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OSCAR SCHACHTER (1915–2003)

Among “jurisconsults of recognized competence in international law” and “most highly qualified publicists of the various nations,”¹ no one in the second half of the twentieth century did more than Oscar Schachter to influence both the theory and the practice of international law, especially the law of the United Nations Charter. When the centennial of the American Society of International Law arrives in two years, we will have occasion to reflect on his contributions to this *Journal* and many other endeavors of the Society, across a long and vigorous life.

I. SIX DECADES OF SERVICE TO THE PROFESSION

The *Proceedings* of the American Society of International Law record “Schachter, Oscar, Department of State, Washington, D.C.,” on the membership rolls as early as 1943.² Just a few years out of Columbia Law School (class of 1939) and then in his twenties, he joined the Society when some of its founders were still present, thereby providing a living link from the original generation through the turn of the twenty-first century.³ In later life he often mentioned, however, that he had rejected the isolationist, neutrality-oriented perspective of many leading American international lawyers before World War II;⁴ he embraced a collective security perspective as a young man and maintained it throughout his life. From wartime jobs in the nation’s capital, he moved in 1944 to the United Nations Relief and Rehabilitation Administration (UNRRA) and in 1946 to the fledgling United Nations, where he found his vocation as an engaged practitioner and in due course the foremost scholar of the law of international organizations. He spent three decades in UN service—the first two in the general legal division, of which he was director from 1953 to 1966, and the last in charge of studies at the United Nations Institute for Training and Research (UNITAR). He left UNITAR in 1975 (at the UN retirement age of sixty) to take up a second career as a professor of international law at Columbia, where he continued to teach through spring 2003 as Hamilton Fish Professor Emeritus of International Law and Diplomacy.⁵

On his bookshelves when he died in December 2003 were the continuous volumes of the *American Journal of International Law* from 1944 through 2003—sixty years, 240 issues. He was elected to the Board of Editors in 1959; his first article in these pages appeared in the January 1960 issue.⁶ His writings in the field of international law had begun a decade earlier, with

¹ ICJ Statute, Arts. 2, 38(1)(d).

² 37 ASIL PROC. 179 (1943).

³ John Bassett Moore and Charles Cheney Hyde, who were among the founding members of the Society, were honorary vice presidents when Schachter enrolled. Compare 1 ASIL PROC. 9, 73 (1907), with 37 ASIL PROC. at v (1943) (rosters of members, officers, and speakers reflecting this generational continuity). Moore and Hyde had both held the Hamilton Fish Professorship of International Law and Diplomacy at Columbia University, which became Schachter’s chair from 1978, after he returned to his alma mater as a faculty member.

⁴ He thus did not study international law at Columbia, where he inclined toward a New Deal career. This and other aspects of Schachter’s development are documented in an interview conducted by Thomas G. Weiss in 2001 for the UN Intellectual History Project [hereinafter UNIHP Interview] (publication forthcoming in UNIHP Oral History Collection, City University of New York; transcript on file at Columbia Law School).

⁵ The emeritus designation took effect when he reached age seventy in 1985, but he never in any sense retired. He maintained a full program of professional activities until his final illness in the fall of 2003.

⁶ *The Enforcement of International Judicial and Arbitral Decisions Against States*, 54 AJIL 1 (1960).

a piece growing out of his experience as one of the first lawyers in the service of the United Nations.⁷ At the end of a presentation by Schachter on a UN topic to the 1959 annual meeting,⁸ Herbert Briggs, then president of the Society and editor in chief of the *Journal*, commented:

My chief grievance with Oscar Schachter has been that we have not heard from him often enough. And we have not had enough from his pen. We took care of that this morning by electing him to the Board of Editors of the AMERICAN JOURNAL OF INTERNATIONAL LAW. He shall now have to contribute regularly to its pages.⁹

And so he did, for almost forty-five years. In a curriculum vitae including more than one hundred principal publications, some thirty are substantive pieces written for this *Journal* or published in the *ASIL Proceedings*, across the entire range of our discipline—sources of international law,¹⁰ the use of force,¹¹ human rights,¹² state responsibility,¹³ dispute settlement,¹⁴ and many aspects of UN law and practice.¹⁵

Schachter was president of the American Society between 1968 and 1970 and honorary president from 1994 to 1996.¹⁶ Almost every year across half a century (most recently in 2002¹⁷), he appeared on programs at the annual meeting, either as principal lecturer or as discussant or moderator, on a staggering range of subjects. In 1997 he was the center of attention in a “living legend” interview, which merits reading in full for a glimpse not just of his remarkable career but of his inimitable sense of humor.¹⁸ The 2001 annual meeting—organized around the theme “The Visible College of International Law” in homage to Schachter’s much-quoted article *The Invisible College of International Lawyers*¹⁹—was the occasion for another scintillating public conversation.²⁰

From 1978 to 1984 Schachter served as co-editor in chief of this *Journal*, together with Louis Henkin. The present editors in chief owe him an immeasurable debt not only for his generous attention to their writing from the earliest stages of their scholarship, but also for his sage advice as they took on the responsibilities of the editorial office two decades later. He continued to read manuscripts for the *Journal* through the summer of 2003.

⁷ *The Development of International Law Through the Legal Opinions of the United Nations Secretariat*, 1948 BRIT. Y.B. INT’L L. 91.

⁸ *The International Official in a Divided World*, 53 ASIL PROC. 344 (1959).

⁹ 53 ASIL PROC. at 349.

¹⁰ See, e.g., *The Question of Treaty Reservations at the 1959 General Assembly*, 54 AJIL 372 (1960); *The Twilight Existence of Nonbinding International Agreements*, 71 AJIL 296 (1977).

¹¹ See text at notes 28–36 *infra*.

¹² See, e.g., *The Obligation of the Parties to Give Effect to the Covenant on Civil and Political Rights*, 73 AJIL 462 (1979); *Human Dignity as a Normative Concept*, 77 AJIL 848 (1983).

¹³ *Compensation for Expropriation*, 78 AJIL 121 (1984); *What Price Expropriation? Compensation Cases—Leading and Misleading*, 79 AJIL 420 (1985).

¹⁴ *Dispute Settlement and Countermeasures in the International Law Commission*, 88 AJIL 471 (1994).

¹⁵ See, e.g., *The Quasi-judicial Role of the Security Council and the General Assembly*, 58 AJIL 960 (1964); *United Nations Law*, 88 AJIL 1 (1994); see also *The International Official in a Divided World*, note 8 *supra*; *The Future of the United Nations*, note 16 *infra*, and various articles on UN peacekeeping and other UN-authorized military operations cited in notes 21–36.

¹⁶ His presidential address to the annual meeting in 1970, *The Future of the United Nations*, was immediately followed by the address of the incumbent secretary of state, William P. Rogers, in a tradition from the days of Elihu Root that unfortunately lapsed after Schachter’s presidency. 64 ASIL PROC. 277 (Schachter address), 285 (Rogers address) (1970).

¹⁷ *Metaphors and Realism in International Law*, 96 ASIL PROC. 268–69 (2002) (remarks at interdisciplinary panel entitled “Realism and Legalism”).

¹⁸ *A Conversation with Oscar Schachter*, 91 ASIL PROC. 343 (1997) (transcript of interview by Brigitte Stern) [hereinafter *Conversation*]. For extracts illustrative of his wit, see text at notes 39, 48 *infra*.

¹⁹ 72 NW. U.L. REV. 217 (1977).

²⁰ 95 ASIL PROC. 18 (2001) (summary of interview conducted by Edith Brown Weiss).

II. SCHOLARSHIP: UNITED NATIONS, USE OF FORCE

From the impressive list of his scholarly contributions, only a few can be noted here. One of his earliest articles, *Legal Aspects of the United Nations Action in the Congo*,²¹ will not be found through the typical research method of search by author name. He submitted the manuscript to the *Journal* when he was director of the UN general legal division; after its acceptance by the editorial board in 1960, he requested permission to publish it under a name that would not identify him as a UN staff member or otherwise draw attention to the article's authorship. (The chosen nom de plume, "E. M. Miller," was the maiden name of Schachter's first wife, Mollie, to whom he was married for almost forty-four years, from 1936 until her death in 1980.)

Schachter's request for a veil of anonymity for the Congo article requires contextual understanding of the Cold War confrontation of the early 1960s. In the archive of papers related to his UN service, which he bequeathed to Columbia Law School, we find his correspondence with AJIL editors William Bishop and Leo Gross about the article; it explains that before sending the manuscript to the *Journal* he had secured the approval of Secretary-General Dag Hammarskjöld for its publication, but that the "mounting attacks" by the Soviet group "impugn[ing] the impartiality of the Secretary-General and especially of the Americans on the staff" led Schachter "to the reluctant conclusion that I should not associate my name with the article at this time. The fact that the Secretary-General has approved it for publication would only, I am afraid, add fuel, since he is the major object of the attack."²² It was in 1960–1961 that the Soviet Union demanded that the secretary-general be replaced with a tripartite committee ("troika"), in a blatant attempt to reduce his authority to the lowest common denominator of superpower consensus and to curb his initiatives in the Congo and elsewhere. In other writings spanning the 1950s and 1960s, Schachter defended the Charter's conception of an independent secretary-general at the head of an impartial secretariat, even in the face of superpower pressures.²³ As principal drafter of Hammarskjöld's public lecture at Oxford in May 1961 on the secretary-general as international civil servant, he further advanced the thesis that independent authority inhered in the office.²⁴

A reader of the Congo article in the twenty-first century will find that it prefigures some of the same structural problems bedeviling the Iraq crisis of 2003, including whether the UN Charter and resolutions adopted under Security Council authority could sustain flexible interpretations sufficient to legitimize military action opposed by at least one permanent member of the Council.²⁵ Schachter's cogent analysis of one of the most difficult UN military operations is relevant even today to such questions as the nature and extent of host state consent required for the introduction of a UN-approved peacekeeping force or the application of the "Uniting for Peace" Resolution.²⁶ Above and beyond its treatment of specific points of UN law and practice, it stakes out a claim for the role of law in organizing the international response to conflict: Schachter tells us that in the circumstances of an unprecedented crisis in world affairs and in the life of the Organization, Hammarskjöld "considered it essential

²¹ E. M. Miller (pseudonym for O. Schachter), *Legal Aspects of the United Nations Action in the Congo*, 55 AJIL 1 (1961) [hereinafter *Legal Aspects*].

²² Letter from Oscar Schachter to Leo Gross (Oct. 31, 1960) (on file at Columbia Law School).

²³ See, e.g., *The International Official in a Divided World*, note 8 *supra*; *Legal Issues at the United Nations, 1960–61* ANN. REV. UN AFF. 142, 148–53.

²⁴ THE INTERNATIONAL CIVIL SERVANT IN LAW AND IN FACT: A LECTURE DELIVERED TO CONGREGATION ON 30 MAY 1961 BY DAG HAMMARSKJÖLD, SECRETARY-GENERAL OF THE UNITED NATIONS (1961). On Schachter's authorship of Hammarskjöld's Oxford lecture (and his later views on positions expressed therein), see *Conversation*, note 18 *supra*, at 353.

²⁵ In the Congo case, the controversy concerned interpretation of the mandate of a peacekeeping force previously established by the Security Council itself—an element not present in the recent Iraq situation.

²⁶ *Legal Aspects*, note 21 *supra*, at 13–15, 20–23; see also *Preventing the Internationalization of Internal Conflict: A Legal Analysis of the U.N. Congo Experience*, 57 ASIL PROC. 216 (1963).

to refer to legal precepts whenever they could furnish guidance," and this conscious appeal to legal standards and procedures provided a framework in which the secretary-general could consolidate his authority even against the preferences of powerful actors.²⁷

In major writings published after he entered the academy, Schachter devoted himself to elaboration of the central substantive norm of the UN Charter—the prohibition in Article 2(4) of the use or threat of force. In canonical articles he not only explicated the content of the Charter rules in relation to the most hotly contested problems, including anticipatory self-defense and intervention in internal conflicts,²⁸ but went on to an eloquent defense of why the Charter's restraint on the use of force matters *as law*.²⁹ In an essay written for an ASIL study group on the International Court of Justice, he examined more than a dozen cases in which disputes involving the use of force had come before the International Court, in order to show that such disputes are both governed by law and suited in principle to adjudication.³⁰ In a colloquy with W. Michael Reisman published in these pages at a time when disagreements over U.S. policy in Central America roiled the legal profession in this country, he insisted that an exception to the Charter prohibition for "pro-democratic" or other supposedly benevolent uses of force would swallow up the rule.³¹ He pointed to the fact that states had indeed organized their military forces in the post-World War II period on a "defensist" assumption, in order to show that the Charter norm had become internalized into state practice and had served to restrain not only aggressive uses of force but even excessive military expenditures.³²

When the multilateral response to Iraq's invasion of Kuwait in 1990 augured the invigoration of the Charter's long-dormant mechanisms for collective responses to threats to the peace, breaches of the peace, and acts of aggression, Schachter wrote authoritatively on the relevance of UN structures and UN law to these developments,³³ with the perspective of one who had advised on the role of the principal UN organs in the Korean crisis of 1950,³⁴ the Congo crisis a decade later, and many other conflicts. One of his papers about the Iraq-Kuwait war begins with the epigram that Isaiah Berlin borrowed from an ancient Greek poem to apply to Tolstoy: "The fox knows many things, but the hedgehog knows one big thing."³⁵ Schachter wrote: "Our subject"—use of force—"is wide and many-sided; it calls for a fox. Yet at this time, our attention is focused on one big thing"—the looming prospect of military action against Iraq.³⁶ Oscar Schachter was the fox who gave us the insights that we needed into that one big thing—when he first wrote about Iraq in 1990–1991, as well as at the outbreak of war again in 2003.

III. THEORY AND PRACTICE OF INTERNATIONAL LAW

Schachter distilled decades of experience and reflection into the book (based on his general course at the Hague Academy of International Law) that is and will remain a classic:

²⁷ *Legal Aspects*, note 21 *supra*, at 1, 28. A year later, following Hammarskjöld's sudden death in the Congo, Schachter opened the January 1962 issue of the *Journal* with a tribute affirming Hammarskjöld's deep commitment to "law as a source and basis of policy." *Dag Hammarskjöld and the Relation of Law to Politics*, 56 AJIL 1, 2 (1962).

²⁸ *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984).

²⁹ *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113 (1986).

³⁰ *Disputes Involving the Use of Force*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 223 (Lori Fisler Damrosch ed., 1987).

³¹ *The Legality of Pro-Democratic Invasion*, 78 AJIL 645 (1984) (responding to W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AJIL 642 (1984)).

³² *Self-Defense and the Rule of Law*, 83 AJIL 259 (1989).

³³ *United Nations Law in the Gulf Conflict*, 85 AJIL 452 (1991); see also *Authorized Uses of Force by the United Nations and Regional Organizations*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 65 (Lori Fisler Damrosch & David J. Scheffer eds., 1991).

³⁴ *United Nations Collective Security: Its Once and Future Role*, in *THE KOREAN WAR IN RETROSPECT: LESSONS FOR THE FUTURE* 119 (Daniel J. Meador ed., 1998).

³⁵ ISAAH BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY'S VIEW OF HISTORY* 1 (1953).

³⁶ *Authorized Uses of Force by the United Nations and Regional Organizations*, *supra* note 33, at 65.

International Law in Theory and Practice.³⁷ Reviewing the Hague course in these pages, Thomas M. Franck wrote:

Reading Schachter's graceful, often witty, superlatively annotated tome, the reader will recall, wistfully, the requisites and dividends of the too-long-neglected treatise. The Hague Academy of International Law is to be congratulated for providing the incentive and opportunity for American international lawyers to rediscover the value of the thing lost and to be once more tantalized by the display of systematic scholarship and creative legal imagination that the genre can manifest, when cultivated by hands as skilled as these.³⁸

The book received the ASIL Certificate of Merit for preeminent contribution to creative scholarship in 1992; Schachter had already received the Society's Manley O. Hudson gold medal in 1981, in recognition of a lifetime of distinguished scholarship.

International Law in Theory and Practice gives the most complete account of a story that Schachter loved retelling, concerning Fiorello La Guardia, New York's colorful mayor, who came to UNRRA as its new director-general and thus became Schachter's boss:

When I first met Mr. La Guardia on business in his office, his first question to me was: "Sonny," he said (this was a long time ago) "are you a hot lawyer or a cold lawyer?" I looked at him rather blankly, and he said, "Well, if you are a hot lawyer, I am going to get myself a cold lawyer; and if you are a cold lawyer, I am going to get myself a hot lawyer." This rather dumbfounded me, and I said, "Does this mean I am through?" He said, "No, you are not through. But I need both of you. I need a hot lawyer to tell me that I can do what I want to do, and I need a cold lawyer to tell me I cannot do what I don't want to do."

. . . [L]et us first consider the unstated premises of La Guardia's attitude. One such premise, clearly, was that most legal questions permit at least two responses. A second was that it is the lawyer's role to serve his client It is apparent, too, that La Guardia's concern was not with rules of law but with the decisions that had to be taken. These three propositions are a good starting point of our discussion, for they sum up the reasons for a policy-oriented approach to law.³⁹

Schachter then proceeds in *Theory and Practice* to explicate "the proper and improper uses of policy and purpose in the application of international law"⁴⁰—not the first of his essays on this topic, but the one in which his evolving ideas on the relationship between law and policy reached their fullest expression.

Schachter's theory of international law, which in the formulation in *Theory and Practice* bears the hallmarks of other twentieth-century jurists as well as his own original imprint, is dynamic in its appreciation of the need for law to evolve in response to policy imperatives. Yet it also pays due regard to the autonomy of law in relation to policy. Though he maintained a long collegial relationship with Myres McDougal and Harold Lasswell (through a co-taught seminar at the Yale Law School from 1955 to 1970) and acknowledged that the New Haven School of policy science had deeply influenced his thinking, Schachter clearly differentiated his theory of international law from McDougal's policy-oriented jurisprudence.⁴¹ When all was said and

³⁷ INTERNATIONAL LAW IN THEORY AND PRACTICE (1991) [hereinafter THEORY AND PRACTICE]. The book is a revised and updated version of Schachter's Hague lectures, *International Law in Theory and Practice: General Course in Public International Law*, 178 RECUEIL DES COURS 11 (1982 V).

³⁸ Thomas M. Franck, *Review Essay: The Case of the Vanishing Treatises*, 81 AJIL 763, 771 (1987).

³⁹ THEORY AND PRACTICE, note 37 *supra*, at 19. For an earlier retelling of the same story, see *The Place of Policy in International Law*, 2 GA. J. INT'L & COMP. L. 5, 5–6 (1971), and for a later one, see *Conversation*, note 18 *supra*, at 345 (ending with Schachter's recollection that he muttered to La Guardia, "I'm probably a hot lawyer in the New Deal pattern."). More than a few of Schachter's colleagues recall this story as if the "hot lawyer" side clearly won out, whereas Schachter's own presentations of it were nuanced in their appreciation of a necessary duality in the lawyer's role.

⁴⁰ THEORY AND PRACTICE, note 37 *supra*, at 23 (the quoted phrase is the subheading for a section on this theme).

⁴¹ Schachter's remarks at the panel discussion on *McDougal's Jurisprudence: Utility, Influence, Controversy*, 79 ASIL PROC. 266–73 (1985), contain a concise statement of both commonalities and differences between Schachter and McDougal, as well as trenchant criticisms of some of McDougal's positions.

done, Schachter declared himself a positivist, in the sense of distinguishing law from politics or morality and finding law in authoritative sources rather than in purposes or desirable results;⁴² but in contrast to strict versions of positivism, his theory embraces a creative role for the law applier to “mediate the underlying positivist data” in order to produce “the reasoned and principled decisions that become accepted as the law in force.”⁴³

IV. HUMAN QUALITIES

A tribute of this sort cannot easily convey the ineffable qualities of a man who remained youthful enough to relish adventures in the New York City subway system through age eighty-eight.⁴⁴ Some will remember his cameo appearance as Mayor of the Munchkins (“Monists”) in a skit at the ASIL’s annual banquet in 1997, when he ad-libbed “monism, schmonism!” before leading a chorus of officers of the Society in singing “We represent the Law-of-Land [Lullaby] League.”⁴⁵ Others will always break out in a grin whenever a citation to *Alienating Oscar?* turns up in the literature of feminism and international law, knowing that Oscar would be smiling right along.⁴⁶

Students came from all over the world to study with him at Columbia and found him the most generous of mentors. They knew that the “Columbia book,”⁴⁷ of which he was a principal author through four editions in twenty years, could give them a tour d’horizon and 1600 pages of research leads; for the real stories of law-in-action they knocked on a door that was always open. They then went on to practice international law in all its many forms, and in many cases to teach it, thus carrying his ideas and ideals to every continent and to every level of national and international service. The alumni and alumnae of his “invisible college” populate the international judiciary, the International Law Commission, the international civil service, foreign ministries and other government agencies, nongovernmental organizations, and many other walks of life.

Those of us who adored him agree that the unforgettable “conversation with Oscar Schachter” at the 1997 annual meeting of the American Society captured something of his essence. His interlocutor, Brigitte Stern, asked, “What have been your main mistakes—as a lawyer, I mean?” The transcript records:

OSCAR SCHACHTER: Gosh. After that wonderful introduction . . . you call for my mistakes. Sure I made lots. . . . In 1948, . . . at the United Nations, the architects planning the future headquarters asked me how many seats they should make in the General Assembly. Now is that a lawyer’s question? . . . The United Nations then had only fifty-one members. An international lawyer would be expected to know how many sovereign states existed and were potential members. I confidently answered the architects (after checking some

⁴² *Conversation*, note 18 *supra*, at 347.

⁴³ THEORY AND PRACTICE, note 37 *supra*, at 46.

⁴⁴ For reminiscences of a more personal sort, see my tribute and those of other colleagues, forthcoming from the *Columbia Law Review* and the *Columbia Journal of Transnational Law* in spring 2004. Louis Henkin’s recollection of their collaborations over more than half a century, including their joint service for six years at the helm of this *Journal*, will appear at 104 COLUM. L. REV. (2004).

⁴⁵ For Schachter’s writings illustrative of his thinking relevant to the “monist-dualist” debate (and more generally on uses of international law in relation to constitutional law), see *The Charter and the Constitution*, 4 VAND. L. REV. 643 (1951) (supporting a California court decision that had used Charter principles to invalidate a discriminatory state law). As evidenced by the *Agora: The United States Constitution and International Law* in the present issue of the *Journal*, the controversy persists, more than half a century after Schachter first addressed it in print. On criticism of his article from right-wing circles in the United States, see UNIHP Interview, note 4 *supra*, at 18–19.

⁴⁶ Cf. Hilary Charlesworth, *Alienating Oscar? Feminist Analysis of International Law*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 1, 15 n.2 (Dorinda G. Dallmeyer ed., 1993) (anecdote confirming that an early conference on feminism and international law, far from “alienating Oscar,” had engaged his curiosity and spurred his interest in and support for feminist projects).

⁴⁷ INTERNATIONAL LAW: CASES AND MATERIALS (Lori Fisler Damrosch, Louis Henkin, Richard Crawford Pugh, Oscar Schachter, & Hans Smit eds., 4th ed. 2001) (reviewed by David J. Bederman in this issue at p. 200).

textbooks) that they could safely add twenty seats to the fifty-one. It did not take long for my estimate to be mistaken and for costly renovations to be needed. A simple point, perhaps, but can lawyers confidently take the world as it is at a given moment when we know that it is in constant change? Could anyone have foreseen the breakup of colonial empires and the Soviet Union? The real problem, of course, does not involve guessing numbers but how to develop ideas and proceedings to cope with the unexpected changes that are inevitable.⁴⁸

When the world changed unexpectedly on September 11, 2001, he did not claim that law books had the answers, but many of us turned to him in search of wisdom.

Together with his widow, Dr. Muriel Sackler, his daughters Judith Schachter and Ellen S. Leventhal, and a large and growing family, we mourn the passing of a great man.

LORI FISLER DAMROSCH*

⁴⁸ *Conversation*, note 18 *supra*, at 344.

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