
*Imagining the International Community**

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Neither Marxists nor Austinians, admittedly, give much comfort to those concerned with visualizing the international 'community' in which rules are obeyed and obligations taken seriously.

– Thomas M. Franck‡

... the 'international community' in which everyone speaks roughly the same language of missiles and missives, sanctions and sanctimony.

– David Kennedy§

[We have come] to have an international system which was, and is, post-feudal society set in amber. Undemocratized. Unsocialized. Capable only of generating so-called *international relations*, in which so-called *states* act in the name of so-called *national interests*, through the exercise of so-called *power*, carrying out so-called *foreign policy* conducted by means of *diplomacy*, punctuated by medieval entertainments called *wars* or, in the miserable modern euphemism, *armed conflict*. This is the essence of the social process of the international non-society.

– Philip Allott¶

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** University of Nottingham. Rapporteur of the Committee on Theory and International Law of the International Law Association (British Branch) (1998–2001). I owe a special debt of gratitude to Thomas Franck and Colin Warbrick, and, of course, to the members of the Committee on Theory and International Law for providing an excellent and sustained intellectual environment for developing the ideas contained in this article.

‡ T. M. Franck, *The Power of Legitimacy among Nations* (1990) 15.

§ Kennedy, 'The Disciplines of International Law and Policy', 12 *Leiden Journal of International Law* (1999) 9, at 126.

¶ P. Allott, *International Law and International Revolution: Reconceiving the World* (1989) 10.

1 Introduction

At the heart of the thesis which is articulated and developed in *Fairness in International Law and Institutions* (1995) is the idea of community, which is defined as a ‘social system of continuing interaction and transaction’ and ‘an ongoing, structured relationship between a set of actors’.¹ Communities, it is said in this volume, consist of ‘a common, conscious system of reciprocity between [their] constituents’² and ‘shared moral imperatives and values’.³ The idea of community is fundamental to fairness discourse,⁴ ‘the process by which the law, and those who make law, seek to integrate [the] variables [of legitimacy and distributive justice], recognizing the tension between the community’s desire for both order (legitimacy) and change (justice), as well as the tensions between differing notions of what constitutes *good* order and *good* change in concrete circumstances’.⁵

There is a triumphant claim which resonates throughout these assessments of fairness discourse as international law enters its ‘post-ontological era’,⁶ and this claim relates to the ‘emerging sense of global community’ within the international system.⁷ To be sure, such assertions reflect an abiding engagement with the matter and are traceable to an earlier work of Professor Thomas M. Franck, his influential *The Power of Legitimacy Among Nations* (1990).⁸ Towards the end of that seminal work, it was admitted that the ‘fundamental assumption of community’ had been made ‘but not

¹ T. M. Franck, *Fairness in International Law and Institutions* (1995) 10 [hereinafter *Fairness*]. At 12, that ‘structured relationship’ is defined thus: ‘a community is defined by having a corpus of rules which it deems to be legitimate and by having agreed on a process that legitimates the exercise of authority, one which conduces to the making of fair rules and fair allocations’.

² *Ibid.* at 10 (where the ‘system of reciprocity conduces to fairness dialogue’).

³ *Ibid.* (or, at 11, of a ‘common moral enterprise’ and, at 12, of a ‘moral community engaged in formulating itself as a “rule community”’).

⁴ *Ibid.* at 26.

⁵ *Ibid.* at 25–26.

⁶ *Ibid.* at 6 (in which international lawyers ‘need no longer defend the very existence of international law’ and are ‘now free to undertake a critical assessment of its content’). Or, as he intimates to similar effect at 363, ‘how far international law has progressed, from dour scholastic issues of ontology to vibrant questions of survival’. See, further, Warbrick, ‘Brownlie’s *Principles of Public International Law: An Assessment*’, 11 *EJIL* (2000) 621, at 625 (who is ‘sympathetic to the position that international lawyers need feel no embarrassment in explaining the legal nature of international law’ in its ‘post-epistemological situation’).

⁷ *Ibid.* at 11–13.

⁸ T. M. Franck, *The Power of Legitimacy among Nations* (1990) [hereinafter *Legitimacy*] (where a sharp contrast is established in the opening chapter, at 5, between ‘societies of natural persons, as opposed to states’ and, at 8: ‘Teleologically speaking, one might hypothesize that nations obey rules of the community of states because they thereby manifest their membership in that community, which, in turn, validates their statehood’). A synthesis of the ‘legitimacy thesis’ is presented in *Fairness*, at 30–46, and at 82 *AJIL* (1988) 705. See, also, T. M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (1999) 98 [hereinafter *Empowered Self*]. While the overall emphasis in this later book is on the idea of personal self-determination, there is still recognition of the value of community and of the international community: ‘[w]hat appears to be happening in this new age of emergent individual rights and reconfiguration of loyalty systems is best explained in terms of what Professor Alexander Wendt has called a “sociology of international community”’: Wendt, ‘Collective Identity Formation and the International State’, 88 *American Political Science Review* (1994) 384, at 390.

demonstrated' in the preceding chapters of that book.⁹ In consequence, the topic was then awarded the exclusive attention of an entire chapter,¹⁰ in which 'community' was defined as an association reaching 'an advanced stage of development'¹¹ and stood to be contrasted with a 'rabble':

in that it is an organized system of interaction in accordance with rules, while a rabble typically involves unstructured, standardless interactions between actors whose conscious relationship to one another is limited to the circumstance of casual proximity. A rabble is a crowd whose members interact because they just happen to be in the same space at the same time. 'Members' of a rabble do not regard themselves as members, anymore than persons on a crowded subway car regard themselves as members of an underground.¹²

These reflections form part of an incremental and increasing turn within the discipline of international law from accounts of the requirements for statehood to the idea of the formation of an *international community*.¹³ Presented as such, we are given a radical alternative as our point of departure for conceptualizing and understanding international law, one that is far removed from sceptical receptions and even ideological resistances to 'community' that have appeared from time to time in international law literature.¹⁴ The general neglect in concentrating energies on this

⁹ *Ibid.*, at 181.

¹⁰ *Ibid.*, at 195–207.

¹¹ *Ibid.*, at 196 (or, at 201–202, where it is used 'to denote a high level of sophistication in the *rule* structure within which a group of actors habitually interact').

¹² *Ibid.*, at 196–197 (inspired by the work of Ronald Dworkin, that members of a true community 'accept that they are governed by common principles, not just by rules hammered out in political compromise. Members of a society of principle accept that their political rights and duties are not exhausted by the particular decisions their political institutions have reached, but depend, more generally, on the scheme of principles those decisions presuppose and endorse. So each member accepts that others have rights and that he has duties flowing from that scheme': *Law's Empire* (1986), at 211).

¹³ H. Möslér, *The International Society as a Legal Community* (rev. edn, 1980) and 'International Legal Community', 7 *Encyclopaedia of Public International Law* (1984) 309. Consider, also, the position of Rosalyn Higgins, that 'when examining what is meant by the word "state", it is necessary to appraise the community interests which will be affected by the decision to interpret it in one way rather than in another'. The community, of course, is strictly a 'community of nations' whose 'long-range objectives' shape the framework of principles governing statehood and derivations thereof, and, as such, those 'generally recognized as full members of the international community': *The Development of International Law through the Political Organs of the United Nations* (1963), at 11–12. See, also, Franck's reference to states 'in joining the international community, are bound by the ground rules of that community': *Fairness*, at 29 (where a state's membership of the 'community of states' is described as 'an inescapable incidence of statehood').

¹⁴ C. de Visscher, *Theory and Reality in International Law* (1968), at 94. ('It is therefore pure illusion to expect from the mere arrangement of inter-State relations the establishment of a community order: this can find a solid foundation only in the development of the true international spirit of men. There will be no international community so long as the political ends of the State overshadow the human ends of power'). Stephen Toope has written that his 'understanding of the possibilities of international normativity' is 'predicated upon the view that there is no such thing as the "international community", though generations of UN Secretaries-General would have us believe otherwise': S. Toope, 'Emerging Patterns of Governance and International Law', in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000) 91, at 103. See, further, P. E. Corbett, *Law in Diplomacy* (1959), at 273 ('What is principally missing is the measure of agreement on supreme common

front has led to robust accusations that the normative process of international law ‘is doomed to be what it has been — marginal, residual and intermittent’:¹⁵ international law requires the context of a ‘community’ for it to exist ‘as a limitation of political power’ and be regarded as a force with independent reckoning in international relations.¹⁶ It is this essential absence of ‘community’ — or, at least, the absence of a *consciousness* of community — that has given some cause to lament the current critical condition of international law and its institutions.

Of course, within mainstream literature on international law, references to and reliance upon the idea of an international community are not as rare as these inimical treatments would have us believe: there exists an extraordinary wealth of allusions to ‘community’ in both classic and modern scholarship, with Sir Hersch Lauterpacht’s feature work on *The Function of Law in the International Community* (1933) one of the earliest and most prominent examples to come to mind. Yet, for all the abundance of these references, it is rare for the ‘international community’ to have been subjected to the conscious endeavours of definition: it is almost as if there exists a subliminal and pervasive appreciation of the meaning of this term — of what forms and frames this community — that eliminates the need for further detail or consideration. The result is that, all told, the institution of an ‘international community’ is taken as a given for the most part and its usage taken for granted from the perspective of international law.

This is where *Fairness in International Law and Institutions* (1995) breaks rank with a major share of the scholarship: it sets out to offer an informed and sustained discussion of the idea of an international community when considered through the kaleidoscope of fairness discourse as well as the histories of international law. This article responds to these formulations: it carries an exposition as well as a critical appreciation of the invocations of the metaphor of ‘community’ in *Fairness in International Law and Institutions* (1995). The article relates how twin *conceptions* of ‘international community’ emerge from reading *Fairness* and how, *in ultimo*, these conceptions serve to complement and reinforce each other. Part 2 explores the first of these conceptions, where ‘community’ is used as a rhetorical device for referring to the expanding set of ‘persons’ identified in orthodox accounts of the subjects of international law. Here, ‘community’ has been devised as a convenient descriptive harness for a series of multiple and co-existing communities within the international system. We build upon these expositions contained in *Fairness* and argue that these communities — of legislators, addressees and adjudicators — are best understood in terms of their

values, the sense of community, loyalty, and mutual tolerance which within the state make compulsory institutions bearable’).

¹⁵ P. Allott, *Eunomia: New Order for a New World* (rev. edn., 2001) 104 (para. 16.17).

¹⁶ G. Niemeyer, *Law without Force: The Function of Politics in International Law* (1941), at 174 (concluding that ‘[i]n this respect the function of international law was not unlike that of constitutional law. This is the feature which distinguishes the international law of modern Europe from all other previous cases of legal procedures between states: [i]t consisted not only in occasional treaties and arbitrations, but in a solid body of rules which were neither created nor easily changed by the action of governments’).

respective functions and capacities, all the while emphasizing the discursive nature of community when used in this, its rhetorical, sense.

Part 3 of the article then moves to consider the much more applied and subtle manipulation of ‘community’ at work in *Fairness*. Here, the ‘international community’ appears to have been used in a more pronounced sense, where it is developed as an independent dynamic within the political infrastructure in order to provide substance to the notion of ‘fairness’ in law and in practice. We are, after all, informed at an early stage of proceedings that fairness discourse ‘presumes community’.¹⁷ It is in this respect that the international community can be said to be *imagined*:¹⁸ the manner of its conceptualization reveals — in provisional terms at least — the preferences of its author regarding the form which this community assumes as well as the priorities and methods which this community, in turn, shapes. The *form* of this community articulates whether it exists as a statist or a communitarian institution,¹⁹ and the claims made in *Fairness* are evaluated in a modest critique, where the notion of a community that shares *both* statist *and* communitarian elements is tested and where the relation between rhetorical and imagined communities is explored. The summaries of argument, and conclusions relating thereto, are given in the final section, Part 4, of the article.

2 The Rhetorical Usage of International Community

A Outline

As the background for the exposition of the rhetorical invocation of ‘community’ in *Fairness*, it is proposed that some mention is made of how the term ‘international community’ has been used in existing scholarship. We use the term ‘rhetorical’ to

¹⁷ *Fairness*, at 26 (‘If legitimacy validates community, community must be present for legitimacy to have content’) and at 8 (‘fairness supposes a moral compass, a sense of the just society’).

¹⁸ Derived, as of course are the title and theme of this article, from B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1983) and its application elsewhere: D. Cannadine, *Ornamentalism: How the British Saw Their Empire* (2001), at 3. For further application of this theme, see Malkki, ‘Citizens of Humanity: Internationalism and the Imagined Community of Nations’, 3 *Diaspora* (1994) 41.

¹⁹ Tasioulas, ‘In Defense of Relative Normativity: Communitarian Values and the *Nicaragua* Case’, 16 *Oxford Journal of Legal Studies* (1996) 85, at 116–117 (the ‘statist’ conception of international society exists where ‘[s]tates form the irreducible units of the international community and, given the absence of a system of organic representation, the idea of such a community is nothing other than the sum total of its states’ and the ‘communitarian’ conception of international society ‘affirms, instead, that it is only as members of the community of humankind as a whole — a community whose self-understanding is integrally orientated in part by the acknowledgment of shared values — that its components (be they states, people, organizations or individuals) can understand their own identities’). See, further, the dichotomization developed between the Grotian and Kantian international communities: A. Cassese, *International Law* (2001), at 18.

indicate that the practice of referring to an ‘international community’ is part of a wider phenomenon in the literature of international law — it is not unique to *Fairness* — where the term is engaged for the purpose of collective reference: it brings within its fold the multitude of actors recognized to greater or lesser degrees as ‘persons’ within the international system. However, it is also argued that, on one interpretation of *Fairness*, what is really occurring in the work is a conceptual shift towards the *function* rather than the identity of such actors in the traditional sense of states as opposed to individuals, international institutions as opposed to non-governmental organizations. Through this process, communities of legislators, addressees and adjudicators come into being, and these communities connect and interact with each other through the language or medium of international law. This is why the discursive nature of this community is emphasized in *Fairness*: it is this element which defines ‘community’ in this particular context and which characterises the relationships operating within that community.

B *Conventional Treatments*

It would be a false and unwarranted impression to suggest that no extended discussion has occurred on the reach and meaning of the ‘international community’: such accounts do of course obtain in dispersed fractions of mainstream literature, but these are few and far between and, when they have taken place, their purchase has been on the teaching that states are the makers and mainstay of this community:

in the Euro-Mediterranean area in the Middle Ages an international Community existed which included all the different States of the region: a sole pluralistic Community, not a plurality of distinct Communities. The fact that the rules of law born in this one community did not bear a Catholic, or Orthodox, or Islamic label will be shown in all its importance the day in which the outer frontiers of this Community became opened to the participation of political systems of other regions and its law adapted to meet the need of a *community of States* that is world-wide, and therefore all the more markedly pluralistic.²⁰

Others, such as Antonio Cassese, have plotted a related course, one that is an essential derivative of the above formula: the first third of his *International Law In A Divided World* (1986) charts the origins and foundations of the international community as understood from the history of the multiplication of states. This becomes clear if one considers the chronological milestones which are identified: the Peace of Westphalia (1648), the First and Second World Wars and the Charter of the United Nations (1945). Room is made for the ‘new subjects’ of this community — as if the ‘international community’ has become some sort of convenient short-hand for

²⁰ Ago, ‘Pluralism and the Origins of the International Community’, 3 *Italian Yearbook of International Law* (1977) 30 (emphasis added). See, further, Ago, ‘The First International Communities in the Mediterranean World’, 53 *BYbIL* (1982) 213. On the philosophical underpinnings, consider Bull, ‘The Importance of Grotius in the Study of International Relations’, in H. Bull, B. Kingsbury and A. Roberts (eds), *Hugo Grotius and International Relations* (1992) 65, at 71–75.

depicting the expanding range of persons within the system²¹ — but the overwhelming emphasis of the analysis is on the continuing significance of states, as revealed when Cassese wrote, in 1986, that, ‘at present, the community is split into three main segments, each with a distinct socio-economic philosophy, a fairly fully developed ideology, and diverse political motivations — and even within each of these groups[,] there are many diversions and differences’.²²

Elsewhere, the international community has been used to conjure the vital ‘universality’ of international law: that, notwithstanding differences of political or ideological principle, international law does not recognize ‘any distinctions in the membership of the international community’ and no longer participates in an enterprise in which the old Christian states of Western Europe constituted ‘the original international community within which international law grew up gradually through custom and treaty’.²³ These sentiments find contemporary expression in doctrinal thinking on sovereignty and self-determination, or, as the International Court of Justice said in the *Nicaragua Case* (1986), ‘the fundamental principle of state sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a state’.²⁴ The ‘community’ which arises within such conventional treatments is a community of sovereign states (hence, the romanticism embodied in the idea of a ‘family of nations’):²⁵ the process is thereby begun of determining whether such a community knows of values other than the sovereign identities of its individual members — whether the ‘community’ becomes more than the mere collection of its parts, or, to use Franck’s words, ‘the system’s values, aims, and effects’²⁶ — and the extent to which (if at all) the ‘community’ is prepared to admit actors other than states within its following.

²¹ See, further, Fassbender, ‘The United Nations Charter as Constitution of the International Community’, 36 *Columbia Journal of Transnational Law* (1998) 529, at 532 (making reference to ‘the international community in its entirety, i.e., all subjects of international law’).

²² A. Cassese, *International Law in a Divided World* (1986), at 32 (concluding that ‘the profound rifts existing in the international areas have also had a profound effect in the realm of law’). The result, at 33, of these ‘broad arenas of dissent or only partial agreement on the one side, and the emergence of certain fundamental standards of behaviour acceptable to all States on the other’ is ‘a distinction between three categories of international norms: *universal* (principles applicable to all States belonging to the three main groupings referred to [herein]), *general* (customary rules or norms of multilateral treaties accepted by only two groups of States), and *particular* (bilateral treaties, as well as multilateral treaties, adhered to by one segment only of the international community)’. See, further, Cassese, *supra* note 19, at 19–45.

²³ Sir R. Jennings and Sir A. Watts, *Oppenheim’s International Law: Peace*, vol. I (9th ed., 1992), at 87.

²⁴ *Case Concerning Military and Paramilitary Activities in and against Nicaragua: Nicaragua v. United States of America*, ICJ Reports (1986) 14, at 133 (paragraph 263). See, further, N. Wheeler, *Saving Strangers: Humanitarian Intervention and International Society* (2000), at 28 (describing the ‘rules of sovereignty and non-intervention’ as ‘the constitutive rules of international society’).

²⁵ Armstrong, ‘Law, Justice and the Idea of a World Society’, 75 *International Affairs* (1999) 547 (writing of the ‘societal grounding’ of international law as ‘a presumed society of states: a loose and limited association among sovereign entities whose primary purpose was to enable orderly relations among states without in any way diminishing their sovereign statehood and rights’). Franck describes the state as the ‘basic community’: *Fairness*, at 13.

²⁶ *Fairness*, at 9.

C *Beginnings of Community*

As observed above, the attention awarded to *communitas* in *Fairness in International Law and Institutions* (1995) is recurrent and its hold on the ensuing thesis is quite unmistakable. It would not be an exaggeration to say that it transfuses the consciousness of the entire work:

There must also be a shared sense of identity of those entitled to a fair share; there must be an ascertainable community of persons self-consciously engaged in a common moral enterprise. The members of such a community participate not only in the sense of receiving a share of each allocated good or obligation, but they also participate in determining the rules by which the shares are allocated. There must, in other words, be a moral community, engaged in formulating itself as a 'rule community'.²⁷

Who, then, are the members of this community? It will be recalled that in *The Power of Legitimacy Among Nations* (1990), the intellectual forerunner to fairness discourse, Franck had concluded that the elements of a 'rule community' were in place in the 'international arena of states'.²⁸ In that work, there was specific categorization of the community as 'a community of *states* and interstate institutions': it was, emphatically and after evident deliberation, '*not* [one] of persons'.²⁹

A recent and forceful pronouncement of such a state-based — and what Martti Koskenniemi has called, with necessary precision, 'UN-directed'³⁰ — international community occurred in the political context when British Prime Minister Tony Blair

²⁷ *Ibid.* at 11–12. See, also, Koh, 'Why Do Nations Obey International Law?', 106 *Yale Law Review* (1997) 2599, at 2642 (that Franck 'sees a transnational actor's impulse to comply as deriving not from a multitude of cost-benefit calculations regarding particular rules, but more broadly rooted in the solidaristic "communitarian peer pressure" that nations feel as members of a club'); Simpson, 'Is International Law Fair?', 17 *Michigan Journal of International Law* (1996) 615, at 639 ('Franck emphasizes the sense of community and there is much talk of global community') and Tasioulas, Book Review, 1 *Edinburgh Law Review* (1997) 509 (reflecting on Franck's appreciation of 'a more communitarian self-image among humanity' as a 'pervasive feature of the contemporary world').

²⁸ *Legitimacy*, at 202. See, further, Wheeler, *supra* note 24 (that 'international society, like other organizations in the social world, is constituted by rule-governed actions').

²⁹ *Ibid.* (emphasis added). There is a clear sense that gratuitous or emotive incantations of the 'international community' are best avoided, in preference for more considered applications of the term: 'Analogies to tribes with ties of kinship, proximity and belief-system are helpful only metaphorically (as in 'the global village') or else are downright misleading. We are speaking of a community of *states* and interstate institutions, *not of persons*. While persons may be in fixed communion at many different levels and by virtue of many different forces, states are more limited in the ways they can relate to one another' (emphasis added).

³⁰ Koskenniemi, 'Repetition as Reform: Georges Abi-Saab *Cours Général de droit international public*', 9 *EJIL* (1998) 405, at 411. See, further, the discussion of the 'present UN community' as a distinct entity within the context of the jurisprudence issued by the International Court of Justice: M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989), at 409. Franck himself writes of the 'UN community' which 'sided firmly with Kuwait against Iraq' and he does so 'because most states, especially those in the Third World, feared that to do otherwise would open the floodgates of uncontrollable global change': *ibid.* at 23–24. In *Legitimacy*, at 226, Franck actually equates the United Nations with the 'community of states'.

addressed the Economic Club of Chicago in April 1999. There, Prime Minister Blair concluded that:

[w]e are witnessing the beginnings of a new doctrine of international community. By this I mean the explicit recognition that today more than ever before, we are mutually dependent, that national interest is to a significant extent governed by international collaboration and that we need a clear and coherent debate as to the direction this doctrine takes us in each field of international endeavour. Just as within domestic politics, the notion of community — the belief that partnership and co-operation are essential to advance self-interest — is coming into its own; so it needs to find its international echo.³¹

This theme — of countries ‘coming together’ — has been revisited by Prime Minister Blair in recent times when, in a speech to the annual Labour Conference in Brighton in October 2001, he declared that the ‘power of community is asserting itself’ on the world stage.³² The ‘power of the international community’ could, he said, ‘sort out the blight that is continuing conflict in the Democratic Republic of the Congo’: ‘[t]he state of Africa is a scar on the conscience of the world [and] if the world as a community focused on it, we could heal it’.³³ ‘Community’ has become the ‘lesson’ of ‘the financial markets, climate change, international terrorism, nuclear proliferation [and] world trade’ because ‘our self-interest and our mutual interests are today inextricably woven together’.³⁴ It is also the instrument through which justice (or, in deference to current parlance, ‘fairness’) is realized:

If globalisation works only for the benefit of the few, then it will fail and will deserve to fail. But if we follow the principles that have served us so well at home — that power, wealth and opportunity must be in the hands of the many, not the few — if we make that our guiding light for the global economy, then it will be a force for good and an international movement that we should take pride in leading.³⁵

It is this idea of co-operation (as opposed to simple co-existence) in an interdependent world that has become the rallying cry of those chanting the coming of an ‘international community’ in modern times: let us not forget the Declaration of President Bedjaoui of the International Court of Justice in the *Nuclear Weapons Advisory Opinion* (1996):

Despite the still modest breakthrough of ‘supranationalism’, the progress made in terms of the

³¹ Speech by Prime Minister Tony Blair to the Economic Club of Chicago on 22 April 1999. Located at www.fco.gov.uk/news/speechtext.asp?2316. See Evans, ‘Conflict Opens “Way to New International Community”’, *The Times* (London), 23 April 1999, 16. This excerpt has been described as ‘the clearest refrain’ of the doctrine of international community in the speech, and has been understood to mean that international relations is ‘a co-operative enterprise defined by the pursuit of shared goals and values: a *universitas*’: R. Jackson, *The Global Covenant: Human Conduct in a World of States* (2000) 356.

³² Blair, ‘A Moment to Seize: Let Us Reorder this World around Us’, *The Guardian* (London), 3 October 2001, 4.

³³ *Ibid.*

³⁴ *Ibid.* (or, elsewhere in the same speech, ‘the power of community, solidarity, the collective ability to further the individual’s interests’).

³⁵ *Ibid.*

institutionalisation, not to say integration and ‘globalisation’, of international society is undeniable. Witness the proliferation of international organizations, the gradual substitution of an international law of co-operation for the traditional law of co-existence, the emergence of the concept of ‘international community’ and its sometimes successful attempts at subjectivization. A token of all these developments is the place which international law now accords to concepts such as obligations *erga omnes*, rules of *jus cogens*, or the common heritage of mankind. The resolutely positivist, voluntarist approach of international law still current at the beginning of the [twentieth] century has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of states organised as a community.³⁶

Culled from their jurisprudential setting, these remarks are not too far removed from recent claims made that an international community is flourishing because, according to Prime Minister Blair, ‘[w]e are all internationalists now’.³⁷

Though state-based, it must be noted, the international community is now also being modelled in terms of international institutions such as the African Union, the European Union, the World Trade Organization and the North Atlantic Treaty Organization. Indeed, when one reflects further back into the hallowed annals of international jurisprudence, there are vivid incantations of ‘community’ as part of the rationalization for endowing international institutions with juridical personality: in 1949, for instance, the International Court of Justice accepted that the ‘subjects of law’ are ‘not necessarily identical in their nature or in the extent of their rights’ and that these depended upon (what the Court called) ‘the needs of the community’.³⁸ International institutions are, after all, inter-state creations, at the helm of which lies the United Nations:

Any new rules, however, will only work if we have reformed international institutions with which to apply them. If we want a world ruled by law and by international co-operation then we have to support the [United Nations] as its central pillar.³⁹

So far, so good. However, we note that it is a more ambitious ‘community’ which is endorsed in *Fairness in International Law and Institutions* (1995) when compared with that in *The Power of Legitimacy Among Nations* (1990). At first, there would appear to be no difference in the ‘community’ that Franck presents in 1990 and then again in 1995 — consider his handling in *Fairness* of the ‘cultural-anthropological aspects of

³⁶ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), ICJ Reports (1996) 268, at 270–271 (per President Bedjaoui).

³⁷ *Supra* note 31.

³⁸ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) ICJ Reports (1949) 174, at 178. See, further, the Individual Opinion of Judge Alvarez, to the effect that the conclusion of the Court ‘appears to me to be in accordance with the general principles of the new international law, the legal conscience of the peoples and the exigencies of contemporary international life—three essential factors which have to be taken into account in the development of international law’. ICJ Reports (1949) 174, at 190.

³⁹ *Supra* note 31. Prime Minister Blair had earlier argued that we need to focus ‘in a serious and sustained way on the principles of the doctrine of international community and on the institutions that deliver them’. These included the areas of global finance (and the G7), free trade (the World Trade Organization), the United Nations, the North Atlantic Treaty Organization, the environment (and the Kyoto process) and Third World debt.

rules' and the institution of symbolic validation as against states and inter-state institutions⁴⁰ — but there can be no mistaking the tenor or the difference of the message which is delivered in *Fairness*, where a radical version (or vision?) of the international community comes bursting to light: '[w]hat was an anarchic rabble of states has transformed itself into a society in which a variety of participants — not merely states, but also individuals, corporations, churches, regional and global organizations, bureaucrats, and courts — now have a voice and are determined to interact'.⁴¹

In orchestrating the international community in this way, Franck appears to have recast his earlier mould of what *constitutes* this community: the select and elite international community brought to life in *The Power of Legitimacy Among Nations* has now become a 'newly socialized community' where 'much of the attempt at interaction is discursive: an interlocutory process of exhortation, expiation, explanation and exposition'.⁴² At the same time, however, this is not an end in itself. Setting us on this path suggests that, in *Fairness in International Law and Institutions*, we are making our first fragile and tentative manoeuvres towards what has been called the *socialization of international society*, or 'the capacity [of societies] to form socially their social purposes'.⁴³ With these proclamations, it would appear that the states of the world are going global with a project inaugurated by the countries of Western Europe and committed to:

the business of trying to create a new form of society, a community, a *Gemeinschaft*, complementing and completing their national societies, in the spirit of culture which they had always made communally. It seemed then, as it seems now, that the self-transcending nature of the European Community, rudimentary and pre-democratic as it still is, has significance for the making of the new self-transcending international society of the whole world.⁴⁴

⁴⁰ *Fairness*, at 37 (of how the 'international community' responds to the violation of rules 'by rallying around the rule, as the Security Council and the International Court of Justice demonstrated when the Iranian regime encouraged the occupation of the U.S. Embassy in Tehran'). See, further, at 42, the discussion of the 'secondary rules of recognition', which 'manifest the normativity of interactions between states, providing evidence of a *community* which defines, empowers and circumscribes statehood, and supporting a public perception of the law's fairness'. Franck also places (at 45) considerable emphasis on the idea of associative rights and obligations and on the idea of statehood, 'which attach to all states by virtue of their status as validated members of the international community'.

⁴¹ *Ibid.*, at 477 (signifying, at 4–5, the 'progress' and 'maturity' of international law 'covering all aspects of relations among states, and also, more recently, aspects of relations between states and their federated units, between states and persons, between persons of several states, between states and multinational corporations, and between international organizations and their state members').

⁴² *Ibid.*

⁴³ P. Allott, *International Law and International Revolution: Reconceiving the World* (1989), at 8 (although Franck in *Fairness*, at 141, considers that the 'rise of international systems' — such as the Secretariats of the United Nations and its specialized agencies, the Commission of the European Union 'and many others' — has contributed to a 'centripetal socialization and bureaucratization'). See, also, Hudson, 'The Prospect for International Law in the Twentieth Century', 10 *Cornell Law Quarterly* (1925) 419, at 459 (to the effect that '[t]he nineteenth century made the peoples of the world into an international community. The twentieth century must convert that community into an organized society').

⁴⁴ *Supra* note 15, at xlv. Elsewhere (*ibid.*, at xxx) Allott considers the alternative view of 'international society, if there can be said to be any such thing', as 'nothing more than a rudimentary *society of states*, a

D *Multiple and Concentric Communities*

Are these differing accounts of the membership of the international community problematic, or are they reconcilable? To be sure, we are confronted here as much by a particular *context* as we are by a shift in *focus*. The shift in *focus* is clear: it is (and it will be argued that) the function (as opposed to the identity) of actors is what is driving part of the argumentation in *Fairness* when understood in the particular *context* of the discursive power and potential of international law. By its nature, this context has produced an increased crop of users of international law — increased because of the exponential spread outwards of entitlements and responsibilities to entities other than states — which has, in turn, facilitated interaction and defined the nature of relationships between and among these communities.

How we define these ‘multiple’ communities is then called into question, because Franck advises against depictions which prioritize a thematic dimension, so as to produce communities ‘of trade, of environmental concerns, of security, of health measures’.⁴⁵ This much is clear, as is his defence of the multiple and concentric communities which exist *within* the international community. Their time, it would appear, has come:

Communitas can be concentric and overlapping. Society is starting to perceive itself as a community of states and, simultaneously, as a community of persons. It is not a matter of abandoning concepts of state sovereignty but of recognizing in law what is increasingly evident in social and cultural practice: the striation of identity to accommodate multiple identifications.⁴⁶

These words present, in effect, an international community which is more inclusive and all-encompassing of those it considers its members, and which functions as a structured community of actors operating across state frontiers. However, without

barely socialized global state of nature’. Franck himself contends that the European Community ‘shows the way’ because ‘[i]ts Council of Ministers in Brussels operates as an organ of a community of states or governments; and the European Parliament at Strasbourg represents its other aspect, a community of persons’: *Fairness*, at 13. Andrew Linklater has written that within Western Europe, ‘some evidence of a transition from Westphalian to post-Westphalian principles of political organization is already evident’ and that this ‘new polity’ might ‘come to be regarded as a historical watershed within the evolution of international society as a whole’: *The Transformation of Political Community* (1998), at 204. See, also, the reference of Prime Minister Blair to Europe as ‘the most integrated grouping of all’: *supra* note 32.

⁴⁵ *Fairness*, at 12 and D. J. Harris, *Cases and Materials on International Law* (5th ed., 1998), at 6. Although, compare the position of Georges Abi-Saab, that ‘it is better, for the sake of precision, to speak of the degree of community existing within the group in relation to a given subject, at a given moment’: ‘Whither the International Community?’, 9 *EJIL* (1998) 248, at 249. Franck does, however, advocate the idea of a ‘cross-sectoral approach’, as in the case of the law of the sea, which embraces ‘different interests and [creates] the basis of *communitas* — in a matrix including shipping, fishing, mining, archipelagic waters, and naval transit’ and which made the negotiations on the Law of the Sea Treaty of 1982 ‘so fruitful’: *ibid.*, at 371.

⁴⁶ *Fairness*, at 13. For further reflections on this theme, consider R. J. Jackson, ‘International Community beyond the Cold War’, in G. M. Lyons and M. Mastanduno (eds), *Beyond Westphalia? State Sovereignty and International Intervention* (1995) 59.

more, it is not altogether clear what properties are being seized upon to define each of these communities: the cited paragraph makes reference to a 'community of persons', but, elsewhere in the work, the importance of other *communities* of actors is also discussed. It therefore becomes imperative to sift through the remaining evidence in *Fairness* to get a better sense of how these communities come into their own and why it is that they can be said to be members of a 'discursive' international community.

After a detailed appreciation of what Franck has written, and reading *Fairness* as part of the progression of work to which it belongs, it is thought that these communities can best be identified on the basis of the functions and competences of their respective members under international law.⁴⁷ These could be identified as the *legislators*, *addressees* and *adjudicators* of the system. This approach, not presented in these terms in *Fairness*, appears to have informed the outcome of recent deliberations within the International Law Commission on the nature of the international community. These deliberations took place in the context of the Commission's work on state responsibility, during which time states such as France, Mexico, Slovakia and the United Kingdom made the suggestion that the appearance of the phrase 'the international community as a whole' in the 2000 Draft Articles on State Responsibility⁴⁸ should have been made to read 'the international community of states as a whole'.⁴⁹ These states relied upon the formulation of peremptory norms of general international law contained in the Vienna Convention of the Law of Treaties of 1969, and its related convention of 1986, which make reference to 'the international community of states as a whole'.⁵⁰ In response, Professor James Crawford, the Special Rapporteur on State Responsibility, concluded that no qualification to this 'well-accepted phrase' was necessary because, as he wrote, 'states remain central to the process of *international law-making* and *law-applying*, and it is axiomatic that every state is as such a member of the international community. *But the international community includes entities in addition to states*; for example, the European Union, the

⁴⁷ This construction would seem to adhere to that advanced by Christian Tomuschat in his lectures at the Hague Academy of Public International Law: 'Every modern system of governance is operated through law-making, administration and adjudication. The question arises whether the international community can be called a system of governance regulated by a constitution in the sense just delineated'. See Tomuschat, 'Obligations Arising for States without or against their Will', 241 *RdC* (1993-IV) 195, at 216 (where, at 211, 'community' is described as a term 'suitable to indicate a closer union than between members of a society').

⁴⁸ See UN Doc. A/CN.4/L.600 (11 August 2000) (such as Article 43, which read: 'A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to: (a) that State individually; or (b) to a group of States including that State, or *the international community as a whole*, and the breach of the obligation: (i) specially affects that State; or (ii) is of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned') (emphasis added). The phrase also appeared in Articles 26, 34 and 41.

⁴⁹ Fourth Report on State Responsibility, UN Doc. A/CN.4/517 (31 March 2001) (Professor James Crawford), 11-12 (emphasis added). See, also, State Responsibility: Comments and Observations Received from Governments: Ser. Art 43, UN Doc. A/CN.4/515 (16 March 2001).

⁵⁰ 1969 Vienna Convention on the Law of Treaties, 8 ILM (1969) 679, Article 53. See, also, the 1986 Convention on the Law of Treaties between States and International Organizations or between International Organizations: 25 ILM (1986) 543, Article 53.

International Committee of the Red Cross, the United Nations itself'.⁵¹ In the Articles adopted by the International Law Commission in August 2001, no qualification was therefore added to the phrase 'the international community as a whole'.⁵²

E Legislators, Addressees and Adjudicators

Even accepting the division of communities into legislators, addressees and adjudicators, there must feature within this framework some margin for an overlap of functions — states, as legislators of international law, also happen to be its chief addressees⁵³ and states themselves no longer remain sole legislators within the system⁵⁴ but the main idea that is sustained is that the actors or persons within the system are defined in terms of their particular functions and capacities. Within the realm of the legislators of international law, for example, there is an undisputed acceptance of the continuing significance of states and of state consent: the chapter on just and unjust wars predicates rules such as those of the right of anticipatory self-defense upon 'state conduct'⁵⁵ and the laws of war are said to have benefited from 'considerable consensual development' — in other words, the consensus of *states*.⁵⁶ We learn of various judicial acknowledgements of 'the common normative practice of states engaged in war',⁵⁷ of how international law is 'discerned behaviourally'⁵⁸ at this point of time in the history of the 'community'. On economic fairness, Franck comments that 'it is by no means clear that international law has been designated *by the community of nations* to protect the government of a sovereign state against its own deliberate decision to act in a way which may well be unfair or imprudent'⁵⁹ — an

⁵¹ *Supra* note 49 (emphasis added). See, further, J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002) 40–41 ('The formulation [of "international community as a whole"] does not imply that there is a legal person, the international community. But it does suggest that, especially these days, the international community is a more inclusive one'). The integrity of the phrase — articulated by the International Court of Justice in the *Barcelona Traction Case*, ICJ Reports (1970) 3, at 32 (paragraph 33) — is thus preserved. See, also, Crawford, 'Responsibility to the International Community as a Whole', 8 *Indiana Journal of Global Legal Studies* (2001) 303, at 313–314 (noting that '[i]f the phrase "international community of states as a whole" is intended to be exclusive it no longer reflects the reality of the world').

⁵² UN Doc. A/CN.4/L.602/Rev.1 (26 July 2001).

⁵³ *Fairness*, at 245 (discussing the 'normative constraints on the belligerence of states').

⁵⁴ J. H. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (1998) and Cass, 'The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade', 12 *EJIL* (2001) 39, at 42. See, also, Crawford, *supra* note 51, at 313 ('[I]nternational organizations play a role in *identifying and applying* peremptory norms; they do not merely act as a forum in which states do so') (emphasis added).

⁵⁵ *Fairness*, at 251.

⁵⁶ *Ibid.*, at 253.

⁵⁷ *Ibid.*, at 254 (citing *The Paquete Habana*, 175 U.S. 677 (1900)).

⁵⁸ *Ibid.* As Franck has written before, international law is 'a branch of behavioural science, as well as of normative philosophy': Franck and Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force', 67 *AJIL* (1973) 275, at 303.

⁵⁹ *Ibid.*, at 445 (emphasis added).

unequivocal signalling of where the fundamental source of legal obligation continues to lie in the present period.

It is true that there are certain occasions when Franck suggests that the foundations of legal obligation arise from sources external to states themselves.⁶⁰ For example, his reading of the judgment of the Nuremberg tribunal is that it provides us with ‘a sense of law *above* state sovereignty, a “natural” law of humanity’s common custom, which manifests itself in the good conscience of mankind and in the normal (as opposed to the deviant) conduct of states’.⁶¹ However, this statement follows immediately after a recounting of the reasoning given by the tribunal, to the effect that the rules set down in the Hague Convention of 1907 had, by 1939, ‘been recognized by all nations, and were regarded as being declaratory of the laws and customs of war’.⁶² While the phenomenon of judge-made law is adverted to in places,⁶³ what Franck in truth is addressing in these passages is the broader question of the impact which international institutions can have on the creation and development of rules of international law: he considers, for instance, the role of the Security Council in ‘generating new penumbral “customary” or definitional law’⁶⁴ and writes of the ‘possibility for genuine systemic transformation’⁶⁵ occasioned by the organs of the United Nations in this regard. One could go even further — *pace* the experiences of the 1997 Ottawa Convention on Anti-Personnel Mines⁶⁶ and the 1998 Rome Statute on the International Criminal Court⁶⁷ — and mine the unexplored seams of non-governmental organizations and *their* relation to and impact upon the ‘sources’ of international law. Yet, the overwhelming sense derived from these accounts affirms how *potent* state consent still is, as much as it underscores the *potentialities* of ‘an organic institutional system [where] law plays precisely such a reality-altering role, thereby affecting, altering, and restricting the options for unilateral action by the participating states, no matter how powerful’.⁶⁸

Once international law has been made, it is communicated to its respective

⁶⁰ *Ibid.*, at 265 (‘It may be ventured that the legal system of the *community* of states has evolved in a direction diametrically the opposite of the law *within* states. Whereas national law has moved from natural to positive, international law has turned from an exclusively positivist jurisprudence to one which incorporates a modern secular version of natural laws and rights comparable in force to those which inspired the authors of the United States Constitution’).

⁶¹ *Ibid.*, at 263.

⁶² *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany* (1950), 467.

⁶³ *Fairness*, at 347 (described as a ‘profound fairness issue’ which ‘has not been resolved to general satisfaction within any state, so it is unlikely to be resolved readily in a global context’).

⁶⁴ *Ibid.*, at 266.

⁶⁵ *Ibid.*, at 286.

⁶⁶ 36 ILM (1997) 1507.

⁶⁷ 37 ILM (1998) 999.

⁶⁸ *Fairness*, at 285. Evidence of just how ‘organic’ the system is can be found in the multilateral action known as Operation Desert Storm (at 288) and the extent of the United Nations ‘intelligence capability of its own’ with respect to monitoring compliance with the economic sanctions that it imposes (at 292). See, further, the ‘far-reaching political, legal and logistical as well as fiscal consequences for the U.N. system’ heralded by the management of mandates for the United Nations operation in Somalia (at 303).

addressees: these are not, it is clear, confined to states, but include actors such as individuals, non-governmental organizations and multinational corporations.⁶⁹ The momentous content of one chapter,⁷⁰ on the fairness to persons through ‘the democratic entitlement’,⁷¹ is directed *in toto* towards the realization of the rights of individuals. Elsewhere, there is reference to the rights of guerrillas,⁷² and to the channelling of obligations to private parties.⁷³ The 1963 Vienna Convention on Civil Liability for Nuclear Damage⁷⁴ and the 1970 International Convention for Civil Liability for Oil Pollution Damage⁷⁵ are recounted in terms of the provisions they make for the strict liability for non-governmental actors. Furthermore, the idea of distributive justice (a central integer in fairness discourse) is considered from the perspective of ‘shareholders’ in ‘the process of governance by which distributive and conservational decisions about the resource are made’.⁷⁶

We move, finally, to *adjudicators* as part of the system of adjudication and the administration of fairness. When Sir Robert Y. Jennings makes reference to developments in the law of the sea and human rights, he uses the term ‘community’ to refer to national law systems, where, he writes, ‘one finds that there is always one court which is the supreme court and therefore the ultimate legal authority’.⁷⁷ The impression one obtains from this analogy is that, for the elements of an international community to be in place, adjudicators cannot be overlooked and their importance cannot be overstated. It is therefore necessary ‘for serious thought and consideration whether more could be done to ensure that the principal judicial organ of the United Nations is the supreme court of the international community, bearing in mind that a court which exists in isolation, however splendid, is not really in a position to be a supreme court in relation to other courts, as it does not have any formal relations with those other courts’.⁷⁸ These sentiments reflect a certain unease at the present state of affairs — or, we could say, the affairs of states! — as Jennings himself writes of the ‘extraordinary anomaly of an international community’ in which ‘international organizations play an increasing role and yet, even interstate organizations cannot be parties, or be made parties, to contentious cases before the supreme court of that community’.⁷⁹ That said, from the perspective of fairness discourse, there is a firm appreciation of the significance of adjudicators within the community: the advent of

⁶⁹ Indeed, the entire project on *legitimacy* is conceived in terms of *addressees* (in the normative sense), as the formulation adopted is of ‘the property of a rule or rule-making institution which itself exerts a pull towards compliance *on those addressed normatively*’: *Legitimacy*, at 16 and 24 (emphasis added).

⁷⁰ An earlier version of which was published as ‘The Emerging Right to Democratic Governance’, 86 *AJIL* (1992) 46.

⁷¹ *Fairness*, at 83–129.

⁷² *Ibid.*, at 281.

⁷³ *Ibid.*, at 336.

⁷⁴ 2 ILM (1963) 727.

⁷⁵ 9 ILM (1970) 45.

⁷⁶ *Fairness*, at 395.

⁷⁷ Jennings, ‘The International Court of Justice after Fifty Years’, 89 *AJIL* (1995) 493, at 504.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, at 504–505.

the World Trade Organization and the Understanding on Rules and Procedures Governing the Settlement of Disputes⁸⁰ evidences ‘the move to mandatory process legitimacy in application of the rules to disputes’ and ‘marks a (potentially) long step towards the infusion of genuine fairness into the global trading system’.⁸¹

3 The Imagined International Community: A Modest Critique

A *Fairness and Community*

Let us now turn to consider the application of ‘community’ within fairness discourse. At first, it should be said that fairness discourse is projected along parallel trajectories: the ‘process by which law is made in the international community’ as well as on ‘outcomes’, which are described as the ‘cardinal indicators of fairness’.⁸² The former of these two components travels under the rubric of *legitimacy*, or ‘right process’,⁸³ while the latter component is framed in terms of *distributive justice*.⁸⁴ It will be appreciated that these expositions of fairness discourse are conceived and presented in the specific terms of a ‘community’ — which supplies fairness with its meaning — rather than on a construction of fairness which adheres to some objective standard:⁸⁵ ‘[f]airness is not “out there” waiting to be discovered,’ writes Franck; ‘it is a product of social context and history’.⁸⁶ ‘Community’ for him is an essential part of that social context — he writes at one point that ‘the notion of a global community begins to reshape the terms of the discourse’⁸⁷ — so that our own assessments of fairness discourse are contingent upon our reception of ‘community’ and how it is worked into the argumentation of what it is to be (or not to be) ‘fair’.

Of course, we have considered above the possibilities of functional communities at issue in *Fairness*: to recap, communities of legislators, addressees and adjudicators figure with some prominence in one reading of fairness discourse. Another, nuanced

⁸⁰ 33 ILM (1994) 112.

⁸¹ *Fairness*, at 434.

⁸² *Ibid.*, at 351 (‘[o]utcomes’, suggests Franck at *ibid.*, ‘also provide a measure of the fairness of the process by which they are fashioned’).

⁸³ *Ibid.*, at 477.

⁸⁴ *Ibid.* (‘Justice-based claims generally focus on distributive modalities and advance reasons for change in existing entitlements and patterns of distribution. Justice-based claims seek both release from improvident obligations and mitigation of the consequences of wrong-doing or bad choices. They may sacrifice expectations of stability in exchange for a new and better order’.) Franck thus departs from one of the strategies in J. Rawls, *A Theory of Justice* (1971), which he interprets as follows: ‘It is the *Process* by which principles of justice are defined which assumes pivotal importance. What the principles produce in the way of “goods” is not irrelevant, but secondary’: *Legitimacy*, at 215.

⁸⁵ For assessments of ‘fairness’ on the basis of internal versus external criteria, see C. Albin, *Justice and Fairness in International Negotiation* (2001), at 8–12. Franck affirms this point when he writes: ‘There are no objectively fair answers. All one can do is to refer the choices to a process of convergence involving states and persons’ (*Fairness*, at 370).

⁸⁶ *Fairness*, at 14.

⁸⁷ *Ibid.*, at 371.

reading, however, reveals an insistence on the idea of the ‘international community’ as a separate political force, which injects an additional dynamic into the geopolitical realities of international relations.⁸⁸ To be sure, in its acute form, this community is not developed as a ‘separate juridical entity’ in *Fairness*: it has no legal personality ‘over and above, and distinct from, the particular international organizations in which the idea of it may from time to time find actual expression’.⁸⁹ Still, it remains a delicate enterprise which Franck is undertaking because of the impact on international law of a political force known as ‘community’ operating in all spaces of legal activity: legislation, application and adjudication. We therefore proceed on the basis of the *specific applications* of this ‘community’ which occur in fairness discourse. Here, we discover that Franck has imagined a community of essentially statist design — *essentially* because Franck is as conscious of present and future realities (where the state will continue to assert itself) as he is of the threat which a state-centric community poses to the project of ‘fairness’ which he is pursuing within the global realm. In the process, the ‘community’ of states comes to be imagined *via* the mechanisms of disaggregate fairness and international institutions. However, as this critique indicates, these mechanisms do not come without their share of difficulties, because the invocation of ‘community’ seems somewhat misplaced in certain moments and its manifestations are not as clear or as consistent as are made out at other times.

B *Specific Applications*

Let us commence with a brief portrait of how the ‘international community’ is summoned in the pages of *The Power of Legitimacy Among Nations* (1990), where Franck wrote of ‘traces of community in a world of nations’⁹⁰ and of ‘the metaphorical negotiation of representatives of *governments*’⁹¹ convening behind the veil of ignorance to reach just conclusions on such dilemmas as non-intervention in situations of moral or humanitarian alarm. As observed above,⁹² notwithstanding certain departures from this formulation of ‘community’ when we reach fairness

⁸⁸ Note the conclusion of Professor James Crawford in his work on state responsibility, that the use of the phrase ‘international community’ is ‘not, however, intended to imply that there is a legal person, the international community. Clearly there is not. But while particular organs or institutions (e.g. the principal organs of the United Nations) may represent community interests, generally or for particular purposes, their failure to act in a given case should not entail that a state in breach of an obligation to the community as a whole cannot be called into account’: *supra* note 49.

⁸⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971) 56 (per Sir Gerald Fitzmaurice). See, also, Crawford, *supra* note 51, at 306 (‘There is no legal entity by [the] name [of “international community”]’).

⁹⁰ *Legitimacy*, at 182. And, of course, the revealing statement cited above, that ‘[w]e are speaking of a community of *states* and interstate institutions, not of persons’: at 202. See, also, Franck’s formulation, at 20, of ‘an international “community” of states’.

⁹¹ *Ibid.*, at 221.

⁹² *Supra* notes 29 and 41 (and accompanying text).

discourse five years later, there is no shortage of references in *Fairness* to the ‘community of states’ and ‘the states which constitute the world community’ (fairness to persons);⁹³ to the ‘international community’ of ‘global and regional communities’ (fairness to peoples);⁹⁴ to the ‘community of states’ (just and unjust wars);⁹⁵ and to the ‘international community of states’ or ‘community of nations’ (economic fairness).⁹⁶

To demonstrate this emphasis, it is appropriate for us to conscript an example which Franck himself uses in the chapter on fairness to peoples. There, Franck maintains that a claim of peoples to self-determination ‘counterposes the following: (1) the interests of the claiming minority; (2) the interests of other groups directly affected, the majority and/or other minorities and (3) the interests of the international community’.⁹⁷ This itemization is quite telling because one would think — *pace* the expansive understandings of the ‘international community’ which litter other aspects of fairness discourse⁹⁸ and which have informed our earlier discussions — that this ‘community’ incorporates minorities as well as ‘other groups directly affected’. However, in this context, Franck appears to have awarded the idea a more precious, precise and distinct meaning, one that is quite separate from minorities and other groups and different in tone to the ‘international community’ when encountered in its rhetorical sense. On this reading, the notion of an international community is pressed into service to reflect a more particularized set of considerations before these are weighed in as a quotient of the fairness equation. When one reads on, one finds that the term is used to refer to ‘innocent bystanders’ or — since the interests are defined as those of ‘peace and good order’⁹⁹ — states. This interpretation is affirmed by the way in which the ‘international community’ is shaped at frequent intervals in *Fairness*: on judicial fairness, for example, we are informed that the ‘indispensable party shield’ raises ‘few problems of fairness, as long as the Court is willing to allow interested states sufficient latitude to intervene on their own initiative’¹⁰⁰ and, on administrative fairness, ‘the diminished appetite of the international community for tackling potentially costly and nettlesome tasks in places which do not directly affect the *members*’ national interests’.¹⁰¹ His rejection of thematic communities — mentioned earlier¹⁰² — occurs because the different regimes of environment, trade and human rights intersect within the infrastructure of the *state*.¹⁰³ Consider what advances these statements make on the claim made in 1990 that the Convention on the Elimination

⁹³ *Fairness*, at 84.

⁹⁴ *Ibid.*, at 146.

⁹⁵ *Ibid.*, at 256.

⁹⁶ *Ibid.*, at 413.

⁹⁷ *Ibid.*, at 145–146.

⁹⁸ See, in particular, *supra* note 41.

⁹⁹ *Fairness*, at 146.

¹⁰⁰ *Ibid.*, at 343.

¹⁰¹ *Ibid.*, at 180 (emphasis added).

¹⁰² *Supra* note 45.

¹⁰³ *Fairness*, at 12.

of All Forms of Discrimination against Women¹⁰⁴ introduced an ‘element of ambiguity’ in its formulations because ‘[s]uch accommodation between justice and legitimacy is equally — perhaps *more* — necessary to the survival of a secular community of states’.¹⁰⁵

With each of these examples — which reflect a broader pattern of the prioritization of a statist community operating within fairness discourse — the sense given is that the community is the sum of its parts but also that, in political terms, *it is more than the sum of its parts*: we are witnessing a situation in which states are indeed fashioning themselves into something akin to a community. The idea is to conceive the community beyond its discursive incarnation towards a system of shared ideals, policies, values. If such be the case, the upshot of these deliberations — where fairness discourse is conditioned by a community that has itself been conditioned by states — would suggest that the power and potential of fairness discourse to deliver a universal series of ‘just deserts’ (no mean task by any standard) is rather limited. Operating within such structural modalities, for instance, how would this ‘community’ respond to fundamental criticisms of the *discipline* of international law, pointing as they do to the ‘arbitrariness of traditional categories of analysis’ and suggesting that ‘in reality sex and gender are an integral part of international law in the sense that men and maleness are built into the structure of international law and that to ignore this is to misunderstand the nature of international law?’¹⁰⁶ How, if at all, would this ‘community’ so-framed engage such criticism? How is it engaging such criticism? The concern is that, at base and for all its virtue and promise, fairness discourse becomes the bidding agent of this community of states, an elaborate scheme in which certain values are professed but where the essential realities remain unchanged. Perhaps fairness discourse affords an opportunity for this community to create impressions of integrity and justice when, in fact, it prejudices the very interests it is seeking to protect and promote?¹⁰⁷

To his credit, Franck has anticipated the problem: as far back as 1990, he offered a hint — and it was no more than a hint — that conceiving the analysis in terms of governments and states was ‘perhaps simply the wrong way [of thinking] about

¹⁰⁴ 19 ILM (1980) 33.

¹⁰⁵ *Legitimacy*, at 238.

¹⁰⁶ H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000), at 18–19. Simpson considers, *pace* Charlesworth, Chinkin and Wright, ‘Feminist Approaches to International Law’, 85 *AJIL* (1991) 613, that ‘[i]t is remarkable’ that ‘the most innovative critique of this process is ignored altogether’: *supra* note 27, at 641.

¹⁰⁷ Henderson, ‘British Fair Play Beats U.S. Golf’s Rough Justice’, *The Times* (London), 12 January 2001, at 15 (claiming that statistical evidence has demonstrated that the most widely used golf handicapping system (of the United States Golf Association) has been shown to be a handicap to less accomplished players and that, contrary to its intentions, the system discriminates in favour of better golfers). For the evidence, see Kupper, Hearne, Martin and Griffin, ‘Is the USGA Golf Handicap System Equitable?’, 14 *Chance* (Winter 2001), 30 (www.public.iastate.edu/%7Echance99/141.kupper.pdf). For a study to this effect, see Jochnick and Normand, ‘The Legitimation of Violence: A Critical History of the Laws of War’, 35 *Harvard International Law Journal* (1994) 49.

principles of justice in the international community'.¹⁰⁸ He builds upon this reflection in his 1995 work, where at least two mechanisms have been engaged to withstand claims that fairness discourse is not radical — or, at least, not radical enough in its declared pursuits and ambitions. These mechanisms are predicated on the notion that the statist paradigm in and of itself represents 'an imperfect measure of fairness',¹⁰⁹ and so it is that Franck concentrates part of his energies on (1) disaggregate fairness and (2) international institutions. Both of these mechanisms are summoned to mete out fairness in the international sphere, although, in the end, each mechanism serves to reinforce the idea of how much the state remains (and could forever remain) the basic unit of organization. Let us now deal with each of these mechanisms in turn.

1 *Disaggregate Fairness*

Disaggregate fairness is worked into the thesis on the basis that aggregate fairness — fairness between states — is an insufficient instrument for actualizing justice within the international system. In the passage that follows, we learn of one manifestation of disaggregate fairness, which is 'measured in terms of effects on individuals':

[t]he difficult problems of measurement inherent in all attempts to measure disaggregate impacts are compounded, in the special case of the environment, by claims of *intergenerational* fairness which seek to take into account the impact of various environmental policy choices and strategies on the 'rights' or 'goods' of future generations.¹¹⁰

For Franck, this recasting of 'community' in environmental cases does not make fairness discourse impossible: what it does is to make it 'complicated' because 'its matrix is so variegated, including poor and rich states, poor and rich persons, parsimonious and spendthriftly consumers and, most challenging of all, future as well as present generations'.¹¹¹ Disaggregate fairness therefore becomes the means by which the original community of states, very much at work in 1990, is now caught, for the purposes of fairness discourse, gyrating further and further outward to the point where it is in danger of becoming (in a phrase that Franck himself uses) a 'community of "everyone"'.¹¹²

Context aside, at the point of contact with disaggregate fairness in the passage quoted above, Franck introduces the additional consideration of an intertemporal dimension to 'community' that suggests engagement with the potential rather than

¹⁰⁸ *Legitimacy*, at 221–222. See, further, *supra* note 85, at 12. Cf. B. Barry, *Justice as Impartiality* (1995) 51.

¹⁰⁹ *Fairness*, at 371.

¹¹⁰ *Ibid.*, at 371. 'Disaggregated fairness' is a form of fairness which surfaces earlier (*ibid.*, at 12) and embodies 'the difference between fairness to states and fairness to persons. These may coincide, or they may not'.

¹¹¹ *Ibid.*, at 353. This idea, of the intergenerational dimension of fairness discourse, appears earlier (at 79): 'Justice, as an augmentation of law, is also needed to protect those interests not ordinarily recognized by traditional law, such as the well-being of future generations and the "interests" of the biosphere' and (at 351): 'are persons — those now alive and those yet to be born — to be legally entitled to a quality of life which is globally applicable and, where necessary, globally implemented and enforced?'

¹¹² *Ibid.*, at 15.

the full problematique of disaggregate fairness as a workable concept within our world. As it is constructed here, it also betrays an anthropocentric understanding of the natural environment (which, it must be noted, has not been deemed to have its own intrinsic value; instead, its worth is tied to present and future generations of the human species).¹¹³ This means that while the idea of distributive justice has been developed as a *value* of this community, there is little to assist us in understanding how these values are configured and how, in real terms, each of these values relate to each other.

Even if we were to have been apprised of the relevant constitutional and operational dynamics on these matters, the containment of intergenerational fairness — an idea ripe for exploration at this level of debate — to the natural environment is never explained. Just why is it that ‘intergenerational fairness’ is activated ‘in the special case of the environment’¹¹⁴ and not elsewhere? Why are the ‘generations’ thereby invoked generations of the future and not also generations of the past? If a ‘community’ is being conceived in intergenerational terms, and, indeed, has the power to conceive of itself in such terms, then why cannot the ‘international community’ move to ‘[a]ffirm that the slave trade is a unique tragedy in the history of humanity, particularly against Africans — a crime against humanity which is unparalleled, not only in its abhorrent barbaric feature but also in terms of its enormous magnitude, its institutional nature, its transnational dimensions and especially its negation of the essence of the human nature of the victims’¹¹⁵? Or is it a question of *which* international community is seeking to pass judgement on this period of human history? If the ‘power of community’¹¹⁶ can be mobilized for the sake of future and anonymous generations, can the same power not extend to determining the history of previous and known generations? If it can, then what is the measure of the power awarded to the present international community to conceive of and legislate *its* value system in the name of other generations? If not, then what is the measure of the power which denies the international community the capacity to dispense fairness to previous generations?

¹¹³ See, generally, Redgwell, ‘Life, The Universe and Everything: A Critique of Anthropocentric Rights’, in A. Boyle and M. Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996) 71, at 72–73. See, further, the critique that Franck’s analysis ‘loses sight of the idea — or, more to the point, just never gets so far as to entertain it — that species of flora and fauna have a value quite independent of their value as goods to be distributed in fulfillment (whether instrumentally or constitutively) of human interests, and that this independent value ought to figure prominently in justifying and determining the content of legal regimes for their preservation’: Tasioulas, ‘International Law and the Limits of Fairness’, 13 *EJIL* (2002) 993.

¹¹⁴ *Fairness*, at 371.

¹¹⁵ Proposal of African states for consideration at the 2001 United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance and reported in McGreal, ‘Britain Accused Over Slave Trade’, *The Guardian* (London), 21 May 2001, at 2.

¹¹⁶ *Supra* note 32.

2 International Institutions

We are, it would seem, on much firmer ground with contributions to a genuine 'community' made by international institutions: these made a regular appearance in 1990 but have been awarded a more central and commanding role in fairness discourse, where Franck has made them an integral aspect of his mission (hence the title of the book) and allocated two parts of the book to questions of fairness and institutional power and the institutions of distributive justice.¹¹⁷

The prevalence given to international institutions cannot be overstated in this discourse because one is left with the distinct impression that it is through such entities that an 'international community' in any honest sense of the term can be imagined, asserted or realized.¹¹⁸ To be sure, there are institutions and there are institutions: in terms of history, composition, responsibilities and operation. Taking the United Nations as a whole, we are introduced with care to its organs and personnel: the office of the Secretary-General is itself an important piece of the overall puzzle because, as Franck intimates, 'this role has been vouchsafed not to a benign neutral government but to the senior bureaucrat of the international community'.¹¹⁹ At another point, the Secretary-General is announced as 'the voice of world conscience'.¹²⁰ However, witness the important considerations which bear down on that office: the Secretary-General is regarded within the institution as the 'servant' of the member states of the United Nations (and not of some spirited international community);¹²¹ the dominant position of the permanent members of the Security Council ('which naturally may prefer to see the [United Nations] as a continuing conference of governments and not as an independent actor in the global system');¹²²

¹¹⁷ *Fairness*, at 351 (referring to 'the burgeoning role of international institutions in conflict resolution' and *ibid.*, at 354, of fairness arising 'as an issue in the evolution of institutions necessary to the application and implementation of a new norm'). It has been noted that historians of international relations 'have not been paying sufficient attention to international organizations': A. Iriye, *Global Community: The Role of International Organizations in the Making of the Contemporary World* (2002), at 4. Compare the contributions of political scientists on international organizations: E. Luard, *International Agencies: The Emerging Framework of Interdependence* (1977) and H. Jacobson, *Networks of Independence: International Organizations and the Global Political System* (2nd edn, 1984).

¹¹⁸ Franck asserts: 'The past few decades have seen a radical reconfiguration of international processes': *ibid.*, at 173 and credits the initiatives of multilateral lending institutions such as the International Bank for Reconstruction and Development and the International Monetary Fund over and above bilateral aid programmes as part of the drive of the 'international community' to 'create a number of entitlement programs aimed at reducing the gap between the economic power of developed and developing countries': *ibid.*, at 416 and 418–420. See, further, *ibid.*, at 352.

¹¹⁹ *Ibid.*, at 174–175. See, further, Crawford, 'The Charter of the United Nations as a Constitution', in H. Fox (ed.), *The Changing Constitution of the United Nations* (1997) 3, at 10.

¹²⁰ *Ibid.*, at 181.

¹²¹ *Ibid.*, at 176. Although Secretary-General Perez de Cuellar himself described the United Nations as 'an organization of governments' and that it would be 'against our philosophy to be in touch with the enemies of governments': UN Press Release SG/SM/4127 (27 April 1988), 6. Consider the later reference, *ibid.* at 209, of the role of the Secretary-General 'as "humble servant" of the political organs [of the United Nations]': UN Press Release SG/SM/4752 (18 May 1992), 7.

¹²² *Ibid.*, at 177.

and the normative constraints of the office ('as the executive head of an organization of sovereign states, he cannot be truly neutral about a non-negotiable principle of the organization: the inviolability of boundaries, especially in the face of *de facto* changes wrought through the use of force').¹²³

Shifts taking place in the 'global power structure'¹²⁴ since the end of the Cold War have meant that it is another 'institution' that has taken centre-stage in recent years, and the evaluations of the performance of the Security Council force us to question just how far this institution has come in terms of developing its own identity and traditions — as well as its capacities for representing the construct known (at least in these treatments) as the 'international community'. The discussion occurs against the background of the contributions made to 'community' by other institutions, such as the office of the United Nations Secretary-General.¹²⁵ Here, the position taken is that the political and moral authority of the Security Council is such that '[i]ncreasingly, although the Charter does not require it, even the use of force in individual or collective self-defense is being subject to authorization — normally *prior* authorization — by the Security Council'.¹²⁶ However, at another point Franck alleges that the Security Council 'is not a forum conducive to fairness discourse but seems driven almost entirely by short-term policy'¹²⁷ and it is this claim above all which, it seems to me, comes scrambling closest to the grain of truth.

If we probe into the reasons for this — reasons apart from but allied to the composition of the Council¹²⁸ — we are sure to find that the Council is still some distance from cultivating its *own* corporate persona in the global body politic, let alone acting as the executive 'representative' of an erstwhile 'international community'. Its performance since the end of the Cold War — where, for example, the 'fairness consensus of the international community'¹²⁹ during the Lockerbie saga is located in the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the

¹²³ *Ibid.*, at 194.

¹²⁴ *Ibid.*, at 198.

¹²⁵ Or, for that matter, the North Atlantic Treaty Organization: the idea of 'community' and its representatives is specifically invoked by Nigel White in the context of his assessment of Operation Allied Force: 'It is easy to invoke the "international community" to legitimate a military intervention, but who or what is the "international community"? Do 19 democracies acting in concert represent the international community? The fact that NATO is composed of liberal democracies does not by itself suggest that it is the fulcrum of the international community, although there has been a significant trend in the international community towards democratic government': 'The Legality of Bombing in the Name of Humanity', 5 *Journal of Conflict and Security Law* (2000) 27, at 35. A more favourable account is provided of the creation, in 1973, of 'an environmental protection *system*, with the [United Nations Environmental Programme] at its core, which approaches the problems of the biosphere holistically, and which has institutionalised the impetus for change in a continuing, comprehensive process': *Fairness*, at 359.

¹²⁶ *Fairness*, at 313.

¹²⁷ *Ibid.*, at 232.

¹²⁸ *Legitimacy*, at 176 ('[N]ations not endowed with the veto do consider it an affront to the integrity of the system, and that perception may be growing').

¹²⁹ *Fairness*, at 242.

Safety of Civilian Aviation¹³⁰ and not in the responses of the Security Council — brings a sobering influence to our reading of the claim that: ‘While the Security Council is a body composed of states, the members function collegially, rather than as prince-electors of the Holy Roman Empire. The Council is not merely a meeting of sovereign states. It has the collective power to take decisions. When it acts, it may pre-empt powers ordinarily exercised by members of the United Nations system as incidents of their sovereignty’.¹³¹

We need not despair, though: if the Security Council has taken its time to find its stride and to develop principled applications of its own considerable powers, then it has also been engaged in creating offspring institutions which do seem to have an enhanced sense of ‘international community’ about them. How else could one rationalize recent developments with the office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia?¹³² For whose ‘community’ is the Prosecutor so hard at work?¹³³ And which community’s ‘justice’ is being served in the process? It is once we turn to these agonizing questions that we begin to recognize the fundamental role of institutions in *constituting* a true ‘international community’, and it is for this reason that it has been said that international lawyers ‘are not the servants of governments but of international society’ as they are ‘servants not of power but of justice’.¹³⁴

It is in this ambitious cause that another institution — the General Assembly of the United Nations — has made its presence felt: its campaign for a New International Economic Order has, according to Franck, ‘laid the foundation for a widening communitarian consensus that in the world, as in the state, the happenstance of affluence carries a responsibility to alleviate the condition of the less fortunate’.¹³⁵ It is how Franck structures the argument here — note how the ‘world’ is rallied to good effect in this excerpt and held out in contrast to the ‘state’ — that frames the competing propositions we are dealing with. So, it is institutions which have become the engines of change — they are the do or die of an authentic international community — and which are needed to make this ‘community’ matter: the General Assembly is, after all, where the ‘initiative’ of *res communis* ‘ushered in an entirely new fairness discourse’¹³⁶ and where ‘a new process for making international law’¹³⁷ was introduced in July 1994 (in the context of deep-sea bed and its subsoil). Furthermore,

¹³⁰ 974 UNTS 177.

¹³¹ *Fairness*, at 284–285. To further effect, see M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (3rd ed., 2001) xiii (describing the politics of the United Nations as ‘no more edifying than the politics of many of its members’).

¹³² Hoyos, ‘Annan Hails Victory for International Justice System’, *Financial Times* (London), 30 June–1 July 2001, at 6.

¹³³ Wright and Dempsey, ‘Croatia Left in Disarray by Demands over War Crimes’, *Financial Times* (London), 9 July 2001, at 18.

¹³⁴ Allott, ‘State Responsibility and the Unmaking of International Law’, 29 *Harvard International Law Journal* (1988) 1, at 29.

¹³⁵ *Fairness*, at 415.

¹³⁶ *Ibid.*, at 395.

¹³⁷ *Ibid.*, at 397.

in the wake of the intervention over Kosovo in the spring of 1999 — occurring much later than the publication of *Fairness* but no less pertinent to the case Franck is making — there was a current of opinion which proposed that ‘when combined with its undoubted competence in matters of human rights *and its legitimate claim to represent the international community*’ it was the General Assembly that was ‘the natural alternative when the Security Council was deemed to have failed to take adequate action’.¹³⁸ Given this context, it is small wonder that, in the manifesto that passes as the final chapter of *Fairness*, he situates the future of fairness discourse in the halls of the General Assembly: in the closing pages of his book, he announces that ‘successful fairness is unlikely to be perceived as occurring in forums which are composed unfairly’¹³⁹ and sets forth his ‘modest proposal’ for a second chamber of the United Nations General Assembly based on universal suffrage.¹⁴⁰

C Institutionalization of Community

From these transcriptions, we also learn that sovereignty has ‘historically been a factor greatly overrated in international relations’¹⁴¹ and that, ‘far from being absolute, [sovereignty] is a form of community-sanctioned stewardship’.¹⁴² These, indeed, are profound and far-reaching statements which, in the course of things, will force a fundamental rethinking of our operating assumptions on states and on their relationship with international law and the wider world. However, in contrast with the above positions on the possible constitution of an international community and on the present state of sovereignty, it is appropriate to examine whether there is more life in the old sovereign yet — and that is through its propensities to close ranks with other sovereigns and create the political dynamic of a ‘community’ of sovereigns. It could well be that, faced with the daunting and ceaseless challenges which brace the contemporary age, sovereignty has found a formidable new form of asserting itself, and that is through the beloved institution of community.

When we read *Fairness* from the perspective of this ‘imagined’ and meaningful community, it becomes clear that the intellectual commitment exerts itself most in terms of a state-based community. Hence, the International Court of Justice is said to represent ‘such a major advance in the twentieth-century progress towards the *institutionalizing of a community of states*’,¹⁴³ and we learn of an international trusteeship system ‘grounded’ in the notion of ‘limited authority conferred on a few states to administer territories on behalf of the *international community of states* which

¹³⁸ *Supra* note 125, at 42 (emphasis added).

¹³⁹ *Fairness*, at 479 (and, at 483: ‘The increasingly heard charges of illegitimacy, injustice and unfairness must be addressed’). A premium is placed by Franck on the notion of ‘structural impartiality’ for instance: *ibid.*, at 319–327.

¹⁴⁰ *Ibid.*, at 483–484 (with the other chamber retaining its ‘Westphalian “one state, one voice” principle’). See, further, the comparison made between the General Assembly and the World Bank as a ‘problematic’ which ‘has become central to the discourse about restructuring [the] Global Environmental Facility’: *ibid.*, at 355.

¹⁴¹ *Ibid.*, at 3.

¹⁴² *Ibid.*, at 432 (specified in the context of resource entitlements under the 1982 Law of the Sea Convention).

¹⁴³ *Ibid.*, at 316 (emphasis added).

retain their legal interest in common'.¹⁴⁴ The entire content of one chapter, written with exquisite detail, is devoted to the topic of 'equity' as the flagship of fairness, but takes place in the context of an unadulterated state-centric setting.¹⁴⁵ There is, however, no clearer formulation of this line of thinking than that which appears in *The Power of Legitimacy Among Nations* (1990),¹⁴⁶ where 'the system of states' is described as 'the basic contemporary circumstance of the international community'.¹⁴⁷

It is not, I do not think, that we are faced with a historical phenomenon or even an inevitable community that makes Franck regard or speak of it in this way. It is that there are sufficient proofs that can be marshalled to make the case for a political force known as an international community. In effect, Franck is tracing the evolution of the *institutionalization* of community and providing us with a modern portrait of the stage at which we find ourselves in this process and how far it is we still have to go. Furthermore, one senses that Franck writes with a degree of admiration and approval of the developments within state relations which inspired the introduction in 1971 of the Generalized System of Preferences as an exception to the 'most favoured nation' system¹⁴⁸ and the conclusion of the 1991 Madrid Protocol on Environmental Protection to the Antarctic Treaty.¹⁴⁹ There is also some appreciation that this 'statist' conception of community is not as exclusive as it at first might seem: on the *Gulf of Maine* case (1984), Franck writes that 'both governments gratefully accepted the imposed solution [of the International Court of Justice] and still felt free to protest those parts of the decision which disappointed the highest expectations of some of their constituents'.¹⁵⁰ To this, one could perhaps add that the actual litigation of the case — on the delimitation of the continental shelf as well as the superjacent fishery zone between Canada and the United States of America — itself involved states acting on behalf of sections of their respective citizenries. It is the current system that has proved workable and which needs to be defended, Franck argues in a subsequent work, from the disruptive and destabilising forces of the future.¹⁵¹

Far too often we have come to chide the institution of a community of 'statist' orientation — and, perhaps, at times with good reason — without stepping back and thinking how much of a feat it is that we can speak of a 'community' in this context of

¹⁴⁴ *Ibid.*, at 405 (emphasis added).

¹⁴⁵ *Ibid.*, at 47–80. See, further, the 1992 Framework Convention on Climate Change, 31 ILM (1992) 849.

¹⁴⁶ *Supra* note 29.

¹⁴⁷ *Legitimacy*, at 233. And, at 226: 'The priorities and sensibilities of rulers, not the people's shared (or intersecting) notions of justice, usually frame the contents of the rules and also have the most say in determining their compliance pull'. See, also, Koskenniemi, 'The Future of Statehood', 32 *Harvard International Law Journal* (1991) 397.

¹⁴⁸ *Fairness*, at 426.

¹⁴⁹ 30 ILM (1991) 1455: *ibid.*, at 404 (which represents 'a modified notion of *res communis* in which, in effect, the most active participants recognize an obligation to preserve and protect the common area for the benefit of all' such that '[t]he stewardship of Antarctica's resources thus appears to be in the hands of a small proportion of states administering them for the benefit of the entire international community') (emphasis added). See, also, the application of *res communis* in the context of the 1982 Law of the Sea Convention: *ibid.*, at 430–432.

¹⁵⁰ *Ibid.*, at 318.

¹⁵¹ *Infra* note 165.

all! Recall, for good measure, how impossible it seemed at the end of the Second World War for an international community to be created ‘out of units so fantastically disparate as China and Albania, Norway and Brazil!’¹⁵² Some sense of perspective — of historical proportion — is required in order to make our investigations meaningful and productive. How far have we come since the ‘two odes in honour of hopeless hope’¹⁵³ of the 1970s — the Declaration on the Establishment of A New International Economic Order and the Charter of Economic Rights and Duties of States?¹⁵⁴ Or the ‘two sinister epics of international mythology’,¹⁵⁵ the Definition of Aggression and the Declaration on Principles of International Law Concerning Friendly Relations Among States? What does it mean that *states* concluded the 1998 Rome Statute of the International Criminal Court, which affirmed in its preamble that ‘the most serious crimes of concern to the international community as a whole must not go unpunished’?¹⁵⁶ Is there no ‘social capital’¹⁵⁷ between and among states of which we can speak? Are we destined to agree with Philip Allott, that ‘[t]he essence of the international unsocial process is conceived as the interactive willing and acting of governments in relation to each other (so-called diplomacy) and physical conflicts of differing degrees of violence between the state-systems or sponsored by the state-systems (so-called war or armed conflict)’?¹⁵⁸

D Rhetorical and Imagined Communities

It is when we compare the rhetorical and imagined communities at work in *Fairness* that we begin to get some sense of how ‘deep’ each of these respective communities are. When used in its rhetorical sense, we have seen how the idea of community is developed as the venue for discursive interaction, where ‘[t]he adoption of norms seems to be the price which the individual actor — person or state — must pay to participate in an interactive community’.¹⁵⁹ This is what is called the ‘newly socialized community’ where ‘[t]he need to explain, to expatiate, is the deference which political power pays to the social potential of law’,¹⁶⁰ and international law becomes the vital medium for these exchanges.¹⁶¹ Dialogue becomes the critical essence of community:

¹⁵² E. H. Carr, *Nationalism and After* (1945) 43.

¹⁵³ *Supra* note 15, at xlii.

¹⁵⁴ The latter of these — General Assembly Resolution 3281 (XXIX) — is described by Franck as ‘non-binding but influential’ and, critically given present discussions, see Art. 2(1): ‘Every state has and shall freely exercise full sovereignty, including possession, use and disposal, over all wealth, natural resources and economic activities’. This is criticized on the basis that it conflicts with the ‘rights of the international community to impose some degree of stewardship on nations’ regulation and use of their own resources’: *Fairness*, at 446. See, also, *ibid.*, at 413–437.

¹⁵⁵ *Supra* note 15, at xliii.

¹⁵⁶ 37 ILM (1998) 999 (emphasis added).

¹⁵⁷ I draw the term from the recent study of R. D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (2000). See, also, ‘An Interview with Robert D. Putnam’, 6 *Journal of Democracy* (1995) 65.

¹⁵⁸ *Supra* note 15, at 244 (§13.105 (4)).

¹⁵⁹ *Ibid.*, at 477.

¹⁶⁰ *Ibid.* See, *supra* note 42 (and accompanying text).

¹⁶¹ Kritsiotis, ‘The Power of International Law as Language’, 34 *California Western Law Review* (1998) 397, at 409. See, further, Reisman, ‘International Lawmaking: A Process of Communication’, 75 *Proceedings*

community is about 'who has a voice and how are decisions reached'¹⁶² where 'right process' is 'defined by the community'.¹⁶³ However, dialogue has also become the basis for criticism — captured in the castigation of the international community 'in which everyone speaks roughly the same language of missiles and missives, sanctions and sanctimony'¹⁶⁴ — because the community is regarded as no more than a ubiquitous and superficial forum where international law's transformative impact is limited and self-serving.

Contrast the position when the community is reduced to the more manageable base of state actors.¹⁶⁵ Here, in our imagined community, we are moving beyond the virtues of discourse to a discourse of *values*. The 'theoretical framework' is a much tighter one: the admission is made that the framework at this level is 'largely applicable to states, which join in common protective measures and institute institutional processes to secure safety, peace, and the promotion of prosperity',¹⁶⁶ where the talk is of the 'wellspring of association',¹⁶⁷ the 'conditions of membership' and 'ground rules' of the community.¹⁶⁸ What is at stake here is more than the notion of communication;¹⁶⁹ it is about 'associative'¹⁷⁰ or 'communal' obligations,¹⁷¹ about discovering the extent to which the aforesaid community exists thick in the struggle for its own set of beliefs, values, ideals and ideas of progress.

Read in this light, fairness discourse could be seen to be limited in its capacities to produce a 'deep' international community because it is stapled to the *particular* value of distributive justice (and, at least in the pages of *Fairness*, it would seem to little else).¹⁷² However, the very notion that distributive justice is being put forward as a

ASIL (1981) 101, and Boutros-Ghali, 'Foreword' in *International Law as a Language for International Relations* (1996) xiv ('next to the society of states, there is an international scientific community that desires to establish law as a language of international relations').

¹⁶² *Fairness*, at 478.

¹⁶³ *Ibid.*, at 26.

¹⁶⁴ Kennedy, 'The Disciplines of International Law and Policy', 12 *Leiden Journal of International Law* (1999) 9, at 126.

¹⁶⁵ A theme retained and detailed by Franck in his *Empowered Self*, at 23 ('Unchecked, such virulence could lead to an unmanageable world of 2000 mutually hostile states').

¹⁶⁶ *Fairness*, at 27.

¹⁶⁷ *Ibid.*, at 26.

¹⁶⁸ *Ibid.*, at 29.

¹⁶⁹ For further analysis, see Koskeniemi, 'Letter to the Editors of the Symposium', 93 *AJIL* (1999) 351.

¹⁷⁰ R. Dworkin, *Law's Empire* (1986), at 197.

¹⁷¹ *Fairness*, at 45.

¹⁷² *Ibid.*, at 353 ('If there is to be law, its power to pull states to agree to a new rule, or a new normative system, and to abide by new normative structures and strictures will significantly depend upon perceptions of the distributional justice with which a new order addresses questions of costs and benefits'). See Tasioulas, *supra* note 19, at 510 ('The impression of thematic disunity is heightened [in *Fairness*] by the suspicion that issues of distributive justice have no immediate bearing on most of the topics discussed [therein]. One might have thought, to take just one example, that humanitarian law has a basis in "humanitarian" values distinct from distributive justice. Distributive justice sometimes impinges on these values, but usually only tangentially, as in questions of the distribution of benefits and burdens in carrying out operations such as humanitarian assistance or intervention'). Questions are thus prompted as to whether the 'communities' we have are indeed thematic and/or hierarchical, of whether there exists (within the framework of international trade relations) a 'bias toward trade values [which] ignores other

value and argued as *one* common denominator of states in various fields of mutual endeavour does suggest that there is *prima facie* evidence of a ‘community’ committed to more than just the value of the ‘sovereignty’ of each of its members. The incorporation of ‘significant fairness-based concepts’ into the Framework Convention on Climate Change of 1992¹⁷³ is argued in this vein and its achievements and those of Kyoto in 1997 demonstrate a gathering sense of community *beyond* the sovereign self — even if not all members choose to share or participate in this process. Community, after all, does not mean unanimity:¹⁷⁴ it is a social construct as well as a process and the sustenance and success of the imagined international community will depend upon the thriving network of discursive relationships occurring within the so-called rhetorical community. Furthermore, it should be said that while the value of distributive justice is pedalled throughout *Fairness*, it needs to be seen in the broader context of Franck’s other scholarship — such as *The Empowered Self: Law and Society in the Age of Individualism* (1999) — which details the development of other values by this community and by international law.¹⁷⁵

If these representations present the realities, then the idealized community still remains at large. Our ‘international community’ is ‘deep’ enough to have conceived of the idea of *jus cogens* but not deep enough to know what to do with it. It is caught in the perennial mire of something called *erga omnes* (or obligations owed to the ‘community’ as a whole),¹⁷⁶ and continues to inch toward so-called crimes and offences against the ‘international order’.¹⁷⁷ That said, just how deep is the ‘international community’ that composed the 1948 United Nations Convention on the Prevention and Punishment of Genocide and stood back in 1994 when Rwanda was overtaken by the very

human values that are ordinarily a central part of the political processes of most communities’: Perez, ‘WTO and UN Law: Institutional Comity in National Security’, 23 *Yale Journal of International Law* (1998) 368, at 376.

¹⁷³ *Fairness*, at 392.

¹⁷⁴ In his Separate Opinion in the *Gabcikovo-Nagymaros Project Case* (1997), Judge Christopher Weeramantry wrote there of the ‘general support of the international community’—a ‘community of nations’ is how he qualified that reference—for legal propositions and that the process of creating custom is due to the general will and not the unanimous will of ‘every member of the community’: *Case Concerning The Gabcikovo-Nagymaros Project: Hungary v. Slovakia* (25 September 1997), 95.

¹⁷⁵ In *Fairness*, it is said: ‘humanity wants reassurance that the emerging legal system is capable of ensuring both stability and progressive change’: *Fairness*, at 7.

¹⁷⁶ *Case Concerning Barcelona Traction, Light and Power Co. Ltd., Belgium v. Spain*, ICJ Reports (1970) 3, at 32; *Case Concerning East Timor, Portugal v. Australia*, ICJ Reports (1995) 90, at 102; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Yugoslavia*, ICJ Reports (1996) 616. See, further Crawford, *supra* note 51, at 308–309 (‘[W]e have a situation where the pre-eminent court in the international legal system has not done much to clarify the modern law of obligations’).

¹⁷⁷ R. Higgins, *Problems and Process: International Law and How We Use It* (1994), at 58. See, further, the formulations of the Supreme Court of Israel in the *Eichmann Case*, that the crimes of which Adolf Eichmann was accused constituted ‘acts which damage vital international interests; they impair the foundations and security of the international community; [and] they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilized nations’: 36 ILR (1961) 5, 291.

murderous convulsions that the Convention was designed to prevent.¹⁷⁸ Just how deep is the commitment of this community to universal human rights, to disarmament and world peace, to economic and environmental justice, to the self-determination of all peoples?

4 Conclusion

The critique contained in this article has proceeded from a sceptical position regarding the need to invoke the idea of an *international community* within international law literature. The foundation of that scepticism lies in the fact, as any treatise of the discipline worth its salt will show, that international law has identified each of the actors of the international system for what they are — whether they be states, international institutions, individuals or corporations. As such, the need to engage additional appellations or terminologies has been questioned. In so doing, we have come to appreciate how these actors have been bundled together to give us a community of sorts, what has been labelled an international community in the rhetorical sense. The matter has not been left there, however, because the idea of multiple and concentric communities has been developed on the basis that these communities are best understood from the perspective of the functions of their respective members (as legislators, addressees and adjudicators). The discursive nature of these relationships and interactions establishes and defines this rhetorical community.

Considerations of the idea of an international community have also made us aware of loose applications which the term invites: it is a ‘coded’ word which is ‘open to manipulation’.¹⁷⁹ Writing with some candour of this experience, former British Prime Minister Margaret Thatcher admitted in her memoirs that ‘the West or, as we tactfully preferred to describe it, “the international community”, would prevail over Saddam Hussein and reverse Iraq’s aggression against Kuwait’.¹⁸⁰ However, we have also witnessed how in modern times this term — or, now, the *doctrine* of international

¹⁷⁸ L. Melvern, *A People Betrayed: The Role of the West in Rwanda’s Genocide* (2000). Also see Pfaff, ‘There is No World Community’, *International Herald Tribune* (The Hague), 22 April 1994, 5 (reflecting that the experience during the conflict in Bosnia-Herzegovina ‘demonstrated that the international community is a phantom’).

¹⁷⁹ Weil, ‘Towards Relative Normativity in International Law?’, 77 *AJIL* (1983) 413, at 441 (‘as the international community still remains an imprecise entity, the normative power nominally vested in it is in fact entrusted to a directorate of this community, a de facto oligarchy. [T]he concepts of “legal conscience” and “legal community” may become code words, lending themselves to all kinds of manipulation, under whose cloak certain states may strive to implant an ideological system of law that would be a negation of the inherent pluralism of international society’).

¹⁸⁰ M. Thatcher, *The Path to Power* (1995), at 508. See, however, M. Thatcher, *Statecraft: Strategies for a Changing World* (2002), at 35 (noting that ‘[t]his doctrine of “international community” à la Blair is a prescription for strategic muddle, military overstretch and ultimately, in the wake of inevitable future, for an American retreat from global responsibility’). It is also observed, at 264: ‘The humiliation of America at the hands of those who regard themselves as representing the “international community” has continued. In May 2001 the US was voted off the UN Human Rights Commission. But Pakistan (with a military government), Sudan (with an Islamist regime conducting a genocidal civil war) and Sierra

community — has become a strategic part of the lexicon of international law and politics. These applications do appear to have come with their advantages: even the most doubting of philosophical minds has recognized that ‘words help to form conceptual horizons, and phrases [such as “the international community” and “international security”], with their unavoidable universalist overtones, may be the outward signs of a real change in the axiomatic foundations of intergovernmental relations as understood by the governments themselves’.¹⁸¹ The prospects held out by investigations of this nature — of how ‘history is on the move from state sovereignty to international community’¹⁸² — set themselves in radical contrast to established traditions of legal thinking, which have cast international relations as ‘formalist [and] legalistic, entranced by a fantasy billiard ball world of states’.¹⁸³

These investigations have begun in earnest,¹⁸⁴ and Professor Franck has made a contribution to the debate that is nothing short of significant and masterful. In *Fairness*, he has sought to transport the idea of community beyond its rhetorical application — valid though this is — to an imagined and meaningful community that has as its core the sovereign state in a world of proliferating international institutions. ‘Community’ in these pages is therefore being given flesh; it is being given depth. The path he has marked out for us enjoins both of these communities — the discursive and the value-driven — and underscores the significance of these communities for each other. Moreover, the heralding of an international community as a new political force in our midst is certain to impact at different times and with differing intensities in the different spheres of the making, application and adjudication of international law. Professor Franck has presented these arguments with considerable skill, erudition and confidence — he brands those who have rejected the advent of a global community as plain ‘wrong’¹⁸⁵ — in a work that promises to shape our deliberations in the contemporary period and beyond. We now have a forceful proclamation of the idea of an international community and have been urged to optimize the discursive and social powers of international law at a time of great political change and challenge.

Leone (the scene of terrible abuses) are all represented. So much for the UN’s conception of human rights.’ The United States regained its seat on the Commission a year later: ‘US Regains Position on UN Rights Commission’, *Washington Post*, 30 April 2002, at A16.

¹⁸¹ *Supra* note 15, at xiii. Although, cf. Allott, ‘Kosovo and the Responsibility of Power’, 13 *Leiden Journal of International Law* (2000) 85 (that the Kosovo crisis illustrated that ‘[o]nce again, the reality of international society has overwhelmed the capacity of international law to respond coherently and convincingly to that reality [and that] [o]nce again, international law has revealed itself as the dysfunctional law of a dysfunctional society’).

¹⁸² Koskeniemi, *supra* note 30, at 407.

¹⁸³ *Supra* note 164, at 114.

¹⁸⁴ See, in particular, the Hague Academy lectures of Tomuschat, *supra* note 47, and Simma, ‘From Bilateralism to Community Interest in International Law’, 250 *RdC* (1994) 217. See, further, Simma and Paulus, ‘The “International Community”: Facing the Challenge of Globalization’, 9 *EJIL* (1998) 266.

¹⁸⁵ *Fairness*, at 19 (responding to Rawls, ‘The Law of Peoples’, in S. Shute and S. Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures* (1993), at 41–82).