INTERNATIONAL LAW: AN INTERVIEW WITH OSCAR SCHACHTER

Oscar Schachter is the Hamilton Fish Professor of International Law and Diplomacy at the Columbia University School of Law, and since 1978 has been Editor-in-Chief of the American Journal of International Law. Prior to 1975, he served as Director of the legal division of the United Nations and as Director of Studies at the U.N. Institute for Training and Research. In the following interview, professor Schachter draws on his experience as both a scholar and a practitioner to provide a general overview of some of the key issues in international law, including the theoretical basis of the international legal order, the process by which that order evolves, contending approaches to treaty interpretation, and the role of international organization in the changing world order.

FORUM: To what extent and on what levels may it be said that international relations function according to a framework of international law?

SCHACHTER: One answer relates to decisions made by governments through their foreign offices. Numerous decisions are made almost every day in international relations which are considered obligatory on the basis of state practice, treaty provisions, or some other source of international law. On another level is the fact that most conceptions of international propriety or legitimacy are at least linked to principles of international law. More specifically, fundamental characteristics of the state system such as the principles of state sovereignty and territoriality, are embodied in international law.

FORUM: Do you recognize an international legal order which exists outside of specific positive provisions of law, such as treaties?

SCHACHTER: Yes, I certainly do. A great deal of the international law applied by states either consciously or implicity rests on postulates or principles that are not explicitly put down in treaties or expressed in judicial decisions. A large part of the discourse of international relations is derived from international law conceptions: most communication between governments is carried on in the language of law — language of authority, of jurisdiction, of the right to raise questions, or of states' obligations. This is a different notion from that of legal rules enforced by a court; it is the kind of law which is implicitly ingrained in norms of behavior and notions of legitimacy.

FORUM: So you see it as an essentially self-regulating and self-enforcing system?

SCHACHTER: Well, in a large part it is. That, incidentally, is also true of a municipal legal order. Most domestic law is observed without the need for intervention by the courts or police. Actually, international law has a much higher degree of observance than does domestic law. This point is often misunderstood by people who think of international law as unenforced. One reason for this compliance is that international law rests on practice. If it is not observed to any degree, it loses its character as law; so there is a built-in foundation of practice. That practice rests ultimately on consensus and therefore judicial enforcement tends to play a minor role, just as it does in most domestic law. Much compliance takes place through institutionalized habit; governments have, so to speak, "internalized" the rules. They also consider their reciprocal interest in observance and the likelihood of retaliation. Violations are rarely cost free.

FORUM: From a theoretical perspective, by what processes do rules of international law develop and evolve?

SCHACHTER: That's a very broad question. I've written an article called "The Nature and Process of Legal Development in International Society."[1] It's a very extensive article on the way in which international law develops. The short, conventional answer is that it develops by practice and by agreement. The more complex answer looks to the various political and socio-historical factors — to the problems, to the conflicts, to the tensions that give rise to a felt necessity for rules or authoritative decisions. There is no brief answer to a question like this one. The big debate generally has been whether the consent of states — the "will of states," as it is sometimes put — forms the essential theoretical basis of international law. In a broad sense, I think one might accept consent as the paramount source of international law, but it would not be a sufficient answer to explain what goes on. It is necessary also to consider factors of power, interests and conceptions of social necessities, justice and order.

FORUM: What impact do bilateral and multilateral conventions have upon the formation of customary law in a more general sense? Will a multilateral convention have any effect upon the broader legal system encompassing non-member states?

SCHACHTER: Of course treaties have a considerable impact on legal

1. Published in MacDonald and Johnston, The Structure and Process of International Law (Nihoff 1983) pp. 745-808.

obligations. A large proportion of contemporary international law has been more or less codified in the large codification conventions to which most states adhere. In addition there have been some thirty to thirty-five thousand bilateral and plurilateral treaties concluded since 1945. Any person attempting to find out what law or obligation is applicable would have to consult those written instruments. Your second question is essentially an empirical one. That is to say, there are some treaties which non-parties have complied with, and eventually in such cases a customary practice is considered to have been, as they say, grafted upon the treaties. I don't know the exact number of such treaties; the number should not be exaggerated, but they do exist. There are famous ones like the earlier conventions on the laws of war, and there are more recent ones, such as the Vienna Convention on the law of treaties. The so-called codification conventions are considered to be, in part, at least, declaratory of customary law. Their observance by non-parties is therefore partly explainable by that fact. However, such general multilateral codification treaties often include some provisions which are clearly not customary law, and the states tend to apply those provisions really as a matter of course, so that they merge, you might say, with customary law. For example, the United States will apply most of the new treaty on the law of the sea as customary law, while rejecting the sections on seabed mining.

FORUM: To what extent and in what ways has the international legal order changed since the end of World War II? Have there been changes of a fundamental nature?

SCHACHTER: Yes, there have been some very striking changes in international law since World War II. These changes, of course, have occurred on different levels. First, there has been a great expansion of the body of international law. A great many areas of transnational activity that were not directly affected by international law are now regulated by it. This shift has been most notable in the economic, social, and technological fields, where international law has become much more complex, much more specialized.

Secondly, there has been a proliferation of international institutions. This includes the United Nations, including its family of affiliated organizations, and then the numerous other institutions of one kind or another based on multilateral treaties — the so-called *regimes* which develop on the basis of an initial general treaty. There has been a tremendous multiplication of such bodies. To give one example, non-navigational use of rivers involves over one hundred commissions.

A third significant development, not of the same character, is the attempt to regulate force and to outlaw war. This has been a primary

objective since World War II and has significantly changed the tone of international discourse since that time. Other particular areas of new international law include its extension to responsibility of the individual, which can be called the Nuremberg line of international law, and most important, human rights — the protection of the individual against the state. Taken together, these and other developments amount to an enormous change in the field of international law since World War II.

FORUM: Does the U.N. Charter, particularly Article 2(4) and Chapters VI and VII, provide a viable framework for the expansion and evolution of international law as it applies to the political interactions between states?

SCHACHTER: I'm not sure what will develop in the future, but Article 2(4), the prohibition on the use of force, is not likely to disappear as a standard of international conduct.[2] Efforts to implement it, to give it more content and efficacy, are necessary if disaster is to be avoided. Without that prohibition, we are back in the time when war was a lawful instrument of national policy. No state can advocate that today. It is true, force has not been abolished in actuality, but its proscription (except for self defense) must be the normative basis for further efforts. Obviously the difficulty in reaching an agreement on implementation does not mean the rule against force should be abandoned. Even without a Security Council or International Court governments can be made aware of their self-interest in restraining the use of armed force. There are those who believe that the rules have no meaning without institutions to enforce them; that without bodies to make authoritative determinations, they lose their character as law. But in a relatively decentralized system, determinations of legitimacy are in fact made by governments and concerned citizens all the time. True, it would be desirable to have a centralized application of rules whenever that could be agreed upon, but centralized application is not an essential element of a legal system. Perceptions of mutual interest in avoiding catastrophe and a sense of the need for reciprocal restraint are powerful reasons to observe Article 2(4) even if the Security Council does not function as it was meant to. The Security Council still has the opportunity to utilize its peaceful settlement powers under Chapter VI, and one hopes that more will be done to enhance that role.

FORUM: In light of the problems of the contemporary world order, may

2. For a recent analysis of the rules on force, see Schachter, "The Right of States to Use Armed Force" 82 Michigan Law Rev. 1620 (1984). See also Schachter, "The Legality of Pro-Democratic Invasion" 78 Am. Jour. Int. Law 645 (1984).

we redefine or revise certain stated or implicit intentions of those who drafted the Charter, or should we adhere to a more rigid, positivist interpretation of the Charter and its application?

SCHACHTER: The Charter is always being construed, just as any comprehensive instrument drafted in general terms is constantly filled in with content that derives from contemporary attitudes and applications. That sort of thing is inevitable and goes on continuously. That does not quite solve the problem, though, because there are always questions of degree — of different states' views on how much a bargain struck at one time should be departed from. But if states have sufficient agreement on what should be done in any given situation, then that is what happens. In that sense, the Charter is constantly being rewritten. And if it can be determined that a development in the world order should be integrated into the system (the existence of nuclear weapons, for example), I do not see that the Charter itself stands as a barrier in any realistic sense.

But there are implicit checks upon the application of this process. For example, some states might say that they do not like the veto and that the world requires majority rule, but that is a highly disputed contention, and would therefore not bring about a change in the Charter's interpretation or application as long as the major powers are opposed. A line of conduct or activity for the U.N. may or may not be supportable, but if it is not adopted, it will be due to that lack of broad support, and not because of the language of the Charter.

FORUM: You have written on the subject of equity in international law. How may this concept be implemented practically in the international order?

SCHACHTER: At the outset, you must give this ambiguous term some meaning. One can say that insofar as the states or persons involved in a transnational interaction have notions of what is fair and what is acceptable in terms of fairness, their ideas influence what they are prepared to accept or not; so nearly every time agreements are hammered out, whether explicitly or through practice, they embody a perception of equity to a considerable degree. To the extent that an agreement is viewed by one side as inequitable, it is not likely to remain viable. In this very general sense, therefore, notions of equity influence the way in which agreements are reached and maintained.

Particular notions of equity vary. Consider, for example, whether in any given case "need" should be emphasized rather than historic rights. Questions of this kind are not answered by reference to equity alone, since two conflicting notions of equity will apply in such a case. In

practice, efforts are made to settle on more specific formulations. In the case of, say, boundary delimitation, historic entitlements loom very large; it would be considered inequitable for one state to take the territory of another state because it needed it for its purposes. In other areas, such as uses of common rivers or lakes, more emphasis is placed on equitable conceptions related to the relative needs of one side compared to the other. So while notions of equity clearly have an influence upon the reaching of agreements, they must be particularized and linked to the situation being considered. Of course, such decisions are not made on the abstract level of ideals; power plays a large role, as do psychological factors.

FORUM: Regarding the global distribution of wealth and the allocation of the world's resources, how do you feel about the potential of international law in contributing to a mutually satisfactory solution to the problem as it now exists? Are you sanguine about prospects for the future?

SCHACHTER: I think the contribution of international law in that area has to be a relatively subsidiary one. The main questions have to be sorted out on another level. But I do think that in several areas covered by that broad question, areas in which international regimes play an important role, such as the oceans or rivers or some aspects of outer space, international cooperation is required. International cooperation in turn requires ground rules: some recognition of diversity, of reciprocity, of relative needs and interests. I would think that in that sense, international law has a good deal of a contribution to make. But again, it is not something that should be dominated by international lawyers, except in the sense that where a regime exists and where there are pressures for change, international lawyers may facilitate means of orderly change and help to ensure relative stability. They may also perhaps be influential in analyzing notions that relate to equity and good faith behavior.

I think that this is a field in which international lawyers ought to have an active interest, but their contribution will depend largely on the extent to which a legal structure already exists. They would probably have very little to contribute on such a critical issue as a country's trade protectionism. They might point to treaties which are antiprotectionist, or to certain commitments for recognizing the needs of other countries, but their views would be subject to other considerations with no less authority. I think that the New International Economic Order must be viewed in the context of global bargaining and conflicts of interests, and in that sense it is an area in which the law can play a secondary role.