permit more important trade and economic agreements. One of these methods is "value tying," where payments to private parties come from favorable trade agreements, extension of credit or reducing an import barrier. Such payments, however, are not always passed onto the injured claimants. For a discussion of the French practice, see B. WESTON, *INTERNATIONAL CLAIMS: POSTWAR FRENCH PRACTICE* 33, 119 (1971). See also I. FOIGHEL, *NATIONALIZATION AND COMPENSATION* 111-19 (1964); R. LILLICH, *INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS* (1962).

<sup>65</sup> Such strategies consist of arrangements permitting the transfer of new and existing foreign held investments to local ownership and control. For a survey of possible divestment mechanisms, see A. HIRSCHMAN, *HOW TO DIVEST IN LATIN AMERICA AND WHY* 11-22 (Essays in International Finance No. 76, 1969).

national agreement, and award any amount to be drawn from the previously negotiated lump-sum settlement. The law would be invoked directly by central institutions.

The extension of legal process completes the tacit assumptions of the casebook, that international process requires allocation of functional jurisdiction to central institutions both in economic and in human rights disputes. To survive changing conditions, the law must be made applicable to individuals having disputes under the jurisdictional device, whether economic or basic rights. Such development, engineered with the artistry and skill of well-educated lawyers, would stand as a most significant and feasible advancement in the world order.

I have attempted to interpret this major casebook in international law by beginning with its own assumptions about functional decisions. While the work professes to put theory and philosophy to a later priority, it surely rests inherently both on a need for theory and on theoretical assumptions themselves. It deserves high praise in freeing us for more contemporary inquiry less bound by the metaphysics of the past; yet it is subject to fair criticism for failing to give us sustained guidance in any theoretical methodologies to aid in the global process of decision under study. Alternative thinking, empirical research, and the use of the social sciences and humanities, need to be integrated more in the materials if they are to sustain their claim to deal with a legal system of global dimension. While the term itself claims too much, it is necessary to begin to work toward realistic global perspectives.

The context of the work requires understanding of forces about which we do not enjoy thinking: violence, deprivation, mass hunger, retaliation, and change in attitudes toward human dignity and equality. My analysis of jurisdiction is an effort, in agreement with the authors, to show how juridical concepts of jurisdiction might better serve functional needs for orderly decisions than dealing from the concept of a nation-state. The book's attempt to study the allocation of power to prescribe and enforce rules before examining the state and its recognition is a worthy beginning effort at constructing an unwritten world constitution, at least in concept. It also corresponds to the conclusions of thinkers such as Kelsen and McDougal who always ask how the larger community ultimately allocates power and authority. Equally important, however, are the limitations on this power and authority which appear under various names such as "act of state doctrine," "sovereign immunity," and "minimum standards of international law." My point in analyzing these concepts from the book's view is to show that important collisions are taking



place between the economic analysts, who place utilitarian emphasis on the efficiency of the legal process, and the humanists, who attempt to limit the egalitarianism of welfare when it sacrifices certain human rights. Even more troublesome are the welfare duties which require states to take affirmative social and economic action for their peoples. This welfare function of states may also be incompatible with the liberal notion of a rule of law meant to settle disputes about power in favor of liberty. The authors deserve high praise for separating the economic enterprise from the human individual and in examining both rights and duties for each, implying that the classifications require different juridical concepts.

The most serious criticism of the work lies in a common failure of American law casebooks—the paucity of alternative thinking or creativity regarding systematic proposals for change and strategies for implementing such proposals. Such skills are no less the common heritage of lawyers than knowing how decisions are made within the system. Creative images of hopeful but realistic alternatives under international law are needed, requiring competence of an extraordinarily sensitive and skillful kind. The conception of international jurisdiction under lawmaking treaties, where individuals can bypass the state in agreed areas of cases or controversies, is one possibility to which the casebook's material leads. Especially in light of the authors' biases in favor of the realistic, analytic mode of study with emphasis upon actual decision, this next step of an international process for judicial decision seems to flow logically, with the necessary obligation to decide what are justiciable and what are political or economic cases or controversies.

The authors have given us a new set of tools for teaching these skills. On balance, they have given us something far more valuable: a simple set of materials through whose structure and purpose we shall see the world legal system differently. It is for bringing international law closer to perceptions of present and future realities that we owe Professors Leech, Oliver and Sweeney our greatest debt.

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