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An Appreciation of Jonathan I. Charney

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Jon Charney preceded me into the academic world by a dozen years and already had a well-established reputation in international law when I was a brand-new law teacher. At the time we met in 1984, Jon was tackling some of the most ambitious topics in the theory and practice of international law, and he reached out to others for collegial engagement on those subjects. From the mid-1980s, he and I worked together on three collaborative books and on many projects for the American Society of International Law and the *American Journal of International Law*.

Among the themes that preoccupied Jon as his scholarship blossomed, I would like to single out two that are fundamental and pervasive. First, he asked the deepest questions about the creation of legal norms for a diverse and changing international community: can there be a genuinely universal international law?¹ Is international law ultimately grounded on the consent of states, or could legal obligations take hold even if states have not consented to them?² Second, he was concerned with the institutional framework in which international law is applied and international disputes are adjudicated: are international courts capable of ruling effectively on the kinds of disputes that litigants have sent them in the last few decades? Now that we have a veritable constellation of international tribunals, will their jurisprudence fit together for a coherent rather than fragmented international law?³ It is not necessary to be an international lawyer to understand that those questions are

1. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993)

2. Jonathan I. Charney & Gennady M. Danilenko, *Consent and the Creation of International Law*, in BEYOND CONFRONTATION: INTERNATIONAL LAW FOR THE POST-COLD WAR ERA 23-60 (Lori F. Damrosch, Gennady M. Danilenko & Rein Müllerson eds., 1995).

3. Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 COLL. COURSES HAGUE ACAD. INT'L L. 101 (1998); Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697 (1999) (lead article in Symposium on the Proliferation of International Tribunals).

fundamental to the theory of international law, indeed to the nature of law itself. They epitomize the perennial challenge for our discipline: is international law really "law"? Jon was committed to the nature of international law as "law" and to the value, even the virtue, of holding its sources and methods and its institutions to the most probing scrutiny.

In the mid-1980s, our profession went through one of its periodic paroxysms over an issue of national and international policy, on that occasion in reaction to the case known as *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*.⁴ In 1985, I was asked by one of the leaders of our field, John R. Stevenson, a former Legal Adviser of the Department of State, to help set up a study group on the International Court of Justice (ICJ), in order to develop high-quality scholarship that could be relevant to states that were rethinking their policy positions toward the Court. Jack Stevenson chaired the study group and I edited the papers that our group produced in 1985 and 1986, which were published as *The International Court of Justice at a Crossroads*.⁵ In a planning meeting at the American Society of International Law in Washington in 1985, Jack proposed the names of the best scholars of and practitioners before the ICJ who should be invited to join the study group. Jack identified Jon as one of the handful of younger-generation lawyers with this expertise. They had worked together on the *Gulf of Maine Boundary* case which the ICJ had decided the previous year⁶—Jack as Special Counsel for the U.S. delegation that presented the case in The Hague, and Jon as an expert on maritime boundary law.

It was in the context of the ICJ study group that I first came to work closely with Jon. The chapter that he wrote for the study tackled a set of problems concerning the attitudes of litigants and potential litigants toward international judicial settlement of disputes: he called the chapter "Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance."⁷ From the vantage point of the 1980s, the two paradigmatic and contrasting cases that were simultaneously pending at the Court were *Gulf of Maine Boundary*, which was submitted to the Court with the consent and active

4. 1984 I.C.J. 169 (May 10) (Provisional Measures); 1984 I.C.J. 392 (Nov. 26) (Jurisdiction); 1986 I.C.J. 14 (June 27) (Merits).

5. THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS (Lori F. Damrosch ed., 1987).

6. Delimitation of the Maritime Boundary of the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Oct. 12) (Merits).

7. Jonathan I. Charney, *Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 288-319, *supra* note 5.

participation of both interested states, and *Nicaragua*, in which the United States as respondent strenuously denied that either side had ever consented to the Court's jurisdiction over this category of case or that the dispute was amenable to judicial settlement. In the former case, Canada and the United States accepted the authority of the Court and fully carried out the resulting judgment; in the latter, the United States so strongly disagreed with the Court's ruling on jurisdiction that it not only boycotted the rest of the proceedings and refused to carry out the judgment, but even renounced its acceptance of the entire form of jurisdiction under which Nicaragua had grounded its major claims. Against this background, Jon undertook a comprehensive study of international adjudication, in which he asked, among other things, about the correlation between contemporaneous consent and compliance. He concluded that consent is relative, that judgments of the Court tend to command less respect when the Court acts on the basis of contested consent, and that the Court and prospective litigants should be sensitive to questions of institutional credibility when deciding on whether to proceed with cases in which the respondent denies the basis of the Court's authority.⁸

We had a spirited debate about these propositions in discussing Jon's paper within the study group. The importance of the issues to international lawyers is comparable to the jurisprudential controversy in the United States during the Vietnam era over Alexander Bickel's "passive virtues": does a judicial body best conserve its authority by declining to decide certain kinds of politically delicate matters (such as war-and-peace questions), as contrasted to deciding all cases without regard to political considerations? Jon took a carefully nuanced position, which is faithful both to the need for the International Court to decide cases on the basis of law rather than politics, and also to the need for the Court to be aware of the political environment in which it operates. He wrote:

In addition to the Court's duty to decide cases in accordance with the applicable law, it has a duty to the institution and the international community to avoid matters that would, on balance, result in its decline for no just cause. . . .

. . . This is not the time for reaching out for more difficult cases and subjects for adjudication. This is the time for conserving the institution of the Court in the hope that there will be a time when the international environment is more hospitable to this method of dispute resolution.⁹

8. Charney, *supra* note 7, at 307-09.

9. *Id.* at 309.

He continued to pursue this theme of the institutional suitability of particular international forums for different kinds of disputes throughout his scholarly career.

A few years after the ICJ study, I organized another research project for the American Society of International Law, this time in the context of the end of the Cold War and the transformation of the Soviet Union. The idea for the project was to team up younger-generation experts on international law from the United States and the former Soviet Union to work on collaborative papers on cutting-edge problems. At a meeting in Moscow in December 1989 with colleagues at the Institute of State and Law of the then-USSR, our planning group agreed that one of the priority topics would be how international law should be made in the post-Cold War period, and in particular whether an overarching theory of international law should embrace non-consensual sources of obligation. Our Soviet colleagues had not yet met Jon as of 1989, but they had read his articles in the *American Journal of International Law*, the *British Yearbook of International Law*, and elsewhere, in which he had written on the theory of customary international law. I vividly recall that the Soviet members of the planning group identified Jon Charney as having produced the most stimulating and thoughtful work on problems in the theory of international law among younger-generation professors in the United States in the 1980s—"head and shoulders above the rest," one of them said. When I returned from Moscow, we invited Jon to join the study group for our next meeting, which took place in Washington in 1990, and he later participated in a memorable Moscow meeting during one of the tumultuous months in the transition to the post-Soviet era. Jon and his Russian co-author were not of one mind on the theory of consent and international law, yet they executed a *tour de force* in which they managed both to articulate and to bridge their differences.¹⁰

In both of the study groups just described, it was my privilege as editor of the collaborative volume to "edit" Jon's papers. Of course, as anyone who knows Jon's work will appreciate, his prose does not require anyone else's editorial assistance. He could write with a clarity of expression that leaves no doubt about meaning and little room for improvement.

In the later 1990s, Jon prodded me to take on some new projects, in which I was able to benefit from his editorial guidance. One of these was still another collaborative book project, for which this time Jon was a co-editor and I was one of the contributors. The project

10. Jonathan I. Charney & Gennady M. Danilenko, *Consent and the Creation of International Law*, in BEYOND CONFRONTATION, *supra* note 2. Alongside this collaborative work, Jon honed his own thinking about the problem of consent and published one of his major Articles—*Universal International Law*—at about the same time. Charney, *supra* note 1.

had special meaning for both of us, because it was a celebratory volume in honor of our shared mentor, Louis Henkin.¹¹ Jon and his co-editors proposed, and the Columbia side agreed, that the volume would be published both as a hardcover book and as a special symposium of the *Columbia Journal of Transnational Law* in 1997.¹² Jon enlisted me to write a piece on use of force, and he also mobilized me as liaison to the Columbia student editors. Through this endeavor I learned at first hand how much an author's piece could improve between the time Jon first saw it and the time it finally reached print. More important, he played an active part in conceptualizing the volume as a whole, so that in contrast to many *Festschriften*, which are tacked together from the disparate contributions of unconnected writers, this one had an overarching structure, thematic organization, and a high level of substantive content.

In 1998 Jon delivered a course of lectures at the Hague Academy of International Law and wrote the monograph that constitutes one of his major and enduring contributions to our discipline.¹³ Those who are not international lawyers may not be fully cognizant of the esteem confirmed and conferred by the invitation that comes from the Curatorium of the Hague Academy to deliver such a course. And those who are not regular readers of the *Recueil des Cours de l'Académie de Droit International de la Haye* may not realize that lecturers at the Hague Academy do not always follow the letter of the law laid down by the Curatorium, that all manuscripts must be handed in at The Hague no later than the week in which the lecturer gives the course in question. To paraphrase our colleague Professor Henkin, it would be nice to say that "almost all Hague lecturers finish writing almost all of their lectures without too much lapse of time,"¹⁴ but the truth is that almost all Hague lecturers are still scribbling their lectures on the airplane and almost none of them have given a moment's thought to the footnotes until well after they leave the Hague. In Jon's case, as everyone who knew him will appreciate, before he left Nashville for The Hague in summer, 1998 every single footnote was in place—all 1087 footnotes for a 271-page monograph. The Hague Academy set a record for timely publication when they printed his lectures in the same year.

11. POLITICS, VALUES, AND FUNCTIONS: INTERNATIONAL LAW IN THE 21ST CENTURY: ESSAYS IN HONOR OF PROFESSOR LOUIS HENKIN (Jonathan I. Charney et al. eds., 1997).

12. *Essays on International Law in Honor of Professor Louis Henkin*, 36 COLUM. J. TRANSNAT'L L. 1 (1997).

13. Charney, *Is International Law Threatened by Multiple International Tribunals?*, *supra* note 3.

14. Cf. LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979) ("It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.") (emphasis in original).

Two strands in Jon's legal thought that I mentioned at the outset—the theme of a universal international law, and the theme of the institutional setting for adjudication of international disputes—come together in Jon's Hague lectures. The question he poses—"Is International Law Threatened by Multiple International Tribunals?"—could not have attracted more than hypothetical interest until the late 1990s, when many new courts and court-like institutions had just come into being. He asked the right question at the right moment, and his answers have set the terms of scholarly discussion on the subject for the turn of the 21st century. In the Hague lectures, Jon undertook a thorough survey of what the various international adjudicatory bodies had been doing in the 1990s, in order to understand whether they were applying a universal, coherent international law or a fragmented, specialized, disjointed set of laws. His conclusions are that universality is not threatened, that a diversity of tribunals is healthy, that experimentation and dialogue can lead to improvement in international law, and that the availability of a multiplicity of potential legal forums increases the likelihood that disputes will be resolved in light of international law (whether or not a tribunal actually decides on the dispute). But he added a cautionary note,

While diversity, experimentation, and competition have value, the coherence of international law has high value to the continuation of a peaceful and productive international legal system. All of the participants in this system should be sensitive to the maintenance of an appropriate degree of coherence in order to avoid unnecessary risks.¹⁵

The admonition that "all participants in the system need to be sensitive to the risks inherent in the decentralized system and be careful to avoid actions that might pull the system apart"¹⁶ recalls his earlier position concerning the ICJ,¹⁷ in the sense of advice to both litigants and judges to ponder systemic implications of particular cases.

In April 1998 Jon was elected by his colleagues in the profession to a five-year term as Editor-in-Chief of the *American Journal of International Law* (AJIL), together with W. Michael Reisman of Yale. All of us who had already worked closely with Jon knew what an outstanding leader he would be. The wisdom of that selection has been validated in issue after issue of the *Journal*—almost 20 of them now. The operations of the AJIL moved to Vanderbilt in 1998. Jon was a hands-on manager of these operations, as well as a first-rate

15. Charney, *Is International Law Threatened by Multiple International Tribunals?*, *supra* note 3, at 373.

16. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, *supra* note 3, at 708. In the NYU symposium, Jon distilled the main ideas from his Hague lectures.

17. See *supra* notes 8-9.

editor on all levels, from the initiation of a concept for a collection of pieces down to the wordsmithing of the final product.

Jon was able not only to run the *Journal*, but also to continue to write actively for it and for other scholarly periodicals at the same time. His later writings, including on Kosovo, were a plea for maintaining rule-based methods for enforcing existing norms or making new ones, within the systemic structures of the U.N. Charter.¹⁸ He likewise urged the use of U.N. Security Council authority for responses to the attacks of September 11, 2001 and the struggle against terrorism.¹⁹ He insisted on the integrity of an international system for international law-making and law-enforcement, and one rule of law for all participants in it.

Close to the end of the five-year term for which Charney and Reisman were elected as Editors-in-Chief of the AJIL, a succession plan emerged under which I will have the privilege and burden of carrying forwards Jon's legacy as an incoming Editor-in-Chief. As the details of this succession plan took shape, Jon and I spoke at length about all aspects of the running of the *Journal*, including the intricacies of the complex machinery in place at Vanderbilt. I have had many occasions to stand in genuine awe of the high standard he has set for the AJIL.

The last time I saw Jon was at the spring 2002 meeting of the American Society of International Law, when I sat with Jon and Sharon at the annual banquet and we talked about the *Journal*. He carried himself with such dignity and looked so strong that it was possible to cherish the hope that he might be with us for years to come. His achievements of scholarship and leadership will endure to inspire us by example.

18. Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 32 VAND. J. TRANSNAT'L L. 1231 (1999); see also Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT'L L. 841 (1999).

19. Jonathan I. Charney, *The Use of Force Against Terrorism and International Law*, 95 AM. J. INT'L L. 835 (2001).