

Jonathan I. Charney: An Appreciation

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Jonathan Charney was one of the leading international legal scholars of his generation. He was the authority on the Law of the Sea and his magisterial four-volume work on international maritime boundaries quickly became the *vade mecum* for anyone involved in virtually any aspect of the Law of the Sea. But Law of the Sea was only a part of his awesome oeuvre. He wrote authoritatively on the use of force and humanitarian intervention; self-determination; customary international law and, in particular, soft law; international environmental law, international tribunals and jurisdiction, technology, and constitutional law. All of his work was marked by a concern for theoretical issues, extraordinary attention to detail and a commitment to the question of the contribution that law might make to the resolution of whatever problem he was addressing.

I would like to focus on five aspects of Jon's work in and impact on international law: his interest in customary international law; his distinctive methodology; his work on the Law of the Sea; his work on the *American Journal of International Law*; and his influence on colleagues worldwide. I apologize if, in doing this, my remarks become substantive. You cannot talk about Jonathan Charney or his work without being substantive.

Most of international law is customary and customary international law is the proverbial legal iceberg: nine-tenths of it is below the surface. Custom is identified by an examination of the practice of states in particular areas, but not all practice generates law. In order for the practice to contribute to the formation or consolidation of international law, it must be accompanied by a certain subjective sense on the part of the state concerned that what it is doing is being done because it is legally right but is not being done out of any constraint: the classic texts refer to this state of mind as the *opinio juris sive necessitates*. I warn my students that if they confront something in Latin, it is usually a signal that jurists are unsure of what they are talking about and are trying to conceal their confusion behind a solemn and pretentious Latin phrase. The very obscurity of the Latinism should give you a sense of how daunting a task the research into customary international law is. Practice is continuous and there is an enormous amount of it. As for determining which state practice arises out of the sense that it is required by law and which arises out of a sense that more powerful states are demanding it or it is simply expedient at that moment—

suffice it to say that the intellectual task of determining customary international law is very challenging.

The determination of custom is, perforce, the distinctive responsibility of the international legal scholar. Indeed, the Statute of the International Court of Justice stipulates in Article 38 that the work of scholars is a subsidiary source of law upon which the Court is to rely. The responsibility of the scholar here has a significant moral dimension as well. International law is based on consent, which is a healthy and democratic feature. Actors are not bound by law unless they agree to it. They can agree explicitly through treaties and conventions or implicitly—through practice. Just as it would be intellectually dishonest and profoundly immoral to try to impose a contract on a party that had never agreed to it, it is intellectually dishonest and immoral to try to reach the same result by pretending that a customary international rule has been formed, without systematically determining that state practice accompanied by the necessary attitudes has generated a customary rule.

Every beginner in international law struggles with the concept and content of custom. Those who go on to write books or articles on the subject usually focus on the “concept” side of the problem rather than the custom itself and the research is usually about what courts and tribunals, and, of course, other scholars, have said about custom rather than the practice that actually gives rise to a custom. Affidavits of scholars in litigation more often than not express what the scholars believe the law should be rather than which practices, if any, have generated custom.

This was not Jonathan Charney’s approach. While he was interested in theory and contributed to it and he had many suggestions to make about improving international law, he was, at heart, an empiricist. He respected the complexity of events, he could handle massive amounts of data and he was undaunted by details. The area in which he decided to apply his empirical approach was the Law of the Sea.

Our origins are in the sea, but our species has evolved into land dwellers. We tend to forget that five-sevenths of our planet is covered by water. For most of human history, the oceans have served as a protective barrier, a highway for transportation and for moving goods and weapons platforms, a source of food, and a great garbage pail. For the past three centuries, international law had committed itself to confirming the freedom of these uses of the oceans by anyone and the inalienability of ocean space by any state.

Jonathan Charney was born in a generation in which all this was about to change. Technology was in the process of putting the oceans to ever more intensive use and making the oceans susceptible to national control. More intensive fishing was rapidly depleting the renewable resources of the seas and industrial uses were straining the capacity of the oceans to absorb the detritus of our civilization. Jon was, as I mentioned, a member of the U.S. delegation to the third Law of the Sea

Conference and participated in the formation of the 1982 Law of the Sea Convention, the most important treaty, in the view of many, of the 20th century.

Because the new conventions on the Law of the Sea were discarding the old Grotian concept of freedom of the seas in favor of a world in which national jurisdiction would extend, in various forms, to broad zones of the oceans, it was necessary to draw, as strange as it may sound to land-dwellers, boundaries in the sea. Because so much was at stake in how these boundaries were to be drawn, the diplomatic conference could not agree upon principles to govern boundary delimitation. Nor could the 15 members of the International Court of Justice agree on the law. The President of the Court, Gilbert Guillaume, confessed to the Sixth Committee of the U.N. General Assembly last year that, after 1969, the Court's decisions in this area followed no clear pattern like all the most important matters in international law, this issue, too, was perforce left to customary international law. The task of the international legal scholar was to find and assemble state practice and make sense out of its seeming chaos.

Jon turned his attention to this area and it became his magnum opus. The practice that had to be organized was, without exaggeration, as vast as the seas themselves. The task required the collaboration of many and that required a leader, with vision and managerial skills and a knowledge so superior to that of the various collaborators that each would accept direction and discipline. The only person who could have provided that leadership was Jonathan Charney. Because he was already one of the very few acknowledged experts in the field, he knew precisely what had to be done and drew up a plan that was comprehensive and breath-takingly ambitious. Because of his expertise, he knew precisely to whom to turn and because of the respect in which he was held, those to whom he turned were willing to accept his vision, the assignments he gave each and the discipline he imposed upon them.

International legal scholars are notoriously independent and difficult, as I can attest from my experience on the Board of the *American Journal of International Law*. Two years ago, in preparing five lectures on maritime boundaries for a Hague Academy Conference in Manila, I went through every page of the then three volumes of Charney & Alexander. Prior to that time, I had used individual reports in it for cases I was involved in; now I read the books straight through. Like others in the field who always turned to the work as the authoritative statement on international maritime boundaries, I knew that the work was absolutely reliable. Now I discovered how consistent the technique of research and the style of redaction was in every report and how powerful had been the hand of the leader of the project. That Jon could have controlled such an independent and rambunctious group was a testament to his dominating knowledge and the respect in which he was held by his colleagues.

I believe that Charney & Alexander, and now Charney & Smith, will be Jon's monument in international law. The work will be cited by tribunals, foreign offices, and scholars for generations and the expression "Charney on Maritime Boundaries" will become as common as "Oppenheim on International Law" or "Wigmore on Evidence." He has left us a magnificent legacy.

Jonathan Charney's service to the *American Journal of International Law*, both as a long-time member of the Board and as the co-Editor-in-Chief, constituted a major personal contribution to international scholarship. Over the years, he published many articles and editorials in the *Journal*, chaired many of the Board of Editors' committees and was one of the most active and respected members. Jon was also an expert in information technology and presided over the challenging task of the transition of the *Journal* from its old-fashioned production method, which, without too much exaggeration, had not advanced far beyond the technology of the quill and inkpot, to the most up-to-date Desk-Top procedure. It proved to be a very difficult job and could not have been accomplished without his leadership.

I would like to speak briefly of the personal relationship Jon and I had as co-Editors in Chief, which I will always value. On the selection of manuscripts, we were equal and respectful of each other's views. We each read every submission and sent a memorandum on it to the other; if there were disagreements, we wrote again and if necessary, we talked. Other than through reading each other's work, we had not known each other very well before we took on the *Journal* together. I respected Jon greatly but was uncertain about how our views would jell. I think that Jon, for his part, was also a bit uneasy about working with me. As it turned out, we agreed on virtually every manuscript the first time around. On a few occasions, when we did not agree on a first reading, one of us persuaded the other. I reviewed my records last week and found that of some 800 submissions we read, we disagreed beyond compromise on two and simply sent them to the jury. On the others, I was surprised how often Jon changed my mind and, in rereading his memos, how much I learned from him.

Some two years ago, I was here at Vanderbilt to deliver the Johnson Lecture and gave a brief faculty seminar a few hours before it. I opened the seminar by remarking that I had been working for Jon for the prior two years. Everyone—including Jon—laughed. But it was true. In every area other than the selection of publication of manuscripts, Jon was the leader. He seemed to have unlimited resources of energy and a capacity to remain focused on a problem until it was solved and solved right. He was an institution builder and I came to appreciate how he was able to produce Charney & Alexander. He could envision an organization, the roles it required to perform its various functions, the people who could fill the roles, and what was required of them. He had enormous patience, but he insisted on getting the job done. His leadership style was distinctive. He never applied the lash. Josette

Amsilli, his assistant, can testify to that. He led by example, by doing more than anyone else and simply requiring the rest of us to keep up with him. The e-mails from Vanderbilt rained down on us, showing how much he was doing and how much we had to do. Authors were required to revise and revise until things were right. The copy editors remarked to me that in the final phases of production, Jon reviewed every line and every footnote and caught things that they had missed! And there were still more e-mails. After the first few weeks, I called Diantha, his assistant at the time, and asked rather timidly whether she thought Professor Charney was writing me a lot of e-mails. She responded: "He sends me just as many. He sent me another one not five minutes ago and though he's in the very next office, he just walked in to make sure I'd gotten it." The very rapidity of e-mails carries the imperative of a rapid response, so I sometimes felt that I was constantly working for Jon. I can remember sighing with relief when Jon would write before Rosh Hashanah or Thanksgiving that he was turning off his computer for several days. I think those were the only times he did turn the computer off.

Those who worked with Jon, either as his co-Editor, as fellow Board members, as those involved in production, or as authors of pieces about to be published in the *Journal*, encountered a precise and analytic mind, an enormous range of knowledge and an uncompromising demand for precision. He was a man of principle and when principles were at stake, he could be hard, but he was never harsh. The American Journal of International Law was far richer for his leadership of it, much poorer now, for his loss.

There is an old Hebrew saying: *Ain Na-vi bi-e-ró*. "No man is a prophet in his own city." It plainly did not apply to Jon at Vanderbilt, where he was honored with two successive chairs. But I doubt that many of his colleagues knew how enormous was his reputation in the world of international law. I knew Jon was a great man, but, until the weeks after his death, I was unaware of his impact worldwide.

In one of Anton Chekhov's plays, if memory serves me, an illiterate peasant woman, who has just lost her child, rushes, grief-stricken, to the telegraph office in her isolated village and asks the clerk to send the message. To whom, he asks. She looks blankly at him. For all the grief she has to express, she has no one in the outside world to tell. I was reminded, again and again, of Chekhov, as people from all over the world wrote e-mails, or called me or stopped me when I was abroad to tell me that they had met Jon once or heard him speak at a conference or he had advised them on a research project and they wanted to express their grief at his death. They did not know his family or his colleagues at Vanderbilt, but contacted me because my name followed his on the masthead of the *Journal*. I was the telegraph clerk.

I do not wish to cause any more pain to Jon's family, but, for very personal reasons, I must speak about Jon's bearing through the course of

his illness. Over two years ago, I was in Geneva and knew something was wrong weeks before he called me. The e-mails had lessened and Jon's focus on our common enterprise was not at its usual intensity. I expressed my misgivings to my wife and finally sent an e-mail, asking if anything were wrong and if I could help. Because one of my children had just gone through a harrowing and life-threatening illness, I assumed that Jon was distracted by a family problem. He, himself, had to be indestructible. Shortly afterwards, Jon called me and told me of the diagnosis. It was the only time his voice faltered and he showed emotion. I offered to take on more of the *Journal* work but he demurred.

From time to time, Jon would tell Charlotte Ku and me of the course of his treatment because he felt that our work on the *Journal* required it. Beyond that, it was a private matter and Jon carried on with a full schedule. I respected his privacy and spoke to no one about his condition. As for Jon, he continued to work at full pace. When I had to write to members of the Board of Editors of his death, many members were shocked and stunned, because they had not known he was ill. Many people who contacted me later also expressed their surprise. Some had worked closely with him scarcely two months before and knew nothing of his illness.

I was awed by Jon's courage and his grace and nobility throughout his ordeal.

All those who had the pleasure of working with Jonathan Charney will always remember how intense he could be in discussion of any subject of international law. He would lean forward in concentration, focusing on the issue under discussion, often speaking slowly and pausing on the definite article as he formulated his thoughts. Then he would suddenly lean back, tipping his head to the side, and narrowing his eyes until they crinkled with good humor. His face would glow, as a slow wonderful smile crept over it. No matter how intense the discussion, it was clear that Jonathan Charney was having a hell of a good time over the sheer delight, even the glee, of intellectual exchange. And it was infectious. I will always remember it.

I and the other members of Board of Editors of the *American Journal of International Law*, who had the pleasure and privilege of being his colleagues, grieve not only for the loss of our colleague and friend, but for the loss to the study and advance of international law of a splendid scholar and a great and good man.