
The Days of Wine and Roses

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Abstract

This review essay takes an in-depth look at the most recent addition to the Oppenheim family, a two-volume work on the law and practice of the United Nations, prepared by Rosalyn Higgins and a dream team composed of some of her former students. The essay not only zooms in on the merits of the work but also aims to place it in context in a changing world, wistfully noting a little nostalgia (on the side of the reviewer as well as that of the authors perhaps) for, well, the days of wine and roses.

1 Introduction

In retrospect, the 1980s were the last days of innocence in international law. As undergraduate students, aspiring international lawyers could still plausibly be told that all international legal problems had a single right answer, in accordance with the teachings of the then highly popular Ronald Dworkin. If only we would look hard and deep and seriously enough, the one and only correct answer would present itself to us. And if it never did, then the proper conclusion to draw was that we either lacked Herculean qualities or had not looked hard enough or deep enough or serious enough – *quod erat demonstrandum*. We could also still believe, with some credibility, in the proposition that courts could solve political problems. Surely, once the International Court of Justice (ICJ) would be confronted with, say, a claim involving the legality of nuclear weapons, we would know for sure whether their use or the threat thereof

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would be legal or illegal. And once there would be an International Criminal Court (ICC), genocide and crimes against humanity would become a thing of the past.

More generally still, in the 1980s (my formative years, needless to say perhaps), we could still believe that the end of the Cold War, if it were to come, would spell the end of the ‘divided world’ that so characterized international law. We could still dream about the possible arrival of a global legislator, perhaps in the form of the Security Council if and when this would properly have been reformed, with the General Assembly cast in the role of world parliament. No deep change would be needed: a General Assembly bereft of law-making powers could still affect the ethos of the international community. We could linger at romantic thoughts about self-determination and the idea of the local actually being represented by the local instead of by authorities far away; about decolonization and a newer, fairer international economic order and even a newer, fairer information order; and we considered it highly desirable that non-governmental organizations (NGOs) be given a seat at the table because they would represent something pure and good, in much the same way in which we thought that international organizations would help turn swords into ploughshares or, more pragmatic and less biblical, at least create networks of interdependence. And the latter, so our disciplinary brethren studying international relations taught us waving copies of Immanuel Kant’s *Zum ewigen Frieden* in our face, would be a good thing too.

These were the days when aspiring international lawyers were initiated into the discipline with the help of, mostly, Michael Akehurst’s self-styled ‘modern’ introduction, and those with more advanced ambitions would read either *Brownlie* or, more voluminous but accessibly written, *Shaw*. In those years, the name Oppenheim was a faintly familiar name from the past, someone who may have been English, or German maybe, or central European perhaps, who seemed to have written a textbook a long time ago that somehow people were occasionally still talking about and that had been reworked by several authorities, including Hersch Lauterpacht, himself an almost mythical figure who may have been English or maybe vaguely German or central European or something.¹

And then 1989–1990 happened, both in the real world and in academia. In the real world, the Cold War came to an end, almost immediately followed by an unrestrained Saddam Hussein walking into Kuwait. Ouch; this was not quite what we had in mind when hoping for the Cold War to come to an end. The Security Council started to legislate indeed, but without any parliamentary control and seemingly favouring the interests of its five permanent members more than anything else – surely, the imposition of sanctions on Libya for its refusal to extradite some of its own nationals could hardly be read in any other way, and why on earth did it sit idle when genocide took place in Rwanda? The ICJ, a few years later, actually was asked about the legality of nuclear weapons (the stuff that dreams are made of ...) and decided to disagree with itself: using nuclear weapons was illegal, it concluded, except when it was legal. The ICC saw the light of day and is still struggling, both with itself

¹ Just for the record, Lassa Oppenheim was born and raised near Frankfurt am Main.

and with its remit; it seems to have had very little effect on the level of nastiness in the world. The new economic order became a neo-liberal order in which the rich got richer and the poor kept starving. It has by now largely come to be accompanied by a 'coalition of the unpleasant and incompetent': populists in strategic governance positions (Donald Trump, Vladimir Putin, Boris Johnson, Recep Erdoğan, to name just the most prominent).

And 1989 marked not just a real world revolution but also a watershed in legal thinking. From their respective vantage points, international lawyer Martti Koskenniemi (with impeccable street credibility, having been in international legal practice for close to two decades) and classicist-turned-international-relations-scholar Fritz Kratochwil both destroyed the idea that rules could have any settled meaning. For Koskenniemi, this was the result of a structural analysis borrowing insights from post-modern French philosophy; for Kratochwil, it was the result of different philosophical considerations, owing much to the pragmatism of David Hume and the language philosophy of Ludwig Wittgenstein.² Either way, the idea of there always being a right answer was exploded. And they were not alone. Koskenniemi's work built on insights formulated around the same time by David Kennedy and a little earlier by Philip Allott, with Kennedy, in turn, building on his namesake Duncan Kennedy and others and their work on private law. Kratochwil, for his part, was accompanied by Nick Onuf and John Ruggie, fellow constructivists renewing the study of international relations by departing from vague ruminations about the Kant of *Zum ewigen Frieden* and finding more solace with the classics (Aristotle more than Plato) and the Kant of the *Critiques*. Both the critics in international law and the constructivists in international relations smashed the myth that international affairs could be a-political or de-politicized in any meaningful manner. Both exploded the idea that there could be a single right answer, and both destroyed the classic conviction that law and politics could be kept as separate spheres of action.

And even if law could be kept separate, legal sociologist Gunther Teubner departed from the more traditional legal sociology by introducing it to sociological systems theory, also, as it happens, in 1989.³ Where legal sociologists had often limited their work to figuring out whether and why new legislation would actually be obeyed or not, Teubner gave legal sociology a radically different twist. For the devastating conclusion to infer from his work was that, if law was separate, it was bound to remain marginal. It might be true that law reproduces itself and does so by its own standards and procedures, but it struggles to communicate with other systems, including those of politics and economics, which also mostly reproduce themselves following their own procedures and standards. In short, the law could not win, and this applied with equal, perhaps greater, force to international law: either it was constantly manipulated by politics or it could not affect politics. Either way, it seemed the death bell

² M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989); F.V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989).

³ G. Teubner, *Law as an Autopoietic System* (1989).

had been rung – what was the point of studying international law, of advocating for international law, if it could not tame the beast of politics? What was the point of law to begin with, if all it could do was reproduce itself?

The only point then, it seemed, was to turn the study of law into the study of politics under a different name, studying the role of law in political projects of domination or, less obviously, emancipation. The relevant legal question was no longer ‘what does the law say’ but, rather, ‘whose interests does it serve’ or ‘what effects does it generate’. Ironically perhaps, and sadly perhaps, those questions no longer seemed to demand a working knowledge of international law; they no longer seemed to demand a professional competence in that discipline – the capacity to ‘think like a lawyer’ or adopt H.L.A. Hart’s ‘internal perspective’. For it turned out to be possible to formulate plausible hypotheses about how international law would affect things without being able to distinguish jurisdiction from admissibility or even without being able to distinguish the ICJ from the ICC, simply by adopting a rational choice perspective or donning critical spectacles. At this point, academic international law risks shooting itself in the foot: if the study of international law is actually the study of something else, then why not leave it to those who know the ‘something else’ and are trained in the ‘something else’? The answer, incidentally, should be obvious: if formulating those hypotheses does not require international legal expertise, testing them properly still does.⁴

2 Why Oppenheim?

Against this background of revolution in 1989–1990, the publication in 1992 of the ninth edition of Lassa Oppenheim’s classic treatise, reworked by Sir Robert Jennings of the ICJ and Sir Arthur Watts of the United Kingdom’s (UK) Foreign and Commonwealth Office, seemed a little underwhelming. Here was a very detailed professional and magnificently skilful discussion of what international law said, produced in an age that had just lost some of its faith in the ability of international law to say anything definitive at all, despite, paradoxically perhaps, having reached its post-ontological phase at roughly the same time.⁵ Contemporary reviewers were delighted and impressed (and, indeed, how could they be anything else?),⁶ but somehow the reception of *Oppenheim* lacked the sort of impact it could have had only a few years earlier – at least in the academic world. And perhaps it is telling that, by the early

⁴ Here, both rationalist and critical scholarship are sometimes found wanting. See Klabbers, ‘On Epistemic Universalism and the Melancholy of International Law’, 29 *European Journal of International Law* (2018) 1057.

⁵ T.M. Franck, *Fairness in International Law and Institutions* (1995).

⁶ K. Highet, ‘Book Review’, 88 *American Journal of International Law* (1994) 383. Reisman too was very complimentary, although he also observed that the absence of a coherent theoretical framework sometimes undermined the work’s authority, and he was downright critical of the circumstance that environmental protection was given less attention than the Commonwealth. Reisman, ‘Lassa Oppenheim’s Nine Lives’, 19 *Yale Journal of International Law* (1994) 255.

1990s, the very distinction between the academic world and the practitioner's world started to make sense in international law.

Of course, other factors played a role too. The work was enormously detailed in an era that had already started to paint with broad strokes. It could present much information, which, it turned out a few years later, was to some extent available online at any rate, albeit without the authoritative interpretations of Sir Robert and Sir Arthur. International law itself had also expanded considerably: it covered more fields of human activity than ever before; there were many more states (and, thus, many more treaties and many more rules) than when Oppenheim wrote his first edition in 1905, and the increasing complexity of society also meant an increasing number of rules.⁷ But there was more to it than just this: if Duncan Kennedy could diagnose the existence of a '*fin de siècle*' sentiment only a handful of years later, however unspecified and merely suggestive it remained,⁸ the sentiment had nonetheless bypassed the editors of *Oppenheim*. And not surprisingly perhaps: they had started their work long before the century was drawing to a close. Theirs was a treatise appropriate for the 1950s, perhaps the 1970s or even the 1980s, but by the 1990s, the moment had by and large passed. And while it is difficult to disagree with anything written in the ninth edition of *Oppenheim*, and one cannot find fault with the professional skills and technical competence of the editors, nonetheless the work seemed of a different time, of a bygone era – at least for those who had digested the academic revolution of 1989.

It was immediately clear in 1992 that the book published as the ninth edition of *Oppenheim* was but a part of something larger. It labelled itself as Part 1 of Volume 1, suggesting that there were additional parts and volumes to follow, and it labelled itself as limited to the law of peace, tapping into a classic, but no longer standard, division of international law into two branches: one applicable in times of peace and another one applicable in times of war. Parts 2–4 of Volume 1 indeed were published at the same time. What was still missing, so Jennings and Watts announced, was a volume that would address the phenomenon of international organizations law: '[T]he law and practice relating to international organisations have now become a separate field of study.'⁹ They had approached Rosalyn Higgins to write a separate volume on international organizations law and had done so as early as 1994, so Higgins recalls. Higgins was at the time well known for her earlier masterful study of the United Nations (UN) and its contribution to international law, a subtle, comprehensive, sophisticated work in the New Haven tradition but without much of the sometimes off-putting jargon;¹⁰ for her work in practice; for her membership in the UN Human Rights Committee; and for her delightful Hague lectures,¹¹ thus combining academic insight with practical experience in the UN system and beyond.

⁷ Jennings and Watts were perfectly aware of all this, but decided admirably to go ahead at any rate, as the preface to the ninth edition makes clear. R. Jennings and A. Watts, *Oppenheim's International Law*, vol. 1, *Peace: Introduction and Part I* (1992), at xi.

⁸ D. Kennedy, *A Critique of Adjudication: Fin de Siècle* (1997).

⁹ Jennings and Watts, *supra* note 7, at xii.

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

¹¹ Published as R. Higgins, *Problems and Process: International Law and How We Use It* (1994).

As it happened, however, Higgins was soon called to higher office, being appointed to the ICJ. The volume on international organizations law was thus temporarily put on hold. Over the years, moreover, the number of international organizations mushroomed, with the academic world trying to keep pace, and the UN alone had grown into a leviathan in all but name and authority, approximating a global welfare state. Thus, by the time Higgins had the opportunity to keep her old promise, the world had seriously changed: a single volume on international organizations was all but impossible,¹² and, in the end, what would have been such a single volume on international organizations law became a two-volume work on the UN alone, co-authored with some of her former students and associates, by now themselves well-respected international lawyers: Dapo Akande (Oxford), Sandesh Sivakumaran (Nottingham), James Sloan (Glasgow) and Philippa Webb (King's College London; the order is alphabetical). While Webb acted as project manager, and the work is presented as a collective endeavour, this nonetheless carries the imprimatur of Higgins, despite the fact that she actually wrote only one of the substantive chapters and a part of one other. She conceived of the whole enterprise, drafted the preface and the introduction, and her name is printed in slightly larger font on the cover. Moreover, she graciously accepts 'ultimate responsibility' for the work (at ix). I will refer to the entire two-volume set as the 'Higgins set', given that it feels wrong to refer to the work as a 'book' or a 'volume'; these assume singularity.

Lassa Oppenheim himself never wrote much about international organizations. The second edition of his *International Law*, published in 1912, devotes a total of six pages to international commissions and international offices, and another 10 pages or so were devoted to the work of 'non-political unions' in the field of postal relations, copyright and so on. In 1919, he dedicated a slender book to the League of Nations when the League was still under construction, not unlike Frank Sayre's *Experiments in International Administration*.¹³ There is one significant difference though between the two: Sayre's is a work in international organizations law, however problematic in its own right,¹⁴ systematically studying existing international organizations for clues as to what would make for a successful League. Oppenheim's, by contrast, is a discussion in classical international law terms, focusing on statehood, sovereignty and Great Power politics.¹⁵

In addition, Oppenheim authored a short article (his last article before his death¹⁶) on the legal nature of the League of Nations immediately upon its creation, holding it to be an entity *sui generis* – nicely aligning with the earlier prediction in his short book.¹⁷ Intriguingly, not once did he consider that it might be an international organization,

¹² Plus, there exists already a similar and invaluable work on international organizations law generally, in the form of H.G. Schermers and N. Blokker, *International Institutional Law* (6th edn, 2018).

¹³ F.B. Sayre, *Experiments in International Administration* (1919).

¹⁴ Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law', 26 *European Journal of International Law* (2015) 9.

¹⁵ L. Oppenheim, *The League of Nations and Its Problems: Three Lectures* (1919).

¹⁶ Whittuck, 'Professor Oppenheim', 1 *British Yearbook of International Law* (1920–1921) 1, at 9.

¹⁷ In *Three Lectures*, he predicts that the only thing the League can ever be is a *sui generis* entity (at 33).

similar to the Universal Postal Union or the International Bureau of Weights and Measures – one is drawn to the conclusion that he intuitively realized that there was something far more ambitious about the League, without exactly putting his finger on it. This was no longer functional cooperation on a more or less technical task, with the organization acting as little more than the agent exercising delegated powers by its member states; somehow Oppenheim realized, without properly articulating it, that the League was something else entirely, not fitting into any of the regular categories.¹⁸

He never had the chance to do much more and never got around to providing a more in-depth analysis of the League and its legal nature – he passed away in October 1919. If he wrote altogether very little about international organizations, such was by no means uncommon in those days: the discipline took its sweet time coming to terms with this new phenomenon (and is still taking its sweet time coming to terms, it may be suggested), and few of his contemporaries paid more than perfunctory attention. His short piece on the League suggests, moreover, that Oppenheim was struggling to understand these new creatures – even if he would have wanted to, he would not have all that much to say just yet during his lifetime.¹⁹

In this light, while he could perhaps have planned an in-depth later study, it is nonetheless surprising that Jennings and Watts announced a separate volume of ‘the Oppenheim’ on international organizations and equally surprising that Higgins obliged – a bit like Bob Dylan presenting his album *Blood on the Tracks* as somehow part of Beethoven’s *Tenth Symphony*, the one Beethoven never finished and may not even have started. And that raises the question: why present this detailed work on the UN, on what it is and what it does, as part of Oppenheim’s large project rather than as part of Higgins’ oeuvre? Surely, Higgins’ own name and reputation are on a par with those of Oppenheim. Higgins does not need to ride on Oppenheim’s coattails; she does not need to tap into Oppenheim’s authority, having plenty of authority of her own, and more recently established authority at that. And, equally surely, there is no question here of updating an existing text, for the good reason that there never was any text to bring up to date. Higgins herself, in a brief interview, suggested that the set should become the first edition of a new addition to the ‘Oppenheim family of treatises’²⁰ – an attractive proposition as such but still not terribly illuminating: why precisely an ‘Oppenheim family’? Moreover, it is unlikely to have been inspired by pure marketing purposes: otherwise, the publication could have been slightly postponed until 2019 to mark the centenary of Oppenheim’s death. In short, monumental as the work is, its relation to *Oppenheim* remains mysterious, and maybe it is indeed simply a matter of Higgins honouring a promise made a long time ago – if so, it speaks volumes about the person.

¹⁸ Oppenheim, ‘Le caractère essentiel de la Société des Nations’, 26 *Revue Générale de Droit International Public* (1919) 234.

¹⁹ On Oppenheim’s relevance for the development of international law, see M. García-Salmones, *The Project of Positivism in International Law* (2013).

²⁰ Available at www.balzan.org/en/prizewinners/rosalyn-higgins/interview-with-rosalyn-higgins.

3 The Ambivalent International Organization

Anyone writing about international organizations is torn between two imperatives: whether to focus on the work of organizations – that is, their output, the substantive law and practices emanating from them – or whether to focus not on the output but, rather, on the machinery, how they work, the institutional law and practices. The dilemma, of course, is that one hardly makes much sense without the other: it is impossible properly to understand the UN's contribution to peace and security (for example) without having some basic idea about decision-making in the Security Council and the General Assembly. Perhaps as a result of this symbiotic relationship between substance and procedure, authors often compromise: they discuss both substantive law and elements of institutional law, but the latter are often geared towards understanding the former rather than the other way around. And perhaps for good reasons: a purely institutional text is not always very exciting to read, and there might still be a vague lingering sense of having to justify the existence of international organizations in a world that is, on the level of ideas if nothing else, dominated by states. And what better way to underline the relevance of international organizations than to point to the work they do, to their contributions to peace and security, disarmament, environmental protection or human rights?

The Higgins set is no exception. Coming in two volumes, volume 1 (the smaller one, at a little over 600 pages) is largely devoted to institutional matters, whereas the second volume (the larger one, at more than 800 pages) deals predominantly with what the UN does. In the process, some hard choices had to be made. These were guided, it seems, by one overarching idea. As with Jennings and Watts' edition of the original text, it should be a 'practitioners' book', showing 'how things *really are*' (at v; emphasis in original). And, elsewhere, it is explained that the purpose of the enterprise is 'to provide a comprehensive study of the legal practice of the UN', to be 'rooted in realities', a study of UN legal practice, 'warts and all' (at 3).

That sounds like a fine plan, but it leaves one vital concern unaddressed: which practitioner is the intended audience? Which reality, 'warts and all', is being discussed, described and analysed and for whose immediate attention? Curiously perhaps, it would seem that the central practitioner – the main audience – is not the international organizations lawyer but, rather, the Foreign Office lawyer. The international organizations lawyer is well served by other texts, most notably Henry Schermers and Niels Blokker's monumental treatise; the Higgins set, by contrast, seems written mostly as a guide for the perplexed Foreign Office lawyer confronted with questions relating to the UN: not only to its procedure but also to its substantive output.

That is a respectable choice, but it does entail that some topics of more 'organizational' interest are hardly treated or sometimes not at all. There is no attention given, for instance, to the UN's treaty practice, other than highlighting that there are relations with a number of international criminal tribunals and with specialized agencies (and those probably entail, it may be presumed, treaties of one kind or another or at least the occasional memorandum of understanding). But there is nothing about the incidence of treaties and agreements, how they are negotiated and drafted, how they

are concluded and by whom or according to what procedure. And, yet, it is precisely this sort of topic that international organizations lawyers (this one, at any rate) can get very excited about, especially given the awkward circumstance that the most authoritative study to date goes back to the early years of the UN.²¹

Likewise, there is little or no discussion of such things as the legal status of presidential statements (that is, those emanating from the Security Council's president) or the Secretary-General's bulletins, despite such instruments being used with some regularity: the UN's adherence to international humanitarian law, for example, is expressed in such a bulletin. The currently much-discussed question of the arbitral practice of the UN in case of disputes with private parties or of a private law nature, which keeps recurring in conversations about compensation for Haitian cholera victims, remains under-illuminated. Status of forces agreements are mentioned but not discussed in any detail. While one of the best chapters addresses the privileges and immunities of the UN, there is nonetheless little attention to residual questions, such as whether the UN would need a license from domestic legal authorities if it were to build an additional wing to its headquarters. There is fairly little attention to the mandate and powers of special representatives of the Secretary-General, politically significant actors though these may be. There is no discussion of how the UN relates to actors such as the Contact Group on Piracy off the Somali Coast, a creature legitimized by the Security Council and comprising UN participation alongside the participation of other international organizations and different private sector actors. And there is little sustained attention for internal accountability mechanisms (all the more relevant perhaps in light of the UN's near-absolute immunity from suit), although the Joint Inspection Unit does get a mention on occasion.

By contrast, there is a separate (admittedly brief) chapter on the Trusteeship Council. Practically defunct as the council has been since the early 1990s, it nonetheless, so we learn, meets approximately twice year. These meetings 'tend to last between five and 10 minutes' (at 105), and their sole order of business consists of appointing the president and vice-president (exclusively divided between the UK and France, it transpires) and adopting the provisional agenda. Somewhat curious, albeit for a different reason, is also the inclusion of a separate chapter on the responsibility of the UN: this, after all, is not a matter of UN law as such but, rather, of general international law – although one can imagine that the Foreign Office lawyer not specialized in the responsibility of international organizations but confronted with a practical question may benefit from the chapter, as it provides a solid introduction to the topic.

The usefulness of the 'Higgins set' for the Foreign Office lawyer is further suggested, for instance, by the inclusion of a list of the 64 subsidiary organs of the General Assembly, ranging from the Board of Auditors to the High Level Committee on South-South Cooperation, and including the UN Staff Pensions Committee as well as the

²¹ Rosenne, 'United Nations Treaty Practice', 86(2) *Recueil des Cours* (1954) 281. The recent volume by S. Chesterman, D. Malone and S. Villalpando (eds), *The Oxford Handbook of United Nations Treaties* (2019), zooms in on the United Nations' (UN) role in multilateral treaty making but remains rather silent on the UN's own treaty practice.

brilliantly named Ad Hoc Open-Ended Working Group of the General Assembly on the Integrated and Coordinated Implementation of and Follow-Up to the Major United Nations Conferences and Summits in the Economic and Social Fields. There are further lists of peacekeeping missions in operation at the time of writing as well as operative political missions and offices.

There is also a very useful chapter on the different voting procedures prevailing in different organs and on different topics, although here the discussion of the development of the interpretation of Article 27(3) of the UN Charter, relating to whether an abstention by any of the five permanent members in the Security Council amounts to a veto, is very brief indeed, coming in at two sentences (at 376).²² Perhaps most curious of all is the inclusion of a lengthy section, some 150 pages, on the relations between the UN and a number of international criminal tribunals. There is nothing wrong with these discussions as such (quite the contrary, the section is wonderfully informative), but, in some cases, the connection with the UN is a little tenuous, and much of these discussions is devoted not to that relationship but, rather, to matters internal to these tribunals, such as their composition, jurisdiction and powers. Pertinent questions, moreover, relating to the possible legal limits to Security Council referrals to the ICC are not discussed.

In the end, then, the work is a curious mix of enumeration and analysis. The promise to present a picture with ‘warts and all’ is not always met, partly as a result of the editorial decisions on what to include and what not to include. That said, most of these editorial choices seem to have been made with the harried and hurried Foreign Office lawyer in mind rather than the international organizations lawyer, let alone the academic audience. In this light, there might be something appropriate after all in presenting the ‘Higgins set’ as part of the Oppenheim family.

4 On the ICJ

The most enjoyable chapter, no doubt in part because it appealed to the reader’s baser interests,²³ is Chapter 29, devoted to the ICJ and written with great authority (not surprisingly) by Higgins herself. This truly is a description of the Court with ‘warts and all’, only marred a little (just a little) by Higgins attributing a state of affairs to ‘political reasons’ in the beginning of the chapter.²⁴ This ‘explanation’, as well its close cousin ‘political will’, would do well to be eradicated from the international lawyer’s vocabulary; since most anything in international affairs can be explained by invoking ‘political reasons’, its analytical value is close to zero.

²² It gets a further sentence, accompanied by an explanatory footnote, elsewhere (at 85).

²³ Luckily, I am not alone in this: in conversation, others too single out Chapter 29 as particularly exciting.

²⁴ She recounts that the informal understanding concerning the regional and P5 distribution of seats on the ICJ may be broken ‘for political reasons’ (at 1139), and in a footnote attributes the absence of a Chinese judge between 1967 and the mid-1980s likewise to ‘political reasons relating to China’ (at 1139, note 6).

This aside, Chapter 29 is a gem, and if the set were not so expensive, one might almost be tempted to say that Chapter 29 alone would justify its purchase. In it, Higgins describes elements of the Court's organization with a great eye for practicalities, noting, for example, that the ad hoc judge is mostly useful for purposes of explaining the thinking behind domestic law of the state that appointed her or when specialized knowledge might come in handy: an example she mentions is the usefulness of having an ad hoc judge with knowledge of police cooperation and arrest warrants on the bench when deciding the *Arrest Warrant* case.²⁵ But she seriously deflates the idea of the ad hoc judge as guardian of the rights of the party appointing her, scathingly observing that the theory of the ad hoc judge making sure that that state's position is fully heard borders on the nonsensical: 'One would hope that this would occur in any event' (at 1145). Moreover, this kind of advocacy would not be tolerated in a full member of the Court stemming from one of the litigant parties.

There are additional considerations that suggest that a reconsideration of the phenomenon of the ad hoc judge might be pertinent. She notes that, in 2016, there were 12 ad hoc judges, all of them requiring a room, secretarial support, a clerk and a trainee: in the 2015–2016 budget, the ad hoc judges alone cost the Court over a million dollars. And then there are eminently practical concerns: the ad hoc judges have access to the *Restaurant des Juges*, which seems to entail that lunchtime conversation by the Court over pending cases may be inhibited: surely, a judge sitting only in a case between A and B has no business participating in conversation concerning a case involving C and D nor in overhearing such conversations.

Higgins also has interesting things to say about advisory opinions. She notes, for example, that the ICJ is not pleased with serving as a kind of super-appellate court in international civil service cases, largely because of the absence of equality of arms in the relation between an organization and a disgruntled staff member.²⁶ Organizations may be able to appeal to the ICJ; staff members may not, and, to make matters worse, staff members can only communicate with the Court via the organization concerned. The careful reader of the latest opinion of this kind – the 2012 *International Fund for Agricultural Development* opinion²⁷ – had already understood as much, but it is of interest to see Higgins confirming the ICJ's unease with such requests in no uncertain terms.

She is even more outspoken though about the role of NGOs in advisory proceedings, castigating the International Committee of the Red Cross (ICRC) for its role in the *Nuclear Weapons* advisory proceedings.²⁸ As she tells the story, the ICRC tried to get a letter discussing the ICRC's position on some points accepted as part of the case

²⁵ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Reports (2002) 3. Judge ad hoc Van den Wyngaert should likely consider this a compliment.

²⁶ With respect to the UN, this facility was removed in 1995, by the General Assembly; with respect to other organizations and administrative tribunals, however, it continues to be a possibility.

²⁷ *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed Against the International Fund for Agricultural Development*, Advisory Opinion, 1 February 2012, ICJ Reports (2012) 10.

²⁸ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226.

file. The Court decided against this but did allow the letter's entrance into the library of the Court so that it could be, but did not have to be, consulted. Subsequently, however, several states referred to the letter in their presentations, even quoting passages, meaning that the case file did come to include part of the letter. Higgins' outrage is still tangible: 'There is no doubt that the Court felt ... that matters had been manipulated by the ICRC' (at 1176), and the Court sent a letter, never published, to the president of the ICRC, who indeed acknowledged, she writes, that the ICRC had acted wrongly. The topic would eventually come to be addressed in the Court's Practice Direction XII.

Very entertaining is how Higgins discusses the effect of the creation of the ICC on diplomatic protocol in The Hague, which is the seat of both courts. Traditionally, the ICJ president would take precedence over all diplomats, including even the doyen of the diplomatic corps, with the Court's vice-president being third in line. This now was rudely disturbed with the arrival of a new kid in town, the ICC. Much to Higgins' chagrin, the third place in the order of precedence at official receptions is now taken by the president of the ICC instead of the ICJ's vice-president; the explanation she proffers, not without some sour grapes it seems, is that the ICC is 'politically very important to The Netherlands, notwithstanding that it is not actually a UN body' (at 1193).²⁹

Higgins is also fiercely protective of the autonomy and independence of the Court, both within the UN system and with respect to the state where it has its seat. Concerning the latter, she notes that, since no headquarters agreement ever works totally without problems, some 'unfortunate incidents' have also occurred between the ICJ and the Netherlands, incidents 'for which no explanation has been offered nor apologies rendered' (at 1192). Unfortunately, she does not go into further detail, although she does recall, in a footnote, an incident involving a judge exceeding the speed limit. He or she received a penalty that was annulled on appeal, as being incompatible with the immunity of ICJ members – Higgins wholeheartedly agrees.

With regard to the Court's independence within the UN system, she not only accepts that the Court is subject to internal financial audits but also recalls how it had been very reluctant to receive the UN's Joint Inspection Unit (JIU), tasked with reviewing management and administration – these matters, she holds, fall squarely within the Court's autonomy. By the same token, she is not very enthusiastic about receiving the Office of Internal Oversight Services (OIOS) either and ends her discussion by noting, with apparent glee, that the 'relationship between the JIU and the OIOS appears on occasions to be unclear, with one asking for information already requested by the other' (at 1190).

Highly instructive is also the discussion on the Court's financing, revolving around an ill-fated resolution of the General Assembly (Resolution 61/262), which gave rise to 'a major drama' (at 1199). The General Assembly had fixed the salaries of ICJ judges (and judges at the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda) at a certain level, while retaining a different (seemingly higher) level for those already on the bench. As Higgins opined,

²⁹ Note that this does little to justify the lengthy discussion of the International Criminal Court in the work.

this was ‘clearly illegal under the Statute’ (at 1200), and she chides the UN Office of Legal Affairs for not having set off any alarm bells when the General Assembly was preparing the resolution – which is interesting from a ‘checks and balances’ perspective. What the episode most vividly illustrates (though without making the point explicitly) is that international organizations law desperately needs a proper system of secondary law: how to enact, withdraw, amend, reverse or terminate resolutions or decisions once adopted.³⁰ There was a lot of talk apparently about the impossibility of rescinding the resolution concerned, and, in the end, it seems to have been cast aside by a later resolution setting the salary without distinguishing between sitting and new members of the Court.

One of the things making the chapter on the ICJ so appealing is that it shows the person behind the text, despite the initial claim in the work that ‘personal opinion is largely eschewed’ (at 4) – an impossible claim at any rate. Higgins’ gleeful observation that the JIU and the OIOS do not seem to be coordinating much, as discussed above, is one example. Another is that she can sometimes list her own acts in the third person, suggesting a certain righteousness without overdoing it, as when she recalls that – unlike others perhaps – she recused herself from a case having advised one of the parties many years earlier (at 1213, note 355) or when remarking that, as president, she laid down several principles to guide ICJ members in doing arbitrations, principles ‘which have not always been followed in subsequent years’ (at 1217, note 373). And, very telling, in a non-ostentatious way, is how she consistently refers to the UN Secretary-General in terms of ‘he/she’ or ‘his/her’. This may strike many readers as obvious (and should be obvious), but given the fact that the UN Charter with equal consistency merely uses the male version (‘he’, ‘his’), it can also be seen – and praised – as an act of calm resistance. It is opinionated writing like this that makes the chapter lively and memorable.

5 The UN

The UN presents serious problems for any student of international organizations. It is big and sprawling, and it seems almost nonsensical to discuss the UN in terms of a function, delegated by member states to be exercised by the UN as agent, in much the same way in which Oppenheim held the League of Nations to be departing from the prototype of the public union but unable to be discussed in terms of statehood either. Treating the UN as an international organization, even if *primus inter pares*, ignores the circumstance that the UN has come to absorb many functions and is probably better seen as something of a proto-state (if it has to be classified to begin with), doing many of the things states tend to do but on a different level of administration, rather

³⁰ It was this insecurity that the USA tapped into when justifying its invasion of Iraq in 2003, claiming to give effect to Security Council resolutions adopted well over a decade earlier. For brief discussion, see V. Lowe, *International Law* (2007), at 273.

than as a functional agency.³¹ After all, as the Higgins set makes clear, the UN is engaged not just with peace and security but also with disaster relief; not just with democratic governance and electoral assistance but also with improving social conditions; and not just with protecting the environment but also with protecting human rights. In short, the UN is a hopelessly unrepresentative species of the *genus* international organization, only matched in its unrepresentativeness by the equally unrepresentative European Union (EU).

And, yet, the UN is also (and, again, not unlike the EU) often somewhat tacitly seen as the highest evolved form of the *genus*, as embodying something that, somehow, other organizations should aspire to, despite one or two design flaws – such as the special prerogatives of the permanent members of the Security Council. When things go wrong, we look at the UN to step in. Sometimes we do so in vain, never more problematically so than in Rwanda in 1994; sometimes we do so with some measure of success when it comes to election monitoring or peacekeeping, in many cases, or starting human rights revolutions. And we always do so with hope. The UN might sometimes manifest the worst in people, but it also provides an almost indefeasible beacon of hope. It is often with the UN in mind that observers can write about international organizations promising the ‘salvation of mankind’ or invoke the equally biblical turning of ‘swords into plowshares’. And, yet, as the legendary Secretary-General Dag Hammarskjöld famously held, the UN was ‘not created in order to bring us heaven, but in order to save us from hell’.³² The UN, unique among international organizations, thus serves as the screen on which many different ideas and aspirations can be projected, and it does so in ways that do not quite apply to, say, the World Meteorological Organization or the Universal Postal Union.

The Higgins set faithfully reflects this conception, tilting towards the UN as, by and large, beneficial. While not uncritical in any way (there are some ‘warts’ discussed in the 1,500-odd pages of the two volumes), the Higgins set maintains a positive attitude towards the UN – this is not a critical study of the UN. It is not very critical in the everyday sense of that term, offering critiques of inefficiency, ineffectiveness or mission creep or even suggesting, in full ‘John Bolton mode’, that the UN best be terminated. There is little of that kind of critique. Nor is the Higgins set critical in the ‘critical legal studies’ sense, identifying structural biases or investigating how some interests are structurally benefited or prioritized over others. The one image that stays upon reading the 1,500-odd pages is that of the UN as a global behemoth, generally benign and covering many fields of human activity and endeavour. Sometimes things may go wrong; some initiatives come to naught or get lost in a bureaucratic quagmire, and the Security Council is not to be trusted but, alas, that is the reality, and, by and large, the UN is a force for good. In this, the Higgins set is no different from most

³¹ Oppenheim, ‘Caractère essentiel’, held that the League was not a super state, an opinion echoed three decades later by the ICJ with respect to the UN (at 238). See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports (1949) 174.

³² As quoted in Klabbers, ‘The Changing Image of International Organizations’, in J.-M. Coicaud and V. Heiskanen (eds), *The Legitimacy of International Organizations* (2001) 221.

international legal studies of the UN – it is just bigger, more comprehensive, more sophisticated and more detailed.

But, as noted, the study is mostly of interest (I would imagine) to the somewhat overwhelmed Foreign Office lawyer, who may have started his or her career at some other ministry, may not be particularly specialized in international law and may not have followed recent doctrinal developments very closely; he or she may spend most of his or her days attending meetings and filing reports concerning those meetings.³³ If such a legal advisor is confronted with the question whether his or her state should run for a seat on, say, the Economic and Social Council or whether resources are best reserved for a different occasion, the Higgins set may provide useful background. If this legal advisor may wish to find out whether or how to object to some other state proposing a reservation to a UN-sponsored human rights treaty, the Higgins set may offer guidance. And if this legal advisor needs to respond to a parliamentary query about whether his or her state should volunteer to take part in UN peacekeeping, the Higgins set will provide a sound starting point for further reflection. It is this legal advisor, harried and overworked in the legal department of a Foreign Office in one of the 193 member states, who can be expected to reach for the Higgins set. The lawyer working at the International Labour Organization, by contrast, or the International Olive Council or even the EU, will have considerably less occasion to reach for the Higgins set, and the same might even apply to the lawyers in the UN's own Office of Legal Affairs.

6 Concluding Remarks

There is a considerable irony in the above consideration: a monumental work on the most important international organization ever conceived of by humanity speaks mostly to the national legal advisor. It adds little to the law of international organizations as a general discipline (little other than comprehensive and reliable information about the UN – no mean feat in its own right) and unwittingly still demonstrates the state-centric nature of the discipline. For, while international organizations may be recognized as subjects of international law and may increasingly even be granted international legal personality, highlighting autonomy and independence, they also remain creatures of their member states, destined to reflect the positions of their most important member states (which may, to be sure, differ from topic to topic, and it is nice to see that the Higgins set devotes some attention to the informal group of the Small Five,³⁴ in addition to the more traditional Big Five). International organizations both reflect their member states and assume some distance from them, and each analyst will have to determine for himself or herself where on the spectrum between full

³³ This, after all, is what Foreign Offices do, most of the time. A fine study is I. Neuman, *At Home with the Diplomats: Inside a European Foreign Office* (2012).

³⁴ The Small Five is an informal but active network comprising Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland.

dependence and full autonomy he or she will situate him- or herself. Like most international lawyers, Higgins and associates find a position close to the middle, allowing them on occasion to treat organizations as more or less autonomous and allowing them on occasion to treat the organization as little else but a vehicle for member states. That said though, while situating themselves somewhere in the middle, Higgins and associates tilt a little towards the vehicle position, considerably more so than, for example, Schermers and Blokker. On withdrawal from the UN, for example, the Higgins set suggests that, in the absence of a withdrawal clause, the relevant rules of the law of treaties would apply, betraying a conception of the constituent instrument as predominantly an interstate agreement, a vehicle for states (at 290–291). By contrast, Schermers and Blokker would be far less happy in such circumstances with relying strongly on the law of treaties, precisely because this diminishes the institutional component: the constitution not only is an interstate compact but also creates organs that are distinct from the states composing them.³⁵

In the end, the Higgins set is, ‘of course’,³⁶ a monumental study. It contains an enormous amount of detail, is well organized, generally well written, hugely informative and, with a practical focus, is geared to the needs of the Foreign Office lawyer. Some of the editorial choices made may be debated – in particular, perhaps, the huge attention for international criminal tribunals, many of which are only tangentially related to the UN, as Higgins indeed acknowledges.³⁷ But there is absolutely nothing wrong with the analysis contained in the almost 1,500 pages of the Higgins set: it is reliable, insightful and authoritative. And perhaps its proposed audience of Foreign Office legal advisors helps make sense of the *Oppenheim* label: *Oppenheim*, first published over a century ago, became a classic handbook for Foreign Office officials, finding its way into the chancelleries of the world; the Higgins set aspires to much the same.

It is far too strong to claim that, in addressing mostly the Foreign Office lawyer, the Higgins set represents a throwback to earlier days when states were the sole actors of any relevance in international law. After all, those advising NGOs will often face similar questions to those faced by Foreign Office lawyers, and the Higgins set does a supreme job at answering those questions. And, yet, it is reminiscent of a bygone era. The uninitiated reader will not glimpse from the Higgins set that the UN can serve anyone’s interests but, rather, only those of the global community and perhaps individual member states; he or she is not told that often the value of the UN resides not so much in what it does but, instead, in what sort of platform and vocabulary it provides to states (and others) in their contacts with each other. And the Higgins set reproduces a picture of UN law as somehow existing without much connection to the global economy or to international politics.

Perhaps fittingly, this leads to an inherently ambivalent conclusion. Curious as it is to read a major treatise bypassing the core insights of the three main intellectual

³⁵ Schermers and Blokker, *supra* note 12, at 110–119.

³⁶ This is how Highet, *supra* note 6, treated the Jennings and Watts edition in his 1994 review: ‘This is, of course, magisterial.’

³⁷ See text accompanying note 29 above.

revolutions in international legal thinking taking place 30 years ago (the critical work of Koskenniemi, the constructivism of Kratochwil, the systems orientation of Teubner), it is also cause for some celebration (muted perhaps, but still) that such a work can still be produced, and will come to occupy a prominent place on the desk of every Foreign Office legal advisor – alongside the other volumes of *Oppenheim*. Perhaps the final take-away should be, then, that traditional international legal scholarship has managed to weather the storms of 1989. The Higgins set is not embedded in a broader theoretical framework about the role of the UN in today's global politics; it is not engaging with questions concerning the UN as a political project, or its relative autonomy as a political system. It does none of these things and yet manages to be highly informative and add to our understanding of what the UN is, how it works, what it does. Readers keen to do so can find what they need on topics as diverse as the relationship between the UN and the ICC, or on the current situation of the Trusteeship Council, and then let their own interpretations loose and embed it in theoretical frameworks of their own. Traditionally, one of the major roles of international legal scholarship has been to find, organize and systematize information, and, while that is never completely innocent, it is comforting to notice that such work still has an important role to play.