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International Organizations in Their Legal Setting: Documents, Comments and Questions by Frederic L. Kirgis, Jr. and Legal Problems of International Economic Relations: Cases, Materials and Text by John. H. Jackson

Cynthia Crawford Lichtenstein

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CYNTHIA CRAWFORD LICHTENSTEIN*


Occasionally, even in the most anarchistic1 of laws schools, faculty members, prodded by conscience (or by students who, accepting the oft-repeated statement that the law is a seamless web, nevertheless dare to propose that the pedagogical strands be more closely woven), talk to one another about the integration of the curriculum. So I remember well the occasion on which the teacher of Property said to me, a teacher of Contracts, "You know, we use different substantive approaches and we all have different styles, but I think all the first year teachers here are really teaching the same thing: legal process."

This teacher was speaking of the common thread running through the teaching of "Contracts," "Torts," "Property" and "Civil Procedure," but she could have been describing the basic pedagogical aim of any number of specialized courses in the international law area with catalogue titles chosen, one suspects, to fill a curricular hole while permitting the teacher to concentrate on his or her true intellectual love: supranational norm creation and observance.2 The "grandfather" casebook for such teachers, Chayes, Ehrlich and Lowenfeld, International Legal Process,3 not only is open in its title about this

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*Cynthia Crawford Lichtenstein, is Associate Professor of Law at Boston College Law School; A.B., 1955, Radcliffe; J.D., 1959, Yale; M.C.L., 1963, Univ. of Chicago.

1. The polite term is "faculty-run," or, a law school where the Dean is prima inter pares and each peer is left sovereign in his or her academic turf.

2. A new Professor of International Law, bumped from the teaching of the basic course by the return from leave of the usual incumbent, has happily entitled the materials he has put together for his course in International Organizations, "The Process of International Organization." S. J. Burton, The Process of International Organization (1978) (unpublished course materials for International Organizations, Spring Semester, 1979, University of Iowa College of Law) [hereinafter cited as Burton]. His Preface gives his students three reasons aside from academic curiosity why they should develop a "[sophisticated] perception of international public policy processes." Id. at iv. The third is the insight that a study of legal process in an arena without "effective legislature, courts and police" provides into domestic legal processes. Id. The authors of the two casebooks under review would quarrel with Professor Burton as to the absence, outside the nation-state, of legislature, courts and police (both books take a close look at the processes of the European Economic Community); but both share fully his fundamental interest in how the "law" works outside the individual sovereignty of the nation-state.

approach to the teaching of international law, but the Introduction makes the classic statement about the content of the process:

Obviously, no limited group of problems can present the entire spectrum of international legal questions. The materials make no pretense of doing so. The problems, like appellate decisions in conventional course books, are essentially a source of vicarious experience. As such they can provide the basis for some understanding of how law operates in situations that concern more states than one: to order relations, to allocate resources, to organize activity, and to resolve or contain conflict. The subject for inquiry is, in the broadest sense, the legal process by which interests are adjusted and decisions are reached on the international scene.

Still we can learn much about law as a whole by observing it in the international setting. Courts are perhaps not so central to the idea of law as we had supposed. The role of assent, as opposed to command, appears with greater clarity. The process and institutions of growth and change are inevitably emphasized more than in the study of a field where the moorings are more fixed. In the end, an understanding of the way law adapts to change may be more important for both student and practitioner than a study of what the law may say about the world at any single point in time.4

Both casebooks under review here, while purporting to cover different substantive areas (International Organizations; International Economic Law), are worthy successors to the tradition, and both state this prime pedagogical aim in their Prefaces: Kirgis: “the hope is that [the student] will gain insights into the role of law and of legal concepts in the continuing process by which nations attempt to pursue shared values and to inject order into their international relations through the creation and use of international organizations.”5; Jackson: “First and foremost, this book is constructed so as to emphasize the legal system and legal process of international economic relations in context.”6 There, however, the similarity ends. These two casebooks, both avowedly concerned with international legal process and often using the same

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4. I id. at vii-viii, xiv-xv. Not the least of the pleasures of this seminal casebook is the felicity of its authors’ prose. Unfortunately, they teach by relating stories, true stories, and asking students hard questions about what was going on in those stories and since the book was published in 1969, the pedagogical effect is lessened by the resistance of contemporary law students to learning from ancient history. The process lessons remain the same, but few students are Clausewitz; and to be fair, today’s international confrontations are exciting to study.

5. F. Kirgis, INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING: DOCUMENTS, COMMENTS AND QUESTIONS xvii (1977) [hereinafter cited as Kirgis].

legal institution as a vehicle (the E.E.C., the International Monetary Fund) are in fact extremely different in content, focus and mode of teaching legal process and ultimately, I suspect, pedagogical aim. Both differ even more in teaching style from Professor Andreas Lowenfeld's series of volumes in International Economic Law,7 to which I shall contrast them after we have taken a closer look at each casebook under review.

Kirgis' book is deceptive in its beginning: despite the legal process avowal in the Preface, the materials begin with the classic doctrinal topics of international personality (who are "subjects of international law"), the legal capacity of international organizations and the privileges and immunities of international organizations and those associated with them. The format is the statement of a particular problem followed by a collection of material to help the student resolve the issues. In this doctrinal portion of the materials, the questions considered are those that might be posed to the general counsel of one of the organizations, resembling nothing so much as the kind of question the general counsel of a corporation must often consider: in what ways will a contemplated course of conduct make this organization civilly responsible or able to demand responsibility from another? This doctrinal analysis goes perhaps more deeply than some teachers would care to dig, particularly in the materials on the "problem of reciprocity" and the International Organizations Immunities Act, 22 U.S.C. § 288f (1976).8

However, as stated, this doctrinal opening is deceptive; by Chapter 2, Membership and Participation in International Organizations, Professor Kirgis is well launched into his prime concern: legal process in international organizations — and beginning what turns out to be a recurrent and progressively more resounding theme of the book: what can we learn from the processes and their effect on the conception of international law so as to increase the effectiveness of international law as a protector, a mode of recourse, for individual human rights. Thus he treats the topic of membership and participation in international organizations through consideration of the questions of U.S.S.R. admission to the International Labor Organization, the PLO as a United Nations Observer and the representation of the People's Republic of China in the United Nations. More than one-third of the

8. KIRGIS, supra note 5, at 70-71.
Chapter, however, is devoted to decision-making procedures, where Professor Kirgis introduces procedures, such as techniques for conciliation, that will be studied again in Chapter 6, Enforcement of Human Rights, as well as posing to students purely process questions, e.g., devising provisions for decision-making within a specific agency.

The process theme is fully expanded in the next two chapters on Rule Making and Dispute Settlement (Chapter 3) and Enforcement Techniques (Chapter 4). In Chapter 3, Professor Kirgis uses the International Monetary Fund along with other organizations to illuminate the rule-making process and asks students to consider the Fund’s 1974 Guidelines for the Management of Floating Exchange Rates and to compare with them the Fund’s authority over exchange rate policies under the 1976 amendments to the Fund Agreement. The questions are extremely interesting; I wonder, however, how well students are able to explore these questions in the absence of any exposition of the history or economic theory background of the Bretton Woods system (very well set out by Jackson, infra) or more specifically, international monetary problems. In this area, considerable substantive learning may be necessary to comprehend process. On the other hand, the materials on the legal effect of U.N. resolutions, and especially on the “quasi-constitutive role” of the General Assembly as Kirgis terms it, utilizing the Palestinian and Namibian cases, are splendid. In a very short space Professor Kirgis has raised all the theories, all the arguments that would be needed to make the case, say, for this year’s Phillip C. Jessup International Moot Court Competition problem on the “lawfulness” of a developing nation’s actions vis-à-vis patent rights of an alien owned corporation.

Chapter 4 is both in the center of the book (pp. 431-602) and the guts of it. Professor Kirgis explores in detail the modes by which international organizations, having been given norm creating powers, can encourage compliance with obligation. He covers the gamut from consultations and informal pressure, the “mobilization of shame” and waivers to authorized retaliation,

9. Here, I would pick an organizational quarrel with Kirgis. My own sense is that the question of decision-making procedures is too important to be simply a subsection in a chapter on organization membership and participation. (It ended up there probably because so much of U.N. decision-making has concerned membership.) However, the greater sin is the lack of any reference back to this question in the chapter on rule making and dispute settlement. The students are never asked to consider the extent to which the acceptance by nations of use of “mandatory language” by international organizations may be linked to the procedures by which that language is formulated. (Again in the Chapter on the E.E.C., Professor Kirgis sets out the story of the compromise with France’s unwillingness to move to non-unanimous decision making by the Council, but omits the opportunity to explore the connection, if any, to the mandatory nature of Community rule making.)

10. Id. at 173.

11. Id. at 272.
formal and informal sanctions affecting membership rights and finally, as do Jackson and Professor Lowenfeld in the third volume of his series, *Trade Controls for Political Ends*,13 the U.N. Rhodesian sanctions.14 The selection of materials seems to me excellent, the use of excerpts from scholarly writing on compliance procedures (particularly the mobilization of shame) judicious. By considering the case of Israel and UNESCO, he faces up frankly to the difficult questions he asks students: "Can a discretionary benefit-withholding sanction of an international organization ever be divorced from the short-term political interests of the states in control of the sanctioning body within the organization? If so, under what circumstances?"15

The Chapter is a fine selection of materials in the compliance area and the essential foundation for Kirgis' final chapter on the Enforcement of Human Rights. I question only the linguistic division of enforcement techniques into the general categories of "nonsanctions" (for Kirgis these are consultations, informal pressure, mobilization of shame, waivers) and "sanctions" (the other techniques mentioned above). The division presumably saves the term "sanctions" for the *economically* afflictive techniques (since a nation cannot be physically afflicted except in *Star Trek*), but leaves the *psychologically* afflictive (the mobilization of shame) up in the "non" camp. Furthermore, the "nonsanctions" grouping does not include any materials on affirmative inducements to compliance (e.g., provision of additional aid funds to assist opium poppy growing countries to aid their farmers to diversify, the diver-
sification funds provided for in commodity agreements to reduce overproduction and the tendency to cheat) thus hardly meriting its title. Professor Kirgis presumably has in his mind a definition of what he means by "sanction." Indeed, at one point in the materials under "Sanctions," he asks whether an authorized retaliation under the rules of the General Agreement on Tariffs and Trade that is insignificant commercially to the nation retaliated against has "any element of sanction in it?" He asks this question following an excellently chosen excerpt from R. Hudec, *The GATT Legal System and World Trade Diplomacy,* which includes the following observation:

> In the first place, the simple fact that the idea of sanction can be attached to these ostensibly "compensatory" countermeasures is a good demonstration of the more basic fact that GATT "sanctions" are an attitude of mind rather than a matter of actual economic deprivation. These actions are treated as "sanctions" because they convey, effectively, a certain severity of protest that words alone cannot achieve. The quality which enables them to convey this message is their relative infrequency, and, in a sense, their acknowledged pointlessness from a commercial point of view. The attendant economic deprivation is of minimal significance by comparison.

If, as I am forced to guess, Professor Kirgis is trying by this question and the ones that follow it to lead the students back to consider the mobilization of shame and conciliation procedures as effective compliance techniques as opposed to looking to economic "punishment," it seems a murky semantic way to do it. An antidote would be to have students read at least excerpts from an article by Reisman, *Sanctions and Enforcement,* for its all-inclusive view of the sanctioning process in the world community.

The materials organized by their process considerations end with Chapter 4 on Enforcement Techniques and the remainder of the book consists of a chapter on the European Communities and the final Chapter on Enforcement of Human Rights. Chapter 5 on the Communities compares very favorably, in my opinion, to Professor Jackson's exposition in his casebook of the institutions of the European Common Market, although to be fair to Professor

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18. Id.
20. Professor Burton has included excerpts from the Reisman piece in his unpublished materials. *Burton, supra* note 2, at 81.
Jackson, he is presenting the institutions as part of the law of the regulation of trade while Professor Kirgis is presenting the legal structure of the Communities as a *sui generis* type of international organization. In any event, Kirgis' materials explore in what way the European Economic Communities are a new breed of animal, how the Rome Treaty is not just a "treaty" in that it partakes of the nature of what we might think of as a constitution; in general the materials could well be entitled the "legal process of the E.E.C." Furthermore, the Chapter carries out the underlying theme of the book: it provides considerable material on the access of individuals to the European Court and the ways in which the Community Treaties create rights and duties on the part of individuals. Thus Kirgis has come full circle: the first Chapter presented the traditional view of only States and international organizations as "subjects" of international law, and by the penultimate chapter, the student should have a growing perception of the ways in which this conception — through international legal process — has changed so as to include human rights in the international law spectrum. The last chapter, of course, then explores the modes of enforcement of rights of individuals under international law. This last chapter could serve as the basis of a separate minicourse in human rights and should commend itself to teachers of the basic course in international law whose usual materials do not strike them as providing adequate coverage of human rights.

One final note on Kirgis: the beginning of the book offers an explanation of the classification of United Nations documents which could be an invaluable aid to the neophyte doing research in international law.

As noted initially, Professor Jackson's *Legal Problems of International Economic Relations*, while also concerned with legal process, is a very different book from Professor Kirgis'. First, while Kirgis' book would be useful learning for a student who envisions him or her self as counsel to an international organization or as utilizing the process now available for protesting violations of human rights, the materials are primarily focussed on general concepts and the general theme. Jackson's book, on the other hand, could be used as a training manual for a student who intended to go directly into the specialized customs bar. Despite its general title, this is a book on trade law and its specific rules, and other areas of international economic relations receive little attention. Besides trade (including a chapter on export controls and their political uses, and a chapter on commodity problems and agricultural goods), only the international monetary system is considered, and the total number of pages (out of a total of 1097 pages) devoted to institutional aspects and operations of the International Monetary Fund is approximately 60, of which 10 are used for discussion of the adoption of trade measures for balance of payments reasons. I understand that Professor Jackson's course at the University of Michigan that gave rise to these materials was entitled "Law of International Trade and
Economic Relations,'" and this would have been a more representative title for the book.

Moreover, while the book is very much concerned with legal process, process is approached always from the point of view of international trade: what are the respective powers of the Executive and Congress in rulemaking for trade, what E.E.C. institution makes trade law and what is the relationship of this law to the domestic law of the member States? It just so happens that the separation of powers questions have been raised by disgruntled importers (or consumers) so that a number of good "constitutional" cases are also trade law cases, e.g., United States v. Yoshida International, Inc., 526 F.2d 560 (C.C.P.A. 1975), challenging President Nixon's 1971 import surcharge; and Consumers Union v. Kissinger, 506 F.2d 136 (D.D.C. 1974), cert. denied, 421 U.S. 1004 (1975), challenging the voluntary restraint agreements negotiated with foreign steel producers. Thus, trade is a good transactional focus for examination of the U.S. constitutional problems in the regulation of international economic affairs (Chapter 3 of the book). Moreover, Professor Jackson has included important materials on delegated power, executive agreements and their domestic effect, and the reach of national economic regulation that raise questions much broader in range than the regulation of trade. But trade provides the basic parameters for the study and at times this book might frustrate a teacher who wanted to focus on the process questions from the vantage point of other types of economic regulation but did not have his or her own materials to do so. Thus, selection would be, I think, a problem for teachers using this book. This problem is aggravated by other aspects of Professor Jackson's materials. As noted, in addition to all the legal process materials, the book contains a detailed examination of the "nitty-gritty" of U.S. trade law, the rules and procedures. Professor Jackson is frank in his Preface:

23. It is because of the narrowness of focus in examination of the Community institutions that I prefer Professor Kirgis' presentation of the European Economic Communities. On the other hand, Professor Jackson has written extensively in his book (from the first hand knowledge as a former General Counsel to the Special Representative for Trade) of the difficulties of a system where the executive must negotiate internationally but the legislative branch is unwilling to give carte blanche and insists on taking a second bite at the policy after the deal is made (a most contemporary topic now that Ambassador Strauss is bringing home to Congress the package that finally has been put together at the lengthy Tokyo Round of GATT). His materials on the Community include also how the United Kingdom upon its entry into the Community dealt with the question of the domestic effect of Community law (he reprints the European Communities Act, 1972) and the problem of, in effect, the delegation by Parliament of legislative power to regulate Britain's trade to the Community Executive. The answer from Parliament was to adopt a "scrutiny procedure" which Professor Jackson asks the student to compare to the provisions for second bite by the U.S. Congress in the Trade Reform Act of 1974. These materials seem to me to be a superb example of teaching comparative law.
Thirdly, the emphasis of this book is on the legal processes in context, but the emphasis is on law. The context obviously includes difficult conceptual and empirical questions of economics and political science, of sociology, history and especially overall foreign policy. But the emphasis here is on those subjects which have developed relatively sophisticated rule systems.24

Thus Chapter 8 on Import Restraints contains a detailed investigation of legal problems of national tariffs, including classification for customs purposes, valuation, GATT and its "bindings," quotas and the E.E.C. variable levy. All of Chapter 9 is devoted to the most-favored-nation clause; Chapter 10 is on the national treatment clause and nontariff barriers; Chapter 11 is on adjustments to imports and safeguards against injury, including a detailed examination of the provisions of the Trade Act of 1974. Chapter 12 considers dumping and countervailing duties at length. For the law review member with a note or comment on trade law to write, or the young lawyer taking a job with a firm specializing in trade work, the book would be a wonderful source. Professor Jackson also states in his Preface that "this book has also been designed so as to be useful for research and reference."25 For the teacher attempting to use the book to teach not trade law but a broader sweep over the law of international economic affairs, the detail probably could not be assigned, but lectures or a lecture might have to be prepared summarizing the material.

Finally, the teacher without a very sure conception of the theme of his or her course — and able to assign very selectively — might be frustrated by Professor Jackson’s inability to leave any legal conception, however peripherally connected to the law of international trade, unelucidated. The fact that Professor Jackson makes available to the teacher who wishes to include the materials a chapter on the legal aspects of the private transactions — and financing — of international commerce is good; but does he really need as part of that chapter a section entitled "International Efforts to Unify Law" to explain what the American Law Institute is and to list processes of unification of law in the United States? Teachers who use stripped down teaching tools would prefer a sparer, less inclusive book, and to save this one for a reference

24. JACKSON, supra note 6, at xvi.
25. Id. at xvii. It is perhaps an unkind quibble, but if a book is designed to be a research aid, careful proofreading of galleys or care by the publisher in making noted corrections is a necessity. I have not tried a random citecheck on Professor Jackson’s citations, but the number of typographical errors that have leapt to my eye suggests that the page references also may be inaccurate. For example on page 35 he gives in note 1 one of his "research footnotes" listing materials on the international sales transaction: E. A. FARNSWORTH & J. HONNOLD, CASES AND MATERIALS ON COMMERCIAL LAW (1968); and J. HONNOLD, CASES AND MATERIALS ON THE LAW OF SALES AND SALES FINANCING (3d ed. 1968), are both cited spelling Professor Honnold’s name as Hornwold.
work on international trade. On the other hand, the teacher who is willing to take the time to select carefully, and has students who can afford both Professor Jackson’s book and outside supplementary materials of the teacher’s choice will find gems here. For example, Chapter 6 on International Economic Regulation and the Bretton Woods system contains what Professor Jackson calls “materials [on] the basic ‘constitutional’ or ‘institutional’ questions,”26 including voting, sanctions and all the other process questions considered at length in Kirgis, that are a superb selection for a small space and a superb introduction to the legal process of international regulation of economic affairs.

But with all of his inclusion, Professor Jackson leaves out — as does Professor Kirgis — an important aspect of the understanding of the rules of international economic affairs. Nowhere in this encyclopedic book is there an inquiry into the sociology of the economic interests involved in the rule making process. The rules, so important to Professor Jackson, are dealt with only on the macroeconomic level, just as Professor Kirgis deals only with the conceptual level of the legal processes he treats. Professor Lowenfeld’s series of volumes and as yet unpublished materials on international economic law differ from both books in that, by continuing the particular problem method of Chayes, Ehrlich and Lowenfeld,27 he forces the student to consider not only legal process, but the impact on that process of the microeconomy, the structure of the particular industry or industries that are being regulated. For example, commodity agreements are taught through consideration of the history of the International Coffee Agreement, and Professor Lowenfeld’s as yet unpublished materials, based on Problem VIII of Chayes, Ehrlich and Lowenfeld, include, as did Richard Bilder’s highly perceptive writing28 on this topic of international economic regulation, a description of the characteristics of coffee growing and coffee marketing. The unpublished materials on the international regulation of trade include materials on Japan, as does Professor Jackson’s book, but Professor Jackson covers Japan’s trade law, while Professor Lowenfeld tries to develop an exposition of Japan’s economic history that will help the student understand the process of negotiations with Japan on agreed upon rules for the international conduct of trading. In this field, as in all others in which the lawyer functions not only as an advocate but as a participant in both policy and strategy planning processes, the student can use an understanding not only of legal process, but also of law in society, the relation between the modes of regulation (the formulation of the rules) and the nature

26. Jackson, supra note 6, at 352.
of the regulated. Professor Burton's new materials\(^{29}\) takes this into account. After his conceptual materials, he sends his students into an exploration of the problem of a future regulatory scheme and/or regime for the Antarctic and its resources. I would embrace both Professor Kirgis' and Professor Jackson's casebooks more wholeheartedly if they had been able to include this aspect of pedagogy along with their excellent presentations on legal process in international affairs.

\(^{29}\) Burton, \textit{supra} note 2.