
Introduction to the Symposium

Colin Warbrick*

To some ears, a ‘British’ group on theory and international law will sound like an oxymoron.¹ Isn’t the British tradition in international law technical and analytical, taking the law as it finds it and finding it only through an examination of the practice of states?² The values of the law are thus the values of the practice: speculation about what the values ought to be moves from law to politics. This ‘modern positivism’³ follows a long British tradition in foreign affairs — realistic, pragmatic and amoral.⁴ The aspiration to a ‘foreign policy with an ethical dimension’ at the beginning of the present Labour administration in the United Kingdom seemed to confirm rather than modify the established dispensation by reason of its brevity⁵ — though the subsequent forays of Prime Minister Blair into external affairs, before and after 11 September 2001, suggest that there is still a hankering after a more idealistic and altruistic version.⁶ Foreign Secretary Cook’s ethical dimension included subjecting policy to the constraints of international law but the Prime Minister’s project seems to be predicated on new law — the law of an international community. The government’s legal advisers do not seem to have found it unduly difficult to respond by providing legal arguments in favour of the bombing of Yugoslavia⁷ or the intervention in Afghanistan.⁸ Developments such as these do shake the foundations of the subject and

* Professor of Law, University of Durham.

¹ The Committee on Theory and International Law of the International Law Association (British Branch) was the forum for this Symposium.

² Warbrick, ‘The Theory of International Law: Is There an English Contribution?’, in P. Allott *et al* (eds), *Theory and International Law: An Introduction* (1991) 47.

³ For the use of this expression, see Simma and Paulus, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View’, 93 *AJIL* (1999) 302, at 306–308.

⁴ See the observations of a British international relations expert, Armstrong, ‘Law, Justice and the Idea of a World Society’, 75 *International Affairs* (1999) 547; for stringent criticism of policy adopted on such principles in a specific situation, see B. Simms, *Unfinest Hour: Britain and the Destruction of Bosnia* (2001).

⁵ R. Cook, ‘British Foreign Policy’, 12 May 1997. All the speeches of Foreign Office Ministers appear on the Foreign & Commonwealth Office website. Cook’s was among them. It is not there now!

⁶ Speech by Prime Minister Tony Blair to the Economic Club of Chicago, 22 April 1999, www.fco.gov.uk/news/speechtext.asp?2316; Labour Party Conference speech, *The Guardian*, 3 October 2001.

⁷ United Kingdom Materials on International Law, LXXI *BYbIL* (2000) 549. The story really begins somewhat earlier with the legal justification for the use of force in the no-fly zones over Iraq, LXII *BYbIL* (1992), at 827–828.

⁸ ‘Legal Warning on War Aims’, *The Guardian*, 4 October 2001, at 2.

the search for something more than a weary pragmatism to explain the international law project takes on a practical, as well as an academic, dimension.

The initiative to institute the International Law Association (British Branch) Committee on Theory and International Law anticipated the Blairite musings on international community. It was, in local terms, a bold step, though it may, in the global context, seem only a modest one. The first project adopted by the Committee was a study of Professor Thomas M. Franck's *Fairness in International Law and Institutions* (1995) (*Fairness*).⁹ I was both present and not present at the creation. The Committee was set up under the guidance of Professor Christine Chinkin (LSE) as its inaugurating Chair and through the energetic efforts of its Rapporteur, Dino Kritsiotis (Nottingham). The adoption of the Franck project followed a suggestion of Iain Scobbie (Glasgow). All this was in place when I succeeded Professor Chinkin. Coincidentally, though, I had been at the Hague Academy in 1993 when Professor Franck delivered the lectures, which were the basis of *Fairness*, as the General Course in Public International Law for that year.¹⁰ The lectures were enormously successful, coherent and economical and profusely illustrated, often by examples drawn from Franck's own wide and varied experience in international affairs. One envied the ease with which he held the attention of his large audience throughout the three-week course. For his students, the occasion was enhanced by his accessibility: each lecture was followed by animated, informal discussions and his seminars were inspiring lessons.

It soon becomes clear when one reads *Fairness* that it cannot be properly appreciated without reference to Franck's earlier book, *The Power of Legitimacy among Nations* (1990) (*Legitimacy*).¹¹ It is concerned with those technical matters of law-making and decision-taking, including the determinacy of the rules, which go to improve the prospects for compliance with international legal rules, matters which apply largely regardless of the contents of the rules. The work has an empirical base and depends upon taking the international legal method as it is — essentially a positivistic dialogue among elites.

Content, though, to put it mildly, is not irrelevant to compliance. *Fairness* is a study not just of what the content of international law is but of what it might be, perhaps even, what it should be. Franck sets out his *Fairness* prospectus and shows how it is embodied already within the practices of international law. The aims of *Legitimacy* and *Fairness* catch the traditional dilemma for law between securing stability and accommodating change, a challenge especially severe for international law, given the deficiencies of its institutional mechanisms to address and manage conflicts between the two. Much must still depend upon the conduct of states. In his latest book, *The Empowered Self: Law and Society in the Age of Individualism* (1999) (*The Empowered Self*),¹² which was published during the currency of the Committee's *Fairness* project,

⁹ T. M. Franck, *Fairness in International Law and Institutions* (1995).

¹⁰ Franck, 'Fairness in the International Legal and Institutional System', 240 *RdC* (1993–III) 9.

¹¹ T. M. Franck, *The Power of Legitimacy among Nations* (1990).

¹² T. M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (1999).

Franck exposes another puzzle for international lawyers — how to reconcile the state's role as the protector of individual rights and its power to make that possible with the reality that the power will be abused or ignored, that what is intended to improve the lot of individuals turns out to make their condition worse. These big questions have not frightened Franck and are the main reason why his work is worthy of sustained consideration. Just as his own position has developed, Franck's writings confront others with demands for reappraisal of that which they might have thought concluded.

Versions of the papers which are presented in this Symposium were all given more than once, before the Committee in Edinburgh (20 November 1999) and Durham (27 January 2001), at a meeting organized by the British Institute of International and Comparative Law in London (23 March 2000) and at a colloquium attended by Professor Franck in Glasgow (1 June 2001). The first essay by Iain Scobbie sets out the fairness doctrine and the international context in which it is to operate.¹³ He identifies its orthodox, liberal elements but contrasts them with the demands of an international system which seems to demand more and more by way of the regulation of transnational relations and the furtherance of a perceived universal interest. It is an irony that the so-called triumph of liberalism leads to calls for a more prescriptive and interventionist international law in place of the old liberal (or, more exactly, laissez-faire) regime which allowed states to pursue their own projects, liberal or not. Franck's proposal, Scobbie says, has 'more than a tinge of idealism'. It is, it seems to me, a project sustained by the optimism of the American 'idea of progress',¹⁴ in which setbacks to the grand design are seen merely as aberrations (which will be put right) rather than as demonstrations that the plan is misconceived or unattainable. The American domestic experience has made it rather easier to sustain this kind of enthusiasm than the much more fraught history of Europe during the twentieth century. Holly Cullen (Durham) points out the fragility of the democratic and liberal endeavour in Europe during this time.¹⁵ That good will prevail over evil cannot be taken for granted; the idea of progress must be treated with some scepticism. Now, after '11 September', her remarks have been given particular salience. It will be interesting to see how, even if, the 'idea of progress' survives in the United States. It concerns us all, of course, and we shall have to wait to see if the distinctly illiberal reactions of states were an aberrational interlude or were absorbed into a security-conscious and defensive (and exclusive) idea of national and international normality.

However it all turns out, in his contribution John Tasioulas (Oxford) suggests that there is still work to be done on Franck's account of fairness to fashion an adequate grounding for a just and universal order.¹⁶ While Tasioulas endorses Franck's assertion of the need for fairness discourse, he sees the resolution of this discourse as being more complex than Franck's espousal of the fairness principle would have us

¹³ 13 *EJIL* (2002) 909.

¹⁴ A. Bickel, *The Supreme Court and the Idea of Progress* (1978).

¹⁵ 13 *EJIL* (2002) 927.

¹⁶ *Ibid.*, 993.

anticipate. His criticism goes not just to the idealism of the project but to its content. Tasioulas is more circumspect than Franck about the prospect for the identification of truly universal values in the face of, not merely unresolved, but possibly enhanced ethnocentrism. The debate here raised the passions in Glasgow. It goes not to 'how' the fairness plan can be realized but to 'what' it ought to be and takes the matter on into the territory of *The Empowered Self*. Tasioulas is proposing more inquiry to isolate the values of what we might then identify as an 'international community' with common standards. Even if it were possible, the idea of an international legal community would still seem to face the difficulty of establishing institutions which can act for it in an authoritative way. (Franck, with his knowledge of a range of international institutions, seems to find this less of a problem.) It is the question taken on by Dino Kritsiotis in his paper, 'Imagining the International Community'.¹⁷ If he does not share Franck's perceptions entirely, Kritsiotis is, like Franck, an optimist who can discern in the development of modern international law the substantive bones of an international community, diverse, perhaps, and not coming from a grand plan but real nonetheless. We needed, he maintains, the idealized talk about an international community to enable us to see what there was there already in the existing international system. Having recognized that, lawyers can get to work to make the most of the rules and processes which serve community ends. The process is far from complete. Kritsiotis, like Tasioulas, goes on to *The Empowered Self* but, unlike him, finds there the evidences for the furtherance of the project. As it does for Franck, the state looms large in Kritsiotis's scheme. He is hopeful, rather than confident, that the concrete identification of universal values can be mediated through state institutions and that there will be commitment to them by a sufficiency of states to provide for their increasing realization, a sort of ratchet against back-sliding as a minimum, even that the values will be enforced against delinquents as a maximum: the line between community and hegemony in such circumstances is a narrow but crucial one.

If we use *Fairness* and *The Empowered Self* as our guide to the ways in which the values of the international community are to be found and conflicts between them to be reconciled, we find a prospectus which gives priority to the interests of individuals, if only in the long run. If Kritsiotis is right and the notion of international community is getting some practical bite, one issue demands attention above all others — what are we to do about people living in states the governments of which actively deny these 'rights'. Of course, it is conceivable that the 'international community' will respond, something that Franck endorses in *Fairness* under the auspices of the UN and which Kritsiotis supports even by states acting unilaterally. But what of the people themselves? Neither the UN nor states will act in all cases where most people or a substantial group within the state would claim that they are not enjoying respect for universal values. If the people claim a right to act, they claim a right to self-determination, though not necessarily a legal right. Stephen Tierney (Edinburgh) addresses Franck's analysis of whether or not fairness demands that the law should give them relief to the point of allowing them to leave their present state and establish

¹⁷ *Ibid.*, 961.

their own.¹⁸ Tierney notes that Franck's developing views on the law of self-determination from *Fairness* to *The Empowered Self* reflect the problem Franck himself identified between *Legitimacy* and *Fairness*: how to accommodate justice with stability. The difficulty, which Tierney identified in his paper first given before *The Empowered Self* was published, was that the reasoning in *Fairness* led towards a right of secession. Franck's retreat from such a conclusion in *The Empowered Self* has both practical and principled underpinnings. The practical consequences of what Franck posits as a world of 2,000 states are, for him, too chaotic to tolerate but, more importantly, the demand for secession is a demand for an identifiable group to exit the state. Whether the group describes itself as a people or a minority is of little consequence to Franck because the identifying criterion is the anti-liberal one of determined identity, the self-determining individual is absorbed by the superior claim of the self-determining group. Tierney points out that some liberal writing does not see an antinomy between the claims of the individual and the claims of the group, nor between those of the group and those of the state. Tierney thinks that the idealism of *The Empowered Self* has got beyond what the practical conditions presently can accommodate, with not merely instability as a consequence if attempts were made to make reality comply with its prescriptions but also for the realization of liberal values, properly understood. It was better done, Tierney maintains, in *Fairness*. Tierney wants better states; Kritsiotis wants states to be made better; Tasioulas wants to know if we know what 'better' means.

Does *Fairness* provide the answers? At the Glasgow colloquium, Professor Franck gave his critics a gracious hearing and an engaged response, parts of which are reflected in his comments which conclude this Symposium. *Fairness* has had its critics (and, in some measure, Franck himself is one of them). The division between the prescriptive and the descriptive in international law is not a bright line but a murky process. *Fairness* shines a light into the gloom. If it is not the bright sun which causes the mists to lift completely, it, with *Legitimacy* and *The Empowered Self*, picks out some paths to follow but, as the papers here suggest, going along them we might encounter further obstacles in the way of final enlightenment. But the achievement of *Fairness* is to show that links can be made between theory and practice, if only one tries hard enough. Franck's faith in international law has been all the more important because of the tests which it has been set by recent events. Kosovo is one. The Committee organized a conference in London on 25 July 2000 on the prospects for international law after Kosovo, with papers by Professors Allott (Cambridge), Charlesworth (ANU),¹⁹ Koskenniemi (Helsinki),²⁰ and Weiler (NYU) and commentaries by members of the Committee. These will be published in the form of a collection of essays next year. For the members of the Committee, the experience of examining Tom Franck's work was a vital element in coming to terms with impact of the Kosovo-related events

¹⁸ *Ibid.*, 941.

¹⁹ Charlesworth, 'International Law: A Discipline of Crisis', 65 *Modern Law Review* (2002) 377.

²⁰ Koskenniemi, '“The Lady Dost Protest Too Much”: Kosovo, and the Turn to Ethics in International Law', 65 *Modern Law Review* (2002) 159.

in Yugoslavia on its understanding about international law. The events following '11 September' pose an even more radical assault on the traditions of international law. Perhaps, even for people of my inclinations, a little dose of theory is called for.