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Rosalyn Higgins on International Organizations and International Law: The Value and Limits of a Policy-Oriented Approach

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Abstract

Taking an approach to international law that embraced key features of the New Haven School, Rosalyn Higgins has made several important contributions to the law of international organizations. In 1963, at a time when no theory had addressed the work of the United Nations' (UN) political organs, Higgins showed how General Assembly resolutions and other decisions contribute to the development of customary international law. She also demonstrated that, separate and apart from UN member states, the UN Secretariat was contributing to the development of customary international law regarding treaties. Later, as counsel for the International Tin Council and later rapporteur for the Institut de Droit International, Higgins put on the global agenda the issue of the accountability of international organizations for harm to third parties, highlighting gaps in existing law and competing policy concerns that precluded easy solutions. Higgins made two contributions in marking the path forward for theorizing about international organizations, one substantive and the other methodological. She highlighted the importance of considering international organizations in relation to the full range of actors with whom they interact, including private parties. As a methodological matter, Higgins demonstrated the value of an inductive approach where legal claims are grounded in close, detailed and careful observations of how international organizations actually operate.

1 Introduction

In 1959, Rosalyn Higgins crossed the Atlantic to undertake her doctoral studies at Yale University.[1] That decision proved to be quite consequential for Higgins' conception of

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1 L. Dingle and D. Bates, 'Conversation with Dame Rosalyn Higgins, Former President of the International Court of Justice', *Squire Law Library* (2014), available at https://api.repository.cam.ac.uk/server/api/core/bitstreams/81736f38-6be7-4340-80e1-e1505e92b0cb/content.

international law and the role of various actors – including international organizations – in making it. Higgins studied with Myres McDougal; at the time, McDougal and his political science colleague Harold Lasswell were developing what came to be known as the New Haven School.[2] As Higgins put it, McDougal 'was the one who taught me, which I still believe to this day, that international law is not about rules'.[3] Or, at a minimum, as she declared later, international law is not only about rules; 'rules play a part in law, but not the only part'.[4] Higgins adopted the New Haven School's view that international law is better understood as a 'continuing process of authoritative decisions' that emerge from the claims and counterclaims that various actors make about a given issue.[5] Moreover, this process inevitably and appropriately takes policy goals into account.[6] The question is whether to openly acknowledge and defend those policy considerations and the role they play – or to obfuscate them. Higgins prefers the former approach, which, among other things, allows such factors to be discussed and debated.[7]

This symposium is revisiting contributions by key figures in international law to gain greater insight into the evolution of thinking about international organizations and to 'develop a sense of the range of theoretical approaches that have been and remain possible within the discipline'.[8] Higgins' writing on international organizations – supplemented by an interview with the author – showcases both the value and the limits of a policy-oriented approach.[9] Higgins' groundbreaking 1963 book *The Development of International Law through the Political Organs of the United Nations*[10] made major contributions to the law of international organizations, and those contributions are traceable to Higgins' adoption of key elements of the New Haven School. As a matter of methodology, understanding law as a process means documenting

2 Myres McDougal and Harold Lasswell published the most comprehensive and polished version of their jurisprudential views as a two-volume work in 1992. H.D. Lasswell and M.S. McDougal, *Jurisprudence for a Free Society*, 2 vols (1992). One commentator noted that this manuscript was published 'several decades after it was ready for publication in virtually its present form'. Falk, 'Casting the Spell: The New Haven School of International Law', 104 *Yale Law Journal* (*YLJ*) (1995) 1991, at 1991.

3 Dingle, 'A Legal Journey through the UN, Academia, and the ICJ: Conversations with Dame Rosalyn Higgins DBE, JSD, FBA, QC', 15 *Legal Information Management* (2015) 86, at 88. Honouring Myres McDougal shortly after he died in 1998, Higgins described the 'two great themes' she had learned from studying with him – that international law 'was not rules but process, and was not neutral but dedicated to the achievement of specified social ends' – as the 'lodestars' that continued to guide her. Higgins, 'McDougal as Teacher, Mentor, and Friend', 108 *YLJ* (1999) 957, at 958.

4 R. Higgins, *Problems and Process: International Law and How We Use It* (1995), at 2.

5 *Ibid.*

6 *Ibid.*, at 5.

7 *Ibid.*; R. Higgins, *Themes and Theories* (2009), at 18 ('[i]n making this choice one must inevitably have consideration for the humanitarian, moral, and social purposes of the law. And it is the fact that these are pre-articulated, not just ex post facto, and intellectually systematized, that distinguishes policy choices from politics. It is all part of transparency. Where any decision-maker comes out on the really difficult issues of international law depends in large part on his/her philosophical point of departure and methodology').

8 Klabbers and Sinclair, 'On Theorizing International Organizations Law: Editors' Introduction', 31 *European Journal of International Law* (*EJIL*) (2020) 489, at 492.

9 Interview with Rosalyn Higgins, by the author, 14 August 2023.

10 R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963).

not just the outcomes but also the exchanges and interactions that lead to them.[11] Moreover, the New Haven School's emphasis on accurately understanding the genesis of past decisions demands a close look at the contributions of the full range of participants in that process without prejudging the importance of 'any one factor or category of factors'.[12] In line with these prescriptions, Higgins carefully reviewed debates and the patterns of decisions that emerged from the United Nations' (UN) political organs. Her book made a compelling argument that states' actions and reactions at the UN contribute to customary international law. Today, that claim seems obvious, perhaps even banal, but when Higgins first made it, the claim was novel and even 'somewhat radical'.[13] Higgins' book made another important contribution that did not garner immediate attention; she showed how the UN Secretariat also contributed to the development of customary international law through its day-to-day operational work on treaties.

Higgins' next major interventions in the development of the law of international organizations came in the 1980s after the International Tin Council went bust. Higgins defended the council and its member states against myriad lawsuits that creditors filed in United Kingdom (UK) courts. The International Tin Council's collapse marked an inflection point in thinking about international organizations. Up until that point, international organizations were assumed to be the 'good guys'; the inability of creditors to obtain relief in court changed that narrative, underscoring the possibility that international organizations could harm third parties and then evade the consequences of doing so. These concerns remain highly salient today.[14]

Higgins addressed these broader issues as a rapporteur for the Institut de Droit International, delivering a highly influential report in 1993 titled 'The Legal Consequences for Member States of the Non-fulfilment by International Organizations of Their Obligations toward Third Parties'.[15] More specifically, Higgins reviewed whether and when member states of an international organization might be concurrently or secondarily liable for harm that the organization has caused to third parties. After canvassing relevant case law, the writings of scholars and state practice with respect to drafting the charters of international organizations, Higgins concluded that general international law did not impose such liability on member states.[16]

What is more, Higgins went on to demonstrate the deficiencies in the available analytical tools. Analogies to liabilities of business organizations under national law were

[11] Lasswell and McDougal, *supra* note 2, at 37, 188–189.

[12] *Ibid.*

[13] Reflecting on her own work 30 years later, Higgins observed how 'modest and indeed cautious' the views she expressed are today, 'though in 1963 they were regarded as somewhat radical'. Higgins, *supra* note 4, at 23.

[14] Consider, for example, the introduction of cholera to Haiti by United Nations (UN) peacekeepers, the imposition of targeted sanctions by the UN Security Council and the financing of projects that have harmed the environment and local communities by the International Finance Corporation.

[15] Higgins, 'The Legal Consequences for States of the Non-fulfilment by International Organizations of Their Obligations toward Third Parties', 66(1) *Annuaire de l'Institut de Droit international* (1995) 251.

[16] *Ibid.*, at 285.

inconclusive because liability rules varied.[17] Policy considerations tugged in opposite directions; there was a tension between the goals of protecting third parties, on the one hand, and the efficient and independent functioning of international organizations, on the other.[18] The New Haven School instructs decision-makers to heed these considerations, but it does not provide definitive guidance about how to resolve this tension.[19] That said, this limitation is shared by other theoretical approaches. As Jan Klabbers has observed, the functionalist approach that has long dominated the field also fails to provide traction on international organizations' interactions with third parties, including individuals who might be harmed by the organization's acts or omissions.[20] In other words, Higgins' main contribution in this report was exposing a serious problem that could not be easily solved without undermining a defining feature of international organizations – their autonomy from member states. By calling attention to these challenges, Higgins' report laid the groundwork for subsequent efforts in other venues to shape the practice of international organizations and to progressively develop the rules that govern their responsibility for violations of international law.[21]

Looking ahead, Higgins' work does not lay out a clear route for theorizing the law of international organizations, but it does supply some useful signposts for future endeavours. Her writing also powerfully illustrates some of the work that a theory of the law of international organizations must do: it must account for international organizations in relation to the full range of actors with whom they interact, including private parties. As a methodological matter, Higgins showcases the value of an inductive approach where legal claims are grounded in close, detailed and careful observations of how international organizations actually operate.

2 The UN as Lawmaker

When *The Development of International Law through the Political Organs of the United Nations* was published, D.W. Bowett observed that there was 'a tendency amongst international lawyers to regard the United Nations as a rather tiresome newcomer to the scene whose activities are of little relevance to the substance of international

[17] *Ibid.*, at 286–287.

[18] *Ibid.*, at 288.

[19] B.S. Chimni, *International Law and World Order* (1983), at 125 (observing that McDougal 'does not proffer any serious suggestions as to how the conflicts between the preferred values are to be accommodated').

[20] Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law', 26 *EJIL* (2015) 9, at 11 ('[i]t has turned out that functionalism, being a theory concerning the relationship between organizations and their members, has little to say about legal issues that could not be cast in terms of that relationship – this applies to internal organizational issues [such as staff relations, relations between organs] and, most prominently perhaps, to the situation of third parties').

[21] See, e.g., the 'recommended rules and practices' adopted in 2004 by the International Law Association's Committee on Accountability of International Organizations, *Final Report, Accountability of International Organisations* (2004), available at https://www.ila-hq.org/en_GB/documents/final-conference-report-berlin-2004-1, and the Draft Articles on the Responsibility of International Organizations adopted in 2011 by the International Law Commission. 'Draft Articles on the Responsibility of International Organizations with Commentaries', 2(2) *ILC Yearbook* (2011) 40.

law itself'.[22] Indeed, the same year, Bowett had published what he described as the first 'general, introductory textbook' on the law of international institutions.[23] His textbook did not consider at all how the UN or any other international institution, through its operations, might contribute to the development of general international law. As Higgins put it, when she was working on her book, '[t]here was in the theoretical analysis virtually no references to resolutions as such'.[24] Even the claim that the practice of the UN's organs was relevant to interpreting the UN Charter was quite novel at the time.[25]

Given this context, Higgins' book opens in a defensive stance, observing that some might find the UN's 'highly political organs as the frame of reference for a study on the development of law' rather 'curious and perhaps eccentric'.[26] Higgins made a deliberate choice not to focus on overtly legal bodies like the International Court of Justice (ICJ) or on the UN General Assembly's exercise of its authorities to encourage the codification and progressive development of international law.[27] Instead, she trains her attention on the more subtle ways in which international law influences – and is influenced by – the day-to-day decision-making of the political organs.[28]

Higgins does not proceed from assumptions about what unfolds at the UN. Employing an 'abridged form of the McDougal technique',[29] she takes a magnifying glass to the nitty-gritty of '*actual claims* made before United Nations organs, and the *responses thereto*'.[30] The result is a rich description of arguments and counter-arguments and a

22 Bowett, 'Review of *The Development of International Law through the Political Organs of the United Nations* by Rosalyn Higgins', 22 *Cambridge Law Journal* (1964) 307.

23 D.W. Bowett, *The Law of International Institutions* (1963), at xi.

24 Higgins, *supra* note 4, at 23; 'New Rules for Nations' (book review), *The Economist* (18 January 1964), at 220 ('previous attempts to ascertain the practice of states have been largely limited to their diplomatic contacts; the behaviour of governments, as shown by the votes and statements of their representatives in the United Nations, has hitherto been little explored as a source of international law').

25 The International Court of Justice (ICJ) provoked strong reactions when it looked to the practice of UN organs to interpret the UN Charter in a 1962 advisory opinion. *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advisory Opinion, 20 July 1962, ICJ Reports (1962) 151; Arato, 'Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations', 38 *Yale Journal of International Law* (*YJIL*) (2013) 289, at 319 ('[t]here seems to have been absolutely no precedent for the notion that the practice of the organs of an international organization might act as a proxy for subsequent state conduct. And this position engendered no small amount of controversy among the judges in the event – certain of whom decried the seismic potential of the Court's novel interpretive shift').

26 Higgins, *supra* note 4, at 1. For an example of a sceptical reaction to Higgins' claims, see James, 'Review of *The Development of International Law through the Political Organs of the United Nations*', 40 *International Affairs* (1964) 301, at 301.

27 UN Charter, Art. 13.

28 Higgins explained this by arguing that the political organs are the most 'dynamic and significant' place to discern the impact of and on international law. She elaborated that the International Law Commission's work, 'while useful, has been limited' to 'matters upon which general consensus has already been available'; that the International Court of Justice is hampered by its limited jurisdiction; and that the UN General Assembly's Sixth (Legal) Committee has been largely bypassed. Higgins, *supra* note 4, at 3.

29 Schachter, 'Review of *The Development of International Law Through the Political Organs of the United Nations*', 59 *American Journal of International Law* (*AJIL*) (1965) 168, at 169.

30 Higgins *supra* note 10, at 10 (emphases in the original).

demonstration that the law plays a significant role in decision-making by these bodies. Higgins' core claims emerge from these close observations: nothing in the UN Charter explicitly authorizes the political organs to make customary international law, but they do it anyway. Sometimes the UN General Assembly self-consciously and deliberately tries to shape customary international law. Other times, the effects on customary international law are indirect; the General Assembly or other political organs might take actions or decisions that, along the way, interpret the UN Charter and influence customary international law.

Higgins' discussion of self-determination powerfully illustrates the direct and indirect influence of the UN's political organs on customary international law. In 1920, Higgins noted, the Commission of Jurists refused to recognize a legal right to self-determination in a decision regarding the Aaland Islands.[31] The UN Charter refers to self-determination twice, but it does not characterize it as a legal right. Article 1 enumerates the purposes of the UN, which include developing 'friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'. Article 55 lists various goals for the UN to promote '[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'. If self-determination reflects nothing more than a 'pious hope, devoid of legal substance', then it is not the General Assembly's concern in light of Article 2(7), which provides that, with the exception of Chapter VII enforcement measures, the Charter does not authorize the UN to 'intervene in matters which are essentially within the domestic jurisdiction of any state'.[32] By contrast, if self-determination is an international legal right, it is very much the General Assembly's business.

Seventeen years of UN practice revealed that self-determination had become an international legal right, Higgins concluded.[33] She made this assessment after canvassing efforts to vindicate a right to self-determination at the UN.[34] For example, during the 1950s, the General Assembly was a forum for airing complaints that France was violating the UN Charter provisions on self-determination in Morocco, Tunisia and Algeria; in each case, France invoked Article 2(7), and the resolutions were not adopted. But, every year, support for a legal right to self-determination grew, and the votes on the resolutions got closer and closer.[35]

The General Assembly's 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples marked a turning point, Higgins explained.[36] This resolution affirms that '[a]ll peoples have the right to self-determination' and was adopted by a vote of 90 to none.[37] Following the 1960 Declaration, outcomes shifted.

[31] *Ibid.*, at 91.
[32] *Ibid.*, at 90.
[33] *Ibid.*, at 103.
[34] *Ibid.*, at 91.
[35] *Ibid.*, at 93–96.
[36] GA Res 1514 (XV), 14 December 1960.
[37] Higgins *supra* note 10, at 100.

In short order, the General Assembly and Security Council both adopted resolutions that formally recognized the Algerian right to self-determination.[38] In 1961, the General Assembly established a new committee to implement the declaration.[39] This step, Higgins argued, demonstrates that it 'was not meant as a mere moral declaration'.[40] Higgins recounted how that committee went on to investigate the situation in what was then Southern Rhodesia and issued reports that ultimately led to resolutions that 'deplor[ed] the denial of equal political rights and liberties to the vast majority of the people of Southern Rhodesia' and sought the convening of a constitutional conference, the restoration of rights of the non-European population and amnesty for political prisoners.[41] Concluding her review of these developments, Higgins wrote: 'It therefore seems inescapable that self-determination has developed into an international legal right, and is not an essentially domestic matter.'[42]

Reviewers' evaluations of Higgins' analysis diverged. Bowett characterized it as 'the best treatment of self-determination this reviewer has yet read'.[43] Stephen Schwebel, then of the US State Department, criticized Higgins for overstating the significance of the 1960 Declaration.[44] In the years that followed, support for a legal right to self-determination grew.[45] And, indeed, the ICJ recently sided with Higgins. In its 2019 *Chagos Islands* advisory opinion, the Court concluded that the right to self-determination had crystalized into a customary rule by the mid-1960s, just a few years after the publication of Higgins' book.[46]

Higgins' general claim was that these resolutions constitute evidence of customary international law – that 'the practice of states comprises their collective acts as well as the total of their individual acts'.[47] These '[c]ollective acts of states, repeated by and acquiesced by sufficient numbers with sufficient frequency', attain the status of law once states regard themselves as legally bound by the practice.[48] Attaining such status is neither instantaneous nor inevitable, but Higgins demonstrated that it was possible, even within the UN's (then) relatively short history. Today, the position that Higgins staked out and defended has become mainstream. The ICJ has endorsed it,[49] and the

[38] *Ibid.*, at 96–97.
[39] *Ibid.*, at 101.
[40] *Ibid.*
[41] GA Res. 1747 (XVI), 28 June 1962; GA Res. 1755 (XVII), 12 October 1962. Both resolutions are discussed in Higgins, *supra* note 10, at 102–103. Resolution 1760, adopted two weeks later, directly 'confirm[s] the inalienable rights of the people of Southern Rhodesia to self-determination and to form an independent African state'. GA Res. 1760 (XVII), 31 October 1962.
[42] Higgins, *supra* note 10, at 103.
[43] Bowett, *supra* note 22, at 308.
[44] Stephen M. Schwebel, 'Review of *The Development of International Law through the Political Organs of the United Nations*', 75 *YLJ* (1966) 677, at 679.
[45] Higgins, 'The United Nations at 70 Years: The Impact upon International Law', 65 *International and Comparative Law Quarterly* (2016) 1, at 10–11.
[46] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, ICJ Reports (2019) 95, paras 144–162.
[47] Higgins, *supra* note 10, at 2.
[48] *Ibid.*, at 4–6.
[49] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226, para. 70.

International Law Commission's (ILC) Draft Conclusions on Customary International Law likewise track Higgins' views about the significance of resolutions of international organizations and the practice of political organs.[50] The contemporary widespread acceptance of Higgins' views may make it easy to overlook her significant contribution; doing so would be a mistake.

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Higgins' book makes an important – and prescient – contribution to another controversy that did not fully materialize until several decades after its publication: whether international organizations 'as such' – that is, separate and apart from their member states – have the capacity to contribute to the development of customary international law. Higgins demonstrated precisely how the UN Secretariat could and did do exactly that. She drew heavily on her own experience in 1958 as an intern in the Legal Office of the United Nations, where for a few months she was 'immersed in the world of action'.[51] At the time, Oscar Schachter headed that office; he and McDougal both advised Higgins on her research and manuscript.[52]

Higgins' openness to the possibility that the UN Secretariat might contribute to the development of customary international law is traceable both to her experience working there and to the theoretical approach of the New Haven School, especially its understanding of international law as a process in which diverse actors participate.[53] McDougal and his co-authors were keen to correct a perspective that 'exaggerate[ed] the role of the nation-state as the principal subject of international law' while obscuring the 'factual role' of international organizations.[54] The New Haven School did not put much weight on such formal categories, underscoring instead the on-the-ground reality that state and non-state actors alike were 'making claims across state lines, with the object of maximizing various values'.[55]

The Secretariat features most prominently in Part 5 of Higgins' book, which is devoted to UN practice with respect to the law of treaties. In this part, Higgins shows that international organizations 'as such' contribute to the formation of customary international law on treaties – both rules that are particular to international organizations

[50] International Law Commission (ILC), Report on the Work of Its Seventieth Session: Draft Conclusions on Identification of Customary International Law (ILC Draft Conclusions), UN Doc. A/73/10 (2018), Draft Conclusion 6(2) ('[f]orms of State practice include … conduct in connection with resolutions adopted by an international organization'); Draft Conclusion 10(2) ('[f]orms of evidence of acceptance as law (opinio juris) include … conduct in connection with resolutions adopted by an international organization'); Draft Conclusion 12 (explaining that 'while such resolutions [of international organizations] of themselves, can neither constitute rules of customary international law nor serve as conclusive evidence of their existence an content, they may have value in providing evidence of existing or emerging law and may contribute to the development of a rule of customary international law').

[51] Interview with Higgins, *supra* note 9.

[52] Higgins, *supra* note 7, at 992; Higgins, *supra* note 10, at ix.

[53] Lasswell and McDougal, *supra* note 2, at 37, 188–189; Interview with Higgins, *supra* note 9.

[54] M.S. McDougal, H.D. Lasswell and L.-C. Chen, *Human Rights and World Public Order* (1980), at 178.

[55] Higgins, *supra* note 4, at 50.

and rules that apply to all treaties across the board. At the time that Higgins was writing, the UN was already playing a 'vital role' as a forum where states negotiate treaties, as a depositary of treaties and as a party to treaties relevant to the organization's operations.[56] She observed that 'the development of international treaty-law through United Nations practice has been rather more formal, conscious, and premeditated' than the other topics her book addresses. Higgins continued: 'This is another reason why much treaty practice has been in the hands of the Secretariat, and why the law has developed mainly through a process of policy decision and administrative practice rather than through a series of political crises'.[57]

Consider two examples. Higgins reviewed the practice of the UN Secretariat in connection with the 'generally accepted rule of international law that an international arrangement cannot constitute a treaty unless it contains binding international obligations'.[58] Some lawyers doubted that cooperation agreements between two international organizations or between international organizations and states qualified as treaties because the obligations they contained were too trivial and technical to constitute international legal obligations. Higgins disagreed: 'It is inevitable that the vast network of the United Nations family should necessitate the formal regulation of administrative co-operation; and the very newness of these particular problems in international organization needs must give rise to unorthodoxy.'[59] In fact, Higgins was describing the development of a new orthodoxy and a shift to a more capacious understanding of the kinds of obligations that qualify as international legal obligations. Notably, this shift was driven in part by the practice of international organizations 'as such'.

Higgins also recounted the Secretariat's practice with respect to treaty registration and publication. While these issues may seem picayune and technical, they reflect efforts to vindicate the principle of 'publicity of treaties' and, thereby, to instantiate international governance by law rather than power and to improve the capacity of individual citizens and legislatures to oversee foreign policy-making.[60] According to Article 102(1) of the UN Charter, '[e]very treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it'.[61] Implementing this provision required defining the universe of treaties and international agreements to which this obligation applied. This issue was hotly contested by powerful states that preferred to keep certain agreements secret;[62] at the time, Higgins observed that 'there exists in United Nations practice no precise definition as to what is a "treaty" or "international agreement"'.[63] (Recall too that Higgins was writing after

[56] Higgins, *supra* note 10, at 240.
[57] *Ibid.*, at 240–241.
[58] *Ibid.*, at 287.
[59] *Ibid.*, at 288.
[60] Donaldson, 'The Survival of the Secret Treaty: Publicity, Secrecy, and Legality in the International Order', 111 *AJIL* (2017) 575, at 575–576.
[61] UN Charter, Art. 102(1).
[62] Donaldson, *supra* note 60.
[63] Higgins, *supra* note 10, at 329.

the ILC had taken up the topic of the law of treaties but some years before its work was completed and states had adopted the Vienna Convention on the Law of Treaties.)[64]

Higgins reported that the General Assembly had adopted regulations specifying some agreements to which Article 102 applied.[65] But, as Higgins noted, these regulations left some gaps that the Secretariat stepped in to fill as it responded to inquiries from governments and international organizations about whether a given agreement or category of agreements should be registered. For example, the regulations did not address agreements between specialized agencies and member states; Higgins reported that, 'in practice … the UN Secretariat has considered that these are subject to registration'.[66] She also reported that, in general, the Secretariat treated submissions by international organizations no differently from submissions by governments.[67] Higgins concluded that the UN's practice in implementing Article 102 was 'building up a new customary law affecting both states and international organizations in the exercise of their obligations and requested tasks'.[68]

Much more important than the detailed rules regarding registration is the general point that Higgins demonstrated: through its actions and decisions, the UN Secretariat shored up the treaty-making capacity of international organizations and reaffirmed the basic point that treaties to which international organizations are parties are not meaningfully different from treaties between states. Along the way, Higgins supplied a foundation for the claim that international organizations 'as such' do contribute to customary international law. Here too, Higgins' position was ultimately adopted by the ILC, which stated in its Draft Conclusions that, while 'it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law', '[i]n certain cases, the practice of international organizations also contributes'.[69] This position remains the subject of ongoing debate among states and among scholars.[70]

It is striking that Higgins' demonstration of how the UN Secretariat was 'building up a new customary law'[71] did not make a bigger splash at the time that her book was published. One reason is that Higgins did not call attention to this claim and did not frame the issue as a controversial one. In the book's introduction, Higgins defined

64 Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

65 Higgins, *supra* note 10, at 329–331.

66 *Ibid.*, at 331, n. 16.

67 *Ibid.*, at 332.

68 *Ibid.*, at 335.

69 ILC Draft Conclusions, *supra* note 50, at 117–156 (Draft Conclusion 4). In comments, the ILC elaborated: 'The practice of international organizations in international relations (when accompanied by *opinio juris*) may count as practice that gives rise or attests to rules of customary international law, but only those rules (a) whose subject matter falls within the mandate of the organization, and/or (b) that are addressed specifically to them (such as those on their international responsibility or relating to treaties to which international organizations are parties).' Ibid., Comment (5) to Draft Conclusion 4.

70 Compare Daugirdas, 'International Organizations and the Creation of Customary International Law', *EJIL* (2020) 31, at 201, with Brölmann, 'Capturing the Juridical Will of International Organizations', in J. d'Aspremont and S. Droubi (eds), *International Organizations and Non-State Actors in the Formation of Customary International Law* (2020) 42.

71 Higgins, *supra* note 10, at 335.

the subject of her study as the 'political organs of the United Nations', listing the UN Secretariat alongside the intergovernmental organs without further commentary.[72] Indeed, Higgins implicitly disclaimed any challenges to the traditional view that states – and states alone – can make customary international law. Notwithstanding her inclusion of the UN Secretariat as an object of study, Higgins repeatedly described customary international law as emerging from the practice and views of states exclusively.[73]

Higgins explained to the author that when she wrote this book, she did not directly make this bold claim partly because her own attention – and the attention of her readers – was captured by her provocative argument about the intergovernmental organs.[74] As Higgins explained, 'it was enough that I was being a little radical with the political organs themselves'.[75] Moreover, as her book's title indicates, her subject was the development of international law 'through' rather than 'by' the political organs of the UN. Higgins explained that she had not focused on the distinction between the intergovernmental organs and the Secretariat. It seemed obvious to her that the Secretariat merited attention; her experience at the UN Legal Office had demonstrated its role in the 'world of action'.[76] Moreover, the New Haven approach emphasized the appropriateness of considering all the actors who participate in authoritative decision-making, not just those with a formal law-making role.[77] In other words, perhaps the New Haven School's capacious understanding of the participants in international law-making obscured the novelty of the claim that the UN Secretariat could and did directly contribute to customary international law.

Still, in her interview, Higgins emphasized that she agreed that, through this work, she had indeed shown that the UN Secretariat 'as such' was contributing to the

[72] Higgins, *supra* note 10, at 3 ('[t]he following parts of this study will therefore examine the development of international law by the practice of the General Assembly, Security Council, *and Secretariat*, and, to a lesser degree, the Trusteeship Council and Economic and Social Council') (emphasis added).

[73] *Ibid.*, at 1 ('customary rules which are evidenced by the practice *of states*'); at 1 ('[i]nternational custom is modified and developed by the practice *of states*'); at 2 ('[w]ith the development of international organizations, the votes and views *of states* have come to have legal significance as evidence of customary law. Moreover, the practice *of states* comprises their collective acts as well as the total of their individual acts .... Collective acts *of states*, repeated by and acquiesced in by sufficient numbers with sufficient frequency, eventually attain the status of law. The existence of the United Nations ... now provides a very clear, very concentrated, focal point for *state practice*') (emphases added).

[74] Interview with Higgins, *supra* note 9.

[75] *Ibid.*

[76] *Ibid.*

[77] Lasswell and McDougal, *supra* note 2, at 36–37; see also *ibid.*, at 188 ('[t]he important actors in community process, at all levels, will be seen to be individual human beings, but it will be noted that individuals identify and affiliate with, and make demands on behalf of, many different groups – including, not merely nation-states, but lesser territorial communities, international governmental organizations, political parties, pressure groups, tribes, families, and private associations of all kinds. ... A theory about international law which would even approximate relevance must, thus, relate authoritative decisions explicitly and systematically to the larger community process that envelopes such decision'). See also J. E. Nijman, *The Concept of International Legal Personality* (2004), at 325–334 (describing McDougal's rejection of international legal personality in favour of the concept of 'participant' as an 'act of inclusion', and noting that the term 'participant' 'lacked a purely legal connotation but included political reality, and enabled international scholarship to transform not only its theories but also international life itself').

development of customary international law and that it was important to recognize that role. She candidly acknowledged: 'I now think I goofed' in excluding the point from the recently published *Oppenheim's International Law: United Nations*, for which Higgins served as lead author.[78]

3 Liability of Member States for the Conduct of International Organizations

The financial collapse of the International Tin Council marked a turning point in the law of international organizations: it shifted the attention of scholars and advocates to the ways in which international organizations might harm private actors and evade legal consequences for doing so. Higgins played two different roles here: first as an advocate for the council in the litigation that followed its bankruptcy, and second as a scholar addressing the broader implications of these developments. Like other international organizations dedicated to commodities, the council was tasked with regulating prices.[79] It maintained a buffer stock of tin, buying more when prices fell below the target range and selling when prices exceeded it. In October 1985, after making a series of purchases that failed to boost the falling price of tin, the buffer stock manager announced that the International Tin Council had run out of money and could not pay its debts.[80] The council's creditors initiated a series of lawsuits in the UK seeking recovery from various defendants, including the council's member states. The International Tin Council enlisted Higgins to 'act for them on international law matters'.[81] In court, the council largely prevailed.[82] This turn of events called attention to the general point that international organizations have the capacity to cause harm, and it exposed significant gaps in the law applicable to such situations and in the availability of institutions to resolve disputes about such harm when it occurred.

A few years later, Higgins pivoted to a scholarly role and confronted the broader question raised by the International Tin Council cases as a rapporteur for the Institut de Droit International.[83] In 1993, she delivered an influential report titled 'The Legal

78 R. Higgins and Others, *Oppenheim's International Law: United Nations*, 2 Vols (2017).

79 Sadurska and Chinkin, 'The Collapse of the International Tin Council: A Case of State Responsibility?', 30 *Virginia Journal of International Law* (1990) 845, at 850.

80 *Ibid.*

81 R. Higgins, '2007 Balzan Prize for International Law since 1945', *Balzan* (22 November 2007), www.balzan.org/en/prizewinners/rosalyn-higgins/international-law-since-1945-a-personal-journey-zurigo-22-11-2007 ('I had the great good luck to be asked by the International Tin Council to act for them on all international law matters. There were cases in the Chancery Division, cases in the Queen's Bench Division, cases in the Court of Appeal, and cases in the House of Lords. It was an exhilarating and exhausting experience').

82 *Ibid.*, at 856, n. 45; see also Wickremasinghe, 'The Immunity of International Organizations in the United Kingdom', 10 *International Organizations Law Review* (2013) 434, at 439–441.

83 Note that interrogating one's 'observational standpoint' is an important step in the analytical process set out by the New Haven School. Lasswell and McDougal, *supra* note 2, at 185 ('[t]he community member, the effective power holder, the advocate, the authoritative decisionmaker, and the scholarly observer may all have very different perspectives of community process and make very different immediate demands upon authoritative decision').

Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties'.[84] Higgins approached the question of member states' liability with trademark care and precision. She ultimately concluded that international law did not impose such liability as a general or even default matter. Before turning to the main topic, Higgins pointed out that she needed to address some threshold issues. After all, questions about member states' liabilities for the obligations of international organizations to third parties arise only if international organizations have international obligations that diverge from those of their member states. And having such obligations means having separate legal personality.[85] In her report for the Institut, Higgins notes some disagreements among scholars about how to ascertain whether a given organization has separate legal personality.[86] In the Hague Lectures she delivered several years later, Higgins endorsed what she called the 'classic indicia' of international legal personality: '(1) an ability to contract, (2) an ability to sue and be sued, (3) an ability to own property, and (4) a *volonté distincte* – in other words, a capacity to take decisions which bind the membership, perhaps even when not all the members have favoured the decision concerned.'[87] Such organizations, Higgins wrote, are '[t]ruly international actors on their own right'.[88]

Higgins' report did stake out a position on another question that remains somewhat controversial for organizations other than the UN:[89] whether, as a general matter, international organizations have objective legal personality[90] and not, as she later put it, a more limited personality that is 'opposable only to those who have "recognized" the organization, in the sense of being a member of the organization or engaging in some transaction with it, or granting privileges to it'.[91] Higgins took the former position. She did not dwell on the point; she simply stated that the view that international organizations have objective personality 'accords with reality', citing a case from the New York State Supreme Court that 'took it for granted' that the International Tin Council could take legally consequential actions, notwithstanding the USA's non-member status and the absence of any provision of US law that recognized the existence or status of the International Tin Council.[92]

The objective legal personality of international organizations is a key feature defining their relationships with other actors in the international legal system. Legal personality means, as the ICJ explained in the *Reparation for Injuries* advisory opinion,

[84] Higgins, *supra* note 15.
[85] *Ibid.*, at 252–254.
[86] *Ibid.*, at 254.
[87] Higgins, *supra* note 4, at 46.
[88] *Ibid.*, at 47.
[89] See P. Sands and P. Klein, *Bowett's Law of International Institutions* (6th edn, 2009), at 479 (only the UN); H.G. Schermers and N.M. Blokker, *International Institutional Law* (6th edn, 2018), at 1031 (only open-membership organizations); C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, 2005), at 87–90 (most or all international organizations).
[90] Higgins, *supra* note 15, at 276 (citing *International Tin Council v. Amalgamet Inc.* (1988) 524 N.Y.S. (2d) 971).
[91] Higgins, *supra* note 4, at 47.
[92] Higgins, *supra* note 15, at 276.

that states can have international obligations to organizations of which they are not members.[93] It also means, as Higgins pointed out, that international organizations have obligations under general international law to actors other than their member states and that failure to fulfil those obligations could result in liability.[94] As noted earlier, theoretical approaches that focus entirely on relations between organizations and their member states cannot supply any account of such rights or obligations.[95]

In any event, Higgins' main concern in the report for the Institut de Droit International was not the obligations or liabilities of international organizations themselves. Instead, her main concern was when, if ever, member states might be on the hook for what the organization did or failed to do. The law of state responsibility, Higgins noted, did not supply any 'general concept whereby states retain a responsibility under international law for the acts of international organizations to which they belong'.[96] And she ultimately concluded that such obligations exist only where an organization's charter requires member states to pay an assessed share of expenses: '[T]here is no general international law beyond this.'[97] Moreover, general international law did not preclude states from drafting charters with provisions that excluded or limited the liability of member states.[98] Higgins pointed out that Henry Schermers, the one prominent scholar of international organizations who took the contrary position, did not provide any support for it.[99] She found 16 different treaties establishing international organizations that expressly excluded or limited the liability of member states.[100] These treaties raised a further question about how to interpret charters that were silent with respect to such liability: do they reflect a baseline rule that member states are liable without limitation when the organization breaches its international obligations? Or the opposite, that states are generally not liable in the absence of specific provisions to the contrary? Higgins endorsed the latter view, citing the *Lotus* case for the proposition that states' obligations under international law must be affirmatively established rather than presumed.[101]

Some scholars and courts had sought to bolster the claim for liability by analogy to various enterprises under national law. But, as Higgins argued, these comparisons were inconclusive: under various national laws, sometimes participants in those enterprises were liable for the enterprise's obligations and sometimes they were not.[102] There was no single 'correct' private law analogy to an international organization. As a result, general principles could not supply an answer to the question of international

[93] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports (1949) 174, at 185.
[94] Higgins, *supra* note 15, at 276.
[95] See Klabbers, *supra* note 20, at 11.
[96] Higgins, *supra* note 15, at 281.
[97] *Ibid.*, at 285.
[98] *Ibid.*
[99] *Ibid.*, at 266–267.
[100] *Ibid.*, at 271 (referring to *Lotus*, 1927 PCIJ Series A, No. 10).
[101] *Ibid.*, at 286.
[102] *Ibid.*, at 287.

law.[103] Higgins also reviewed policy considerations and concluded that they tugged in opposite directions. On the one hand, establishing or affirming member state liability would help third parties to obtain recourse when they were harmed by international organizations.[104] On the other hand, Higgins worried about eroding the autonomy of international organizations:

> [I]f members know that they are potentially liable for contractual damages or tortious harm caused by the acts of an international organization, they will necessarily intervene in virtually all decision-making by international organizations. It is hard to see how the degree of monitoring and intervention required would be compatible with the continuing status of the organization as truly independent, not only from the host state, but from its membership.[105]

In short, Higgins proceeded carefully and precisely in reviewing potential sources of rules to govern the liability of member states and forthrightly acknowledged the indeterminacy of international law with respect to this issue.

As noted in the introduction, Higgins' report made an important contribution by putting this issue on the agenda. Her work highlighted that the problems caused by the collapse of the International Tin Council were not confined to that organization. There was a general problem that international lawyers and policy-makers had not yet addressed in a systematic way. Even now, nearly 40 years later, few are satisfied by the state of play when it comes to the availability of recourse for third parties that have been harmed by international organizations. In general, the New Haven School does not shy away from coping with uncertainty or indeterminacy in the law.[106] But the New Haven approach does not – and really cannot be expected to – deliver a general framework for supplying more certainty and specifying when member states ought to be on the hook for such harm. As Higgins pointed out during the interview, to expect the New Haven approach to provide such guidance 'misses the whole point' because the New Haven School conceives of international law as a process. That means, Higgins elaborated, that 'inevitably you have your decisionmaker, the judge or the Foreign Office official, or someone comparable looking at these competing interests and there is not a rule you turn to [in order] to say, "This always outweighs, or snaps, the other"'.[107]

Even though the policy considerations that Higgins outlined are equivocal when considered in the abstract or at a high level of generality, a decision-maker faced with a specific dispute about the liability of member states can still find some useful guidelines in Higgins' report.[108] In a particular situation, one factor may be especially

[103] *Ibid.*

[104] *Ibid.*, at 288.

[105] *Ibid.*, at 285.

[106] If anything, the New Haven School is sometimes criticized for overstating the indeterminacy of international law. B.S. Chimni, *International Law and World Order* (1983), at 79–101.

[107] Interview with Higgins, *supra* note 9; see also Chimni, *supra* note 105, at 125 (observing that McDougal 'does not proffer any serious suggestions as to how the conflicts between the preferred values are to be accommodated').

[108] As Higgins put it, '[b]ecause international law [is a way] of making decisions, you have always got the tools to answer a *particular* problem even if you can't pull out of the drawer a prior decision on that problem'. Dingle, *supra* note 3, at 89 (emphasis added).

salient while another is more attenuated. Or there might be a possibility of reconciling the conflicting policy considerations by using or developing a dispute settlement mechanism that is internal to the organization.[109]

4 Conclusion

Although work on international organizations constituted but a small fraction of her output as an international lawyer, judge and scholar, Rosalyn Higgins' contributions to the field of international organizations law are considerable. In terms of marking a path forward for theorizing about international organizations, her work makes two particularly important contributions. First, Higgins' writing showcases the value of considering international organizations in context, together with other state and non-state actors who participate in the international legal system. Higgins' second contribution is methodological; her work demonstrates the value of building a theoretical account that starts from below and is grounded in a rich understanding of what international organizations are actually doing as well as the reactions that those acts and omissions are provoking. One need not adopt the New Haven approach to international law in its totality to see the virtues of paying close attention, as Higgins does, to claims and counterclaims. She put it quite nicely in her tribute to Ibrahim Shihata, where she further reflected on the issue of member states' responsibility for the defaults of international organizations: 'Those of us who remain interested in questions of responsibility within international organizations have somehow to follow the developing detail of relevant practice while firmly keeping our eye on the larger picture.'[110] That point is surely correct and extends beyond responsibility.

[109] Sadurska and Chinkin, *supra* note 78, at 888 (expressing optimism that '[i]n the long run, [states] would be likely to establish an appropriate balance between the necessary autonomy of the organization and security for third parties').

[110] Higgins, *supra* note 7, at 925.