

# Michigan Law Review

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Volume 93 | Issue 6

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1995

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### Recommended Citation

Louis B. Sohn, *International Law as a Process*, 93 MICH. L. REV. 1828 (1995).

Available at: <https://repository.law.umich.edu/mlr/vol93/iss6/34>

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# INTERNATIONAL LAW AS A PROCESS

*Louis B. Sohn\**

PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT. By *Rosalyn Higgins*. Oxford: Clarendon Press. 1994. Pp. 274. \$35.

The international community is used to receiving path-breaking treatises from the pen of Rosalyn Higgins.<sup>1</sup> Her first book challenged the conventional wisdom that only lawyers and tribunals can develop international law. It presented the thesis that the political organs of the United Nations can also develop international law, especially through the practice of interpreting and applying international treaties.<sup>2</sup> In another series of books Professor Higgins documented and analyzed the burgeoning practice of the United Nations in the area of peacekeeping and thereby helped to crystallize the rules governing this crucial field.<sup>3</sup> In *Problems and Process: International Law and How We Use It*, she tackles the even more daunting task of examining the various preconceptions about international law and showing how we can and do use it to solve even the most difficult problems.

Professor Higgins points out that international law has many facets and serves a multitude of purposes. First, international law is a "process" that entails hard work in identifying relevant sources and discovering applicable norms. It is not a mechanistic process but a rational one, taking into account the political and social context. It must be based on decisions made by those authorized to make them. In turn, these decisions rely on past decisions as important guides, selecting from among available choices those that best reflect community interests and promote common values (pp. 8-9). Second, international law is a "system," in which "norms" emerge either because express consent is given, or because there is no opposition, or because the opposition has been overcome.<sup>4</sup> As she

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\* Distinguished Research Professor of Law, National Law Center, The George Washington University. LL.M., 1935, John Casimir University; LL.M., 1940; S.J.D., 1958, Harvard. — Ed.

1. Professor of International Law, London School of Economics.

2. ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963).

3. ROSALYN HIGGINS, *UNITED NATIONS PEACEKEEPING: DOCUMENTS AND COMMENTARY* (1969-1981).

4. P. 16. Professor Higgins prefers "norms" to neutral "rules." See pp. vi, 2-3. As she notes elsewhere in the book, international law is not a mechanistic application of rules, with-

explains, international law is composed of norms that states believe to be necessary to guide their relations with each other (pp. 18, 95).

In discussing the sources of international law, Professor Higgins seems to have changed her evaluation of the role of resolutions enacted by international organizations in crystallizing international norms. In her 1963 book on the development of international law through the political organs of the United Nations, she pointed out that the existence of the United Nations, with an almost universal membership, provides "a very clear, very concentrated, focal point for state practice."<sup>5</sup> In particular, the votes cast by the states and the views expressed by them constitute "collective acts" that, when "repeated by and acquiesced in by sufficient numbers with sufficient frequency, eventually attain the status of law."<sup>6</sup> She admitted at the time that it may be difficult to determine at which point "a repeated practice has hardened into a rule of law," how large a majority of votes is required, or whether the acceptance of this practice by the major powers would be necessary.<sup>7</sup> She concluded that the decisive fact would be when a considerable majority of states would "regard themselves as legally bound by the practice," as evidenced by states' attitudes and public statements.<sup>8</sup>

In her new book, Professor Higgins discusses in more detail the recent emphasis on United Nations resolutions and points out that resolutions are only a limited part of the normative efforts of international organizations. What matters is the whole process of dealing with complex legal issues — exchanging views and taking positions publicly, expressing reservations on views taken by others, and preparing drafts intended to become legal instruments in the form of treaties, declarations, binding resolutions, or even codes (pp. 23-24). All these activities end in a decisionmaking process that may or may not imply a legal view upon a particular issue. It is important to distinguish between binding and nonbinding resolutions (pp. 24-25), and between resolutions on current topics quickly pushed through by a majority and normative declarations of contemporary international law (pp. 25-26). While Professor Higgins discusses various views on the subject (pp. 26-28), she barely mentions the process that has evolved in recent years in which the General Assembly approves declarations that were considered carefully by a broad-based working group over a period of years, declarations that took account of various minority views, produced a docu-

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out regard to context; it is "a system that can assist in the avoidance, containment, and resolution of disputes." P. 56.

5. HIGGINS, *supra* note 2, at 2.

6. *Id.*

7. *Id.* at 5-6

8. *Id.* at 6.

ment satisfactory to various groups of states, and resulted in a declaration that could be approved by consensus, unanimity, or without a vote (p. 28). The best example of such a carefully prepared law-making resolution is the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations,<sup>9</sup> which was prepared over a period of seven years by a special committee, approved by the General Assembly in 1970, and cited as a binding instrument by the International Court of Justice in *Nicaragua v. United States of America*.<sup>10</sup>

The chapter that best illustrates Professor Higgins's approach to international law is the one dealing with human rights.<sup>11</sup> She strongly rejects the contention that there can be no fully universal concept of human rights because of the great diversity of cultures and political systems in the world. The human rights standards are not just Western standards to be imposed on other nations. She believes, profoundly, that human rights are *human* rights. Individuals everywhere want the same essential things: to have sufficient food and shelter; to be able to speak freely; to practice their own religion or to abstain from religious belief; to feel that their person is not threatened by the state; to know that they will not be tortured, or detained without charge, and that, if charged, they will have a fair trial. She is certain that there is nothing in these aspirations that is dependent upon culture, religion, or stage of development (pp. 96-97).

Consequently, economic, social, and cultural rights are as important to her as the traditional civil and political rights. She points out that, from the perspective of the holder of the right, the entitlement to free primary education is as clear as the entitlement to be free from torture (pp. 99-102). To the argument that civil and political rights require only abstention from prohibited conduct, while economic and social rights require specific action by the state, she responds that several civil rights also impose positive duties on the state. For instance, the right to fair trial and access to the courts requires not only keeping the doors of the court open to all, but also the provision of information about legal services, the holding of courts in accessible locations, and, in some circumstances, the provision of legal aid (p. 100). Similarly, the prohibition against torture requires educating the police and the guards, making them familiar with the international Standard Minimum Rules for the

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9. G.A. Res. 2625, 25 U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

10. P. 37 (discussing Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J., at 99-100 (June 27)).

11. See ch. 6 (entitled "Responding to Individual Needs: Human Rights").

Treatment of Prisoners,<sup>12</sup> and, if the rules are violated, vigorously prosecuting and appropriately punishing violators of these rules (p. 101).

In the chapter on the United Nations (ch. 10), Professor Higgins also emphasizes that the maintenance of international peace, the settlement of disputes, and the promotion of social, economic, and humanitarian welfare are considered by the United Nations Charter as parts of "a seamless web" (p. 169). If nations cannot settle disputes, peace is endangered; if injustice and economic and social deprivation prevail, the results are social instability and international terrorism (p. 169).

This view also prevails in the United Nations. In his 1994 report, Boutros Boutros-Ghali, the Secretary-General of the United Nations, pointed out that "the definition of security is no longer limited to the questions of land and weapons. It now includes economic well-being, environmental sustainability and the protection of human rights; the relationship between international peace and security and development has become undeniable."<sup>13</sup> Returning later to this issue, the Secretary-General emphasized that "[t]he gap between international aspirations for the enjoyment of human rights and the widespread violations of these rights presents the basic challenge to the United Nations human rights programme."<sup>14</sup> He suggested that "[t]o close this gap, the world community must identify and eliminate the root causes of violations,"<sup>15</sup> and that the United Nations must increase efforts "to implement the right to development, to define better and ensure greater respect for economic, social and cultural rights, and, at the most fundamental level, to improve the daily life of the individual."<sup>16</sup>

Two issues that are connected with human rights are the self-determination of peoples and the protection of minorities. Professor Higgins is critical of the reference to "the principle of equal rights and self-determination of peoples" in Articles 1 and 55 of the United Nations Charter,<sup>17</sup> because it has been misinterpreted over

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12. The Standard Minimum Rules for the Treatment of Prisoners were adopted in 1955 by the first United Nations Congress on the Prevention of Crimes and the Treatment of Offenders. They were approved by the Economic and Social Council of the United Nations in 1957 and 1977. For the text of the Rules, see 1 UNITED NATIONS, CENTER FOR HUMAN RIGHTS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 243 (1993). For U.S. decisions applying these Rules, see LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 632 (3d ed. 1993).

13. BOUTROS BOUTROS-GHALI, BUILDING PEACE AND DEVELOPMENT, 1994: REPORT ON THE WORK OF THE ORGANIZATION FROM THE FORTY-EIGHTH TO THE FORTY-NINTH SESSION OF THE GENERAL ASSEMBLY 2 (1994).

14. *Id.* at 137.

15. *Id.*

16. *Id.*

17. U.N. CHARTER arts. 1, 55.

the years (pp. 111-12). The original purpose of this phrase was to protect peoples and states against interference from other states. She observes that while this phrase has helped more than a hundred dependent territories to acquire independence, quite often the new governments of these territories do not grant their peoples free political institutions (p. 120). Unlike the Charter, Article 1, as is common to two 1966 covenants on human rights,<sup>18</sup> defines "the right of self-determination" as a right that allows each people to "freely determine their political status and freely pursue their economic, social and cultural development."<sup>19</sup> This right is spelled out even more clearly in the Helsinki Final Act of the Conference on Security and Cooperation in Europe,<sup>20</sup> which provides that by virtue of this right "all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external political interference, and to pursue as they wish their political, economic, social and cultural development."<sup>21</sup>

As far as protection of minorities in international law is concerned, the Declaration on Principles of International Law concerning Friendly Relations in its provisions on self-determination includes a paragraph against the right of secession, opposing "any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states . . . ."<sup>22</sup> This provision, however, also makes clear that it is intended to protect only those states that possess "a government representing the whole people belonging to the territory without distinction as to race, creed or colour."<sup>23</sup> Citing the work of the United Nations Human Rights Committee that supervises the implementation of the Covenant on Civil and Political Rights, Professor Higgins points out that the right of self-determination requires that a free choice be afforded to the peoples, on a continuing basis, as to their system of government, in order that they can determine their economic, social, and cultural development (p. 120).

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18. International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, art. 1, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 1, 999 U.N.T.S. 171.

19. International Covenant on Economic, Social, and Cultural Rights, *supra* note 18, at 5; International Covenant on Civil and Political Rights, *supra* note 18, at 173.

20. Conference on Security and Cooperation in Europe, Final Act, Aug. 1, 1975, Declaration on Principles Guiding Friendly Relations Between Participating States, § VIII, 14 I.L.M. 1292, *discussed at pp.* 114-15.

21. Conference on Security and Cooperation in Europe, *supra* note 20, at 1295.

22. See Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, *supra* note 9, at 124.

23. *Id.*

As long as a government treats its minorities properly, protects all their basic human rights, including the right of nondiscrimination, and grants to persons belonging to ethnic, religious, or linguistic minorities "the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, and to use their own language[.]" the minorities would have no basis for seeking secession.<sup>24</sup> Conversely, the desire of a group for secession — to form an independent state or to join with another group or unit elsewhere — will be at its most intense when that group's human rights are being suppressed. Professor Higgins compares that situation with the parallel problem when individuals desire to exercise their right to leave their country because their human rights are being violated. Similarly, it is not surprising that the desire of ethnic and other groups to break away is most noticeable when they are oppressed (p. 124). Professor Higgins concludes that an international lawyer should eschew fashionable trends when they are intellectually unsound and should concentrate on providing the analysis that would show that the principle of self-determination, properly understood, can serve common values (p. 128).

Professor Higgins presents a similar thoughtful examination of a host of other problems. She discusses the management of natural resources, the mining of deep sea-bed minerals, sharing the water of international rivers, and exploiting petroleum resources on land and on the continental shelf (ch. 8). She examines the accountability and liability of a state for acts or omissions that violate international law (ch. 9). She describes the role played by the United Nations in the progressive development of international law and its codification, in the peaceful settlement of disputes, and in maintaining international peace and security through collective action (ch. 10). She examines the limited use of the International Court of Justice and the ways of increasing resort to it (ch. 11), as well as the importance of increasing the participation of domestic courts in the interpretation and application of international law (ch. 12).

She examines, and is rather critical of, international tribunals' resort to equity — for instance, when applied in settling disputes about maritime boundaries — and proportionality, especially when applied to the use of force (ch. 13). Finally, she discusses the use of force by states in self-defense (ch. 14), and the increased use of force by the United Nations, especially for humanitarian purposes (ch. 15).

Professor Higgins achieves her objective — to depart from the traditional style of the general courses in international law given at the Hague Academy of International Law and to offer instead her

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24. Pp. 124-25 (quoting and discussing International Covenant on Civil and Political Rights, art. 27, *supra* note 18, at 179).

own perspectives and ideas. It is a rich harvest, and it should stimulate many discussions. She maintains a balance between being controversial and critical, on the one hand, and being a pioneering problem-solver, on the other hand. It is not surprising that the American Society of International Law, has already awarded its Certificate of Merit to her for this book in appreciation of her "creative scholarship."<sup>25</sup>

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25. ASIL NEWSLETTER (Amer. Soc. Inter. L., D.C.), Mar.-May 1995, at 3.