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# *International Law and the Limits of Fairness*

John Tasioulas\*

## 1 Beyond Apology and Utopia

International legal theorists have recently popularized a vivid metaphor.<sup>1</sup> It depicts international legal thought as ceaselessly engaged in an unsatisfying oscillation between the poles of apology and utopia. On the one hand, there is the tendency towards apologetics, whereby legal analysis acquiesces in the norms, practices and institutions that have emerged through the largely unedifying processes of geopolitics. On the other hand, there is the opposing tendency to invoke ethical values in a way that threatens to cast international legal reasoning adrift from any meaningful bearing on relations between agents in the global domain. And what these theorists suggest is that this to and fro movement, which I have already termed unsatisfying, is also unavoidable: an antinomy that is inherent in the underlying commitments of international law and that threatens to break out at any moment, endangering its coherence and stability. Hence the relentlessly downbeat quality of many 'critical' analyses of international law, which typically elicit from their proponents one of the studiously non-committal attitudes of post-modernism: cool detachment, an ironic shrug of resignation, or whatever.

Yet this final leap of pessimism, as we might view it, itself seems rather uncritical. For consider how a proponent of the role of values in international law might reply. The danger of utopianism, he might say, is one identifiable as such only in the light of the adoption of an evaluative perspective. 'Ought', after all, implies 'can'. The normativity of values and norms depends upon their being suitably integrated with human capacities, both of individuals and groups. So the need for realism, for the avoidance of issuing utopian prescriptions that are normatively idle, is one that emerges from within the ethical point of view itself. It is not something set over against

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<sup>1</sup> Its source is M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989).

that point of view. How far we can press the role of ethical values in international law depends, among other things, on a sober assessment of precisely the sort of facts that realists have always deemed central: the nature and durability of the state system; the imbalances of power it embodies; the motivations of, and the extent of interaction and interdependence among, the various actors in the international sphere, and so on.<sup>2</sup>

The hopeful prospect that emerges here is not of an interminable and unsatisfying see-saw motion between apologetic realism and naïve utopianism, but rather of an altogether happier and more stable position. One that, following John Rawls, we might call a realistic utopia — grounded in psychological, socio-economic and institutional reality, yet expressive of an acceptable normative stance in responding to that reality.<sup>3</sup> It is precisely in this way, as a contribution to making sense of the possibility of a realistic global utopia, that we should understand Thomas Franck's important discussion of the role of fairness in international law. At one level, of course, he is an unabashed idealist: 'a system's reach should exceed its grasp', he writes, 'or what's heaven for?'<sup>4</sup> Nevertheless, for him the turn to fairness is not the upshot of naïve utopian speculation unconditioned by assessments of psychological, social and institutional reality, but of a favourable configuration in real-life conditions. The contemporary international domain exemplifies what Hume called the requisite 'circumstances of justice'. Thus, the priority Franck gives to the question 'Is international law fair?' depends upon two 'structural preconditions' for fairness discourse which have increasingly come to characterize international life: moderate scarcity and community, along with the increasing maturity and complexity of the international legal system:

we are witnessing the dawn of a new era, defined both by moderate scarcity and by an emerging sense of global community. We have not arrived there yet, but that is where we seem to be heading as we turn the corner into the third millennium. Both moderate scarcity and a shared sense of community have become constant characteristics of our contemporary world. These economic, social, and political conditions have eventuated at the same time as the international legal system has reached a high level of maturity and complexity. This confluence of factors makes discussion of fairness both opportune and necessary.<sup>5</sup>

My objective in this paper is to probe the moral-philosophical underpinnings of *Fairness*. The problems I shall identify are explored against my background agreement with the fundamental thesis of that book: that international law is subject to ethical scrutiny and ought to be shaped in accordance with its deliverances. As Franck puts it, emancipated from 'the constraints of defensive ontology' — the obsessive concern with whether international law is truly law — 'international lawyers are now free to undertake a critical assessment of its content'.<sup>6</sup> My discussion is aimed, instead, at quite fundamental aspects of the way in which Franck seeks to substantiate and follow

<sup>2</sup> For an incisive exploration of the meanings and limitations of realism, see C. Beitz, *Political Theory and International Relations* (rev. ed., 1999), Part I and at 185–191.

<sup>3</sup> J. Rawls, *The Law of Peoples* (1999).

<sup>4</sup> T. M. Franck, *Fairness in International Law and Institutions* (1995), at 7 [hereinafter *Fairness*].

<sup>5</sup> *Ibid.*, at 11.

<sup>6</sup> *Ibid.*, at 6.

through on that appealing thesis.<sup>7</sup> The first problem, that of ethnocentrism, relates to the *status* of fairness. In a world characterized by radical diversity in moral and political practice and belief, how can ‘fairness’ be anything more than a name for a culture-specific value-construct that Franck is proposing arbitrarily to foist on adherents of other cultures through international law and institutions? The other two problems concern the *content* of fairness. The first questions whether fairness is a *sufficient* evaluative underpinning for public international law. The suggestion is that it cannot do all the work Franck charges it with and requires supplementation by other values. The other problem is whether fairness, as interpreted by Franck, is even *applicable* in the international sphere or should instead vacate the field in deference to other, more minimalist values and principles. In this connection, I contrast Franck’s views with Rawls’ recent advocacy of a duty of assistance owed by liberal and decent peoples to burdened societies, as opposed to a duty grounded in considerations of distributive justice.

## 2 The Status of Fairness: The Problem of Ethnocentrism

The advocacy of ethical standards of universal scope, standards whose range of application encompasses all individuals or all societies, is inevitably susceptible to the charge of ethnocentrism. For do not the values credited with universal scope have their historical origin in some ethical tradition or family of traditions rather than others? Beyond the question of historical origin, are not the putatively universal values even now disputed, or at least subject to heated debate as to their correct interpretation, both within and between societies? How, then, can the attempt to fashion international law and institutions according to the template of a privileged set of values (whether concerning fairness, peace, or whatever else) be anything other than the foisting of the value-orientation of (segments within) one culture or tradition on others that do not share it?

The mainstream of the Western tradition of ethical universalism, represented by the Stoics, mediaeval natural lawyers and Enlightenment rationalists, sought to defuse the problem of ethnocentrism (at least implicitly, since they were not always explicitly exercised by cross-cultural variation in ethical belief) by asserting the objectivity of the norms to which they attributed universal scope. Such norms were not only *universally applicable*, so that all individuals or societies came within their purview, but *universally*

<sup>7</sup> I enter a caveat here: it seems to me that Franck is too quick to dismiss as unimportantly ‘ontological’ still-pressing issues concerning how a value-centred approach to international law factors into the doctrine of that law’s sources. His claim, against realists, that international law already embodies important standards of fairness, e.g. a right to democratic governance, depends upon ascribing a role to values (‘a modern secular version of natural law and rights’, (at 265)) in the process of norm-formation that is tantalizingly hinted at, but never fully articulated let alone defended. For this reason, ‘dour scholastic issues of ontology’ (at 363) are not entirely superseded in the ‘existential moment’ Franck aims to seize.

*valid* as well. In other words, universality of scope was combined with objectivity of status: some account of the derivation of such norms through rational reflection on human nature or divine purpose, or through the formal conditions imposed by pure practical reason, was invoked to validate rationally the favoured norms as properly regulating the conduct of all relevant agents in the global domain. Moreover, this rational validation was not presented as contingent on accepting the authority of certain standards simply as given. On the contrary, the project was one of rationally vindicating the basic norms of a universalist ethic in a non-question-begging way against those who might be disposed to challenge its authority.

If the project of an objectivist justification could be successfully carried out, then the charge of ethnocentrism would be overcome. Criticizing other societies by reference to norms they did not accept would not, in itself, amount to an arbitrary exercise of power and cultural imposition. This does not mean that possession of the objective truth about universal ethical norms licenses intervention all by itself in those other societies or the use of coercion against them. For one thing, among the norms vindicated on such an account may be norms protecting cultural self-determination or enjoining tolerance. But that is a different matter. It does not address the concern with ethnocentrism that has its origin in disquiet about the arbitrary *status* of universal ethical standards. However, for many contemporary thinkers, it is precisely the unavailability of a credible objectivist grounding for such standards that gives renewed point to the ethnocentric challenge in our disenchanting and pluralistic world. This train of thought has been pursued recently by the Italian political philosopher Danilo Zolo. His attack is two-pronged. First, he asserts the incompatibility of the values expressed in human rights norms with ‘the dominant ethos in countries like China, Pakistan, Saudi Arabia, the Sudan or Nigeria’. Second, he insists that the lack of objective foundations for such norms renders their invocation ‘a perfect continuation of the missionary, colonizing tradition of the Western powers’. As he puts it:

The universal character of ‘human rights’ is therefore a rationalistic postulate not only without substantiation in the theoretical sphere but also historically contested by cultures different from western culture . . . [T]he risk is thus very great that the cosmopolitan project implicit in the western doctrine and policy of human rights is in actual fact operating as — and is perceived as — an aspect of that process of the ‘westernization of the world’ which is currently overrunning the technologically and economically weaker cultures, depriving them of their identity and dignity.<sup>8</sup>

Zolo’s argument is best interpreted as addressed to the self-understanding of Western proponents of the human rights tradition. It identifies, as part of that self-understanding, a belief in the objective status of human rights. That there is such an objectivist component to the Western self-understanding of human rights is what Zolo’s debunking reference to the ‘westernization of the world’ latches on to. Consider two kinds of ‘westernization’ that have been occurring recently in the formerly

<sup>8</sup> All preceding quotations from D. Zolo, *Cosmopolis: Prospects for World Government* (1997), at 118–119.

Soviet-dominated Eastern European countries: the spread of consumerism through the activities of multinational corporations and the propagation of human rights by Amnesty International, Human Rights Watch and other NGOs.<sup>9</sup> Intuitively, we think of these two processes as quite different: the former is predominantly a matter of the manipulation of the tastes, opinions and lifestyles of Eastern Europeans, the latter a matter of bringing them to accept and conform to standards that are universally valid. Zolo's point, I take it, is that given the illusoriness of ethical objectivity, we are not entitled to that distinction. The advocacy of human rights is not different in kind from the advocacy of Coca-Cola or Calvin Klein. Both involve the manipulation of tastes, opinions and lifestyles and lack any grounding in considerations of universal validity. And it is this failed contrast, Zolo thinks, that gives substance to the charge of ethnocentrism, particularly when human rights abuses are employed to justify the mayhem unleashed by campaigns of 'humanitarian intervention'.

That is the problem of ethnocentrism, at least on one rendering. The question now is, how should advocates of universal ethical norms best respond to it? My own preference is for the traditional two-stage strategy. First, set out the reasons why the preemptory dismissal of ethical objectivity is misguided. Second, with the possibility of objectivity in play, attempt to show that an objective justification might be given for universal norms. But Franck rejects this traditional response because he shares Zolo's denial of ethical objectivity. As he puts it quite starkly:

Fairness is not 'out there' waiting to be discovered, it is a product of social context and history ... What the deep contextuality of all notions of fairness does tell us is that fairness is relative and subjective; not as St Thomas Aquinas hoped, a divine 'given' inculcated into the nature of things to be discovered or intuited by right-thinking humans.<sup>10</sup>

Unlike Zolo however, Franck does not think that the absence of an objective justification shows that advocating norms of universal scope is a form of ethnocentrism; it therefore does not rule out or undermine the adoption of a high-minded, value-oriented approach to international law. But how can Franck manage this last move — to preserve universality and deflect the charge of ethnocentrism whilst jettisoning objectivity?

In *Fairness* he sets about doing this is by adopting an essentially procedural and agnostic conception of discourse about fairness. If fairness is not a rationally detectable datum woven into the fabric of the universe, it does not follow that all judgments about it are simply arbitrary expressions of individual or collective

<sup>9</sup> This is not to deny that there have been vitally important local sources of human rights agitation within Eastern Europe, such as Solidarity in Poland and Charter 77 in Czechoslovakia. Indeed, as Richard Falk reminds us, these movements were sustained in part 'by the realization that their most fundamental grievances had already been validated by the state that was offering such blatant resistance', see 'The World Order between Inter-State Law and the Law of Humanity: The Role of Civil Society Institutions', in D. Archibugi and D. Held (eds), *Cosmopolitan Democracy: An Agenda for a New World Order* (1995), at 164. One might pursue this thought in a way that undermines the empirical assumptions of Zolo's ethnocentrism charge, in particular, the idea that human rights standards resonate with nothing in the local culture they are being used to criticize. The other side of this coin, of course, is that many Western states have a rather mixed human rights record.

<sup>10</sup> Zolo, *supra* note 8, at 14.

preferences and prejudices. Instead, Franck says: '[Fairness] is a human, subjective, contingent quality which merely captures in one word a *process of discourse, reasoning, and negotiation* leading, if successful, to an agreed formula located at a conceptual intersection between various plausible formulas for allocation'.<sup>11</sup> But how will discourse about fairness proceed in such a way as to allay concerns about its arbitrariness and hence about the ethnocentric imposition of norms of universal reach? Franck plausibly suggests that for such discourse to get off the ground there needs to be a background of agreement, a 'shared irreducible core of beliefs as to what the search for fairness itself entails'.<sup>12</sup> I see nothing objectionable in this move. The possibility of any form of communication — and even the possibility of recognizing others as fellow rational agents — depends upon an implicit core of background agreement. Otherwise participants will be speaking past each other, failing to 'connect' with a common subject-matter. As Franck puts it, 'I am willing to discuss with you whether to paint my house blue or white, but would not do so if your notion of blue were the color of this page'.<sup>13</sup> Yet even granting for the sake of argument that the shared background in the ethical case would involve considerations of fairness, this move does not take us much beyond a very minimal set of constraints on judgment. It does not rule out tremendous divergence in intercultural understandings of fairness; and it is precisely such divergence that prompts the anxiety about ethnocentrism.

More is needed, as Franck knows. So he introduces two conceptual barriers to fairness discourse, to act as 'doormen', as it were, regulating entry into the discourse by keeping out troublemakers and undesirable elements. These barriers, he maintains, 'must be recognized not as immutable or divinely ordained, but as useful gatekeepers of the discourse, admitting those willing to participate in a common enterprise of fairness discourse and excluding only those who are not predisposed to participate seriously in it'.<sup>14</sup> (I note here that this is to dismiss, without argument, the possibility that the locus of background agreement that qualifies individuals and groups as participants in a meaningful dialogue is variable from case to case, but such as to provide a sufficient overlap to ensure genuine engagement between them.) The two gatekeepers are the no trumping principle and something akin to the Rawlsian difference principle (or, as Franck calls it, the maximin principle). But, in my view, there are serious problems with both as ways of staving off the ethnocentrism charge.

The no trumping principle is said to follow from the earlier rejection of ethical objectivity.<sup>15</sup> In other words, once we give up the idea that some individuals, cultures or states can have certain and demonstrative ethical knowledge, it follows that all ethical judgments are up for grabs, and no group can appeal to them in fairness discourse as a way of pre-empting the outcome of negotiated settlement. There are,

<sup>11</sup> *Fairness*, at 14.

<sup>12</sup> *Ibid.*, at 14.

<sup>13</sup> *Ibid.*, at 22.

<sup>14</sup> *Ibid.*, at 14–15.

<sup>15</sup> *Ibid.*, at 17–18.

however, a number of problems with this principle in the way that Franck understands it, as emerging out of a rejection of ethical objectivity. First, it seems to be pragmatically self-undermining. For the rejection of ethical objectivity is controversial not only among contemporary philosophers but also in the global community as a whole. But Franck seems to be using the no trumping principle as a way of trumping the outcome of that whole debate. Second, Franck's argument seems to confuse belief in the objectivity of ethical judgments with belief in certain or infallible ethical knowledge, knowledge that can then be invoked to justify authoritarian political structures. But, of course, the appeal to an 'infallible Holy Man'<sup>16</sup> uttering dooms authorized from on high is a red herring. Objectivity, which is a claim about the kind of validity ethical judgments can attain, does not bring with it the epistemological thesis that our grasp of valid judgments must or can be infallible. On the contrary, it is precisely because of one's belief in objectivity — that there are better or worse judgments with respect to ethical questions — that one should be prepared, in a fallibilist spirit, to listen to others and revise or reject one's own previous judgments in light of what one has learned from them. Such an objectivist will also reject pre-emptive trumping, but for quite different reasons: he wants the various claims advanced to be open to rational assessment through a process of dialectical engagement. It should be apparent from this that there is no unproblematic inference from belief in ethical objectivity to authoritarian political institutions. Of itself, the thesis of objectivity entails nothing in this connection; combined with other premises, it may have quite different implications from those indicated by Franck, a point illustrated by the arguments of proponents of deliberative democracy. Nor is objectivism incompatible with a modest form of value pluralism, since a variety of ethical outlooks and traditions may be admissible within the bounds set by objective constraints: the claim to objectivity is not to be confused with the claim to singularity.<sup>17</sup> Finally, Franck has not explained how the process of 'discourse, reasoning, and negotiation' that he does little to flesh out leads to a consensus that is not a matter of manipulation or coercion. After all, he concedes that fairness is not the product of any old brute consensus, no matter how achieved. Objectivity's traditional role has been as a regulative ideal, one that is appealed to in distinguishing being swayed by the force of reason from various non-rational forms of belief-formation, such as manipulation, coercion, brow-beating, and so on.<sup>18</sup> This is presumably why the spread of the doctrine of human rights is not typically seen as another manifestation of 'Westernization' on a par with the proliferation of McDonald's fast food outlets across the globe. Without the idea of objectivity, it is questionable how Franck's 'process' can make sense of that distinction in a non-debunking way. It is questionable also, therefore, that he can quell the ethnocentric challenge.

The second gatekeeper stationed by Franck is what he terms the maximin principle.

<sup>16</sup> *Ibid.*, at 16.

<sup>17</sup> See e.g. Wolf, 'Two Levels of Pluralism', 102 *Ethics* (1992) 785.

<sup>18</sup> For a longer sketch of the relevance of objectivity to the reason/force distinction, see my 'Consequences of Ethical Relativism', 6 *European Journal of Philosophy* (1998) 172.

It is a principle of distributive justice. It holds, in Franck's formulation, that 'unequal distribution is justifiable only if it narrows, or does not widen, the existing inequality of persons' and/or states' entitlements'.<sup>19</sup> I shall come back to this principle later in the paper, but for now it is important to make two observations about it. First, it is highly controversial. Even the author of the principle in its original domestic manifestation, John Rawls, resists its extension to the regulation of relations between societies (see Part 4). It therefore strikes me as wildly optimistic to suggest, as Franck does, that it 'may be coming close to universal acceptance as a core principle of fairness'<sup>20</sup> or that its 'ultimate justification [as a gatekeeper] is that it comes closest to according with the moral sense of most states and most persons'.<sup>21</sup> It is therefore a most unpromising candidate to act as gatekeeper, since it would exclude far too many reasonable participants from engaging in fairness discourse. Surely its rejection does not justify one's being impugned as unwilling to take fairness discourse seriously, the moral equivalent of someone whose notion of blue is the colour of this page.<sup>22</sup> Second, and in consequence, this principle conflicts with the first gatekeeper, the no trumping principle, for it pre-empts reasonable discussion about the place and nature of distributive justice in the global domain. Franck is therefore faced with the undignified spectacle of his two gatekeepers wrestling each other to the ground, or else avoiding this conflict by making the second an ad hoc exception to the first. But, if it is an ad hoc exception, might not those who do not endorse this principle simply regard its presence as expressive of the whim of the management? And what is the presence of a management able to indulge its whims about who may enter the establishment if not a vivid metaphorical rendering of the threat of ethnocentrism? Now, one possible way out is to make the no trumping principle prior to the maximin principle, so that only the former is the true gatekeeper. The idea would be that if one engaged in fairness discourse in the manner required by the no trumping principle, one would end up affirming the maximin principle on due reflection. But this depends on the success of the arguments that can be mustered on behalf of the latter principle, which I discuss below in Part 4.

Nothing in *Fairness*, I suggest, really dispels the threat of ethnocentrism. But Franck's arsenal is not yet depleted. He explicitly takes up the issue of the legitimacy of universal norms in 'Is Personal Freedom a Western Value?'<sup>23</sup> In that article, whose essential tenor is sociological, he argues that personal freedom is not a parochial, specifically Western value and hence not an ethnocentric imposition on non-Western cultures. And this is essentially on the grounds that its prevalence is the outgrowth of developments in industrialization, urbanization, scientific and technological discoveries, transportation, communications, information processing and education. These developments, which Franck assumes are not to be thought of as culture-specific, but

<sup>19</sup> *Fairness*, at 18.

<sup>20</sup> *Ibid.*, at 18.

<sup>21</sup> *Ibid.*, at 21–22.

<sup>22</sup> *Ibid.*, at 22.

<sup>23</sup> 'Is Personal Freedom a Western Value?', 91 *AJIL* (1997) 593. Substantially reprinted as Chapter 6 of T. M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (1999).



rather as 'independent variables', exert a steady liberalizing influence on Western and non-Western states alike. Just as they eventually transformed the communitarian theocracy that was sixteenth-century England into a liberal state, so too they are now at work transforming the values and aspirations of members of non-Western societies in a similar direction:

There is no reason to believe that these underlying emancipatory forces . . . are indigenous to Western society and cannot affect other societies as they have affected our own. On the contrary, one must assume them to be independent variables, which, when they come to the fore anywhere under the right conjunction of circumstances, can tilt the balance in favor of more personal autonomy.<sup>24</sup>

By extension, the idea would be that the values of fairness are not ethnocentric because they too, like human rights, are emanations of 'underlying emancipatory forces' of modernity that are not indigenous to Western culture. The problem of ethnocentrism would therefore be bypassed, without having to resort to a controversial objectivist meta-ethical stance, because it would stand revealed as empirically baseless. The closest this line of argument comes to explicit articulation in *Fairness* is in a passage about the non-parochial character of the democratic entitlement (in essence, the right to vote), which Franck regards as crucial to the institutional realization of fairness discourse:

This almost complete triumph of . . . notions of democracy (in Latin America, Africa, Eastern Europe, and to a lesser extent Asia) may well prove to be the most profound event of the twentieth century, and will in all likelihood create the fulcrum on which future development of global society will turn. It is the unanswerable response to claims that free, open, multiparty, electoral parliamentary democracy is neither desired nor desirable outside a small enclave of Western industrial states.<sup>25</sup>

Now this line of argument is clearly a valuable corrective to the tendency to reify cultures and ascribe to them an historically invariant essence. Socio-economic forces, including those now commonly associated with 'globalization', constantly act upon cultures, stimulating development and interaction across time and thereby empirically falsifying the caricature image of them as rigid structures that are hermetically sealed off from each other.<sup>26</sup> A modicum of historical awareness enables us to see the

<sup>24</sup> *Ibid.*, at 608; see also 595, 615 and 624. A rather similar view has been independently advanced by Jürgen Habermas with specific reference to human rights. He adopts the 'working hypothesis that the standards of human rights stem less from the particular cultural background of Western civilization than from the attempt to answer specific challenges posed by a social modernity that has in the meantime covered the globe. However we evaluate this modern starting point, human rights confront us today with fact that leaves us no choice and thus neither requires, nor is capable of, a retrospective justification'. Habermas, 'Remarks on Legitimation through Human Rights', in *The Postnational Constellation: Political Essays* (2001), at 121. This leads to a fairly brisk response to the 'Asian values' critique of human rights, at 124.

<sup>25</sup> *Fairness*, at 88.

<sup>26</sup> For a powerful critique of the implicit understanding of culture here as 'poor man's sociology', and an instructive emphasis on internal complexity and the effects of global interdependence, see Benhabib,

important grain of truth in Franck's exaggeration that 'a few centuries ago, we were all — as it were — Islamic fundamentalists'.<sup>27</sup> On the other side, it also reveals that liberty and toleration are not the exclusive property of Western societies, and that they are integral in various guises to non-Western cultures.<sup>28</sup>

Still it is unlikely that such empirical considerations, pertaining to modernity as an 'independent variable', can blunt the real force of the ethnocentric challenge. The extension of this line of argument from human rights to fairness, particularly so as to encompass the maximin principle, is problematical. Contrary to Franck's suggestion, there is no widespread convergence on the maximin principle that parallels the allegiance that human rights and democracy have secured across the globe, at least by way of lip-service. But I want to focus instead on a number of problems besetting the argument from modernity generally, rather than its deployment to shore up the status of norms of fairness in particular. First of all, the argument can be countered on its merits as a sociological hypothesis. The idea that value-systems are by-products of socio-economic tendencies that can be characterized independently of those values is a familiar idea in Marxist and other deterministic theories. But it is an idea fraught with difficulties, since it is arguable that the very modernist tendencies that Franck invokes to explain the growing allegiance to values of personal autonomy can themselves only be explained in part by reference to people's belief in those same values.<sup>29</sup> But even if we put this concern aside, it is questionable that the 'exogenous and inexorable forces of economics, technology and communications'<sup>30</sup> that Franck identifies are either immune to human control or, even if they are, that they are reliably determinative of a liberal-individualistic mind-set. Consider, in the latter connexion, the familiar idea of a politically authoritarian and culturally communitarian capitalist society, such as may be emerging in various East Asian states.<sup>31</sup> Indeed, this phenomenon of 'alternative modernities' partly arises from the fact that the success of a transition to modernity in any given society depends on its ability to draw sustenance from the ethical resources within that society.<sup>32</sup> Finally, the forces of

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'Cultural Complexity, Moral Interdependence, and the Global Dialogical Community', in M. Nussbaum and J. Glover (eds), *Women, Culture and Development: A Study of Human Capabilities* (1995).

<sup>27</sup> Franck, *supra* note 23, at 603.

<sup>28</sup> A. Sen, *Development as Freedom* (1999), at 233 *et seq.*

<sup>29</sup> I am not proposing an 'idealistic' inversion of Franck's hypothesis here; it seems to me there is no compulsion to assign explanatory priority either way as between the value-systems and socio-economic forces.

<sup>30</sup> Franck, *supra* note 23, at 624.

<sup>31</sup> Indeed, Samuel Huntington has defended the opposite thesis to Franck's, viz., that modernization spurs cultural and value differentiation: 'the increased salience of cultural identity is in large part the result of socio-economic modernization at the individual level, where dislocation and alienation create the need for more meaningful identities, and at the societal level, where the enhanced capabilities and power of non-Western societies stimulate the revitalization of indigenous identities and culture'. S. P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (1997), at 129. He applies this thesis to the explanation of both the 'Asian values' critique of the West (at 104) and the 'Islamic Resurgence' (at 116).

<sup>32</sup> A point made by Charles Taylor in 'Nationalism and Modernity', in J. McKim and J. McMahan (eds), *The Morality of Nationalism* (1997), at 43–44.

market-driven 'globalization from above', in the words of Richard Falk, have in many instances had a corrosive influence on the pursuit of human rights and the living standards needed to secure their meaningful enjoyment, largely through diminishing the powers and responsibilities of the state in favour of the private sector.<sup>33</sup> There may, in sum, be an element of utopian naïvety in Franck's faith in these 'emancipatory' processes that is not too distant from the sort of optimism nicely satirized by Wittgenstein when he wrote, towards the end of his life, that: 'Men have judged that a king can make rain; we say this contradicts all experience. Today they judge that aeroplanes and the radio etc. are means for the closer contact of peoples and the spread of culture'.<sup>34</sup> All three points suggest that the empirical relations between modernity and liberal values are far more complicated than Franck's 'independent variable' thesis will allow.

But the second objection goes deeper still, for even if Franck is right in thinking that culture-neutral socio-economic forces of modernity tend to bring an allegiance to liberal values in their wake, this does not of itself rebut the essence of the ethnocentric challenge. And this because it is the wrong kind of argument to do so: it is genetic rather than justificatory. Even if a commitment to the values of personal freedom and self-determination is caused by vast, impersonal historical forces to which we are inescapably subject, the question remains whether these values are acceptable to us. One reason we might miss this is that the typical reader of the *American Journal of International Law* has, on the whole, an antecedent commitment to precisely the values that Franck identifies as historically ascendant. But what if the concomitants of the same inexorable, culture-neutral processes were racist or sexist beliefs? Would that be taken to eliminate anxiety about their universal dispersal? Again, assuming that belief in liberal values was fostered by these socio-economic developments, this would provoke a very different normative response from someone whose cultural upbringing taught him to regard such values as dangerously sapping the strength of communal forms and consigning individuals to anomic and unfulfilled lives. Those who press the ethnocentric challenge may view the 'independent variables of modernity' as part of the problem of the arbitrary cross-cultural imposition of values rather than as brute social facts that displace it.

At best, Franck's sociological hypothesis, if correct, would render the reference to ethnocentrism only somewhat ill-judged descriptively, because the 'source' of the putatively universal values of personal freedom would be culture-neutral forces of modernity. Still, it would not be ill-judged in its essence, because the question would remain, given that we find ourselves espousing these values in a world where others

<sup>33</sup> See, e.g., R. A. Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (2000), at 64–65.

<sup>34</sup> L. Wittgenstein, *On Certainty* (1979) 132. At times Franck writes in a Hegelian or providential vein, as if he believed that history expresses an immanent teleology of reason, e.g., 'Historically, in the West, those seeking to enforce conformity eventually yielded to reason, but only when overpowered by political, economic and social forces they could no longer control', Franck, *supra* note 23, at 608. Is the congruence between these forces and reason a happy coincidence? And what might 'reason' mean here, given that Franck abandons the idea of objectively better or worse judgements in the domain in question?

do not, whether we should retain our allegiance to them, use them as a basis for criticizing those others, encourage them to adopt these values or even coerce them into acting in conformity with them. Thus, Franck's empirical hypothesis would not eliminate the demand for objectivity, because the question would always remain whether we have good reason to affirm the values that those socio-economic forces have bequeathed us. So, the fundamental problem remains — that of providing a vindication for universal norms and values that shows them not to be arbitrary — even if it can no longer be given a specifically ethnocentric twist because the link to any particular 'ethnos' is misleading. No amount of sociological hypothesizing and explanation can reconcile us to the universal reach of those norms and values because, to modify Hume's saying, no 'ought' can be derived from a brute sociological 'is'. Franck's more recent thoughts, I conclude, provide only a recipe for resignation in the face of inexorable forces, not a reflectively endorsable reconciliation to the values those forces supposedly generate.

Is there a way forward for the advocates of ethical universalism? Now, one response to what I have said is simply to bite the bullet: to admit that any form of ethical universalism is ethnocentric, because it can receive no objective vindication, but then to argue that this constitutes no genuine problem at all. This is the mirror-image of Zolo's position, which rejects ethical universalism in part because the lack of objectivity ultimately renders it ethnocentric. Universal norms, on this view, can readily do without objective back-up. The quest to provide it is just a wild philosophical fantasy that fails to connect with the truly pressing concern, which is that of furthering the spread and efficacy of liberal values throughout the world. This sort of prescription is advocated by the American pragmatist philosopher Richard Rorty:

I think that the rhetoric we Westerners use in trying to get everybody to be more like us would be improved if we were more frankly ethnocentric and less professedly universalist . . . If we Westerners could get rid of the notion of universal moral obligations created by membership in the species, and substitute the idea of building a community of trust between ourselves and others, we might be in a better position to persuade non-Westerners of the advantages of joining in that community . . . In making this suggestion, I am urging, as I have on earlier occasions, that we peel apart Enlightenment liberalism from Enlightenment rationalism.<sup>35</sup>

And it may be that, insofar as the problem of ethnocentrism is taken to be expressive of a demand for objective grounding, Franck would be prepared to go along with Rorty. For reasons I recount elsewhere, I think this stance, which — felicitously in the present context — Rorty calls 'frank ethnocentrism', cannot work.<sup>36</sup> Instead, I believe that a viable ethical universalism must redeem the ancient promise of objectively grounding its universal norms.

Yet is this not an impossible dream? Perhaps it is. But it seems to me that nothing

<sup>35</sup> Rorty, 'Justice as a Larger Loyalty', in P. Cheah and B. Robbins (eds), *Cosmopolitanism: Thinking and Feeling beyond the Nation* (1998), at 56–57.

<sup>36</sup> Tasioulas, 'Is Cosmopolitanism Ethnocentric?' (unpublished manuscript).

Franck says rules it out. And, more to the point, something Franck does say indicates that there are important lines of thought in this vicinity that can be productively explored. Recall the terms of his rejection of objectivity: given that fairness is not “out there” waiting to be discovered’, not a ‘divine “given” inculcated into the nature of things’, *it follows that* it is ‘relative and subjective’, ‘a human, subjective, contingent quality’.<sup>37</sup> But nothing in Franck’s premise necessitates his conclusion. Like Rorty, Franck imputes to the objectivist a possibly incoherent and certainly non-compulsory conception of what it would be for ethical judgments to be objective. This need not involve limning aspects of an ‘ethical reality’ given independently of any human orientation toward the world, the sort of view Ronald Dworkin has rightly ridiculed for postulating ‘morons’ — mind-independent moral entities, akin to sub-atomic particles — the positions and velocities of which determine the truth and falsity of our moral judgements.<sup>38</sup> Instead, it may be that the objectivity of ethical values — that which underwrites our ability rationally to resolve ethical disagreements and to distinguish better and worse positions on ethical matters — is entirely consistent with their dependence on ethical sensibilities, in much the same way that colours may be thought to be objective features of the world which, nevertheless, are not fully explicable except in relation to the modifications they induce in a characteristically human sensibility.<sup>39</sup> And this metaphysical thesis may be coherently paired with an epistemology that instructs us to seek ethical knowledge by engaging critically and creatively with the resources of our respective traditions, for it is on such traditions that our ethical sensibilities inevitably draw for their conceptual and argumentative resources. If this is so, then part of the process of converging upon objectively justifiable norms of universal scope will be entering into dialogue with adherents of other traditions.<sup>40</sup> Now, if the line of thought I have just sketched has any merit, then universal norms will not be mysteriously ‘intuited’ as part of the fabric of a world independent of humanity. Nor will they simply be human artifacts that are ‘subjective and relative’, admitting of no rational vindication, nor creatures generated by, and facilitative of, inexorable processes of modernization sweeping the globe. Instead, they will be both rooted in a human perspective *and* such as potentially to command the rational assent of all: subject-dependent yet non-arbitrary. Obviously, substantiating this way of looking at things is not a task to be attempted here. But it seems to me one that must be taken on by those who would defend the ethical universalism inherent in

<sup>37</sup> *Fairness*, at 14.

<sup>38</sup> Dworkin, ‘Objectivity and Truth: You’d Better Believe It’, 25 *Philosophy and Public Affairs* (1996).

<sup>39</sup> For two widely influential developments of the idea that ethical properties have to be explicated by reference to the responses they appropriately induce in a suitable subjectivity, without being reduced to such responses, see D. Wiggins, *Needs, Values, Truth* (3rd ed., 1998), esp. Ch. V and J. McDowell, *Mind, Value, and Reality* (1998), Chs 6–8. I have had a say on these issues in ‘Relativism, Realism, and Reflection’, 41 *Inquiry* (1998) 377.

<sup>40</sup> For a brilliant example of this sort of view applied to the vindication of human rights norms, see Taylor, ‘Conditions for an Unforced Consensus on Human Rights’, in J. R. Bauer and D. A. Bell (eds), *The East Asian Challenge for Human Rights* (1999).

Franck's theory of international law, for without a vindication of objectivity the spectre of ethnocentrism will remain unexorcized.

### 3 The Content of Fairness (1): Why Fairness is not Enough

So much for my concerns about the status of the values of fairness in Franck's theory. He might understandably shrug them off as peripheral to his aims in *Fairness*. After all, the substantive content of his fairness thesis may survive even if, philosophically, we interpret its status in a different way from that which he recommends. So I now turn to some problems about the content of fairness as understood by Franck.

In giving priority to the question, 'Is international law fair?', Franck invokes a broad notion of fairness that encompasses two distinct, and sometimes competing, values. They are *legitimacy* (procedural fairness) and *distributive justice* (substantive fairness).<sup>41</sup> The former expresses the idea that 'for a system of rules to be fair, it must be firmly rooted in a framework of formal requirements about how rules are made, interpreted, and applied'.<sup>42</sup> Among the marks of legitimacy are the determinacy of legal rules, their symbolic validation through the possession of attributes that mark them out as authoritative, their application in a coherent manner that 'treats like cases alike' and their adherence to secondary rules that govern the creation, interpretation and application of such rules.<sup>43</sup> Distributive justice is defined, at least initially, as amounting to 'moral rightness' in general. Both values are thought by Franck to promote voluntary compliance with the international legal system insofar as it instantiates them, although he appears to suggest that this is the primary benefit secured by legitimacy, whereas distributive justice is 'rooted in the moral values of the community'.<sup>44</sup> This is a potentially misleading distinction, however, because it obscures the basis of procedural fairness in the moral values secured by the Rule of Law, while simultaneously positing an unduly broad understanding of distributive justice. The latter is normally taken to be only one moral concern among others, that relating to the appropriate distribution of benefits and burdens within some scheme of social cooperation or collaborative arrangement.<sup>45</sup> By contrast, Franck sometimes

<sup>41</sup> Franck remarks that tension between legitimacy and distributive justice is inevitable (e.g. at 24, 33–34), but that it 'can be managed [through a process of "structured discourse"] as long as its elements are understood' (at 24). More specifically, he instances equity as a way that justice-based claims may be advanced without excessive damage to the legitimacy of legal rules and processes (at 47). One should also note the fact that the two values can be mutually reinforcing, e.g. the elimination or reduction of distributive injustices may be necessary to secure procedural fairness, see Beitz, 'Does Global Inequality Matter?', 32 *Metaphilosophy* (2001) 95, at 107–109.

<sup>42</sup> *Fairness*, at 8.

<sup>43</sup> *Ibid.*, at 30–46.

<sup>44</sup> *Ibid.*, at 8.

<sup>45</sup> '[T]here are problems of *distributing* resources, opportunities, profits and advantages, roles and offices, responsibilities, taxes and burdens — in general, the *common stock* and the *incidents of communal enterprise*, which do not serve the common good unless and until they are appropriated to particular

interprets it in the broadest terms possible, subsuming within it Socrates' question, 'How should one live?'.<sup>46</sup> But surely *both* legitimacy and distributive justice are subsumed within that extremely general question, hence it can offer no grounds for distinguishing them, nor for differentiating them from many other potentially relevant values.

Now, this problem of excessive breadth in the characterization of substantive fairness is addressed, to some extent, when Franck advocates a specific principle of 'distributive justice': the 'maximin principle' (a global version of the Rawlsian difference principle<sup>47</sup>). According to Franck's formulation, the principle holds that 'unequal distribution is justifiable only if it narrows, or does not widen, the existing inequality of persons' and/or states' entitlements'.<sup>48</sup> But the equivocation between the broad ('moral rightness') and narrow ('maximin principle') senses of distributive justice still has a distorting effect on *Fairness*, causing Franck's argument to veer between twin dangers. Adopting the narrow sense, the threat is a Procrusteanism that assesses international law on the basis of an unduly limited set of values. Franck is saved from its more damaging effects by ignoring the narrow interpretation in most of his inquiries, but only at the cost of severing any meaningful link between those inquiries and the way he has previously articulated substantive fairness. (I assume here that the articulation in terms of 'moral rightness' is too broad and undifferentiated to be of real interest.) A way out of this bind would be to acknowledge that there are values other than procedural fairness and distributive justice that properly regulate international law and to articulate explicitly their content and implications. Indeed, at one point, Franck concedes that not all evaluative considerations in international law boil down to fairness. However, this is not said in the value-pluralist spirit I am recommending, but rather along the lines that 'short-term solutions to immediate crises' often demand that we resort to considerations other than those that figure in an ideal moral theory of international law.<sup>49</sup>

Why is fairness an insufficient basis for the ethical evaluation of international law? The first component of Franck's concept of fairness, procedural fairness or legitimacy, is in a sense the 'internal morality' of law. Its relevance to the ethical assessment of law is ubiquitous even if it is not the *only* value at stake in such assessments. But is completeness secured by partnering it with distributive justice? The answer, I think, is that it is not. There are other substantive values that are equally relevant to international law, and which sometimes assume far greater significance. My claim is that ignoring them, or failing to consider how they interact with fairness, leads to an impoverished conception of the values to which the law ought to be responsive.

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individuals. The theory of distributive justice outlines the range of reasonable responses to these problems'. J. M. Finniss, *Natural Law and Natural Rights* (1980), at 166.

<sup>46</sup> *Fairness*, at 8.

<sup>47</sup> This famously states that '[s]ocial and economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged', J. Rawls, *A Theory of Justice* (rev. edn, 1999), at 266.

<sup>48</sup> *Ibid.* at 18.

<sup>49</sup> *Ibid.* at 15.

Franck's identification of 'substantive fairness' with a principle of distributive justice — specifically, the maximin principle — causes him to overlook the significance of these other values and to make distributive justice carry more weight than it can reasonably sustain.<sup>50</sup> If this is so, *Fairness* betrays the insight conveyed by its cover illustration, Paolo Veronese's allegorical painting *Venice Enthroned between Justice and Peace*, which acknowledges the existence of at least one substantive value other than justice. Let me try to expand and support these claims.

First of all, it is clear that a distributive principle cannot be the sole substantive principle in a theory of international law. This is because it is concerned with the distribution of benefits and burdens, so that there must be some independent specification of what these are. Something like Rawls' account of primary goods, for example, must be invoked. These goods will in turn depend on some account of what is necessary for a human life to go well or flourish. Beyond that, any plausible ethical theory will constrain principles of distributive justice by invoking other principles. To take Rawls' theory again, the difference principle is lexically subordinate to a first principle that secures to each person 'an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberty for all'.<sup>51</sup> The lexical priority of the first principle precludes certain distributions that would be to the greatest benefit of the least advantaged but would illegitimately transgress the liberty of others. For example, forcing those with certain talents into particular occupations (such as scientific research) is impermissible, even if doing so would enhance the position of the worst-off. Instead, in Rawls' theory, basic liberties can only be restricted for the sake of liberty.<sup>52</sup> Presumably, the great importance Franck attaches to autonomy would lead him to regard it as an independent principle that constrains the operation of the maximin principle, whether or not he also accepts the more controversial requirement of lexical priority. But then surely autonomy and liberty must rank as distinct values alongside legitimacy and distributive justice? And their role in international law will include, *inter alia*, that of underpinning at least some of the key human rights norms.<sup>53</sup> It is telling, I think, that the only individual human right discussed at length in *Fairness* is the right to democratic governance,<sup>54</sup>

<sup>50</sup> Of course, this is not to imply that distributive justice and the other values discussed below are mutually exclusive in their application: a multiplicity of ethical considerations can be applicable to the selfsame subject-matter. One consequence of this is to link the objectivist response to the problem of ethnocentrism advocated in Section 2 with the value-pluralism recommended below: an objectivist value-pluralist can admit a diversity of equally valid justifications for the selfsame schedule of international norms. See Taylor, *supra* note 40.

<sup>51</sup> Rawls, *supra* note 47, at 266. In Rawlsian theory a principle of fair equality of opportunity is also lexically prior to the difference principle, though itself lexically subordinate to the principle requiring equal basic liberties.

<sup>52</sup> On the priority of liberty in Rawls, see Rawls, *supra* note 47, at 214–220, 474–480 and J. Rawls, *Political Liberalism* (rev. ed., 1996), Lecture VIII.

<sup>53</sup> For an account of human rights based on the values of liberty and autonomy, which are sharply differentiated from distributive justice and fairness, see Griffin, 'Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights', *CI Proceedings of the Aristotelian Society* (2001) 1.

<sup>54</sup> *Fairness*, at Ch. 4.



presumably because of the significance Franck attributes to democratic political procedures in securing procedural fairness. But how could other human rights — the right not to be tortured, for instance — be fully explicated within a fairness perspective? My guess is that no such explication is viable, for that right concerns neither the allocation of a common stock nor the incidents of a communal enterprise, but rather the protection of fundamental human interests from violation.

Some of the other principles that must plausibly be admitted alongside principles of distributive justice will be themselves principles of justice: principles of retributive and corrective justice, for example, will be particularly salient in determining forms of harm-infliction that should be proscribed as international crimes and delicts. Moreover, there are also relevant principles that are not principles of justice (assuming here that we identify principles of justice as those imposing perfect obligations, i.e. obligations with counterpart rights on the part of specifiable others). Humanitarian law, for example, also has a basis in ‘humanitarian’ values — which centre on compassion and benevolence towards those who are victims of or threatened by violence, starvation, disease or other grave misfortune — that are distinct from distributive justice.<sup>55</sup> Humanitarian values, so understood, are concerned with preventing death and relieving acute and unnecessary suffering rather than with the distribution of socio-economic benefits and burdens among the participants in a collaborative scheme.<sup>56</sup> With this category of values in view, it seems to me a distortion to claim that the grounds of humanitarian intervention or assistance, for example, can be fully explicated in terms of the values of legitimacy and distributive justice alone. Those grounds relate in significant part to the alleviation of suffering and the prevention of cruelty, concerns which have to be weighed against other values, such as political self-determination. The institutional processes through which these concerns are registered and their competing demands weighed — for example, decision-making by the Security Council concerning humanitarian-inspired enforcement measures under Chapter VII of the UN Charter<sup>57</sup> — must comply with

<sup>55</sup> *Ibid.*, at 274–282.

<sup>56</sup> Such values partly overlap with, but are on the whole more minimal than, human rights. For an analysis sensitive to how this difference plays itself out in international law, see Meron, ‘The Humanization of Humanitarian Law’, 94 *AJIL* (2000) 239.

<sup>57</sup> The fact that measures must, in accordance with Article 39 of the UN Charter, be for the maintenance or restoration of international peace and security has meant that ‘[t]he only way in which economic or military sanctions for human-rights [and humanitarian — JT] purposes could lawfully be mounted under the Charter is by the legal fiction that human-rights [and humanitarian — JT] violations are causing a threat to international peace’, R. Higgins, *Problems and Process: International Law and How we Use It* (1994), at 255. See, e.g., S/RES/794, 3 Dec. 1992 and S/RES/808, 22 Feb. 1993. Here one suspects that greater clarity and integrity could be achieved by distinguishing the values of peace and security, on the one hand, and human rights and humanitarian values, on the other, and enabling the latter to form a basis, in their own right, for enforcement measures. This value-pluralist point chimes with Franck’s observation that ‘[n]ot every violation of international human rights law would necessarily constitute’ a threat to peace, and that ‘it would be useful for the sponsors of such actions [Chapter VII measures] to engage the members in a fairness discourse to clarify the basis on which action was being proposed’ (at 231). My only rider to this claim is that the basis need not be found in fairness values themselves.

procedural fairness if the decisions reached are to be legitimate.<sup>58</sup> But that does not convert the considerations thereby registered and weighed into considerations of fairness. Equally, distributive justice almost always impinges on the effort to respect humanitarian values, but usually only as a collateral matter, as in questions relating to the allocation of costs in carrying out operations such as humanitarian assistance or intervention.

I suppose Franck need not dissent from any of the general points made so far. His aim in *Fairness*, it might be countered, is to articulate one specific substantive value that is centrally important to understanding and evaluating public international law. There may be other substantive values that should also play a role, but it is not part of his project in that work to identify and elucidate them.<sup>59</sup> But if this more modest reading of his strategy is adopted, the worry persists that Franck's official focus on the value of fairness creates problems and distortions. First, by not explicitly identifying other, non-fairness values he runs the risk of propagating — against his own intentions, we are now supposing — an unduly truncated system of values for the assessment and development of international law. Values such as peace, prosperity, compassion, respect for nature and so on that ought to have a prominent role in such a system tend to be shunted aside. Second, by placing such great emphasis on distributive justice, he makes the case for a utopian or value-based approach to public international law seem much more precarious than it is. As I mentioned previously, distributive justice is a heavily contested terrain in contemporary political thought, even within liberal democracies. The idea that it is applicable in the international domain, and applicable in the particularly stringent form represented by the maximin principle, is even more contested. But the bearing of other values on that domain — such as peace and humanitarian compassion — is much less controversial. Franck's focus on fairness thus deprives him of powerful ammunition against those self-styled 'realist' critics who deny any significant role for moral considerations in international law. Third, by overlooking non-fairness values, Franck is not in a position to discuss international law's relative efficacy in securing different sorts of values nor how best to conceive of the relationship between fairness and those other values.<sup>60</sup> In particular,

<sup>58</sup> See *Fairness*, Ch. 7. In this connection, Franck's argument that the legitimacy of such decisions would be enhanced by their subjection, as exercises of delegated power under the Charter, to judicial review by the ICJ (at 242–244), is a compelling one. See also C. Gray, *International Law and the Use of Force* (2000), at 9–12.

<sup>59</sup> For instance, at one point Franck refers to 'the right to peace' as the international community's 'most important norm', and describes the right to democracy as subsidiary to it (at 134). But how does peace relate to either procedural or substantive fairness? Presumably, it comes within the wide interpretation of the latter, but that is the one that is too broad and heterogeneous in its coverage to be informative.

<sup>60</sup> These latter two issues are pressed by Brilmayer in 'International Justice and International Law', 98 *West Virginia Law Review* (1996) 610. She argues that it is easier for public international law to secure international well-being (peace and prosperity) than retributive, corrective and distributive justice, because international law is effective at preserving the status quo or moving to a situation that is Pareto superior to it, i.e. preferable from the point of view of all parties. But international justice typically requires departures from the status quo that impose costs on some (often powerful) states. She further contends that international law's ineffectiveness in securing justice tends to undermine its ability to

he is hindered from adequately addressing how international law should respond to conflicts between fairness and non-fairness values. For example, implementing the maximin principle would require a massive programme of wealth-redistribution that would be strenuously resisted, we may reasonably assume, by rich and powerful states. Their resistance, and the consequent resentment felt by poorer states, poses a threat to peace and stability. Admittedly, this conflict might be treated as a matter for non-ideal theory, which deals with the transition to a state of full compliance with ideally applicable norms. But not all conflicts can be finessed in this way. Another conflict is between the maximin principle and principles of communal identification and responsibility that are protected by the doctrines of self-determination and state sovereignty (see Part 4). Isn't the redistribution contemplated by the maximin principle at odds with the political independence of states in an international context that remains at base, as Franck admits,<sup>61</sup> a community of states?

Finally, and more insidiously, the lack of reference to other values can have the effect of encouraging strained and inappropriate interpretations of distributive justice, leading to the distortion both of it and of the area of law to which it is being applied. One way this can happen is that, not being equipped with a full array of applicable values, distributive justice is 'stretched' to do more work than can be reasonably assigned to it. This danger looms large in Franck's discussion of international environmental law. He assures us, for example, that '[t]he environmental problematic . . . illustrates the interplay of economic and moral considerations necessary to fashion an international legal regime which is able to husband, aggrandize, and apportion the planet's resources'.<sup>62</sup> More specifically, he claims that the issue of environmental protection 'is essentially a classic instance of the problematic of law's distributive fairness'.<sup>63</sup> The worry here is that Franck's exclusive reliance on distributive justice as the operative substantive value in evaluating environmental law automatically, and without argument, implicates him in an anthropocentric perspective that regards the natural world as simply made up of so many 'resources' that are to be apportioned among humans in order to realize their interests.

At the risk of quoting Franck out of context, this problem is well illustrated by the following speculative statement, relating to the bearing of fairness on the preservation of endangered species: 'Hungry and impoverished people may have a "claim" to eat endangered elephants and sell their tusks which morally trumps the "claim" of tourists to admire the vanishing species.'<sup>64</sup> Exclusive reliance on the perspective of distributive justice thus casts the issue of the protection of the elephant as a matter of resolving the conflict between two sorts of human 'claims' to the elephant: as a

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promote peace and mutually beneficial arrangements, insofar as, e.g., a stable peace is often conditional on the redress of previous injustice.

<sup>61</sup> *Fairness*, at 13 and 79.

<sup>62</sup> *Ibid.*, at 364.

<sup>63</sup> *Ibid.*, at 352–353.

<sup>64</sup> *Ibid.*, at 369. Is it a worry about anthropocentrism, I wonder, that explains the quotation marks around the word 'claim'? Elsewhere, he writes of the elephant as exemplifying 'a regime-based approach designed to protect a particularly noble species from imminent extinction' (at 409).

foodstuff and tradable commodity on the one hand, and as photographic fodder on the other. This sort of 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 fulfilment (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. According to this sort of view, the error consists precisely in conceiving of the elephant as nothing more than a resource that is ours to distribute in the light of competing human interests, forming part of the common stock whose allocation among individuals is to be determined by norms of distributive justice.<sup>65</sup> As Bernard Williams has put the point, ‘the human concern for other, non-human and non-animal effects is misrepresented if one tries to reduce it simply to a kind of human self-concern’.<sup>66</sup> Rather, the idea is that the values characteristic of our human outlook include a concern for aspects of nature quite independently of the way in which they impinge upon human interests. To the extent that natural species such as the elephant exemplify those values, then ‘[n]ature may be seen as offering a boundary to our activities, defining certain interventions and certain uncontrolled effects as transgressive’.<sup>67</sup>

What I want to suggest, but cannot establish here, is that a key element in the justification of schemes of environmental protection is precisely our recognition of a value in nature that commands our respect independently of its bearing on our interests, and hence that those schemes cannot properly be seen as entirely expressive of the concern with legitimacy and distributive justice.<sup>68</sup> On the contrary, this bifocal perspective on international environmental law threatens to overlook or distort

<sup>65</sup> There is also a less ambitious objection that can be brought against Franck, one that does not rely on the controversial anti-anthropocentric idea that nature has a value independent of its connection with human interests. The claim would be that this interest-relative value helps justify duties to preserve the environment which are not all duties of distributive justice. They may, for example, be duties not to injure others (e.g. by undermining their access to clean water, unpolluted air, etc.). See O. O’Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (1996), at 176–178. It is compatible with this interpretation that nature is understood as a common good serving the interests of all, see e.g., *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), at 241–242, para. 29 and *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports (1997), at 41, para. 53.

<sup>66</sup> Williams, ‘Must a Concern for the Environment be Centred on Human Beings?’, in B. Williams, *Making Sense of Humanity* (1995), at 234.

<sup>67</sup> *Ibid.*, at 236. This line of thought has been applied by David Wiggins to explicate the value of preserving the swallow in Cambridgeshire: ‘Swallows bring content by virtue of a *pre-existing* engagement with such things that is independent of our pursuit of our own content or happiness. To one so engaged, the existence of swallows will matter whether they are seen or not seen. Where the contentment induced by the sight of them ministers to human happiness and the extinction of the swallow in Cambridgeshire threatens human happiness, that is because human beings already have an outward directed concern with creatures such as these ... [there is] a prior attachment to swallows and martens — a non-instrumental concern with them’. Wiggins, ‘Nature, Respect for Nature, and the Human Scale of Values’, *C Proceedings of the Aristotelian Society* (2000) 11–12.

<sup>68</sup> Giving a positive elucidation of this value is a difficult matter: Williams associates it with the response of ‘Promethean fear’, Wiggins with the Roman notion of *religio*, or ‘holy dread’.

values that should have a central role in it. Moreover, it is arguable that it is to a considerable degree in terms of this (not necessarily absolute) duty of respect for nature that we should understand the general principle of protecting endangered species established by the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Indeed, the same may be said of the general obligation ‘to protect and preserve the environment’ enshrined in Article 192 of the 1982 Law of the Sea Convention, as well as of the common heritage principle<sup>69</sup> and the protection of biological diversity more generally.<sup>70</sup> Irrespective of whether the preceding claims are correct, Franck’s exclusive reliance on fairness values means that he simply forecloses, without the benefit of any argument, on the potential issues which non-fairness values raise in this domain.

Let me conclude with two clarifications. I am not claiming that nature is never to be valued as a means to fulfilling human interests, only that its value in this regard is not exhaustive of its worth and of the ethical demands it imposes upon us. Often human well-being and respect for nature have congruent normative implications for our treatment of non-human nature, e.g. the concern to maintain biodiversity as a source of genetic information that may further human interests through as yet unforeseen developments in, say, pharmacology and biotechnology. But there is also a standing possibility of serious conflicts between human interests and respect for nature, conflicts that cannot be easily overcome by pursuing the goal of ‘sustainable development’. Nothing I have said provides an answer to how those conflicts should be resolved, but acknowledging the non-fairness value of respect for nature enables us to grasp the possibility of conflicts that might otherwise have eluded us. Nor am I suggesting that important questions of distributive justice are not raised by regimes of environmental protection. The claim is instead that a fairness perspective on environmental law is blind to the relevance of many other values, not that it is inapplicable. For instance, Franck reasonably proposes that

to shut the [ivory] trade down altogether would require an obligation on the part of the international community to compensate effective-management states, which maintain herds that warrant culling, for the lost profits from (or opportunity costs of) not selling the ivory harvested from their herds. CITES has no such program. To initiate it would require recognition that the preservation of African elephants is a good for which all nations must accept a degree of fiscal responsibility beyond the income derived from tourism. This is not an unreasonable fairness claim. . . . [t]he preservation of important resources of nature may be worth financial transfers from nations in addition to market-driven transfers from actual users.<sup>71</sup>

But once we have given the independent value of endangered species, such as the

<sup>69</sup> *Fairness*, at 393–399.

<sup>70</sup> *Ibid.*, at 405–412. For an example of a more pluralistic account of the values underlying environmental law, see Sands, ‘Unilateralism’, Values, and International Law’, 11 *EJIL* (2000), at 299–301 (interpreting the decision of the Appellate Body of the WTO in the *Shrimp/Turtle* case as distinguishing between community, conservation and cooperation values as prerequisites to the adoption of unilateral trade measures by states designed to protect animal species beyond their territory).

<sup>71</sup> *Fairness*, at 411–412. For a related discussion, see G. Graham, *Ethics and International Relations* (1997), at 173–175.

elephant, a place in the scheme of values that regulate international law, we can interpret the role accorded to distributive justice here in a more modest way. The sort of redistributive regime envisaged in the above passage is premised on a prior commitment to save the elephant from extinction; this commitment, I have suggested, reflects in significant part a duty to respect and preserve nature that is independent of concerns with human well-being or the norms of distributive justice. But once we have acknowledged the existence of this duty in connection with the preservation of the elephant, important questions of distributive justice arise in constructing a regime to secure its survival in a just manner, one that imposes a fair distribution of costs on the states participating in this global collaborative enterprise. However, even on this analysis, one might have qualms about describing the required redistribution as compensation for ‘lost profits’ of foregone ivory sales. Rather, what is primarily at issue is an equitable way of allocating the costs of preserving the elephant, one that does not impose excessive burdens on the ‘effective-management states’. Discontinuing an established mode of income-generation in a poor state, in the name of environmental protection, without ensuring that the state’s overall economic position does not deteriorate as a result is an unjust distribution of the burdens of environmental protection.<sup>72</sup> On the view that I am recommending then, distributive justice is only one of the normative considerations operative in environmental protection, and acknowledging this enables us to see that it often has an ancillary role in that it is relevant to identifying a just way of carrying out common enterprises which other, non-fairness values make mandatory in the first place. Both of these points disappear from view if we acquiesce in Franck’s claim that environmental protection is ‘essentially a classic instance of the problematic of law’s distributive fairness’.<sup>73</sup>

#### 4 The Content of Fairness (2): Is the Maximin Principle Applicable?

So far, I have considered obligations of distributive justice primarily in the context of some collaborative enterprise arising out of a recognition of, or agreement to fulfil, an independent ethical requirement: to provide humanitarian assistance or to preserve endangered species, for example. Such obligations are both *dependent* on the existence of a collaborative enterprise grounded in a requirement of a different kind and *restricted* in scope to the participants in such an enterprise, where these do not necessarily include all individuals and/or states in the world. But Franck’s claims for the global implications of distributive justice go well beyond the affirmation of

<sup>72</sup> For one compelling attempt to work out principles for the fair allocation of the costs of environmental protection that would support this suggestion, see H. Shue, ‘Global Environment and International Inequality’, 75 *International Affairs* (1999) 531. Shue’s three principles converge on the practical conclusion that ‘whatever needs to be done by wealthy industrialized states or by poor non-industrialized states about global environmental problems like ozone destruction and global warming, the costs should initially be borne by the wealthy industrialized states’ (*ibid.*, at 545).

<sup>73</sup> *Fairness*, at 352–353.

dependent and restricted obligations. We have already challenged his assumption that distributive justice, in the guise of the maximin principle, is the sole operative substantive value in the international sphere (Part 3). Even if he abandons this ambitious thesis, can he still maintain that there is an independent principle of distributive justice that is unrestricted in scope, one that makes the distribution of benefits and burdens across the globe in itself a matter of ethical significance and which figures among the ethical principles that govern international law and the basic institutional structure of the international order? Can he, in other words, make good on the claim that the maximin principle is globally applicable?

The fullest statement of the maximin principle in *Fairness* reads as follows:

The 'maximin' principle is this: that inequalities in the access to, or the distribution of, goods must be justifiable on the basis that the inequality has advantages not only for its beneficiaries but also, to a proportionate or greater degree, for everyone else. In other words, unequal distribution is justifiable only if it narrows, or does not widen, the existing inequality of persons' and/or states' entitlements.<sup>74</sup>

A number of questions of interpretation arise here. Although Franck seems to regard it as a global version of Rawls' difference principle, it deviates from it in significant ways quite apart from the fact that the difference principle is intended by Rawls to apply only within a liberal democratic society (and not necessarily all such societies).<sup>75</sup> The difference principle holds inequalities to be justified if they maximize the position of the representative least advantaged group in society. Franck's formulation of the principle quoted above differs in at least two ways: (a) contrary to the connotations of 'maximin', it does not give priority to the worst-off but requires instead that *everyone's* position be improved by the inequality,<sup>76</sup> and (b) what counts as an improvement is ensuring that existing inequalities are not rendered proportionately greater, rather than any notion of inequalities being to the 'greatest advantage' or maximizing the entitlements of a particular group. These are important differences — (a) making the maximin principle more stringent, (b) making it much less so, than the difference principle — but I shall leave them aside, as they are not noted by and do not exercise Franck. Second, it is not clear which metric — primary goods, resources, capabilities, well-being, and so on — Franck means to employ in determining the 'entitlements' that are the subject-matter of distributive justice. Thirdly, the formulation quoted leaves it open whether it is individuals or states that are the subjects of the principle. The issue is an important one, if only because there is no guarantee that the wealth and resources of a state will correlate with the entitlements of its individual members. Consider, in this regard, states that are domestically hierarchical and inegalitarian despite being relatively rich in resources and having a comparatively high average GDP, so that many of their members figure among the 800 million people throughout

<sup>74</sup> *Ibid.*, at 18.

<sup>75</sup> See Rawls, *supra* note 52.

<sup>76</sup> But there are other formulations closer to Rawls', e.g. 'the maximin approach begins with a principled presumption in favor of equal entitlement to the distribution of rights and good, but makes that presumption rebuttable on a showing that a distribution which results in inequality also benefits *at least as much, or more than proportionately*, those at the bottom of the distributive scale' (at 21).

the world who have insufficient food to meet their basic nutritional needs. This is an issue that relates to Franck's discussion of the aggregated and disaggregated views of distributive justice.<sup>77</sup> For the purposes of this paper, I shall assume that he adopts the more conservative view, that the maximin principle is an aggregated one applying to inequalities in the entitlements of states, even though there is evidence strongly indicative of Franck's insistence on the need also to take account of disaggregated fairness.<sup>78</sup> This will help forestall one of the main objections to the global extension of the maximin principle: that it would necessitate the creation of a world government whose unprecedented powers to tax and redistribute wealth, and to shape aspects of the basic structure of global society such as world trade rules, labour standards, monetary policy, environmental protection and so on, would pose a grave threat of global tyranny.

Even with these interpretative matters set aside, and the objection from tyranny at least temporarily pre-empted, the deployment of the maximin principle in the international arena still encounters serious objections. One set of objections derives from communitarian thinkers who, for deep conceptual reasons, are sceptical about the invocation of any principles of distributive justice in the global context. According to them, principles of justice — or, more specifically, distributive justice — presuppose for their content and authority the shared framework of a political community or cultural tradition, and make no sense and lack normative force in the absence of such a framework. Since there is no overarching political community or shared tradition in the international sphere, principles of distributive justice have no purchase within it.<sup>79</sup> A related line of thought ties in more directly with the requirement of realism set by the 'ought' implies 'can' maxim (Part 1), contending that the feeling of solidarity among members of global society needed to make the imposition of global standards of distributive justice, and the potential sacrifices they demand, anything other than a utopian fantasy simply does not exist. This not only renders such standards unrealistic, for want of the requisite motivational support, it also means that the inevitable failure to meet them will tend to breed a dangerous cynicism about the role of ethical considerations in international affairs. One obvious reply to this sort of scepticism is that, in a world characterized by escalating levels of interaction and interdependence, the shared understanding and mutual affinities needed to underwrite transnational principles of distributive justice already exist, whatever may have been the case in some hypothetical past age in which societies were comparatively self-sufficient and self-contained.<sup>80</sup> But this point about global interdependence only

<sup>77</sup> See *Fairness*, at 12.

<sup>78</sup> *Ibid.*, at 371.

<sup>79</sup> For an influential articulation of this view, see M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (1983), at 28–30.

<sup>80</sup> As Franck puts it, 'There is an acknowledged and rapidly growing global sense of community. Within its precincts, legitimate processes have been established which actively facilitate, indeed, require, fairness discourse among states, including considerations of distributive justice' (*Fairness*, at 9). Walzer agrees that this is the kind of argument needed to establish the global reach of distributive justice, but writes: 'I am inclined to think that, for now at least, ordinary moral principles regarding humane treatment and



fuels another, more practical, line of objection to the international extension of the maximin principle. This is that its application is rendered hopelessly indeterminate by the extreme difficulty, if not impossibility, of ascertaining to any reliable degree of probability the effects of alternative policies and institutions on the least advantaged in a world that exhibits just these bafflingly complex forms of interdependence.<sup>81</sup> In the remainder of this section I shall leave both the conceptual and practical objections aside and consider instead the opposition to a global difference or maximin principle, or indeed any international principle of distributive justice, recently mounted by John Rawls. Does Franck provide us with the resources for defeating Rawls' opposition?

Rawls' criticism consists not so much in a direct refutation of a global principle of distributive justice, but rather in advocating a different sort of principle — the duty of assistance — and then challenging the defenders of global principles of distributive justice to show why, in light of various counter-intuitive results such principles would generate, they should be affirmed in a world in which the duty of assistance has been fully satisfied. For Rawls, the advocacy of the duty of assistance arises within the context of non-ideal theory, which is broadly concerned with the long-term transitional matter of arriving at a global order in which all societies are well-ordered members of the Society of Peoples. To be well-ordered, a society must be either liberal or decent.<sup>82</sup> Among types of societies that are not well-ordered are 'burdened societies', these 'lack the political and cultural traditions, the human capital and know-how, and, often, the material and technological resources needed to be well-ordered'.<sup>83</sup> Well-ordered peoples have a duty of assistance to burdened societies, to help them graduate to the status of liberal or decent societies, but it is not an obligation arising out of a principle of distributive justice.

What is the substance of the contrast between the duty of assistance and obligations of distributive justice? For Rawls it essentially comes down to the fact that the former, unlike most versions of the latter (such as the maximin or difference principle), has both a target and a cut-off point beyond which it ceases to operate. The target of the duty of assistance is to enable burdened societies to make the transition to well-ordered members of the Society of Peoples, societies with liberal or decent institutions that secure human rights and meet the basic needs of their members.<sup>84</sup>

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mutual aid do more work than any specific account of distributive justice.' Walzer, 'Response', in D. Miller and M. Walzer (eds), *Pluralism, Justice, and Equality* (1995) 293.

<sup>81</sup> O. O'Neill, *Bounds of Justice* (2001), at 134.

<sup>82</sup> The nature of liberal and decent peoples is explicated in Rawls, *supra* note 3, at 23–25 and 64–67. For our purposes, the key thing about them is that they are able to accept the Law of Peoples (*ibid.*, at 37) for the right reasons. Among the principles of the Law of Peoples is one enjoining the honouring of human rights. It should be noted that Rawls has a more minimalist conception of human rights than the schedule of rights recognized either in his theory of justice for a liberal society or in contemporary international law (*ibid.*, at 78–81). However, included among these rights is the right to life (including the means to subsistence and security), *ibid.*, at 65. I criticize Rawls' minimalism about human rights in 'From Utopia to Kazanistan: John Rawls and the Law of Peoples', 22 *Oxford Journal of Legal Studies* (2002) 367, at 380–390.

<sup>83</sup> Rawls, *supra* note 3, at 106.

<sup>84</sup> *Ibid.*, at 116.

Once that long-term target is reached, a cut-off point takes effect, so that no further assistance is necessary to eradicate or ‘maximin’ social and economic inequalities.<sup>85</sup> Now, Rawls admits that the maximin principle has considerable appeal in the present circumstances of the world, with its ‘extreme injustices, crippling poverty and inequality’.<sup>86</sup> But he asserts that the fact that it is meant to apply continuously without target or cut-off point, even in a hypothetical world (very different from our own) in which the duty of assistance is fully satisfied, renders its appeal questionable. This is brought out by the following thought-experiment:

two liberal or decent countries are at the same level of wealth ... and have the same size population. The first decides to industrialize and to increase its rate of (real) saving, while the second does not. Being content with things as they are, and preferring a more pastoral and leisurely society, the second reaffirms its social values. Some decades later the first country is twice as wealthy as the second. Assuming, as we do, that both societies are liberal or decent, and their peoples free and responsible, and able to make their own decisions, should the industrializing country be taxed to give funds to the second? According to the duty of assistance there would be no tax, and that seems right; whereas with a global egalitarian principle without target, there would always be a flow of taxes as long as the wealth of one people was less than that of the other. This seems unacceptable.<sup>87</sup>

However, the dispute between Rawls and proponents of international distributive justice is tempered by three factors. First, implementation of both the duty of assistance and an egalitarian principle of distributive justice, such as the maximin principle, would entail a radical departure from the existing situation in which, for example, one-third of deaths annually (18 million people) are attributable to poverty-related causes and in which the US government has stated that any ‘right to adequate food’ or ‘fundamental right to be free from hunger’<sup>88</sup> is an aspiration only and does not generate any international obligations.<sup>89</sup> Second, as Rawls concedes, global egalitarian principles of distributive justice, unlike Franck’s maximin principle, can be made to incorporate a cut-off point, in which case the contrast between the two kinds of principle would mainly manifest itself at the practical level of taxation and administration.<sup>90</sup> Third, given the indeterminacy already noted concerning what the implementation of a global maximin principle would actually involve, it is difficult to ascertain more generally how it would differ in practice from the fulfilment of the duty of assistance.

<sup>85</sup> *Ibid.*, at 111, 118.

<sup>86</sup> *Ibid.*, at 117.

<sup>87</sup> *Ibid.* Rawls also gives a second illustrative case for the same conclusion, one involving a differential rate of population growth resulting in different levels of stress between well-ordered societies on the elements of equal justice for women (at 117–118).

<sup>88</sup> Cf. Universal Declaration of Human Rights, Art. 25.

<sup>89</sup> Both facts mentioned in Pogge, ‘Priorities of Global Justice’, 32 *Metaphilosophy* (2001) 9, at 11. Pogge sums up the current situation thus: ‘The official position articulated by the United States and practiced by the developed countries can then be characterized by these three elements: We are able to reduce severe poverty and the hunger and diseases associated therewith at modest cost, we are willing to spend a tiny fraction of our national income toward such a reduction, but we are not legally or morally obligated to give any weight at all to this goal’ (*ibid.*, at 11).

<sup>90</sup> Rawls, *supra* note 3, at 119.

Although the contrast between the duty of assistance and the maximin principle can be softened in this way, basic matters of principle remain at stake in the conflict between them. One of these takes us back to the claim (in Part 3) that the repertoire of values governing international law is a pluralistic one. For a key aim of Rawls' illustrative thought-experiments is to highlight the importance of collective identification and, as corollaries of this, collective self-determination and responsibility, as values to be protected by the international order. As Rawls puts it, the value of individuals and associations being attached to their culture and taking an active role in its common public and civic life justifies 'preserving a significant room for the idea of a people's self-determination'.<sup>91</sup> And this idea poses the question: once the threshold of decency or justice has been met, why should self-determination be compromised for the sake of further narrowing the gap between the average wealth of different societies? Rawls contends that no such narrowing is warranted, because once the duty of assistance has been satisfied 'each people adjusts the significance and importance of the wealth of its own society for itself. If it is not satisfied, it can continue to increase savings, or, if that is not feasible, borrow from other members of the Society of Peoples'.<sup>92</sup> Now, Franck directly confronts this line of argument in noting that resistance to a global maximin principle on Rawls' part is motivated by the fact that differences in wealth may simply reflect various societies' 'value choices' about their social and economic development, which are presumably expressive of their self-determination. But his reply is that self-determination is not compromised because 'the maximin principle compels no nation to make a redistributive claim which would yield results contrary to that society's values. Rather, the principle posits a discursive claim available to those whose values are frustrated by existing (or projected) distributive injustice'.<sup>93</sup> The obvious problem with this rejoinder is that it focuses entirely on the perspective of potential beneficiaries under the global difference principle and ignores its impact on the self-determination of those societies whose wealth and resources are to be redistributed irrespective of their consent. The Rawlsian objection thus finds no direct, let alone compelling, response in *Fairness*.

This leaves at least two questions. Is such a response available on behalf of advocates of the global maximin or difference principle? And, secondly, is it even necessary to the realization of Franck's true aims? The first question is too large to be

<sup>91</sup> *Ibid.*, at 111.

<sup>92</sup> *Ibid.*, at 114. Elsewhere, he says that the role of the duty of assistance is to assist burdened societies to become full members of the Society of Peoples 'and to be able to determine the path of their own future for themselves', *ibid.*, at 118. For a more extended discussion of the tensions between (national) self-determination and global distributive justice, see D. Miller, *Citizenship and National Identity* (2000), at Ch. 10. Miller emphasizes that self-determination matters not just because of the value of collective autonomy, but also because such autonomy in the domestic context is essential to the emergence of a shared conception of *social* justice.

<sup>93</sup> *Fairness*, at 19.

adequately addressed here.<sup>94</sup> But criticism would no doubt focus on two assumptions that structure Rawls' thought-experiments. The first is the background empirical assumption that the most important determinants of a people's economic condition, and thus of its capacity to support a decent life for its members, lie in 'their political culture and in the religious, philosophical, and moral traditions that support the basic structure of their political and social institutions, as well as in the industriousness and cooperative talents of its members, all supported by their political virtues'.<sup>95</sup> It follows, according to Rawls, that no society exists anywhere in the world, marginal cases like the Arctic Eskimos aside, with resources too meagre to enable it to become well-ordered.<sup>96</sup> It is this assumption that makes differential endowments of natural resources an inadequate basis for justifying a redistributive principle in the international case (as compared with differential endowments of natural talents in the domestic case, the arbitrariness of which helps motivate Rawls' domestically-applicable difference principle). But, of course, it is a problematic assumption, both as to whether it is true (including whether one can really disentangle 'internal' and 'external' causes of wealth) and also whether, even if true, it affects only the implementation rather than the applicability of egalitarian principles of distributive justice.

In the absence of the first assumption, the concern about differential resource endowments might have been deployed to justify a redistributive principle — like Beitz's resource distribution principle<sup>97</sup> — even in a hypothetical situation in which the production of goods and services in each country is 'autarkic'.<sup>98</sup> But a separate argument for redistribution, one that motivates something like the maximin principle, enters the fray once production takes place within a global system of social and economic cooperation. For the claim would then be that the global system has a tendency to create, perpetuate and aggravate inequalities between societies. As Thomas Pogge has put it:

If affluent and powerful societies impose a skewed global economic order that hampers the economic growth of poor societies and further weakens their bargaining power, such imposition is not made right by the fact that the former societies also keep the latter from falling below the minimum.<sup>99</sup>

It is precisely the effects of the 'skewed' system, it might be argued, that are absent from Rawls' presentation of his thought-experiments. This is due to Rawls' second background assumption. In both hypothetical cases, the societies are presented in

<sup>94</sup> See the articles by Beitz, 'Rawls's Law of Peoples', 110 *Ethics* (2000) 669; Buchanan, 'Rawls's Law of Peoples: Rules for a Vanished Westphalian World', 110 *Ethics* (2000) 697; Pogge, 'An Egalitarian Law of Peoples', 23 *Philosophy and Public Affairs* (1994) 195.

<sup>95</sup> Rawls, *supra* note 3, at 108; see also 109, 117. Rawls is here influenced by the views of David Landes in *The Wealth and Poverty of Nations* (1998).

<sup>96</sup> *Ibid.*

<sup>97</sup> Beitz, *supra* note 2, at 137, discussed in Rawls, *supra* note 3, at 116.

<sup>98</sup> Rawls, *supra* note 3, at 116.

<sup>99</sup> Pogge, *supra* note 89, at 16–17.

abstraction from their participation in any ongoing structure of international cooperation. But it is only when the nature and effects of that structure come into view that the case for a global principle of distributive justice becomes plausible.<sup>100</sup> Now, it may well be open to Rawls to argue that the kind of 'skewed' global economic system that is the starting-point for this argument would not exist in his two hypothetical cases. For insofar as those cases are premised on a global environment in which the Law of Peoples is generally adhered to, then principles such as those enjoining that the freedom and independence of peoples be respected, that human rights be honoured, that peoples are equal and parties to the agreements that bind them and that they observe a duty of non-intervention, would tend to eliminate the sorts of practices that 'skew' the global economic system. Thus, for example, it could be argued that the economic fate of decent and liberal peoples would not be dependent on international capital markets or international economic policies that express the interests of powerful states in the ways that Pogge's argument suggests. For such relations of domination and exploitation would be subversive of their freedom and independence, thereby violating the first principle of the Law of Peoples.<sup>101</sup> Something like this also seems to be a possible reply to the objection that Rawls' illustrative cases draw a false analogy between individual and collective responsibility, in that whereas in the former case it is the individual decision-maker who reaps the consequences of their decisions, in the latter case it is often those who had no hand in making the original decisions (perhaps because they were not even alive at the time).<sup>102</sup> For insofar as a society is liberal or decent, allowing various forms of direct and indirect participation in political decision-making, the concern about imposing collective responsibility may be mitigated.

I leave these complex issues aside, because there remains the second question, that of whether Franck really needs to defend the maximin principle as a global principle of distributive justice to regulate the basic structure of international society. The reason for doubt on this front is the discrepancy between what such a principle would presumably require, i.e. radical reform of the international basic economic structure, and Franck's application of the maximin principle in *Fairness*, which is considerably more restrained and primarily at the level of individual treaty regimes rather than deep structural reform.<sup>103</sup> This is especially apparent in chapters 13 and 14 of *Fairness*, which take up 'the most obvious problematic of distributive justice: the income disparity between rich and poor nations, and all its social, political and cultural consequences'.<sup>104</sup> The former examines the global system of entitlements for

<sup>100</sup> Although even this conclusion might be resisted by those who would confine egalitarian principles of distributive justice to the domestic context because their essential role is to legitimate coercive state power, for which there is no international analogue. See R. M. Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (2000), at 2.

<sup>101</sup> Rawls, *supra* note 3, at 37.

<sup>102</sup> Beitz, *supra* note 94, at 691–692.

<sup>103</sup> This more modest interpretation of Franck's project was suggested by certain remarks of his in response to questioning by me at the Glasgow meeting. I do not claim that he would endorse it.

<sup>104</sup> *Fairness*, at 413.

disadvantaged states, e.g. aid programmes, commodity stabilization programmes and payments, trade preferences and resource transfers. The latter concerns international investment law, paying special attention to fairness in the expropriation of foreign-owned property. Need Rawls oppose the proposals in these chapters? It is not obvious that he must. After all, Rawls tells us that, in addition to complying with the Law of Peoples, well-ordered peoples 'will formulate guidelines for setting up cooperative organizations, and will agree to standards of fair trade as well as to certain provisions for mutual assistance. Should these cooperative organizations have unjustified distributive effects, these would have to be corrected in the basic structure of the Society of Peoples'.<sup>105</sup> Adherence to the duty of assistance is what prevents for Rawls such standards from having 'unjustified distributive effects', but nothing obviously precludes peoples from adopting the maximin principle in shaping cooperative organizations, standards of fair trade, environmental protection regimes etc., even if they do not adopt it as a fundamental principle regulating the basic structure of international society as a whole. So, in the end, the kind of pragmatic and piecemeal deployment of the maximin principle that Franck engages in need not draw him into conflict with Rawls, especially given that he is recommending its use in the current state of the world with its 'extreme injustices, crippling poverty and inequality'.<sup>106</sup> If this much more modest interpretation of the role of the maximin principle is adopted, of course, the idea that it is a 'gatekeeper' to the ethical discourse underlying international law goes by the board. But given the serious problems this idea encounters (see Part 2), that would be all to the good. Not for the only time, the tendency of Franck's doctrinal analyses and recommendations to swing free of his official theoretical commitments reveals itself as the *felix culpa* of *Fairness*.

## 5 Conclusion

*Fairness in International Law and Institutions* is a major landmark in recent international legal theory. This is due to its breadth of scope, the way it fuses theoretical insight, doctrinal analysis and proposals for institutional design, and its powerful elaboration and defence of the overarching thesis that ethical considerations should be central to the assessment and development of international law. In this paper, I have argued that those who wish to journey further into the promising territory beyond apology and utopia that Thomas Franck has opened up will have to supplement and modify the doctrines of *Fairness* in three ways: (1) by confronting the ethnocentric challenge through an adequate defence of the objectivity of universal ethical norms, (2) by adopting a more pluralist understanding of the values governing international law, one that goes beyond legitimacy and distributive justice, and (3) by either providing a fuller defence of the global maximin principle or cultivating a more avowedly circumspect and piecemeal attitude to the current and foreseeable significance of principles of international distributive justice. This is simultaneously a

<sup>105</sup> Rawls, *supra* note 3, at 115.

<sup>106</sup> *Ibid.*, at 117.

call for further work on international law that is deeply informed by ideas in moral philosophy, an interdisciplinary approach that promises to yield no less illumination than has been generated by the recent preoccupation on the part of many theoretically-inclined international lawyers with the discipline of international relations.