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The International Legal System--Cases and Materials by Noyes E. Leech, Covey T. Oliver, and Joseph Modeste Sweeney

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THE INTERNATIONAL LEGAL SYSTEM—CASES AND MATERIALS. By Noyes E. Leech, Covey T. Oliver, and Joseph Modeste Sweeney. Mineola, New York: The Foundation Press, Inc., 1973. Pp. lxxxiii, 1372. $20.00. With Documentary Supplement. Pp. vii, 302.

There is a general feeling among law school instructors that the "best" casebook would be one's own. The selection of cases, the ordering of the materials and the decision to incorporate certain aspects of the course and to exclude others are determinations which instructors would generally wish to make for themselves. This natural urge results either in the "casebook shopping" which is undertaken by instructors at the beginning of each semester or in a decision to write a casebook to meet one's own personal needs and hopefully the needs of those other instructors who may happen to be in agreement on these questions. However, for those of us who are not engaged in casebook architecture, the publication of a new casebook is a welcome event if only for the mere fact that it affords us an extra option.

If this choice problem, however, is common to all law school courses, it is particularly acute in the area of the so-called non-bread-and-butter courses where one of the main problems is how best to "sell" the course to students. International law belongs to this group of subjects. True to the law school tradition of teaching law through the cases (rather than through treatises as is the tradition in the various departments of the arts and sciences colleges of U.S. universities or in most other non-American law schools), an American law school international law professor teaches international law through the cases, and for the purpose he currently has at least three nationally acclaimed casebooks[1] to choose from. The new volume by Professors Leech, Oliver, and Sweeney is certainly a welcome and timely addition to the evergrowing pool of international law casebooks.

International law is in the state of a constant flux: in any given year hundreds of international conferences are held to resolve burning international problems, treaties and conventions are concluded on the numerous aspects of the law of nations, national and international courts as well as international tribunals hand down decisions on various questions of transnational law. This leads both to a quantitative as well as qualitative growth of the corpus juris of the law of nations. In view of that fact a current and up-to-date restatement of the law becomes a near necessity. From this vantage point the book by Leech,

[1] These include: W. BISHOP, INTERNATIONAL LAW, CASES AND MATERIALS (3rd ed. 1971); A. CHAYES, T. EHRLICH, AND A. LOWENFELD, INTERNATIONAL LEGAL PROCESS (1968) (with Documents Supplement); W. FRIEDMANN, O. LISSITZYN, AND R. PUGH, CASES AND MATERIALS ON INTERNATIONAL LAW (1969).

Oliver, and Sweeney represents a most up-to-date doctrinal compilation of contemporary international law—a fact which makes this volume tantalizingly preferable to all the other casebooks on international law.

In a 20-chapter arrangement the authors discuss such questions as the application of the law of the international system, the bases and limitations of jurisdiction, the status of the individual in international law, the law of international organizations, the law of treaties and other international agreements, theories about the international legal system, and the uses of force in international law. The authors are men with considerable classroom experience, and two of them have had long experience in government. They were all involved in the drafting of the American Law Institute Restatement of the Foreign Relations Law of the United States. That their experience was brought to bear upon their exposé of the law which is certainly their specialty cannot be gainsaid. Before attempting to discuss the many merits of the book it would be apt for me to express my doubts as to the redeeming classroom value of some of the innovations in the "plot" to the book.

One striking feature of the book is its unorthodoxy. The ordering of the materials in the book is a demonstrative departure from the "norm."[2] Rather than begin in the traditional way (which is to discuss the nature of international law, the sources and evidence of international law, the subjects of international law, etc. before anything else) the authors, for reasons that are not convincing to this reviewer, start off with "a sketch of the structure of the present legal order of the planet." The rationale for postponing a discussion of the more jurisprudential materials until chapter 18 is that, in the view of the authors, "the student will be better able to deal with those questions after some exposure to the subject matter that is the corpus juris of what is called 'international public law'."

This reviewer doubts the soundness of such a reasoning. Experience shows that the average American law student, by the time he comes to take a course in international law, must have been exposed to basic American law courses and, therefore, comes into the international law class with some reasonable expectations that since this is international "law" it should at least bear some similarities to those aspects of American municipal law to which he has been exposed, particularly with regard to the enactment, adjudicative, and enforcement processes. This expectation soon vanishes when he comes to realize that the term "international law" is only a misnomer for what may be called international public morality and as such should be approached differently

[2] See, for example, the ordering of materials adopted by Friedmann et al., *supra* note 1.

from municipal law. The only way to minimize a possible crisis of expectation in such a student is to tell him right from the start that he is going to be dealing with an entirely different legal system and will be faced throughout his course in international law with an entirely different ball game. This, in my opinion, can best be achieved through an early discussion of the international law making processes, the nature of international law and the applicability of international law by municipal courts.[3]

Secondly, it is doubtful if chapter 18 is of any useful classroom purpose. Under the rubric of *The Influence of Legal Philosophy* the authors merely assemble excerpts from different jurisprudential schools on the nature of general international law without even attempting to link these diversities into a meaningful unity which the reader may reasonably call the central theme of the chapter. Rather, we are told that "the excerpts that follow are intended to assist you in the development of your own philosophic outlook about law in the international system, both in terms of what is and what ought to be. You will have been doing this, subliminally at least, as you have gone through the preceding chapters. This is a focusing chapter." Without the instructor's help it will be extremely difficult for the average student to fit together such divergent views as Austin's general opinion theory, Wolff's positivism, Kelsen's pure theory of law, Tunkin's will theory, and McDougal's policy-oriented jurisprudence. Such un-annotated assemblage of divergent philosophical propositions could be justifiable only if a course in jurisprudence were a prerequisite for a course in international law. Unfortunately, this is not the case. Taking into consideration the general background of the prospective student for whom the chapter was intended, this reviewer feels that chapter 18 ought to have been supplied with some linking commentaries.

The above personal disagreements notwithstanding, the book has many advantages which no doubt outweigh its apparent disadvantages. The authors' treatment of the question of jurisdiction is highly commendable. All the pertinent issues are raised, the practices of many states other than the United States are represented, and the most recent developments in this area of international law are fully reflected.

[3] In fairness to the authors it may be conceded that the materials in Chapter 1, with the vigorous intervention of the instructor, may be presented in such a manner as to permit the early exposure of the students to the question of the applicability of international law by municipal courts as well as to the process of international law making. The unorthodoxy of this approach results from the fact that the authors chose to give the students only a functional and operational, rather than a philosophical, answer to the relevant issues about the nature of international law.

One of the many other major advantages this book has over its contemporary American counterparts is that it makes special efforts to articulate the practices and doctrines of international law obtainable in other countries and particularly of the countries of Latin America, Western and Eastern Europe. True enough the practices of the Peoples Republic of China and African countries are glaringly absent here, but at least the American student is made aware of the fact that the making of international law is not just what the United States says it is.

The chapters on the law of treaties are also among the best written sections of the book. The orderly interaction between United States constitutional practices on the question of U.S. treaty-making processes, the Vienna Convention on the Law of Treaties, and the A.L.I. Restatement of the Foreign Relations Law of the United States is particularly illuminating. The temptation, no doubt, was great for the authors to make this work (and particularly the chapters on the law of treaties) another study book companion to the A.L.I. Restatement. They succeeded in avoiding that "mistake" and offer instead a systematic presentation of contemporary international law in which adequate notice is taken of the A.L.I. Restatement. In treating this section of the book it is suggested by this reviewer that the instructor recommend to his students other supplementary materials on the various aspects of the United States constitutional practices.[4] For a long time international law has tended to drift away from constitutional law—a trend which has led to some concern among students of both disciplines. If there is any area of international law that is in urgent need of direct correlation with constitutional law (within the U.S. context) it is the law of treaties, and much of the desired bridge-building will be up to the instructor himself. The law of treaties is the center of gravity of the entire law of nations and in discussing this aspect of the course in international law the American student should be particularly reminded of the pertinent constitutional regulations of U.S. treaty-making powers.

Furthermore, it should be mentioned that the materials in chapter 17 touch upon one of the most current problems of international life—international economic intercourse. Whereas international trade law is a course of its own, distinct from general international law, the exposure of the students in an international law class to the basic principles of international economic regulations is not only desirable but necessary. The authors' selection of cases from the P.C.I.J., the I.C.J.,

[4] Among such supplementary materials this reviewer particularly recommends L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972).

U.S. courts and from various international arbitration tribunals to illustrate some of the problems of international trade is an asset to the chapter. Unfortunately, however, the chapter devotes too little attention to the present problems facing multinational corporations. These transnational giants are slowly but surely changing the present nature of the law of international trade and certainly deserve more than the seven-page treatment accorded them in chapter 17.

The decision to conclude the book with a discussion of the uses of force by states is also very sound. Thus, whereas chapters 1-17 represent the international law of peace (even though the authors' treatment of the methods of the peaceful settlement of international disputes on pp. 51-108 is far from adequate), chapters 19 and 20 realistically provide a derogation from those general principles of the law of peace. The aim of the law of force in international law is to define, structure, and confine the legal uses of force in relations between nations.

It should, however, be pointed out that chapters 19 and 20 focus attention only on the evolution and subsequent development of the notion of *jus ad bellum* (tracing it from 1919, through 1928 and ending with the adoption of the UN Charter in 1945). Almost nothing here is said about the various international conventions which regulate the other aspects of the international law of war—*jus in bello*. Some reference to the numerous international conventions on the conduct of warfare would have been appropriate. After all, the law of force regulates not just the limited right of states to resort to force *(jus ad bellum)* but also places some restriction on the uses of the force once it has been invoked *(jus in bello)*. A discussion of one without the other would not be a fair treatment of the contemporary international law of warfare.[5]

In sum, the book represents a very practical teaching aid produced by highly experienced authors. The state practices reflected in the book are adequately representative of the contemporary state of the world. The doctrinal positions presented are un-parochial, and the status of the law articulated there is most up-to-date. The unorthodoxies pointed out above can be easily remedied by the individual instructor both by reordering the materials to his own taste and by assigning outside materials to the students. This certainly is not too much of a price to pay for the wealth of materials that have been

[5] Some reference to the conventions regulating the conduct of warfare is made in the preceding chapters. Even then it is this reviewer's belief that at least some portions of chapter 19 and 20 ought to have been devoted to the question of *jus in bello*.

assembled by the authors in this book. "[The authors] have done their best to make this book a teaching tool . . . in a field that, for American lawyers at least, has seemed more than usually doctrinal and conceptualistic. [The authors] have tried to suggest functional ways of looking at problems and building new generalizations." To the international law teacher who wishes to expose his students to the most current developments in the law of nations, this book is highly recommended.

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