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## Is International Law Fair?

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# IS INTERNATIONAL LAW FAIR?

THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS.  
Oxford: Clarendon Press, 1995. xxxvi + 500 pp.

*Reviewed by Gerry J. Simpson\**

## INTRODUCTION: THE STATE OF THEORY

International legal theory is a blossoming academic industry. What was until quite recently a marginal, esoteric research pursuit confined to the analysis of sources of international law or treated in the curriculum as a one-lecture effort on "the nature of international law" is now engaging some of the most acute minds in the discipline.<sup>1</sup>

This renewed enthusiasm for matters conceptual and theoretical can be attributed, partly, to a group of scholars who fall under the rubric of "new stream." The work of Martti Koskenniemi, David Kennedy, and Tony Carty, among others, has inspired a new school of international law which rather self-consciously resembles, and is heavily influenced by, the conference of critical legal scholars. The new stream scholars have mined a classic post-enlightenment vein in social theory in order to shift the focus of international legal scholarship from analyses of doctrine to understandings of culture and policy.<sup>2</sup>

Similarly, after decades of resistance and neglect, feminists are making their mark in the field. "Feminist Approaches to International Law," a 1991 essay by Hilary Charlesworth, Christine Chinkin, and Shelley Wright, is now a standard reference point in recent scholarship.<sup>3</sup>

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1. A notable exception to this lack of interest in theory has been the extensive scholarship of the New Haven School of international law including RICHARD A. FALK, *REVITALIZING INTERNATIONAL LAW* (1989); Myres S. McDougal et al., *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968).

2. See ANTHONY CARTY, *THE DECAY OF INTERNATIONAL LAW?: A REAPPRAISAL OF THE LIMITS OF LEGAL IMAGINATION IN INTERNATIONAL AFFAIRS* (1986); MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989); David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L.J. 1 (1988).

3. Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991).

The breakthrough status of this article is confirmed by the impassioned and strangely wounded criticism it has attracted from more conventional liberal scholars such as Anthony D'Amato and Fernando Tesón<sup>4</sup> and by the enormous outpouring of gender-based analysis that has arrived in its wake.<sup>5</sup>

The rapprochement between international relations and international law is a third manifestation of this reawakening of interest in legal theory. The overlapping concerns of these academic activities have at last been the subject of several treatments appearing in international law journals.<sup>6</sup> The cold war between the self-styled muscular realisms of international relations scholarship and the insular positivisms and idealisms of international law writing has mercifully abated even if both camps remain diffident, as discussed below.

Meanwhile, the response to these developments from the dominant liberal tradition in international law has been marked by a somewhat blasé silence. The vast body of this scholarship has remained quite unaffected by these exciting new theoretical ventures. New stream scholarship has been almost completely ignored while feminism is tolerated providing it does not attack the sacred cows of liberalism, such as the autonomy of the self, the ideal of individual choice, or the imperatives of objectivity.

A stark example of the malaise of conventional theory can be found in self-determination writing. Neither Chinkin's plea for a self-determination which accounts for the suffering and marginality of women in national liberation struggles nor the innovative work of Nathaniel Berman on self-determination's roots in the great modernist projects of the inter-war period have caused more than a ripple in recent writing.<sup>7</sup> Similarly, Kennedy's idiosyncratic *oeuvre* has been met with a head-shaking silence from most of his colleagues in the field notwithstanding

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4. See Anthony D'Amato, *Human Rights of Women: National and International Perspectives*, 89 AM. J. INT'L L. 840 (1995) (book review); Fernando R. Tesón, *Feminism and International Law: A Reply*, 33 VA. J. INT'L L. 647 (1993).

5. See, e.g., Karen Knop, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 293 (1993); Anne Orford, *A Feminist Analysis of the Security Council*, 17 MICH. J. INT'L L. 373 (1996); Kris Walker, *An Exploration of Article 2(7) of the United Nations Charter As An Embodiment of the Public/Private Distinction in International Law*, 26 N.Y.U. J. INT'L L. & POL. 173 (1994).

6. See, e.g., Kenneth W. Abbott, *International Law and International Relations Theory: Building Bridges*, 86 PROC. AM. SOC'Y INT'L L. 167 (1992); Shirley V. Scott, *International Law as Ideology: Theorizing the Relationship Between International Law and International Politics*, 5 EUR. J. INT'L L. 313 (1994).

7. Christine Chinkin, *A Gendered Perspective to the International Use of Force*, AUSTL. Y.B. INT'L L. 279 (1992); Nathaniel Berman, "But the Alternative is Despair": *Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993).

some profuse footnoting from his own protégés.<sup>8</sup> Meanwhile, Charlesworth's work has been variously decried as too feminist<sup>9</sup> and not feminist enough<sup>10</sup> but has yet to be subjected to the sort of sustained, sympathetic and critical engagement which oxygenates the discipline. Finally, international relations theory, until the recent cross-fertilizations, confronted international law's liberal pretensions at an angle somewhere between threat and denial. International law's progressive and reformist visions have been dismissed by international relations scholars as hopelessly utopian, absurdly legalistic, or gauche and unsophisticated about the realities of world disorder. The struggle between anarchy and constitutionalism for conceptual dominance has long been regarded as a mismatch by realists of various stripes. As a consequence, international lawyers have redirected their attention toward building institutions or perfecting theories of "sources." Again, engagement has been lacking.

### I. THOMAS FRANCK'S LIBERALISM

It is within this context that Professor Tom Franck's work can perhaps best be approached. Professor Franck is a leading light in the American Society of International Law, the author of several treatises, and a prolific contributor to various journals. His overall intellectual task seems to be the defense and enrichment of liberalism in international law theory. In this imposing volume, which began life as a series of Hague lectures, he sets out to explain *why* international law works in a world of sovereign states by elaborating a procedural liberalism (legitimacy) and *how* it is improving its prospects of meeting the aspirations of the disaffected by adopting the substantive principles of liberalism (democracy and justice).<sup>11</sup> All this may or may not add up to "fairness" but it certainly results in a compelling and ambitious body of work.

Franck, though, is renewing liberalism at a time when liberalism is not at all fashionable with a new breed of skeptics even if it is deeply entrenched among elite American international lawyers. Liberalism is the chosen target of many new stream scholars (according to them it is vacuous, self-contradictory, and anachronistic),<sup>12</sup> feminist scholars (argu-

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8. See, e.g., David Kennedy, *Autumn Weekends: An Essay of Law and Everyday Life*, in *LAW AND EVERYDAY LIFE* 191 (Austin Sarat & Thomas R. Kearns eds., 1993).

9. See Tesón, *supra* note 4.

10. See, e.g., Adrian Howe, *White Western Feminism Meets International Law: Challenges/Complicity, Erasures/Encounters*, 4 *AUSTL. FEMINIST L.J.* 63 (1995).

11. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995) [hereinafter *FAIRNESS*].

12. See, e.g., Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 *HARV. INT'L L.J.* 113 (1991).

ing that liberalism is patriarchal, universalist, and essentialist),<sup>13</sup> and international relations realists (asserting that liberal international law is banal, merely hortatory, or peripheral).<sup>14</sup> The response from this liberal elite has been, as I have indicated, negligible. Some major figures have co-opted a diluted version of the law as politics message of the new stream (Louis Henkin)<sup>15</sup> while others have disparaged it as based on a misconception of true liberalism or the limits of liberalism (Rosalyn Higgins).<sup>16</sup> The liberal response to feminism has been a mixture of regret and fury. Thus, feminism comes in two forms: liberal feminism (approved as liberalism applied to women)<sup>17</sup> and radical feminism (condemned as feminism applied to men).<sup>18</sup> The majority of liberal scholars have been content to leave theory well alone. This is, of course, the exclusive privilege of powerful groups.

It is to Professor Franck's credit that he has not merely described international law in his Hague lectures. Franck wants to refine and redefine liberalism, I suspect partly, to meet some of these criticisms of the liberal project. I regard his liberalism as the most defensible and best explicated in the field. In attempting to regenerate international legal liberalism, Franck, in a startling apostasy, has styled himself as the leading Rawlsian international lawyer with bits of Dworkin and Hart thrown in for good measure. This then is not the dry, libertarian liberalism of sovereign self-regulation exemplified by the *Lotus* decision,<sup>19</sup> but a kinder gentler liberalism in which rights, democracy, and fairness can flourish. In invoking fairness to capture a wide and disparate array of ideas, Franck, of course, invokes Rawls whose genius lay in taking a term as common as fairness and making it his own.<sup>20</sup>

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13. See, e.g., Dianne Otto, *Challenging the "New World Order": International Law, Global Democracy and the Possibilities for Women*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 371 (1993).

14. See, e.g., HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* 275-79, 293-96 (3d ed. 1964).

15. See, e.g., LOUIS HENKIN, *HOW NATIONS BEHAVE* 25-27 (2d ed. 1979).

16. ROSALYN HIGGINS, *PROBLEMS AND PROCESSES: INTERNATIONAL LAW AND HOW WE USE IT* 5 (1991).

17. See generally Tesón, *supra* note 4.

18. *Id.*

19. The Steamship *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A), No. 9 (Sept. 7).

20. Interestingly, Franck tried to demonstrate several years ago that parts of Rawlsian theory could not be applied to international law and, at the risk of sounding facetious, Rawls seemed to have confirmed Franck's thesis in his own recent essay, "The Laws of Peoples." However, Professor Franck's current efforts on behalf of fairness and justice are more convincing than both his previous writing on the subject and Rawls' own application of Rawlsian precepts to the philosophy of international law. Thomas M. Franck, *Is Justice Relevant to the International Legal System?*, 64 NOTRE DAME L. REV. 945 (1989); John

For Franck, as for Rawls, liberalism is a commitment to a certain process rather than a particular end. Ironically, this preference for conversation over decree mimics the argument of many of liberalism's new stream adversaries.<sup>21</sup> The core value of modern liberalism is that there are no ultimate values or foundational truths. This paradoxical claim is fully worked out in Rawls' quest for an overlapping consensus.<sup>22</sup> Thus, according to Rawls, our most defining moral and religious commitments are quarantined in a private sphere (e.g. the practice of worship) while we seek agreement on our public conceptions of justice (e.g. freedom of religion). Franck endorses this view in his discussion of trumping.<sup>23</sup> A requirement of fairness discourse is that theologies and ideologies be screened out before the conversation or negotiation begins. To illustrate, Rawlsian theory divides the self into private and public dimensions. Our private selves are free to pursue our private ends free of interference and according to our own private moralities. In contrast, our public selves pursue political agreement while adopting a more circumscribed political morality. Franckian theory would presumably allow religious states such as Iran to pursue their values internally while excluding these spiritual claims from fairness discourse.

## II. FAIRNESS: TWO ELEMENTS AND SOME DOUBTS

Fairness is the process of reaching reasonable agreement within the parameters established by the principles of no trumping and maximin. Procedural fairness is possible when theologies are absent (no trumping). The limits of substantive fairness are set by the principle that the least advantaged states or persons are favored in any proposed redistribution of opportunities or goods (maximin). Within these limits one can imagine conflicts arising between the outcomes of process and the demands

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Rawls, *The Laws of Peoples*, in *ON HUMAN RIGHTS* (Stephen Shute & Susan Hurley eds., 1993).

21. *Compare* Koskeniemi:

The legitimacy of critical solutions does not lie in the intrinsic character of the solution but in the openness of the process of conversation and evaluation through which it has been chosen and in the way it accepts the possibility of revision — in the authenticity of the participants' will to agree[.]

KOSKENIEMI, *supra* note 2, at 487, with Franck: "Fairness as a *destination* remains for us always an open question. What matters is the opportunity for discourse: the process and its rules . . . . The issue is not a society's definition of fairness in any particular instance, but rather the openness of the process by which those definitions are reached." FAIRNESS, *supra* note 11, at 83.

22. See JOHN RAWLS, *POLITICAL LIBERALISM* 133–72 (1993).

23. FAIRNESS, *supra* note 11, at 16–18.

of justice. According to Franck, "[f]airness is the rubric under which [the] tension [between substantive distributive justice and procedural right process] is discursively managed."<sup>24</sup> Thus we are back with E.H. Carr's and more recently, Koskenniemi's apology/utopia razor.<sup>25</sup> Of course, process fairness is more than just the absence of trumping, just as justice is limited but not defined by the maximin principle. In the next two subsections, I discuss the content of these two potentially contradictory forces in the international system.

### A. Legitimacy

Franck begins his exposition on legitimacy by harking back to the contractarian liberalism of Hobbes, Rousseau, Locke, and Kant.<sup>26</sup> States remain central and their consent remains vital to the achievement of normativity. However, normativity and consent are achieved in many cases where self-interest is lacking. Where does international law derive its capacity to bind unwilling sovereign actors? According to Franck, legitimacy is the key.

International law's procedural fairness, then, is derived from its legitimacy. However, legitimacy is inherently conservative. It endorses the current ordering and is a force for stability. Franck has no qualms about this because substantive fairness offsets this stability by providing the system with its dynamic aspects. But why legitimacy? Franck argues that legitimacy ". . . accommodates a deeply felt popular belief that for a system of rules to be fair, it must be firmly rooted in a framework of formal requirements . . . ."<sup>27</sup> In other words, as citizens we expect consistency and generality in the application of regulatory conditions. Franck thus situates himself firmly in a rule of law tradition whose major proponents have been Lon Fuller and H.L.A. Hart. The requirements of legitimacy have been developed at some length by Franck elsewhere and are merely sketched in this book.<sup>28</sup> There has always been something rather circular about legitimacy theory which Franck has not denied. Briefly, rules possess legitimacy when they are complied with regularly, and legitimate rules elicit high levels of compliance.

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24. *Id.* at 7.

25. See EDWARD H. CARR, *THE TWENTY YEARS CRISIS* (1942); KOSKENNIEMI, *supra* note 2.

26. FAIRNESS, *supra* note 11, at 26-27.

27. *Id.* at 8.

28. See, e.g., THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990) [hereinafter *THE POWER OF LEGITIMACY*]; Thomas M. Franck, *Legitimacy and International Law*, 82 AM. J. INT'L L. 705 (1988). For a critique and application of the concept of legitimacy, see also Jose Alvarez, *The Quest for Legitimacy: An Examination of The Power of Legitimacy Among Nations by Thomas M. Franck*, 24 N.Y.U. J. INT'L L. & POL. 199 (1991).

The four components of legitimacy are, by now, familiar. Legitimate rules possess *determinacy*.<sup>29</sup> Determinacy can be textual, i.e., clear on the face of the instrument or document, or can be provided by institutional interpretation. Franck makes the point that justice can come into clear conflict with determinacy. This is particularly the case with idiot rules where simplicity or clarity leads to absurdity.<sup>30</sup> The same can be said of *symbolic validation*, a second component of legitimacy, which in seeking to preserve those special anthropological signals and cues of the legal system also reinforces a peculiarly conservative attachment to rules with pedigree, regardless of the substantive fairness of these rules.<sup>31</sup>

*Coherence*, the third element of legitimacy, is more obviously congruent with fairness.<sup>32</sup> Treating like cases alike is a basic principle of justice, as is the need to ensure that the application of different rules/treatments accords with a coherent underlying principle. Of course, exceptions to rules of general application can also be coherent if they promote an overall goal of the "legislative" scheme. Franck gives as an example of this, the General System of Preferences exception to the General Agreement on Tariffs and Trade (GATT) rule which prohibits preferential trading, the so-called most favored nation status rule. This exception is coherent because it promotes the overall aim of increased trade for all nations by setting up a system of temporary advantage for the least advantaged nations. This rule "... advances distributive justice while minimising the concomitant discounting of the GATT system's legitimacy ...".<sup>33</sup> Thus, the stability of the system (free trade) is ensured at the same time as substantive fairness (distributive justice) is promoted. A good example of the discursive management of competing imperatives, one might think. However, perhaps a more egalitarian, socialist model of discursive management (disparaged earlier by Franck) might also achieve this outcome. Here, debt forgiveness would be combined with the retention of tariffs in the least developed countries in order to protect nascent economies and threatened cultural forms. Free trade could continue to flourish among OECD states.

It is interesting that Franck takes free trade to be an economic *grundnorm* underpinning any legitimate economic order. Has there been general agreement on this? It would surely be equally consistent and coherent to establish an economic system based on the New Internation-

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29. THE POWER OF LEGITIMACY, *supra* note 28, at 50-66.

30. *Id.* at 67-83.

31. *Id.* at 91-110.

32. *Id.* at 135-49.

33. FAIRNESS, *supra* note 11, at 40.



al Economic Order (NIEO), suitably modified by *laissez-faire* principles. There was, after all, agreement on this which dissipated only under pressure from the advantaged industrialized states who saw this order as a threat to an even more basic condition of the world economic system, i.e., the built-in advantage of the Western post-industrial state.

*Adherence* is the fourth element of legitimacy. This captures the idea that technical rules of international law are subject to certain secondary rules of recognition and that these secondary rules of recognition are themselves founded on an underlying canon of universal principles.<sup>34</sup> No doubt this vertical symmetry suggests a system with the potential to enhance legitimacy. However, the status of *jus cogens* norms, for example, is still not settled and has been subjected to pointed critique from both voluntarists and from the new stream.<sup>35</sup> Equally, the content of these universal principles has been found wanting by feminist critics.<sup>36</sup> Franck does not really attempt to answer these critics other than by invoking the idea of community. Indeed, some of the examples he uses do not support the proposition that specific state consent is trumped by customary law or peremptory norms in the modern international legal order. The United States, despite its objections, may have been "subject to an extensive array of customary law" in the *Nicaragua* case<sup>37</sup> but its decision to withdraw from the case and from the system itself can hardly give us confidence in the normative or persuasive powers of community and custom. Equally, Franck is surely mistaken if he believes that no state since Hitler's Germany has challenged the fundamental norm of the international system which holds all states to be sovereign equals and therefore acknowledged to possess an "equality of entitlements."<sup>38</sup> The whole idea of spheres of influence which marked the Cold War era was premised on a denial of such entitlements to sovereign equality. The incidents of such equality, namely control over internal affairs and foreign policy, territorial integrity and effective indigenous government, were completely lacking in Central America and Eastern Europe from 1945 to 1990. Presidential doctrines from Monroe's to Nixon's and Reagan's effectively abandoned any commitment to such equality.

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34. *Id.* at 183-94.

35. See, e.g., Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983); KOSKENNIEMI, *supra* note 2, at 281-83.

36. See, e.g., Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63 (1993).

37. Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 392 (May 10) (Provisional Measures) [hereinafter *Nicaragua* case].

38. FAIRNESS, *supra* note 11, at 45.

### B. *Justice and Equity*

These doubts aside, legitimacy is a useful way of analyzing the compliance-pull of modern international law. Perhaps the major problem with legitimacy, though, is that it cannot account for the dynamic elements within a system or the influence of justice in that system. As critics of Fuller were quick to point out, generality and consistency alone cannot ensure that standards of fairness are met. Most obviously, these rule of law principles are minimum requirements which say nothing about the content of the laws to be applied.

In order to meet these objections, Franck, following Rawls, adds a second condition of fairness. This is distributive justice. Franck's distributive justice appeals to a "moral compass" shared by citizens who are more likely to regard laws as legitimate if they combine right process with fair distributional consequences. A tax law must be consistently and generally applied (procedural fairness) and also effect allocational redistribution to the disadvantaged groups within society (substantive fairness). All this is quite familiar from recent egalitarian liberal theory. Franck, unlike Rawls, does not seek to support these principles with reference to an underlying foundational theory. Instead he relies on an intuitive, unconvincing, and perhaps contradictory liberal populism. In this discussion, there is too much reliance on potentially problematic "deeply held popular beliefs" or empirically dubious assumptions that Americans, for example, will resist laws that distribute burdens unfairly.<sup>39</sup> There is really no evidence to suggest that citizens in many democratic polities (particularly the United States) possess this moral sense. The recent congressional elections, if anything, tend to bear out the opposite, i.e., that many Americans support policies that reallocate social benefits away from the least-disadvantaged.

Franck, however, is right to say that justice does play some role within the international system. The most salient use of justice occurs when international tribunals and treaties invoke equity. Initially, the International Court of Justice (ICJ) jurisprudence which illustrates this recourse to equity is described in a rather humdrum manner. Franck takes us through estoppel, unjust enrichment, and acquiescence in cases that are, by now, achingly familiar.<sup>40</sup> Where Franck excels is in his ability to organize the different approaches to equity into meaningful compartments. These are differentiated according to the level of autono-

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39. *Id.* at 7.

40. *Id.* at 47-54.

my accorded to equity in decision-making and the proximity of each to the application of abstract justice. Franck uses a tripartite typology to characterize the various ways in which equity can be used. The most familiar is "equity as corrective justice." We can see this form of equity at work in the famous ICJ cases involving the continental shelf disputes where equity is used to cure the obvious defects of a strictly legal outcome.<sup>41</sup> And yet, as Franck remarks, this schism between law and justice is dampened by the judicial opinions in these cases which seek to make equity a norm of international law like any other norm.<sup>42</sup> There is an understandable desire to avoid the impression that this is the exercise of unfettered judicial discretion. Unfortunately, for all this judicial camouflage, the use of equity has not escaped charges of indeterminacy, judicial subjectivism, and the like.

This is not likely to change as tribunals and treaties move in the direction of Franck's other categories of equity: broadly conceived equity and common heritage equity. With the Law of the Sea Convention, broadly conceived equity has become a legal norm in itself. The Convention refers explicitly to equitable principles, and one potential limit on the application of such principles — equidistance — has been excised from the text altogether.<sup>43</sup> Franck notes that in the *Tunisia-Libya Continental Shelf* case, the Court, adopting the reading of equity from UNCLOS II, stated that: "the equitableness of a principle . . . must be assessed in the light of the usefulness for the purpose of arriving at an equitable result."<sup>44</sup> According to Franck, this is "distributive justice in the driver's seat."<sup>45</sup> Given the tautological nature of the *Tunisia-Libya* formula, one is tempted to add that the car currently has neither maps nor a navigator. However, as Franck says, the Court in fact did use a substantive principle of proportionality to resolve this dispute and a later dispute involving the United States and Canada over the Gulf of Maine.<sup>46</sup> This certainly confirms a move to distributive justice in selected cases particularly since the Court in Gulf of Maine was also willing to apply an extra-legal rule of corrective equity to ensure that

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41. See, e.g., *North Sea Continental Shelf* (F.R.G. v. Den.), 1969 I.C.J. 3 (Feb. 20).

42. FAIRNESS, *supra* note 11, at 56.

43. *United Nations Convention on the Law of the Sea*, Third United Nations Conference on the Law of the Sea, 11th Sess., Art. 83(1), U.N. Doc. A/CONF.62/122 (1982), revised by U.N. Doc. A/CONF.62/122/Corr. 3 (1982), and U.N. Doc. A/CONF.62/122/Corr. 8 (1982), reprinted in 21 I.L.M. 1261, 1286. See also FAIRNESS, *supra* note 11, at 68.

44. FAIRNESS, *supra* note 11, at 68.

45. *Id.*

46. *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. 246, 342-43 (Oct. 12). See also FAIRNESS, *supra* note 11, at 71.

any decision based on proportionality (broadly conceived equity) did not have dire consequences for the fishermen of Nova Scotia or New England (corrective equity).

Common heritage equity has the potential to be even more revolutionary in that distributive justice is here applied not to states but to individuals in a global, intergenerational sense. The Madrid Protocol to the Antarctic Treaty is perhaps the best example of this use of fairness in the international legal order.<sup>47</sup>

Ultimately, however, the role of equity as fairness is likely to remain controversial. First, there is always a point at which judicial discretion must be employed. Franck does not indicate how that discretion should be used. He suggests that judges here act as juries in the name of community values, introducing flexibility and "common sense" to the application of legal principles. Alas, these notions of community and common sense are contentious enough in relatively homogenous national societies. Any attempt to incorporate such concepts into judicial decisionmaking in the international order is likely to result in the influence of even more egregious biases and ideological preferences than in these domestic systems. Second, it is at least debatable whether current political conditions must inevitably lead to more distributive justice. As Franck acknowledges: "The growing inequality in the distribution of desired goods indicates that the formal equality of states before the law must be made actual by recourse to notions of justice."<sup>48</sup> Whether this "must" is a moral imperative or historical inevitability is surely the central question. Franck appears to be suggesting that this disparity in wealth will lead to a greater role for fairness in the international system. However, the reverse could equally be true. It might be that fairness in relation to economic wealth is less influential now than at any time in the past fifty years. The global market is simply not susceptible to the demands of justice in a way it might have been thirty or forty years ago. Again, within national contexts, growing gaps between the rich and poor have led to a greater political and legislative will to dismantle these institutions which ensure fairness and redistribution. It is incorrect to assert that "... remedial programs ... are widely accepted by all classes as a necessary part of the social compact."<sup>49</sup> There is simply no consensus among political elites that these programs should continue in the United States or in the United Kingdom, far less that they should be

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47. Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, 30 I.L.M. 1455. See also FAIRNESS, *supra* note 11, at 78.

48. FAIRNESS, *supra* note 11, at 79.

49. *Id.* at 414.

established in more recently developed countries such as Indonesia or the Philippines. The rich do not remain rich as an unfortunate "by-product of deliberate incentives to foster excellence . . . and risk-taking"<sup>50</sup> but, in the United States at least, because of a massive series of state and private subsidies in favour of the already rich, e.g., the system of affirmative action in favour of alumni at elite educational institutions or corporate tax deductions.

Franck's examples drawn from equity do not encourage a sense of optimism. Equity has been used to fill out incomplete law, and in this function it has been occasionally successful. Its role in ameliorating the continuing maldistribution of primary goods in the international order has been negligible. Indeed, such a role is likely to fail the legitimacy test instantly.

Of course, Professor Franck is fully aware of the potentially conflicting nature of the two principles of fairness. Having settled on these preconditions for fairness discourse and identified the content of legitimacy (procedural fairness) and distributive justice (moral fairness), Franck attempts to show how the inevitable tensions between the two independent elements of fairness can be managed. Koskenniemi has demonstrated, at some length, that reconciling them is impossible. The various binary oppositions that underpin the international legal order — justice and order, apology and utopia, norm and deed, cannot be brought to a resolution. Indeed, such resolution would be fatal to the international legal enterprise.<sup>51</sup>

Is the "management" of these tensions the answer to Koskenniemi's conundrum? Franck accepts that resolution may be impossible or undesirable, preferring instead a sort of technocratic balancing of these competing impulses on a case-by-case basis. Thus he situates himself in a school of liberalism which emphasizes process over substance.<sup>52</sup> Perhaps the way to assess this balancing act is to apply the theory of fairness to a series of substantive areas of law.

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50. *Id.*

51. See KOSKENNIEMI, *supra* note 2.

52. See, e.g., HIGGINS, PROBLEMS AND PROCESSES, *supra* note 16. See also Iain Scobbie's excellent critique of Koskenniemi's assumption that liberalism, in order to be plausible and coherent, has to be a closed, fully resolved system. Iain Scobbie, *Towards the Elimination of International Law: Some Radical Scepticism about Sceptical Radicalism*, 1990 BRIT. Y.B. INT'L L. 339, 346–52.

III. FAIRNESS AND DEMOCRACY<sup>53</sup>

Professor Franck's essay "The Right to Democratic Governance" published in the *American Journal of International Law* in 1991<sup>54</sup> and included here as Chapter 4, has given rise to a cottage industry of academic scholarship.<sup>55</sup> Most of this writing has been affirmative in nature and the right to democracy or the democratic entitlement is now a fixture in international law theorizing. As I have argued recently, democracy is rather less regularly affirmed in the world outside the academy.<sup>56</sup> For former U.S. Secretary of State James Baker III, quoted at the beginning of this chapter, "legitimacy . . . flows not from the barrel of a gun but from the will of the people." Regrettably, the legitimacy of most United Nations members continues to be founded on violence, despite the optimism of both Baker and Franck.

The difficulties with Professor Frank's right to democratic governance can be divided into two groups. The first relates to the substantive, political problems with the whole notion of democratic governance; and the second, to his use of a series of largely indeterminate and formless international legal principles to support an argument for the emergence of the right to democratic governance and to provide sources for that right.

The first group of objections question the legitimacy, both legal and political, of the norm. These have been considered in great detail elsewhere and so will be mentioned only briefly here.<sup>57</sup> In this category, there are three significant problems with the idea of democratic governance. First, there is the inadequacy of the empirical evidence for the purported ascendancy of the democratic impulse. Many of the states Franck takes to be "legally committed to permit open, multiparty, secret-ballot elections with a universal franchise"<sup>58</sup> are surely democracies only in name. Though Franck argues that the fair conduct of these elections is "another question," it is surely the central question for a theory purporting to grapple with issues of substantive distributive justice. The

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53. This section is drawn from my recent article, Gerry J. Simpson, *Imagined Consent: Democratic Liberalism in International Legal Theory*, 17 AUSTL. Y.B. INT'L L. 103 (1994).

54. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

55. See, e.g., Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992).

56. See Simpson, *supra* note 53, at 123-25.

57. See, e.g., Otto, *supra* note 13.

58. FAIRNESS, *supra* note 11, at 85.

case for including Angola, Croatia, Guatemala, Honduras, Belarus (included twice on the list, once as Byelorussia), Liberia (!), Malaysia, and Serbia, in a list of democracies is surely weak if one wants to avoid doing damage to the whole idea of democratic governance. The evidence relied upon by Franck has come mostly from Central America, central Europe and South America as well as the Iberian Peninsula. Leaving aside the issue of whether democracy has really been entrenched in some of these regions, there is the additional failing that the norm has not taken root in large parts of Africa and Asia. This is different from saying that states in this region are undemocratic (though this may be the case). Rather the problem is that some notions of electoral and contractual democracy are alien to many cultures which may well practice their own forms of participation that are not recognizably democratic. This is equally a problem with indigenous societies and minorities. The democratic norm imposed on indigenous cultures is perceived by them as a form of neo-colonialism.

A second, associated, problem lies in excessively formalistic and narrow conceptions of the right as elaborated by Franck. There is little consideration of the economic conditions and cultural contexts which make democracy meaningful. Nor is there any regard for the savage effects that decades of repression have had on the democratic consciousness. One wonders whether traumatized electorates in El Salvador, Angola, Mozambique, Guatemala, Argentina, and Nicaragua are capable of enjoying the norm of democratic governance to any realistic extent.

Third, there is the conflict between this norm of legitimacy and other more basic and dispositive values within the international system, with the concomitant impossibility of enforcing this right to democracy while remaining committed to the current, liberal international legal regime. Ultimately, democratic liberalism comes into serious conflict with many fundamentals of international law. The 1970 Declaration on Friendly Relations, for example, contains the following provision: "Every state has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State."<sup>59</sup> The norm of democratic governance threatens to circumscribe that choice too drastically. Such a norm, with its almost "holy" status, could undermine the search for overlapping consensus.

However, a more serious set of objections to the norm is that it relies on a pair of international legal principles which lack the determinacy and content that Franck himself regards as threshold requirements

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59. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, 123, U.N. Doc. A/8028 (1970).

for the emergence of new norms. These are the right to self-determination and the right to free expression.

Any potential role self-determination may have had in promoting a norm of democratic governance has been diminished by two interpretative trends. The first trend has been toward conservative and statist definitions of the principle. This process reached its apogee during the period when self-determination came to be identified exclusively with decolonization. In effect, self-determination has most assiduously served the same state system it pretends to assail. A more recent, second, trend has involved the misappropriation of the label. The elasticity of self-determination, throughout history, has ensured its longevity, but diminished its legitimacy.<sup>60</sup> It has had to be capable of surviving inconsistent application, absorbing anomalies and, ultimately, satisfying powerful strategic and political interests and realities without compromising its revolutionary appeal. In this latter role, it has frequently flattered to deceive and in the process has evolved into an open-textured, highly manipulable, and indiscriminately employed slogan. It vests in all those who use it a tainted respectability but is, at the same time, deprived of clarity and the possibility of legal content. The most startling recent examples of this are the claims to self-determination and a white homeland or *volkstadt* made by elements of the white minority in South Africa and the comparably disingenuous assertions of a right to self-determination by the Bosnian Serbs. Clearly, then, self-determination, at present, lacks both the definition and applicability to be salvaged from its descent into incoherence.

Free speech doctrine in international law is in a similar state, lacking the determinacy and coherence that Franck deems necessary for founding a legitimate and mature rule of international law. The incoherence of free speech stems from the extremely open-textured and heavily qualified nature of the right as laid out in Article 19 of the International Covenant on Civil and Political Rights.<sup>61</sup> Here we have a rather illiberal and potentially anti-democratic enunciation of the free speech principle. The core right to speak freely on political matters is hedged to such an extent that it ceases to exist in any meaningful sense. The Article 19 right certainly bears no resemblance to the libertarian version of free expression prevalent in many Western states, notably the United States.

Problems related to the indeterminacy of the rule spring from the absence of any authoritative pronouncements on what Article 19 actually

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60. See THE POWER OF LEGITIMACY, *supra* note 28, at 153-74.

61. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 178.



protects. Indeed, the right to free expression is something of a rarity in international human rights law, being less well-developed internationally than in many domestic systems. This lacuna is hardly filled with reference to the work of the Human Rights Committee [HRC]. Dominic McGoldrick, whom Franck quotes in support of his thesis, stated at the conclusion of his analysis of Article 19: "The fundamental norms within article 19 remain undefined and largely undeveloped. It appears unlikely that the work of the HRC will redress the disappointing record of the United Nations concerning freedom of expression."<sup>62</sup>

Even if one agrees with Franck that a right to free expression is crystallizing in international law, it is unlikely to be one as closely linked to the democratic process as he imagines. The conceptual leap from free expression as the human right to criticize government without suffering harm to free expression as the right to participate fully in the democratic affairs of the state is not one the international community seems inclined to make. Indeed, while the first, much weaker, version of the right remains controversial, it is unlikely that the more sophisticated and deeper right will attain normative standing in international law. The Committee has never been a staunch advocate of free expression, preferring to give states a margin of appreciation when evaluating the effect of speech. This approach is perhaps exemplified in the *Hertzberg* case<sup>63</sup> where the HRC found that the Finnish Broadcasting Authority could invoke parts of Article 19 as a justification for banning the transmission of homosexual ideas and material on radio and television.<sup>64</sup>

Ultimately, Professor Franck has provided us with a stimulating and challenging account of the possibilities of universalizing democratic governance. However his claim that this norm is now a global entitlement cannot be maintained in the face of the inchoate and ambiguous nature of the legal standards upon which it is said to rest, namely the norm of self-determination and the principle of free expression.

#### IV. FAIRNESS AND SELF-DETERMINATION

As well as lending equivocal support to the doctrine of democratic governance, self-determination as fairness is considered in a separate

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62. DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE* 471 (1991).

63. *Report of the Human Rights Committee*, U.N. GAOR, 37th Sess., Supp. No. 40, Annex XIV, at 161, 165, U.N. Doc. A/37/40 (1982).

64. When the committee charged with drafting the International Covenant on Civil and Political Rights convened to write Article 19, they originally published a list that included no less than 26 possible limitations on the right to free expression. See MARC J. BOSSUYT, *GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 375 (1987).

chapter. The principle of self-determination has been subject to exhaustive analysis over the years.<sup>65</sup> These analyses can be grouped historically into two periods. The first was the outpouring of scholarship which concerned itself with colonial self-determination, i.e., the creation of new states in Africa and Asia following a process of decolonization.<sup>66</sup> A second, more recent brand of scholarship, has focused on what Franck calls postmodern neo-tribalism.<sup>67</sup> This form of self-determination has tended to affect states rather than empires.

There is little doubt that the law of self-determination has been in turmoil for many years. This is partly because the principle encapsulates two contradictory impulses: the revolutionary spirit of secession and group self-assertion and the conservative tendencies of state sovereignty and territorial integrity. Self-determination, like nationalism, is both a force for the creation of states and a threat to the existence of individual states. Self-determination led to the establishment of Bosnia-Herzegovina and may well lead to its ultimate disintegration. In Franck's terms, the legitimacy of ensuring a state's control over its domestic affairs and territory comes into conflict with the fairness of giving peoples a right to pursue their own destinies.

Postmodern neo-tribalism is the term Franck uses for the nationalisms arising in places as disparate as the former Yugoslavia, Somalia, and Scotland. I remember finding this term curious when Franck introduced it at a seminar in Amsterdam several years ago. Back then, it was postmodern tribalism. The "neo-" does not add much to the meaning except to answer critics who felt tribalism was a pejorative term for self-determination movements. Where Franck is right, is to see

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65. See, e.g., Nathaniel Berman, *Sovereignty in Abeyance*, 7 WIS. INT'L L.J. 51 (1988) (demonstrating the internal tensions in theories and applications of self-determination in mainly judicial materials); Deborah Z. Cass, *Rethinking Self-Determination: A Critical Analysis of Recent Theories*, 18 SYRACUSE J. INT'L L. & COM. 21 (1992); Robert McCorquodale, *Self-Determination: A Human Rights Approach*, 43 INT'L & COMP. L.Q. 857 (1994). Two worthwhile book-length treatments have appeared recently. See ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES* (1995); MODERN LAW OF SELF-DETERMINATION (Christian Tomuschat ed., 1995).

66. See, e.g., Leo Gross, *The Right of Self-Determination in International Law*, in NEW STATES IN THE MODERN WORLD 136 (Martin Kilson ed., 1975); Rupert Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459 (1971); Eisuke Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, 16 VA. J. INT'L L. 779 (1976).

67. See, e.g., Philip Allott, *The Nation as Mind Politic*, 24 N.Y.U. J. INT'L L. & POL. 1361 (1992); Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991); Edward M. Morgan, *The Imagery and Meaning of Self-Determination*, 20 N.Y.U. J. INT'L L. & POL. 355 (1988); Gerry J. Simpson, *The Diffusion of Sovereignty*, STAN. J. INT'L L. (1996) (forthcoming); Patrick Thornberry, *Self-Determination, Minorities, Human Rights: A Review of International Instruments*, 38 INT'L & COMP. L.Q. 867 (1989).

nationalism as a threat to the grand designs of the great mutually antagonistic projects of modernity: liberalism and marxism. However, postmodernism is a rather misleading term. Nationalism is the antithesis of the postmodern style. Postmodernism emphasizes the multiple, contingent, and heterogeneous; nationalism is a doctrine of exclusion and absolutes. In particular, postmodernism is concerned with bringing out the discontinuous and fragmentary nature of the tribe or ethnicity,<sup>68</sup> while nationalism is dependent on historical certainties and ethnic rigidities.

It is also doubtful whether there really has been "a resurgence of neo-tribalism." Self-determination, as Franck recognizes, has been an issue for international lawyers for at least a century. No doubt, European and North American scholars have again engaged with nationalism as a result of the carnage in the Balkans and the break-up of the Soviet Union. However, using Quebec and Scotland as examples of this resurgence is misconceived. Scottish nationalism, for example, has been a low-level political issue in the United Kingdom since the Act of Settlement in 1707. Biafra, Bangladesh, and Hungary exercised the minds of previous generations as much as Yugoslavia and Chechnya do today. This is not a new crisis but simply the same old one — playing itself out in different and more strategically sensitive locales.

Perhaps a better way of conceptualizing the self-determination issue is to see it as a series of decolonizations rather than nationalist revivals. Nationalisms tend to simmer away throughout history. What propels a national movement onto the world stage is the disintegration of the empire or state of which it is a part. Thus, we are witnessing the decolonization of the twentieth century's second wave of imperial structures — the communist empire of Eastern Europe. The examples drawn from beyond this context (Quebec, the Sudan, Sri Lanka) simply resonate more in the light of this historical moment notwithstanding the mimetic nature of some nationalisms.

The more important question remains: can we devise a normative matrix capable of resolving the competing claims of the state and the *ethnie*, the empire and the nation? This is Franck's task and he begins with a limpid synthesis of recent developments in the practice of recognition and self-determination into a series of guiding principles which should be required reading for anyone studying in this area.<sup>69</sup> However,

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68. See, e.g., JAMES CLIFFORD, *THE PRECIPITANT OF CULTURE* (1988).

69. For example, see Franck's nuanced discussions of *uti posseditis*, the enumeration of the grounds on which a secession will be deemed legitimate, and the impact of refugee movements on our understandings of domestic jurisdiction and appropriate thresholds for intervention. FAIRNESS, *supra* note 11, at 164–67.

the role of fairness in all this is less easily established. It would be a mistake to see self-determination as simply a matter of reconciling or managing the perennial conflict between justice (self-determination, secession, human rights) and order or legitimacy (statehood, territorial integrity). The self-determination problem is not one that fits easily into such conceptualizations. Franck seems to appreciate this in his "deconstruction" (a word rather carelessly thrown around in this chapter) of the various problems of self-determination. Very often, counter-claims against secessionist movements can be seen as justice claims (e.g., the Bosnian state's right to territorial integrity) while some self-determination claims themselves possess impeccable legitimacy credentials (e.g., East Timor's right to independence).

In the end, Franck favors a context-based approach to justice in which "a process of fairness discourse" generates results according to the key variables of the dispute. Franck identifies two of these variables as the ethnic homogeneity of the seceding entity and the level of human rights abuse suffered by the claimants. These variables will not be unfamiliar to those acquainted with the self-determination literature. However, neither Franck nor numerous writers before him have explained how these variables are to be employed. Context-based reasoning cannot work if the various contexts are all accorded equal weight.

Franck uses the example of Slovenia to show how his "deconstructive" technique can help clarify an issue better than the "idiot rules" he deprecates in his discussion of legitimacy.<sup>70</sup> An idiot rule might say either that Slovenia was not entitled to self-determination since it did not fit the classic colonial model or that as a people it was automatically entitled to secession. Neither of these idiot rules is satisfactory. The first errs on the side of order by denying any right to self-determination outside an exhausted colonial context. The result would be the recognition of a right with no potential recipients or beneficiaries. The second rule would invite chaos by allowing everyone from the East Timorese to the Kennedy Family at Hyannisport (Franck's example of the *reductio ad absurdum*)<sup>71</sup> to secede.

Professor Franck's "deconstructive technique" is just old fashioned contextual analysis.<sup>72</sup> Those expecting Derridean insights will be disap-

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70. THE POWER OF LEGITIMACY, *supra* note 28, at 74.

71. FAIRNESS, *supra* note 11, at 160.

72. Professor Franck writes with great clarity and obvious enthusiasm. Occasionally, however, we see signs of the worst excesses of New Haven diction. Thus we have the unhelpful borrowings ("deconstruction"), the neologisms ("normalize" etc.) and the inelegant ("discursively persuasive").

pointed. In the above example, the Slovenian claim would be assessed according to a number of variables such as the level of human rights abuses suffered by the Slovenes within the Yugoslav federation, the level of representation accorded the Slovenes in that federation, the ethnic make-up of the Slovenians, and the willingness of the Slovenes to recognize the rights of other ethnic minorities within Slovenia. Apart from the problem of according relative weight to each of these indicators, there is nothing value-neutral about them. Franck would like us to believe that these are components of a fairness discourse that mandates no particular outcome but simply ensures the fairness of the process. Yet, these variables are themselves highly controversial. Is there any reason why a group suffering human rights abuses should have a better moral claim to secede than a more fortunate group? Allan Buchanan has suggested that a truly liberal understanding of secession would view it more as divorce where the grounds for divorce include incompatibility as well as violence.<sup>73</sup> Franck compares the oppressed Bangladeshis with the emancipated Quebecois, the former possessing an entitlement to secede, the latter already enjoying the benefits of self-determination within the Canadian federation.

Even more controversially, Franck suggests that the claim of "ethnically-homogeneous" Slovenia to self-determination should be distinguished from that of the multi-ethnic Bosnia's. What is the intended normative impact of such a distinction? It is not always obvious from Franck's descriptions, since he constantly reminds us that the use of such variables "does not predict the outcome of the fairness discourse." The trouble with liberalisms as agnostic as this is that they leave open interpretations that may have illiberal consequences. For example, one way to distinguish Slovenia and Bosnia is to say that the Slovenian claim is to be preferred over Bosnia's because of Slovenia's more settled ethnic configuration (Franck, himself, seems to hint at this when he compares Slovenia's claim with Bangladesh's and Bosnia's with Quebec's). The dangerous consequence of this sort of approach is that it can lead to general preference for ethnic self-determination over civic self-determination. One might equally say that the Bosnian model of heterogeneous social organization (though obviously not the reality in this particular case) is the preferred one.

Ultimately, I do not find fairness discourse a plausible method for resolving self-determination disputes. Fairness provides no indication as to how the various variables are to be organized in characterizing a

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73. See ALLAN BUCHANAN, *SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA TO QUEBEC* (1991).

dispute. There is too much reliance on open-textured principles variously described as "pragmatic normative guidelines" or prefixed with adjectives like "rational" and "balancing." To be sure, "each case is different," but the *ad hoc* approach deployed by the Europeans, and approved of here, has not been a complete success and has been subject to extremely critical analysis by other writers.<sup>74</sup> As description, fairness as self-determination is a comprehensive overview of the complexities of this thorny issue. But prescriptively it defers too much to an unexplained legitimacy process and an index of validity that counsels context-based decisionmaking but fails to provide a way of structuring these contexts.

## V. FAIRNESS AND THE USE OF FORCE

In Chapters 7-9 Franck examines the use of force by United Nations institutions and member states. This is an area in which Franck has published frequently and his ideas are revisited here with clarity and authority. Chapter 7 is primarily concerned with the Security Council's jurisdictional reach under Chapter VII of the U.N. Charter. The author takes us through fifty years of United Nations practice from the early Arab-Israeli wars to the crises in the former Yugoslavia, organizing the case studies into easy cases, where the Security Council's legitimacy is unquestionable (North Korea's aggression in 1950, Iraq's in 1990), and hard cases, where the law remains fluid and controversial (the Congo in 1960, Libya in 1992, the former Yugoslavia ongoing). Franck concludes that both procedurally and substantively, the Council's actions have often lacked legitimacy and that, as a consequence, its behavior is not always regarded as fair. The problems seem to be threefold. First, at a procedural level, there is insufficient transparency in the procedures of the Security Council. In 1992, for example, there were 129 formal meetings of the Council and 188 informal meetings. Much of the decisionmaking takes place in unofficial contacts with little public oversight. This problem is compounded by the failure of the Council to provide constitutional or theoretical justification for many of its recent forays into uncharted waters. The Council has rarely felt the need to argue for the legitimacy of its findings and actions in cases like the Lockerbie bombing or the various interventions in post-war Iraq. Second, the Council has tended to act rather inconsistently since the beginning of its activist phase. Interventions in Yugoslavia, Somalia, and Liberia have

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74. See, e.g., Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 51-57 (1993).

tended to proceed on an *ad hoc* basis while equally worthy cases have been neglected, most notably in the case of Rwanda. Third, and very much associated with the first two problems, the Council has failed to develop a long-term strategy for action in cases of either massive human rights abuses or civil wars. Instead it has adopted a number of quite innovative measures that tend to operate in isolation and have yet to become part of a coherent policy.

A possibility that Franck canvasses briefly is that of judicial review. Drawing on the *Lockerbie* Provisional Measures decision at the ICJ, Franck sketches a potential role for the ICJ as a guardian of the Council's legitimacy. However, this would surely require a full blown theory of judicial review in international law. Only if equipped with such a theory could the Court act as a counter-weight to the increasingly autonomous decisionmaking of the Security Council.

Chapter 9 revisits many of these collective security issues and also takes up the question of the relationship between Article 51 (the right to self-defense) and Chapter VII. Overall, Franck anticipates an expanded role for the Security Council in repelling aggression, whereby the individual and collective right to self-defense is almost wholly usurped. The move to legitimacy and fairness is also a move to institutions. In the interim, the grounds for claiming a unilateral right to self-defense should be judged not by the state itself but by either the Security Council with the aid of fact-finding teams (an excellent suggestion) or by the International Court of Justice in an advisory opinion.

Franck describes this coming pre-emptive role of the Security Council in matters of war and peace as "a dramatic return to just war theory."<sup>75</sup> This is perhaps an unfortunate analogy, given the propensity of just wars to descend into displays of self-righteous violence and brutality. Nevertheless, if the Security Council is to be endowed with the authority to wage or sanction just war, it is important that it do so constitutionally and under rules of procedural legitimacy. For Franck, fairness at the Security Council is a combination of process transparency and substantive equality. The Security Council must "engage in open fairness discourse" and according to set procedures and rules. More importantly, equality must be ensured both in terms of the membership of the Council and the coherence of its decisions to act.

In Chapter 8, Franck argues that the search for fairness in war has resulted in the laws regulating both recourse to war and the means

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75. FAIRNESS, *supra* note 11, at 313.

employed during war. This version of history as progress essays two principal themes. The first assumes that the laws of war (*jus in bello*) have had a progressively civilizing effect on war at the same time as they have become more complex and inclusive. The second, traces a historical arc from the early, post-Westphalian positivist view of war as an essentially self-regulated activity (Vattel, Clausewitz), to the more "contextual-relativist" current scene in which international institutions are "endowed with supranational power to outlaw and prevent war" (*jus ad bellum*).

In his discussion of the laws of war, Franck recognizes that sometimes these laws lack applicability for jurisdictional reasons (e.g., internal disturbances) but seems less concerned with the failure of either the international community or various protagonists to enforce them. Instead, his narrative concentrates on a series of textual and institutional innovations (the Geneva Conventions, the War Crimes Tribunals) that have yet to bear fruit in enforcement terms on the modern battlefield. Indeed, one could plausibly argue that the enlarged scope and detail of the laws of war has been accompanied by an increase in the brutality of armed conflict. Some writers actually go as far as to implicate the laws of war in this dehumanizing process.<sup>76</sup> According to this view, the laws of war can serve to justify acts of violence as much as to prevent them. This is because of the central importance of military necessity as a trumping mechanism built into the Geneva Conventions and Protocols. A consequence of this process can be seen in the widespread acceptance by international lawyers that the Gulf War bombings which led to the death of thousands of Iraqi civilians were justified under the laws of war.<sup>77</sup> In 1939, Neville Chamberlain could remind the world that, "it is against international law to bomb civilians." No such claim could plausibly be made now. Instead, we can trace not a trajectory of progress but a moral descent in comparing, say, the world community's horror at the bombing of Guernica in 1938 to its indifference at the destruction of Baghdad in 1991.

The second thesis, that there is a move to institutions in the laws regulating war, is certainly more plausible. Collective security is now a matter quite clearly within the Security Council's jurisdiction. Unilateral action is likely to remain the exception rather than the rule. Whether the Security Council can be accurately described as acting in "humanity's common interest" is at least moot. Franck discusses this in the next

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76. Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49 (1994).

77. Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 465-67 (1991).



chapter in more detail. I think the better view is that international society is at a transitional mid-way point between the pre-Charter period of tribal competition or national egoism and the situation described by Franck of supranational institutions working in the collective interest.<sup>78</sup> At present, many international institutions are in the process of establishing rules and principles which have the potential to hasten the move to an international society based on common humanity (the HRC, the World Trade Organization, the ICJ). However, this progressive vision continues to be haunted by economic disorder, humanitarian catastrophe, growing inequalities, and a frightening potential for violence both within and between states. A disturbing gulf between international law's rhetorical claims and the reality of an often anarchic world order threatens the otherwise promising doctrinal and institutional efforts of international lawyers.

## VI. IS INTERNATIONAL LAW FAIR?

Is international law fair? Perhaps Professor Franck would answer cautiously that it is becoming fair, that fairness discourse is the dominant discourse. The evidence adduced in favor of the Franckian hypothesis is at times impressive. Fairness considerations are infectious, travelling freely from one area of international law to the next. There is judicial fairness, administrative fairness, and institutional fairness. Best of all there is redistributive, economic fairness. Anarchy is giving way not to utopia or apology but, more prosaically, to a "community with systemic, systematic interactions and utilitarian regimes."<sup>79</sup>

Professor Franck calls this the post-ontological era for international law.<sup>80</sup> However, I am not convinced that our ontologies are quite as passé as our modernisms. According to Franck, international law is no longer compelled to defend its existence. The question is no longer that dinner-party staple, "Is international law really law?" but instead, "Is international law fair?" However, the idea of an international law occupying some public transnational space is one that continues to require defending. The challenge comes not from the recalcitrant sovereign state but from an equally unsympathetic foe, the dynamic and deregulated global market. Fairness is hardly the animating spirit in the boundary-less financial markets. Indeed, regulation of any stripe is antithetical to this global economic order.

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78. FAIRNESS, *supra* note 11, at 283.

79. *Id.* at 477.

80. *Id.* at 6.

Franck emphasizes the sense of community, the shared perceptions of fairness, and the multiple linkages between, for example, trade and human rights. Certainly these are interdependent times and there is much talk of global community, but frequently these shared perceptions of fairness give way to claims of cultural relativism or warnings against revived hegemonies. Even more pointedly, in the critical relationship between human rights and trade there has been some evidence of decoupling. Relations between China and the United States, between Australia and Indonesia, and between the United Kingdom and Nigeria bear witness to a cynical disengagement of moral imperatives from economic policy.

A fairer questioner might ask if Franck's thesis explains public international law convincingly. Let me conclude by identifying two significant and connected weaknesses in fairness analysis.

#### *A. Application*

While legitimacy and redistributive justice are useful ways to view international law, they do not always provide a detailed enough theoretical framework through which to understand or restructure doctrine and practice. Too often fairness is synonymous with a commitment to an intuitive liberal reasonableness.

For example, Professor Franck tells us fairness is enhanced by the development of intricate judicial rules at the War Crimes Tribunal<sup>81</sup> or by establishing criteria for humanitarian intervention based on reasonableness. Similarly, the solution to self-determination disputes using fairness discourse often involves simply taking into account the various contexts of the dispute in order to produce nuanced solutions.

In more contentious cases, Professor Franck declines to apply fairness to the problem. It would have been interesting to know how the fairness doctrine could be used to evaluate the United States refusal to ratify Additional Protocol I to the Geneva Convention. Or how self-determination might apply to indigenous peoples, or why the NIEO of the 1970s was less fair than the present economic system, given the NIEO's emphasis on redistributive outcomes.

Occasionally, the fairness of an institution is measured using indicators like the levels of bias among judges, or its willingness to hear the arguments of both sides even in the case of non-appearance by a state party to dispute before the ICJ. In these matters fairness sounds too much like common-sense. Whenever Franck applies fairness to trickier issues,

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81. *Id.* at 279.

the prescriptions border on the enigmatic. A recent problem for the ICJ has involved the question of indispensable third parties. In the *Certain Phosphate Lands in Nauru* case<sup>82</sup> and the *Nicaragua* case,<sup>83</sup> the Court found that various third parties, though closely associated with the dispute, were not so necessary to the proceedings that their absence invalidated the Court's jurisdiction. Franck applies fairness theory to the question of indispensable third parties in Chapter 10 on "Judicial Fairness" but the opportunity to work through examples is lost. Instead, there is a description of the Court's findings in *Monetary Gold Removed from Rome*,<sup>84</sup> *Nicaragua*, and *Nauru* followed by the suggestion that the Court's decision to exercise jurisdiction in the later two cases "raises few problems of fairness, as long as the Court is willing to allow interested states sufficient latitude to intervene on their own initiative."<sup>85</sup> However, in the case concerning *East Timor*,<sup>86</sup> decided after this book was written, Indonesia's absence was fatal to the admissibility of the dispute between Australia and Portugal. Given that Indonesia would probably have been permitted a right of intervention, does this mean the decision to decline jurisdiction was unfair? Unfortunately, one gets little guidance from the discussion as to how fairness discourse would apply to this central problem of ICJ jurisdiction. No criteria are set out and no specific guidelines are enumerated. The very issues where theory could be useful are those left unexplored here by Franck.

### B. Fairness and Neutrality

At the beginning of Chapter 10 on judicial fairness, Professor Franck quotes from *Distributive Justice*.<sup>87</sup> Morton Deutsch remarks that "An individual's conception of what he is entitled to is determined by at least five major kinds of influence: (1) the ideologies and myths about justice that are dominant and officially supported in his society . . . ." Despite this endorsement of Deutsch, Professor Franck appears quite non-selfconscious about appealing to our intuitions about justice or dominant standards of fairness. Nowhere is there a discussion of the mythic

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82. *Certain Phosphate Lands in Nauru* (Nauru v. Austl.), 1992 I.C.J. 240 (June 26) (Preliminary Objections).

83. *Nicaragua* case, *supra* note 37.

84. *Monetary Gold Removed from Rome* (Italy v. Fr., U.K., U.S.), 1954 I.C.J. 19 (June 15) (Preliminary Question).

85. FAIRNESS, *supra* note 11, at 343.

86. *East Timor* (Port. v. Austl.), 1995 I.C.J. (June 30).

87. FAIRNESS, *supra* note 11, at 316 (quoting M. DEUTSCH, *DISTRIBUTIVE JUSTICE* 52 (1985)).

foundations of justice-talk or the ideological content of ideas like fairness.<sup>88</sup> Professor Franck is as convinced as Rawls that his theory is neutral among competing claims (within the parameters set by the no trumping rule and the maximin principle). However, this liberalism is not as ecumenical as Franck would have us believe. Sprinkled throughout the text are the commitments and preferences of ideology. The balancing of legitimacy and justice is not a process but a definition of the limits of possible outcomes. The redistributive possibilities of radical economic reform are deemed beyond the pale because, though they may be just, they could not possibly meet the requirements of legitimacy. This is why, for example, the use of equity in judicial reasoning cannot be extended to embrace substantive economic equality.

Most disappointingly, Franck never confronts the serious challenges posed by international law's critical and feminist schools. The new stream rates a mention in an early footnote but the index reveals one reference to "feudalism" but none at all to "feminism." Feminist international lawyers, in particular, have made two specific challenges to international law. First, some feminists have suggested that the arguments of international law are not neutral but instead perpetuate a particular way of looking at the world which disadvantages women. The process of talking about international law (fairness discourse) appears neutral and inclusive but actually limits the participation of women in a number of subtle ways.<sup>89</sup> Professor Franck's book is about this discourse and stands or falls on the openness and inclusiveness of the process. It is remarkable then that the most innovative recent critique of this process is ignored altogether.

A second feminist argument questions the effect of international law norms on women's lives. The principle of self-determination, laws regulating the use of force, and the meaning of democracy have all been subjected to this form of questioning. Again, there is no recognition of these debates in Professor Franck's book. More generally, it is regrettable that there is no explicit engagement with any of the new movements mentioned in this review.

## CONCLUSION

Professor Franck has written an imaginative, ambitious and detailed account of the role of fairness in international law. This book represents

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88. See, e.g., JOSEPH C. SMITH, *THE NEUROTIC FOUNDATIONS OF THE SOCIAL ORDER* (1990).

89. See Knop, *supra* note 5, at 304-05.

a major contribution to the defense of liberal theory in international legal thought. Our understanding of law's normative underpinnings are enriched by this text. In this review, I have focused on some of the flaws in Franck's grand theoretical design. Despite the length and density of the text, Professor Franck has missed an opportunity to engage with the new theoretical trends in international law. Ultimately, his liberalism remains too skeletal and self-validating to serve as a complete answer to international law's harshest critics.