1996

Book Review of Problems and Process: International Law and How We Use It, by Rosalyn Higgins

Lung-chu Chen
New York Law School, lungchu.chen@nyls.edu

Recommended Citation
16 New York Law School Journal of International and Comparative Law 151–158 (1996)

PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT

Lung-chu Chen[*]

PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT. By Rosalyn Higgins. Oxford: Oxford University Press. 1994.[**]

This superb book is the revised text of the author's widely acclaimed lectures on the General Course in International Law delivered at the Hague Academy in 1992. Although it is "neither a treatise nor a textbook,"[1] *Problems and Process: International Law and How We Use It* is wide-ranging in its coverage of major international law issues and thought-provoking in its expression of the author's incisive views. One of the world's leading international lawyers, Professor Higgins has sought to demonstrate that "there is an essential and unavoidable choice to be made between the perception of international law as a system of neutral rules, and international law as a system of decision-making directed towards the attainment of certain declared values."[2] Instead of "recounting all the well-agreed principles of international law," she has "deliberately" highlighted many of the "difficult and unanswered issues in international law today."[3] At the outset, the author has made her choice and stand crystal clear: "International law is not rules."[4] Rather, it is "a normative system, harnessed to the achievement of common values."[5] Associating herself with the Policy Science Approach (also known as the New Haven

---

* Professor of Law, The New York Law School.

** Published in the United States by Oxford University Press (New York: 1994. Pp. 256. Cloth $35.00; 1995. Pp. 256. Paper $19.95) (page citations are to the British edition).

1. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT at vi (1994).

2. *Id.*

3. *Id.*

4. *Id.* at 1.

5. *Id.*

School) developed by Professors Myres S. McDougal, Harold D. Lasswell, and their associates,[6] she emphasizes international law as "a process"—"a continuing process of authoritative decisions."[7] Thus, "[i]nternational law is the entire decision-making process, and not just the reference to the trend of past decisions which are termed 'rules.'"[8]

In rejecting the conventional perception of international law as a body of "rules," or "the truly neutral application of rules,"[9] Professor Higgins points out the necessity of choosing between "complementary or competing norms" in particular circumstances.[10] And such choices are to be made in light of political and social contexts: "To remain 'legal' is not to ignore everything that is not 'rules.' To remain 'legal' is to ensure that decisions are made by those authorized to do so, with important guiding reliance on past decisions, and with available choices being made on the basis of community interests and for the promotion of common values."[11] Thus, while law as "rules" requires the application of "outdated and inappropriate norms," "law as process encourages interpretation and choice that is more compatible with values we seek to promote and objectives we seek to achieve."[12]

The explicit recognition of the inevitability of making such choices is accompanied by the author's admonition concerning the stability of community expectations: Approaching international law as a process "entails harder work in identifying sources and applying norms, as nothing is mechanistic and context is always important. But law as process does *not* entail a rejection of that core predictability that is essential if law is to perform its functions in society."[13] Since international law is "an authoritative system of decision-making available in a decentralized system to all authorized decision-makers," the author's focus of inquiry goes far

---

6. Candor requires the full disclosure of the reviewer's identification with the Policy Science Approach (The New Haven School). *See* LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE ch. 1 (1989); *see also* MYRES S. MCDOUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER (1980).

7. HIGGINS, *supra* note 1, at 2.

8. *Id.*

9. *Id.* at 10.

10. *Id.* at 9.

11. *Id.*

12. *Id.* at 10.

13. *Id.* at 8.

beyond the International Court of Justice, "hugely important though its role is."[14]

In addition to generally discussing what international law is, the author also discusses, in chapter one, why international law is regarded as binding and why states comply with the norms of international law, even in the absence of a compulsion to do so. According to the author, norms emerge either through express consent or because there is no opposition to obligations being imposed in the absence of specific consent. The basis of an obligation to adhere to these norms, she finds, rests upon reciprocity. Because states generally "perceive a reciprocal advantage in cautioning self-restraint," "[i]t is rarely in the national interest to violate international law, even though there might be short-term advantages in doing so."[15]

In the second chapter of *Problems and Process*, Professor Higgins examines the provenance of international law. She maintains that "[t]he question of sources is of critical importance";[16] the continuing jurisprudential and philosophical debates on the subject have much more than an academic significance. Such intellectual exchanges are "an admission of an uncertainty at the heart of the international legal system" and "a damaging acknowledgement" of its inadequacies.[17] She adds that until the answers to the question of the provenance of norms are more settled, "we do not have the tools for rendering more certain the content of particular norms."[18]

The author does not merely run through the sources listed in Article 38(1) of the Statute of the International Court of Justice—treaties, custom, general principles, judicial decisions, and learned writings—but focuses instead on a few of the central problems associated with these sources. She gives special attention to the question of custom and the continuing controversy over practice and *opinio juris* (the belief that a norm is accepted as law), the legal effect of resolutions of international organizations, and the overlap between treaty and custom. In ascertaining the role of resolutions of international governmental organizations in the norm-creating process, the author urges that reference be made to the subject matter and binding or recommendatory character of such resolutions, the majorities supporting their adoption, repeated practice in

14. *Id.* at 10-11.

15. *Id.* at 16.

16. *Id.* at 17.

17. *Id.*

18. *Id.*

relation to them, and evidence of *opinio juris*. It is not apparent why the author omits a discussion of "the general principles of law recognized by civilized nations,"[19] clearly one of the more problematical sources of international law.

In any event, the author has clearly shown that the answer to each of the unresolved problems in international law depends in large part upon how one looks at its sources as they bear on a particular subject. In response to Thirlway's view that "international law is what the International Court of Justice would declare it to be" and his "cautions against a loose approach to the question of sources,"[20] the author offers the following conclusion: "If international law is what the International Court of Justice is likely to say it will be (in Thirlway's definition), then—all the intellectual arguments notwithstanding—the Court, as much as the rest of us, is caught in the psychological moment: resolutions and treaties apparently *do* matter."[21]

Having dealt with the nature, function, and sources of international law from the perspectives of policy and process, Professor Higgins has no difficulty in dismissing the traditional subject-object dichotomy as having "no credible reality" and "no functional purpose."[22] Instead, she has clearly identified multiple *participants* in the decentralized, horizontal international legal system. Though at this moment of history nation-states continue to be primary participants, other non-state actors, including international organizations and individuals, are playing increasingly important roles. These non-state participants make claims across state lines with the object of maximizing values.

In subsequent chapters, the author effectively demonstrates how international law (as a process) can be used to address difficult problems in areas such as the allocation of jurisdictional competence, exceptions to jurisdictional competence, the definition and application of self-determination, the allocation and exploitation of natural resources, the determination of state accountability and liability, and the determination of the norms governing the resolution of disputes and the use of force by individual states and by the United Nations.

The author deals with the subject of "international law and national law," which is customarily treated at the beginning part of a textbook,

---

19. Statute of International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179.

20. HIGGINS, *supra* note 1, at 37.

21. *Id.* at 38.

22. *Id.* at 49.

near the end of *Problems and Process*[23] and in connection with the role of national courts in the international legal process. This novel arrangement, as the author intended, has the benefit of facilitating students' understanding of the relationship between national and international law after having obtained substantive knowledge about international law. Another innovative feature of this book is its treatment of the concepts of "equity" and "proportionality." Although these concepts are not "substantive norms" of international law, they are frequently invoked by judges, practitioners, and scholars. Hence, the author's study of the content of these concepts and appraisal of their role in "oiling the wheels of international law" are both illuminating and interesting.[24]

Particularly compelling is the author's discussion of the role of international law in defining and protecting human rights. Because individuals are no longer mere objects of international law but are participants in the international legal process, they do make transnational claims and invoke international prescriptions for the protection and fulfillment of values.

Moreover, the perception of international law as process helps in determining what human rights are. Those who see international law as a body of rules argue that human rights are "to be found in the various international instruments[,] and that whatever rights they contain and designate as human rights *are* thereby human rights, at least for the ratifying parties," and "may in time become reflected in customary international law."[25] If international law is understood as a dynamic process, "international instruments are just the vehicle for expressing the obligation and providing the detail about the way in which the human right is to be guaranteed."[26] Thus, "[i]t is an interaction of demands by various actors, and state practice in relation thereto, that leads to the generation of norms and the expectation of compliance in relation to them."[27] The status of a provision as a human right should therefore "be judged by reference to the authoritative nature of the sources that purport to identify it, by community expectation that an obligation exists."[28]

---

23. *See id.* ch. 12.
24. *Id.* at 219.
25. *Id.* at 99.
26. *Id.*
27. *Id.*
28. *Id.* at 102.

On the highly contentious issue of the universality versus cultural relativism of human rights, Professor Higgins is emphatic in her commitment to universality. In her words:

> It is sometimes suggested that there can be no fully universal concept of human rights, for it is necessary to take into account the diverse cultures and political systems of the world. In my view this is a point advanced mostly by states, and by liberal scholars anxious not to impose the Western view of things on others. It is rarely advanced by the oppressed, who are only too anxious to benefit from perceived universal standards. The non-universal, relativist view of human rights is in fact a very state-centered view and loses sight of the fact that human rights are *human* rights and not dependent on the fact that states, or groupings of states, may behave differently from each other so far as their politics, economic policy, and culture are concerned. I believe, profoundly, in the universality of the human spirit. Individuals everywhere want the same essential things: to have sufficient food and shelter; to be able to speak freely; to practise 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. I believe there is nothing in these aspirations that is dependent upon culture, or religion, or stage of development. They are as keenly felt by the African tribesman as by the European city-dweller, by the inhabitant of a Latin American shanty-town as by the resident of a Manhattan apartment.[29]

On the related and complex issue of self-determination and minorities, the author is extremely careful in her response to the claims "that minorities are entitled to self-determination, and that self-determination entails secession."[30] Expressing her deep concern for "national unity" and "territorial integrity," and drawing on the experience of the Committee on Human Rights under the International Covenant on Civil and Political Rights (minority rights are individual rights under Article 27 of the Covenant), she responds to both claims in the negative and emphasizes

---

29. *Id.* at 96-97 (footnote omitted).

30. *Id.* at 121.

that self-determination is not linked only to "independence."[31] This reviewer, while in general agreement with the author on most of the issues raised in this book, would take exception to this position.

As amply demonstrated in the Baltic states, in the former Soviet Union, and in the former Yugoslavia, the right of self-determination has moved from the era of decolonization to the era of secession or the era of democracy. That the right of self-determination today embraces the right of secession can thus be taken for granted. The critical question is the appropriate criteria by which to appraise a claim for self-determination.

It is essential, in deciding whether to support or reject a claim for self-determination in the form of secession, to take all of the relevant community policies into account. On the one hand, there is a fundamental human rights policy for freedom of choice, for individuals to form and to identify themselves with groups that can give them optimum fulfillment in power and all other values. On the other hand, there is a basic policy in defense of territorial integrity and a viable political community. How these two basic policies can be harmonized in a way to serve the common interests of the world community is the question at the heart of international self-determination policy.

It is important to remember that a demand for self-determination and a decision to grant, support, or reject that demand will have ramifications, not only for the aspiring group demanding self-determination, but also for the community of which the group is a part, the regional community, and the world community. Hence, in a particular context, the aggregate value consequences for all of the affected groups and communities, potential as well as existing, should be subjected to rigorous contextual scrutiny. This can be done by reference to all factors relevant to a particular context: the participants involved and their perspectives (patterns of demands, expectations, and identification); the situations of interaction (geographical, temporal, institutional, and crisis factors); the available base values; the strategies employed; and the outcomes sought and probable effects. After fully estimating the relative costs and benefits of the different options for each of the affected communities, the option that will promote the largest net aggregate of common interests should be supported and honored.[32]

In squarely confronting various difficult issues, Professor Higgins has sought to "fit different pieces together." She has succeeded remarkably in this endeavor. In dealing with particular problems, the author has

---

31. *Id.* at 124-25.

32. For further elaboration, see CHEN, *supra* note 6, ch. 2; Lung-chu Chen, *Self-Determination and World Public Order*, 66 NOTRE DAME L. REV. 1287 (1991).

exhibited a characteristic balance in presenting both pros and cons and in clearly articulating her own views—which are animated by both policy and doctrine, seasoned by both idealism and pragmatism, and tempered by both stability and change. Throughout the book, difficult international law problems are sharply identified and formulated; basic policy considerations are clearly articulated; the trends of past decisions are carefully described and analyzed; the factors affecting past decisions are incisively examined; probable future developments are realistically contemplated; and the exploration and recommendations of alternative interpretations and positions are judiciously executed to further common interests in light of process, policy, doctrine, and context.

In conclusion, the reviewer cannot resist sharing the author's enthusiasm for international law: "International law is a process for resolving problems. And it is a great and exciting adventure."[33] Indeed, the book is a great contribution to the literature of contemporary international law and should be required reading for all those who are concerned with international law and affairs—specialists and non-specialists alike.

33. HIGGINS, *supra* note 1, at 267.