Problems and Process: International Law and How We Use It

by Rosalyn Higgins

N. Stephan Kinsella**, Schnader Harrison Segal & Lewis, Philadelphia, Pennsylvania
[www.StephanKinsella.com; www.KinsellaLaw.com]

Rosalyn Higgins, recently appointed as the first woman judge on the UN's International Court of Justice and former professor of international law at the London School of Economics, has for many years been an outstanding authority on the subject of international law.[1] Her latest offering, *Problems and Process: International Law and How We Use It,* contains several provocative, interrelated discussions of many areas of international law.

The book is not a complete treatise on international law, as are M. N. Shaw's or Ian Brownlie's more general works on international law.[2] Rather, it is a series of interrelated perspectives on and criticisms of several "difficult and unanswered" (p. vi) areas of international law, derived from her lectures delivered at the Hague Academy General Course in International Law. The fifteen chapters of *Problems and Process* cover the following areas:

1. The Nature and Function of International Law
2. Sources of International Law: Provenance and Problems
3. Participants in the International Legal System
4. Allocating Competence: Jurisdiction
5. Exceptions to Jurisdictional Competence: Immunities from Suit and Enforcement
6. Responding to Individual Needs: Human Rights
7. Self-Determination
8. Natural Resources and International Norms
9. Accountability and Liability: The Law of State Responsibility
10. The United Nations
11. Dispute Settlement and the International Court of Justice
12. The Role of National Courts in the International Legal Process

13. Oiling the Wheels of International Law: Equity and Proportionality

14. The Individual Use of Force in International Law

15. The Use of Force by the United Nations

Higgins's discussions and criticisms of these issues are presented in a lively, accessible, and authoritative fashion, and the book is very well-written. Higgins makes many insightful points about and criticisms of many interesting areas in international law, although libertarians would disagree with many of Higgins's conclusions and premises. For example, as discussed below, Higgins sometimes appears to express skepticism regarding the possibility of objectively discovering international law rules, and seems to hold a sometimes positivistic view of human rights. However, *Problems and Process* is full of well-reasoned critiques and analyses that do not depend on these views nor on Higgins's view of international law *as* a process.

Chapter 3, for instance, contains a probing critique of the traditional concept of "subjects and objects of international law." Higgins's analysis here is well-reasoned, useful, and conclusive. However, even though she claims that her analysis is aided by viewing international law as a process rather than as rules, her reasoning seems to be independent of this characterization. I had no trouble being convinced by her reasoning alone, without conceiving of international law as a process. Also, Chapter 10, "The United Nations," as well as Chapter 11, "Dispute Settlement and the International Court of Justice," are extremely well-written and interesting chapters, although many libertarians would disagree with Higgins's pro-U.N. sentiments.[3] Chapter 7, "Self-Determination," is another enlightening chapter, although, here again, many libertarians would object to Higgins's conclusion that there is no legal right of secession where there is representative government.[4]

International Law as "Process"

In *Problems and Process*, Higgins tries "to show 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." (p. vi) She also attempts to show "how the acceptance of international law as process leads to certain preferred solutions so far as these great unresolved problems are concerned." (p. vi) However, as explained above, her analyses and "solutions" generally appear to be successful despite any flaws in her view that law is a "process."

Higgins defines international law as "a continuing process of authoritative decisions" (p. 2); international law is "the entire decision-making process, and not just the reference to the trend of past decisions which are termed 'rules'." (p. 2) Higgins therefore disagrees with the contrasting view of those who "insist that international law is 'rules', and that all international lawyers have to do is to identify them and apply them ...." (p. 3)

During her discussion of this issue, Higgins notes that international law concerns both power and authority. "Law, far from being authority battling against power, is the interlocking of authority with power." (p. 4, footnote omitted) "[I]nternational law is not the vindication of authority over power .... It is decision-making by authorized decision-makers, when authority and power coincide." (p. 15) (I take "authority" here to be equivalent to legitimacy, since "authority" and power without legitimacy is still merely power.) However, contrary to Higgins, it seems perfectly consistent to regard international law as a set of rules while also recognizing that law requires power as well as authority/legitimacy to qualify as law. A recommended or proposed law has the element of legitimacy only; if accepted and implemented, it also has the element of power.

This is similar to the difference between a natural right and a legal right: natural (or moral or individual) rights may properly be viewed as proposed rights that *ought* to be made into legal rights (i.e., law) or respected as such. An illegitimate law contains the element of power alone, with no legitimacy. Thus, Higgins's formulation of law as the "interlocking of authority with power" nicely captures the distinctions between (1) natural law or proposed law (legitimacy only); (2) valid law (legitimacy plus power, i.e. justifiable individual rights which are actually respected, enforced, and recognized); and (3) mere power (e.g. an invalid law, such as one decreeing that all Jews be killed).

While some would urge that international law must be regarded as a set of rules because only then "will it be possible to avoid the manifestation of international legal argument for political ends," Higgins disagrees with this reasoning. "Reference to 'the correct legal view' or 'rules' can never avoid the element of choice (though it can seek to disguise it), nor can it provide guidance to the preferable decision." (p. 5) Judges do not "find rules" but "make choices." (p. 3) Because "there is no avoiding the essential relationship between law and policy, I also believe that it is desirable that the policy factors are dealt with systematically and openly." (p. 5)

Of course, there are many social and political factors considered rightly or wrongly-when judges make decisions. This being a fact, certainly it should not be concealed. Certainly, such "policy factors" should be dealt with "systematically and openly." But this does not mean that international law is not a set of rules, or that no objective rules can be discovered by judges. Indeed, the need to resort to objective norms is inescapable, since one must still recommend a set of normative "rules" that guide a judge in deciding how to take such factors into account. Libertarians, of course, maintain that objective norms (or rules) *are* discernible by reason and should be followed by judges or by whomever enforces law.[5]

Positivism and the Nature of Rights

Higgins recognizes that law must be based on "authority" as well as power. As mentioned above, "authority," in order to be a meaningful concept, must mean legitimacy, for otherwise only the element of power would be present. This view implies that might does not make right, since power alone is not enough to justify a law. Higgins also seems to eschew positivism when she recognizes the universality of human rights, and passionately criticizes non-universal, relativist views of human rights. (p. 97)

However, paradoxically, Higgins also expresses positivistic views of what rights there are. "To assert an immutable core [of] norms which remain constant regardless of the attitudes of states is at once to insist upon one's own personal values (rather than internationally shared values) and to rely essentially on natural law in doing so. This is a perfectly possible position, but it is not one I take." (p. 21) Also, "human rights are demands of a particularly high intensity made by individuals *vis-à-vis* their governments". (p. 105) This positivistic and relativistic view appears to contradict her absolutist views on human rights expressed elsewhere in the book.

"Illegal" Expropriations of Foreign Investments

Chapter 8, "Natural Resources and International Norms," contains an insightful analysis of, *inter alia,* problems that arise when western investors invest in developing regimes. For example, when a foreign investor is granted a contract (called a "concession") by a host state (such as Libya) to explore for and produce oil, there is always the danger that the host state will steal ("expropriate" or "nationalize" in modern language) his investment. Thus, as Higgins points out, the problem facing the foreign investor is: "how can he be sure that, given the vast resources he will be required to make, he will be allowed to reap the benefits of his investment and work effort, and that the rewards will not be taken from him just as the fulfillment of the contract terms beings to bear fruit (that is to say, petroleum)?" (p. 139)

Of course, the answer to this question is, he cannot. As long as nation-states have "sovereignty" over their territories, it is always a possibility that the government will infringe the investor's property rights, although there are ways to minimize such "political risks."[6]

Under international law, an expropriation is legal only if the expropriation is: (1) for a public purpose; (2) nondiscriminatory; and (3) accompanied by prompt, adequate, and effective, or at least "appropriate," compensation.[7] However, international law has long been in a state of confusion over how much compensation an expropriated investor is entitled to. In other words, what is "adequate" compensation? There is disagreement as to whether "full value," which includes both *damnum emergens* (e.g. the value of physical assets such as factories and equipment) and *lucrum cessans* (lost profits), should be awarded, or merely *damnum emergens*, and there is disagreement as to whether the amount of damages should be enhanced if the expropriation is in some sense "illegal" under international law.[8] Higgins adopts the common-sense view that the economic "value" of property of course includes expectations of future profits (p. 144), although this view, remarkably, is not universally accepted.

Despite conclusions of other commentators and arbitrators to the contrary, Higgins tentatively concludes "that the value of the property does not change by virtue of the lawful or unlawful nature of its taking ...." (p. 145) This view also makes sense, because it makes little difference to an investor why his property was taken, for the damage done to him regardless of the motivation for the theft is measured by the (full) economic value of the property. Of course, if this is the case, it makes no sense to distinguish between "illegal"

and "legal" takings.[9] For whether the expropriation is discriminatory or not, or for a public purpose or not, full compensation should be awarded to the investor as damages.

Further, because of each state's sovereignty over its own territory under international law, the alleged internationally "illegal" action of a discriminatory expropriation would never justify another nation physically invading the host state to remedy or prevent the expropriation.[10] Accordingly, since the "illegal" status of an expropriation has little or no consequences, the status seems meaningless, a distinction without a difference. For, as Higgins observes, a right without a remedy is hollow indeed. (p. 16 n. 42, p. 53, p. 99)

Endnotes

* This book is available from Oxford University Press, 1-800-451-7556 (USA). Its order number is 825767-8. Page references will be given parenthetically in the text. I would like to thank Jack Criss for helpful comments on an earlier draft of this review.

** LL.M. (international business law) (1992), University of London King's College London; J.D. (1991) Paul M. Hebert Law Center, Louisiana State University; M.S. Electrical Engineering (1990), B.S.E.E. (1987), Louisiana State University. The author is an associate in the intellectual property department of Schnader Harrison Segal & Lewis, in Philadelphia. Internet: nskinsella@shsl.com.

1. Higgins has published several important books and articles in this field. *See, e.g., Higgins's United Nations Peacekeeping: Documents and Commentary* (Oxford: Oxford University Press, 4 vols. 1969-1981); *The Development of International Law through the Political Organs of the United Nations* (1963); "The Taking of Property by the State: Recent Developments in International Law," *Recueil des cours de l'Académie de Droit International (Collected Courses of the Hague Academy of International Law)* 176 (1982), p. 259; "Conceptual Thinking about the Individual in International Law," *Brit. J. Int'l Stud.* 4 (1978), p. 1; and "The Place of International Law in the Settlement of Disputes by the Security Council," *Am. J. Int'l L.* 64 (1970), p. 1. While pursuing an LL.M. in international business law in 1992, I took Higgins's course "The International Law of Natural Resources," one of the most interesting and stimulating courses I've ever had the pleasure of taking.

2. M. N. Shaw, *International Law* (Cambridge: Grotius Publications Limited, 3d ed. 1991); Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 4th ed. 1990).

3. See, e.g., Ayn Rand, "The Anatomy of Compromise," in *Capitalism: The Unknown Ideal* (New York: Signet, 1967), p. 147-48 (expressing disapproval of the U.N.).

4. For an excellent article on the libertarian view of the right to secede, see Robert W. McGee, "The Theory of Secession and Emerging Democracies: A Constitutional Solution," *Stanford J. Int'l L.* 28 (1992), p. 451.

5. For a few examples of hard-core libertarian justifications for the existence of objective individual rights, see Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism* (Boston/Dordrecht/London: Kluwer Academic Publishers, 1989), esp. chapter 7; Tibor R. Machan, *Individuals and Their Rights* (La Salle, IL: Open Court, 1989); Murray N. Rothbard, *The Ethics of Liberty* (Atlantic Highlands, NJ: Humanities Press, 1982); N. Stephan Kinsella, "Estoppel: A New Justification for Individual Rights," *Reason Papers* No. 17 (Fall 1992), p. 61; and Roger A. Pilon, "Ordering Rights Consistently: Or What We Do and Do Not Have Rights To," *Ga. L. Rev.* 13 (1979), p. 1171. For a critique of legislated law as opposed to judge-discovered law, see Bruno Leoni, *Freedom and the Law* (Indianapolis: Liberty Fund, expanded 3d. ed. 1991); Peter H. Aranson, "Bruno Leoni in Retrospect," *Harv. J. L. & Publ. Pol'y* 11 (1988) 661; and N. Stephan Kinsella,

"Legislation and the Discovery of Laws in a Free Society," *J. Libertarian Studies* 11 (Summer 1995), p. 132.

6. See, e.g., Paul E. Comeaux & N. Stephan Kinsella, "Reducing Political Risk in Developing Countries: Stabilization Clauses, Bilateral Investment Treaties, and MIGA & OPIC Investment Insurance," *N.Y. L.Sch. J. Int'l & Comp. L.* 15 (1994), p. 1.

7. Shaw, *supra* note 2, at 516-28.

8. *See, e.g.,* Shaw, *supra note* 2, at 523-24. *See also* C.F. Amerasinghe, "Issues of Compensation for the Takings of alien Property in the Light of Recent Cases and Practice," *Int'l & Comp. L.Q.* 41 (1992), p. 22; Patrick M. Norton, "A Law of the Future of a Law of the Past? Modern Tribunals and the International Law of Expropriation," *Am. J. Int'l L.* 84 (1991), p. 474.

9. Paul Comeaux and I will argue this point in our forthcoming book: *Legal Aspects of Political Risk* (New York: forthcoming 1996).

10. *See, e.g., Problems and Process* at Chapter 14, "The Individual Use of Force in International Law," and M.N. Shaw, *supra* note 2, at Chapter 18, "International Law and the Use of Force."