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Chayes, Ehrlich, Lowenfeld: International Legal Process: Materials for an Introductory Course

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BOOK REVIEWS

INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE (2 vols. with supp.). By *Abram Chayes, Thomas Ehrlich, and Andreas Lowenfeld*. Boston: Little, Brown. 1969. Pp. xxiii, 1403, 635. \$22.

International Legal Process: Materials for an Introductory Course is a textbook with a thesis. Its authors, Professors Chayes, Ehrlich, and Lowenfeld, argue that the contributions of international law to the international system have shifted markedly in the last quarter century. In their view, however, that development has not been adequately portrayed in most existing academic work. They assert that the academicians have "concentrated on the definition, elaboration and analysis of asserted rules or norms of international law" (p. xi), rather than on addressing their efforts to the "study of the international legal process itself" (p. xi). Moreover, the authors suggest, those rules or norms reflect the concerns of a "classical" period in the history of international law and thus tend to ignore contemporary legal issues of equal or greater import.

In order to remedy these asserted defects, the authors break the mold in which international law casebooks have traditionally been cast. Their work emphasizes process rather than rules; it treats contemporary problems in addition to classical concerns.

The scope of inquiry into the international legal process is circumscribed by four questions that recur throughout the work. How has decision-making competence over international affairs been allocated among individual nations, groups of nations, and supranational bodies? Why has a particular regulatory arrangement, instead of an alternative mode of control—or no regulation at all—been chosen for dealing with specific international problems? How have particular institutions and the international system as a whole evolved to regulate national and individual behavior? Which features in the political, economic, and cultural setting have inhibited or, conversely, favored that evolution?

Emphasis upon contemporary as well as classical issues is achieved by selecting seventeen international problems, each of post-World War II vintage, as the framework for the book.

The authors' program is an ambitious one that calls to mind the earlier efforts of legal realists to shift attention from analytic to empirical legal inquiry. Their eschewal of the case method in favor of scenarios of recent international events creates novel problems of organization and method—problems for which conventional textbooks provide little guidance. The work, however, has proved, in my experience, to be a strikingly effective teaching tool. In addition, the authors' imaginative adaptation of the problem method demon-

strates that the work of the international lawyer, despite its seemingly esoteric character, demands the same professional skills as the work of his domestic counterpart. Hence, it confirms that the seamlessness of the legal web comprehends legal pedagogy as well.

I. LEGAL PROCESS AND THE PROBLEM METHOD: SUMMARY

Process, in John Dewey's apt phrase, is a "weasel word" of variable meaning. Its use has become quite fashionable among legal writers as their belief has grown that single-minded concentration on the mastery of rules spawns barren formalism in the classroom and caricatures the work actually performed by lawyers. The legal process, it is felt, should be studied in conjunction with rules in order to illuminate the factors that account for their creation, vitality, or desuetude. Unfortunately, those using the term often fail either to define it in the context of their particular field or to organize their materials in a manner that exposes its elusive characteristics.¹

Chayes, Ehrlich, and Lowenfeld, however, have faced both problems directly. They agree that rules constitute an essential part of any legal system. But they also recognize that since rules and the concepts underlying them are not "self-defining," it is necessary "[f]or adequate understanding [of those rules and concepts] . . . to see also by what institutions and procedures [they are] brought to bear in particular cases" (p. xi). Accordingly, the term process, as used in their text, includes both a substantive and an institutional or procedural dimension.

The substantive dimension consists of the principal subject matter areas within the international field. In charting those areas, the authors distinguish between the classical and the contemporary periods of international law. The classical period extends from the origins of modern international law under Grotius to approximately the first third of this century; the contemporary period runs from the end of the former era until the present. Classical international law is viewed as essentially "negative and laissez-faire" (p. viii), designed to "preserve as much room as possible for the unregulated activity of [sovereign states]" (p. viii). Freedom of the seas, diplomatic immunity, and sovereign immunity are cited as typical concerns of that period. Contemporary international law, on the other hand, is seen as assuming a more creative role as a "medium for organizing the activities and relations of nations and their citizens in pursuit of common ends" (p. xi)—a role which reflects the rapid expansion in the complexity of international dealings, and the greater interdependence of nations. According to the authors, the agents of those

1. For the reviewer's criticism in this respect of *Land Ownership and Use: Cases, Statutes and Other Materials*, by Professor Curtis Berger, see Costonis, Book Review, 69 COLUM. L. REV. 158, 170-72 (1969).

developments have been the emergence of fifty new nations, their attendant problems of economic development, a vast increase in the volume of world trade, the division of world power among blocs and alliances, and the invention of nuclear weapons. Thus, appended to the former concerns of international law are such matters as accelerating economic growth in underdeveloped nations, supporting the expansion of world trade generally, maintaining security through international peace-keeping operations, and regulating international transport and communications.²

The institutional or procedural dimension of the international legal process has kept pace with these shifts in substance. The simpler affairs of the classical period could be managed on a bilateral or, less frequently, multilateral basis by sovereign states that looked to custom or to relatively uncomplicated treaties as the source of their international rights and duties. As the concerns of the international legal system have become more complex, however, so too has the need for institutional devices of greater sophistication and universality. The authors identify two such devices that have carried much of the burden in recent years: multilateral treaties of detailed and often technical content, and regional or global international organizations endowed with varying degrees of authority for carrying out the responsibilities assigned to them by their constituent states (pp. x-xi).

As a means of portraying the operation of the international legal process, the authors selected a modified version of the problem method. The problems in their work are real, not simulated. Each has a plot or scenario and is developed from its origins to its resolution.

The problems are grouped under three headings: limits of adjudication, economic affairs, and political problems. The first section explores the act-of-state and sovereign immunity doctrines in light of the *Sabbatino*³ and *Bahia de Nipe*⁴ decisions respectively, and it recounts the controversy in the United Nations over the expenses of its peace-keeping operations in the Middle East, Cyprus, and the Congo. The likely efficacy of third-party adjudication—by United States courts in the first two problems and by the World Court in the third—in resolving international disputes provides a common theme for the problems in this section.

The problems treated in the economic affairs section exemplify

2. The authors' conception of the differing contributions of international law to the international system in the classical and contemporary periods parallels that propounded by Professor Wolfgang Friedmann in his treatise, *The Changing Structure of International Law* (1964).

3. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

4. *Rich v. Naviera Vacuba, S.A.*, 197 F. Supp. 710 (E.D. Va.), *affd.*, 295 F.2d 24 (4th Cir. 1961).

the efforts of nations to solve international trade problems on a unilateral or bilateral basis, or through multilateral agreements creating international organizations. The authors explore the vagaries of unilateralism through an examination of the international complications that attended the efforts of the United States to monitor ocean cargo charges and air passenger rates affecting its foreign commerce. An analysis of the background and content of the United States-Canadian Automotive Products Agreement of 1965 provides an example of a bilateral attempt to settle a dispute that had troublesome economic and political overtones. The International Coffee Organization, the International Consortium for Satellite Communications, and the International Monetary Fund are the foci of successive problems that probe the contributions of international organizations to the management of global economic and technological issues. Each problem reviews the multilateral agreement creating its respective organization, and evaluates that agreement in terms of its adequacy in meeting the issues that prompted its negotiation; conclusions based on that evaluation are then tested against the organization's actual response to selected legal and political crises that subsequently confronted it. The economic affairs section also reviews the embroilment of the United States and the European Economic Community in the "Chicken War" dispute. It concludes with an examination of the legal and diplomatic consequences of the decision of an Argentine administration to annul a series of oil exploration contracts negotiated by its predecessor with various foreign companies.

The authors devote the political problems section primarily to issues affecting international security. Three of the problems in the section concern United States-Latin American relations. The Canal Zone flare-up in early 1964 is examined in conjunction with the subsequent efforts of the United States and Panama to renegotiate the Panama Canal Convention of 1903. The landing of United States troops in the Dominican Republic in 1965 offers a point of departure for reviewing the state of international law and practice with respect to intervention. The Cuban missile crisis, the impact of which was more global than hemispheric, provides a framework for reviewing the requirements of the Charters of both the United Nations and the Organization of American States relating to the right of individual and collective self-defense and to the use of force in any circumstances. The authors also scrutinize the dilemmas posed by multilateral treaty-making in a delicate political setting. An examination of the origins, structure, and potential applicability of the Limited Test Ban Treaty provides the framework for this scrutiny. Finally, the third section explores the contributions of the United Nations to the maintenance of international security. It

considers the international peace-keeping operations in Cyprus, conducted under United Nations auspices, and the imposition of sanctions by that body in Rhodesia.

Although the problems considered in *International Legal Process* cut across various subject matter areas and institutional arrangements of the law, they have certain basic similarities. Each of the problems is of recent origin. Hence, the book illuminates contemporary substantive and procedural features of the international process in accordance with the authors' stated intentions. The freshness of the problems is perhaps also attributable to the authors' experience in the early 1960's in the State Department where Professor Chayes was Legal Advisor and Professors Ehrlich and Lowenfeld served as his Special Assistants.

The materials for each problem are of two types: the scenario or plot of the problem with supporting notes, excerpts, questions, and sometimes cases; and the documents—usually statutes or treaties—that define the legal options of the participants. The two principal volumes contain the former; a separate supplement, the latter. The authors have tapped diverse sources for both. Those sources are the press, including newspaper accounts, press conferences, and political cartoons; economic, political, and legal journals; treaties; reports and resolutions of international bodies; and congressional hearings, reports, and legislation. Accompanying each problem are compact background notes which depict the political, economic, and cultural setting for that problem. In addition, the problems have been edited to insure "plot continuity," and they frequently include brief summaries of legal doctrines that are related to the factual and legal issues presented.

Each problem uses the same basic format. A bold-print newspaper headline, such as "FIRST ATOMIC BOMB DROPPED ON JAPAN," or an extensive background note, or both, introduce the problem. Following that introduction, there is a series of threshold questions that isolate core issues and themes. The student's attention is then directed to relevant documents in the supplement by means of a series of questions that probe such matters as the applicability of existing norms to the problem or the responsiveness of relevant treaties or statutes to underlying technical, political, or legal considerations. There may be a note or two recounting the origins of particular institutional arrangements or legal doctrines that have influenced the shape of the document under consideration. When the issues and participants are identified, the general and technical background recounted, the institutional framework charted, and the guiding documents set forth, the problem moves to its denouement. That movement is frequently punctuated by additional questions, supplementary notes, or legal texts. The problems generally con-

clude with an examination of the strategies adopted by the participants and of the respective roles that law and diplomacy played in the selection of those strategies.

II. A CRITICAL APPRAISAL

Chayes, Ehrlich, and Lowenfeld are undoubtedly correct in their view that contemporary international law differs significantly in both substantive content and institutional structure from its classical predecessor. They tend toward overstatement, however, in their implied criticism of existing academic work as insensitive to these differences. The writings of Professors Friedmann, McDougal, and others are expressly addressed to the changes that have occurred in international law during the past quarter century.⁵ Moreover, the changes have not escaped the attention of authors of existing international law textbooks. Professors Stein and Hay devote their entire text⁶ to the institutional arrangements created after the Second World War by the nations of the North Atlantic region in order to enhance their security and economic development and to protect individual human rights. Similarly, recent editions of Professor Bishop's leading casebook⁷ contain increasingly greater amounts of material devoted to modern developments in international law.

Where *International Legal Process* clearly does break new ground is in its unique adaptation of the problem method to present its subject. Existing international law textbooks are organized in much the same way as most domestic law casebooks. Although the former contain a greater percentage of noncase materials, they still rely heavily upon judicial opinions. More important, they both tend to lack a perspective independent of the rules or norms implicit in their materials, a perspective that enables the student to observe and grapple with the interaction of "technique and doctrine" (p. xi).⁸ *International Legal Process*, on the other hand, seeks to provide that perspective by means of problems that locate the rules and norms in distinct contextual settings.

The international legal curriculum has a place for both types of

5. An abbreviated survey of the relevant literature may be found in McDougal & Reisman, Book Review, 65 COLUM. L. REV. 81 (1965).

6. E. STEIN & P. HAY, CASES AND MATERIALS ON THE LAW AND INSTITUTIONS OF THE ATLANTIC AREA (1967).

7. W. BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS (2d ed. 1962).

8. The phrase is the authors'. It appeared in the context of the following statement:

Process, of course, does not operate in a vacuum. Rules and norms may not be the whole of the law, but it is hard to conceive a legal system without them. And so much of this book involves familiar doctrinal analysis—whether of statute-, treaty- or custom-based norms. But *technique and doctrine* develop in interaction. . . . For adequate understanding of the norm we need to see also by what institutions and procedures it is brought to bear in particular cases. [P. xi (italics added).]

texts, whose premises and objectives are, after all, quite different. Instructors are likely to choose between the two on the basis of their preference for one or the other format utilized in these texts. Since the characteristics of the conventional coursebook format are well known, the remaining pages of this Review appraise the pedagogical costs and benefits of the format employed in *International Legal Process*.

In seeking to portray the international legal process by means of a series of problems, the authors encounter numerous difficulties that the less ambitious case method gingerly avoids. Each of those difficulties reflects the inherent tension between the need to select, for each problem, materials that illuminate the content and interaction of its legal and nonlegal components, and the need to confine those materials to a manageable length while retaining a perspective that enhances the student's lawyering abilities. Instances of that dilemma abound throughout *International Legal Process*. For example, the authors include within their notion of legal process the "elements of the political, economic and cultural setting" (p. xii) that affect the capacity both of particular institutions and of the legal system as a whole to restrain and organize individual and national behavior. But even a skeletal portrayal of those elements, as they operated in a situation like the Cuban missile crisis, would require many more than the ninety-three pages allotted to that problem. The same observation applies, in varying degrees, to the other factors that the authors list as central to their concept of process (p. xii). Thus, the problem format requires a high degree of selectivity in the choice of materials. But selectivity itself entails certain risks. Indeed, the authors' severely telescoped presentation of the background information necessary for an understanding of specific problems occasionally borders on the arbitrary and the oversimplified.

The materials in *International Legal Process*, in contrast to those in conventional casebooks, are heterogeneous and diffuse. Consequently, the text's pervasive themes of substance and technique, and the more immediate conclusions to be drawn from its individual problems, do not readily fall into coherent patterns. Nor can they be isolated with the same economy and precision as can the holdings of individual cases or the line of authority implicit in a group of cases and related statutes.

As a result of these problems, *International Legal Process* is not an easy book to use in the classroom. The materials cannot be as neatly segmented for hourly discussion as can those in conventional casebooks. The greater length of assignments, the heterogeneity of the materials, and the use of two principal volumes and a documents supplement require that the topics to be treated in future sessions be appropriately flagged beforehand. In addition, guiding classroom

discussion is more challenging, since the problems treat dramatic and controversial events and include various nonlegal subjects. Differing levels of sophistication among the class members in political, historical, and, especially, economic affairs contribute to a certain unevenness in student participation and interest. Finally, the novelty of the problem format and the difficulty experienced by the students in discerning coherent themes and patterns in the materials create some uneasiness in the initial class meetings.

Two specific criticisms can be added to the foregoing observations, most of which are concerned with difficulties inherent in the problem method itself rather than with defects in the authors' use of that method. First, the authors' decision to portray the "international" legal process by concentrating essentially upon the legal dimension of the United States foreign relations is particularly unfortunate. As a result of that decision, international organizations are treated largely as foils for the advancement of United States interests. Issues relating to the capacity of those organizations to make an independent contribution to the resolution of international difficulties on the basis of their unique nonnational status are not sufficiently explored.⁹ Again, the increasing penetration of international norms—usually treaty-based—into the domestic legal systems of nations less autistic than the United States is overlooked in spite of the far-reaching significance of that trend for the development of the international legal system.¹⁰ Second, the absence of a problem dealing directly and comprehensively with the status of international law within the domestic legal system of the United States is troublesome.¹¹ That issue is implicit in every problem, but

9. This criticism is not applicable to the authors' treatment of the role of the United Nations in the Cyprus and Rhodesian problems.

10. For an analysis of this trend among the member states of the European Economic Community, see Stein, *Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case*, 63 MICH. L. REV. 491 (1965).

The authors state that the absence of materials dealing with nations other than the United States is perhaps an "inevitable limitation" of the book. I am not so sure. Materials reflecting the positions of the less developed nations, for example, could be expanded, especially in the economic affairs problems. A crisis arising in a supranational organization—such as the challenge to the supremacy of the Rome Treaty in the domestic legal systems of the European Economic Community member states—could be examined by means of the same format used by the authors in their text.

11. For illustrations of the treatment of this question in conventional international textbooks, see, e.g., W. BISHOP, *INTERNATIONAL LAW: CASES AND MATERIALS* 57-106 (2d ed. 1962); E. STEIN & P. HAY, *LAW AND INSTITUTIONS OF THE ATLANTIC AREA* 11-26 (1967).

To some extent, a problem that classifies the various types of international and domestic norms and relates them to one another—such as a problem involving a statute and a conflicting, customary international norm, a prior federal statute and an inconsistent executive agreement, or the United States Constitution and a conflicting treaty—encourages the very conceptualism that the authors properly seek to avoid. But a persuasive argument can be made for using one problem to acquaint the beginner with the normative framework within which each of the remaining problems operate.

never receives the sustained treatment that it deserves. Providing a problem of this nature at the outset of the work would enable the beginning international law student to tie together the international and the domestic spheres by means of a normative hierarchy, most of the elements of which he would have already examined in his domestic law courses.

If *International Legal Process* imposes certain burdens on the instructor and the student, it also rewards them handsomely for the extra effort that its use entails. The authors, by their imaginative adaptation of the problem method, have succeeded in portraying the international system from the perspective of the lawyers who counsel the various participants in that system. Short of having one's students intern in the Office of the Legal Adviser, there is perhaps no way of communicating that perspective more effectively. The authors' approach exchanges the analytical tidiness of the treatise or the casebook for a vivid sense of the actual manner in which international problems arise and are resolved—or are "simply outlived" (p. xiv). That sense is only heightened by the work's diffuse materials, its telescoped treatment of certain components of the system, and its complex basic themes. As the authors aptly note:

The lawyer has to impose his own order on a heterogeneous mass of facts and materials, to define and redefine the legal issues, and often the problem itself, in the light of his professional experience and knowledge. [P. xviii.]

In addition to its unusually vivid portrayal of the work of the international lawyer, *International Legal Process* fulfills its authors' promise to illuminate the relative roles of law and diplomacy in the international system. The authors' concept of process is sufficiently broad to require treatment of both factors. By enabling the students to examine the impact of those factors in various contexts, the problem method clearly demonstrates that the relative weight of those factors is variable. Hence, the work encourages students to ask what it is about the individual components of a particular context or about that context generally that accounts for the greater—or lesser—efficacy of legal constraints upon the behavior of the participants in the international system.

Another advantage of the approach adopted in *International Legal Process* is that it permits a fuller examination of the meaning of the rules of international law by selecting contexts in which those rules have been applied. This advantage requires elaboration. It is axiomatic that the meaning of a legal rule—domestic or international—is determined in significant part by the manner in which it is applied. Thus, the analytical process of deriving a rule of law from a series of cases or legal texts, while an indispensable first step in the process of legal reasoning, does not provide a complete ac-

count of what the rule means. In order to discern the full meaning of a rule, the procedures and institutions that will bring that rule to bear in specific instances must be examined.

Despite the alarm of the legal realists over discrepancies between law in the books and law in action, this examination is omitted from most domestic substantive law casebooks. Domestic institutions and procedures, it is assumed, are sufficiently well-conceived and backed by the requisite sanctions to insure that, within tolerable limits, rules will mean essentially what the cases and statutes say they mean. Similar confidence, however, is lacking in the international sphere where effective third-party adjudication, made through authoritative institutions and procedures and enforceable by an impartial government, has yet to materialize. The fact that nations solemnly agree to refrain from "aggression" or to pay "adequate compensation" upon nationalizing the property of foreigners indicates very little about the meaning of their obligations to do so. Those obligations may be understood only by reference to the institutional and procedural arrangements that are available to enforce them.

The seventeen problems in *International Legal Process* were drafted with this concern in mind. Each problem contains ample materials for examining the institutions or procedures that were utilized in defining and resolving the controversy in question. Each contains texts setting forth rules that ostensibly govern the relevant issues. And each captures through its scenario the interaction of the institutions, procedures, and rules from the initial stages of the problem to its eventual resolution.

The final advantage of the authors' approach is that it encourages students to rethink many of their premises concerning the character of the domestic legal system itself. This feedback effect contributes significantly to their general education as lawyers. Vicarious participation in the negotiation of an international agreement and the attempt to circumvent troublesome treaty language prompt the realization that all lawyers, whatever their special field, are called upon to perform essentially the same functions. Moreover, a comparison of the generally excellent record of law observance that prevails in the international field with the often spotty levels of compliance in certain domestic fields leads many students to conclude that international law is not so fragile, nor domestic law so authoritative, as they had once thought. Numerous other issues begin to receive careful attention. Such issues include the relative merits of negative sanction and positive inducement as regulatory devices; the existence of important differences between the role of the lawyer as a counsellor and his role as a courtroom advocate; and the capacity of legal institutions to respond to social, technological, and economic developments. In short, *International*

Legal Process not only serves as a rigorous and practical introduction to the work of the international lawyer, but also succeeds in enlivening many of the basic jurisprudential issues that have for so long been the subject of Anglo-American legal thought.¹²

In summary, Professors Chayes, Ehrlich, and Lowenfeld have produced a volume that demonstrates a good deal about the operation of the international legal process and about the contributions of lawyers to that process. Its reception will not be uniform among international law instructors: many will welcome it as a text that enriches the basic international course by virtue of its unique format; others will question whether its ambitious goals do not ultimately fall victim to the inherent limitations of that format. But none will doubt that it constitutes a distinct alternative to the international textbooks already on the shelf.

In addition, the volume speaks, in a fresh and valuable manner, to the place of international law courses in the general law school curriculum. Other international law textbooks have tended to exaggerate differences between the international and the domestic sides of the curriculum by concentrating upon the content of international rules. *International Legal Process*, on the other hand, points out the broad areas of similarity between the two fields by investigating the role and contributions of lawyers to the international system. With this subtle, but fundamental, shift in emphasis, its authors fully achieve their stated objective of locating the instruction of international law "in the mainstream of the intellectual and educational enterprise of [law] schools" (p. vii).

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12. It would be wrong, of course, to imply that conventional textbooks do not also partake of the foregoing advantages. The question is obviously one of degree, influenced in no small way by the special talents and concerns of the individual instructor. Classroom use of both types of textbooks, however, has persuaded this reviewer that these advantages can be more effectively realized through the use of *International Legal Process*.