

FOREWORD
NEO-MADISONIAN GLOBAL CONSTITUTIONALISM:
THOMAS M. FRANCK'S DEMOCRATIC
COSMOPOLITAN PROSPECTUS FOR MANAGING
DIVERSITY AND WORLD ORDER IN THE
TWENTY-FIRST CENTURY

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United Nations Secretary-General Kofi Annan opened the NYU School of Law Institute for International Law and Justice Conference in Honor of Thomas M. Franck, from which the papers in this Conference issue resulted, with a delightfully warm tribute to Tom as "an invaluable advisor, a wonderful friend, and someone who makes even the most dry problems fun!" This combination of deep personal affection for Tom and respect for his extraordinary contributions to international law and its institutions was a theme in every one of the multitude of accolades delivered at that event by current students, by dozens of former students who had the privilege of working with Tom as Junior Fellows of the Center for International Studies, and by leading international lawyers from many countries. American Society of International Law President Anne-Marie Slaughter highlighted Tom's contributions to the ASIL, Canadian Foreign Minister Bill Graham attested to the esteem in which Tom is held in his native Canada, Alain Pellet documented Tom's qualities as a litigator in the International Court of Justice, and longtime colleagues John Sexton and Norman Dorsen spoke eloquently of Tom's leading roles in the development of New York University and its Law School. Dean Richard Revesz, who joined the Law School faculty as a young assistant professor in fields of law quite different from Tom's, expressed his appreciation for Tom's support as a mentor: "Tom was interested in my work before there was any work to be interested in." Tom's younger international law colleagues at NYU wrote collectively:

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His vast and profound body of scholarship; his intellectual leadership; his boundless energy for organizing events on timely and important subjects; his unique ability to bring together scholars, judges, international civil servants, diplomats, legal practitioners, and others to share ideas and experiences; his immense talents as a teacher; and, not least, his expansive personal generosity—all of these qualities, so remarkably encompassed within a single person, have immeasurably enriched our institution and our work.¹

Harold Koh's speech, delivered with characteristic empathy and élan and reprinted verbatim in this *NYU Journal of International Law and Politics* issue, captures the sentiments of all.²

The academic papers from this Conference are written by scholars who have in some way joined in Tom's teaching at NYU in recent years. The authors were not asked to be exegetical, let alone hagiographical. Explicit or implicit disagreements with Tom are many in the following papers, for Tom has not chosen his coteachers by reference to any criterion of like-mindedness. Indeed, while every one of the papers is characterized by deep affection and is founded on mutual respect, many of the authors' international law arguments in these papers quickly traverse the shared ground and move off along paths Tom has eschewed. This Foreword will seek to bring together elements of Tom's thought that are separately discussed in the different papers and will suggest that, when considered together, these elements may be interpreted as comprising parts of a neo-Madisonian global constitutionalist project. Several of the major formal themes in Tom's international law scholarship would fit easily into a constitutionalist scheme if one could be established, including his advocacy of international rule of law, central institutions such as the United Nations, legally structured coordination between national governmental power and international norms, and indi-

1. Philip Alston, David Golove, Benedict Kingsbury, Mattias Kumm, Joseph Weiler, and Katrina Wyman, *Foreword to Commemorative Program, NYU School of Law Conference, International Law and Justice in the Twenty-First Century: The Enduring Contributions of Thomas M. Franck* (2002).

2. Harold Hongju Koh, *A Toast to "Tom the Frank,"* 35 N.Y.U. J. INT'L L. & POL. 303 (2003).

vidual rights and freedoms. But the object here is to assess whether a set of less formal elements in Tom's thought may provide the initial grounding for such a constitutionalist project. The starting point must be the fundamental commitments in Tom's sense of his own vocation as international lawyer. These commitments shape his thought on a cluster of constitutionalist ideas that will then be considered seriatim: Impartial Adjudication, Jurying, Rationality, Democracy, Cosmopolitanism, and Diversity. It will be suggested at the end that these together form a partial global constitutionalist project, but that the particular sense of vocation felt by this global constitutionalist explains why the project must, for now, be incomplete.

What does the vocation of international lawyer mean in Tom's thought? David Kennedy's luminescent periodizing account,³ positioning Tom's works in the intellectual and political currents of their times, earned the acclaim of all at the conference, including Tom and scholars such as session chair Oscar Schachter, who had been active in U.S. international law scholarship throughout the period on which Kennedy focuses: 1945 to the end of the century. Kennedy's underlying argument is that the discipline of international law is to be defined, not in terms of something that *is* international law, but rather in terms of the projects of the people who, at any moment, make up the field (the "people with projects" approach). Martti Koskenniemi attributes a comparable view to Tom, interpreting Tom's scholarly style or method as one implying that international law is "an extension of what well-placed lawyers, and especially courts, do (including the argument that courts should do as much as possible)."⁴ But for Tom, international law is a matter of commitment, not just of doing something fitting for the moment. In Weberian terms, it calls upon both the ethic of conviction and the ethic of responsibility.⁵ The scholar confronts power with the optimism and sense of purpose of Shahrazad: "I will tell thee a tale which shall be

3. David Kennedy, *Tom Franck and the Manhattan School*, 35 N.Y.U. J. INT'L L. & POL. 397 (2003).

4. Martti Koskenniemi, *Legal Cosmopolitanism: Tom Franck's Messianic World*, 35 N.Y.U. J. INT'L L. & POL. 471, 483 (2003).

5. See MAX WEBER, *The Profession and Vocation of Politics*, in WEBER: POLITICAL WRITINGS 309-69 (Peter Lassman & Ronald Spiers eds., 1994).

our deliverance, if so Allah please, and which shall turn the King from his blood-thirsty custom."⁶

It is this deliberate mingling of conviction and responsibility, of theory and practice, that animates the modern international law tradition and creates the grounds for the optimism and committed purpose that characterize Tom's scholarship. Might Tom's scholarly vocation be one that connects this international law tradition to a future global constitutionalism? Consideration of such a connection must begin with Tom's first book, *Race and Nationalism*,⁷ which is taken up in Karen Knop's paper.⁸ This book, and Tom's related work on the foundations and prospects of postcolonial federation in south-central and east Africa,⁹ manifest a belief that good constitutional architecture makes a tremendous difference to human flourishing, but that such architecture can only be built and function effectively where it is conformable to the particular histories, cultures, and diverse constituencies in which it must be embedded. Tom's focus then was on the elaboration of a workable constitution for a single society or small group of federated societies, a project in which the interaction with international law and politics was only a secondary matter.

Tom's work on U.S. constitutionalism, also begun early in his career and sustained ever since, manifests similar beliefs, although in this work structural features and core values have loomed larger than contingent historical and social dimensions.¹⁰ David Golove makes a persuasive case that Tom's ap-

6. THE ARABIAN NIGHTS: TALES FROM A THOUSAND AND ONE NIGHTS 22 (Richard F. Burton trans., Modern Library Classics 2001).

7. THOMAS M. FRANCK, RACE AND NATIONALISM: THE STRUGGLE FOR POWER IN RHODESIA-NYASALAND (1960).

8. Karen Knop, *Reflections on Thomas Franck, Race and Nationalism* (1960): "General Principles of Law" and *Situated Generality*, 35 N.Y.U. J. INT'L L. & POL. 437 (2003).

9. WHY FEDERATIONS FAIL: AN INQUIRY INTO THE REQUISITES FOR SUCCESSFUL FEDERALISM (Thomas M. Franck ed., 1968).

10. See, e.g., THOMAS M. FRANCK & EDWARD WEISBAND, FOREIGN POLICY BY CONGRESS (1979); THE TETHERED PRESIDENCY: CONGRESSIONAL RESTRAINTS ON EXECUTIVE POWER (Thomas M. Franck ed., 1981); THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992); THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS AND SIMULATIONS (2d ed. 1993).

proach to U.S. constitutional provisions relating to international affairs is distinctly Madisonian.¹¹ Golove emphasizes the importance in Tom's thinking of core Madisonian arguments for separating the powers of government among different institutions, and for interpreting the U.S. Constitution so as both to achieve harmony between the objectives of U.S. and international law and to enable the United States to participate in international agreements and institutions. Golove thus claims a Franckian and Madisonian heritage for his own argument that the U.S. Constitution limits the President's commander-in-chief powers so as to require that their exercise conform also to the international laws of war.

Moving from national constitutionalism to Tom's thought about the special needs of a legitimate and fair international politicolegal system, several papers identify different adaptations Tom has proposed from Madisonian national constitutionalism. These neo-Madisonian transpositions from U.S. constitutionalism to the architecture of the more haphazard system of international law and institutions include strong advocacy for the rule of law and third-party decision making, ideally through impartial judging but otherwise through a jury of peers, a thoroughgoing Enlightenment rationality, and a democratic commitment.

Karen Knop argues that a heuristic based on the role of the national court judge has fundamentally shaped Tom's thought about the international system from the beginning of his career.¹² She sees his efforts to promote some form of institutional impartiality and a culture of reason-giving as rooted in a desire to transfer the hopes of a domestic adjudicative ideal into the arrangements of international politics. As she points out, international adjudicative institutions were less central than other U.N. institutions in Tom's early writing, precisely because he felt there was not global acceptance of the ideal of courts as impartial makers of decisions based on reasoned justification.¹³ But he has argued repeatedly for refined but active judicial involvement in international affairs,

11. David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. INT'L L. & POL. 363 (2003).

12. See Knop, *supra* note 8, at 439.

13. See Knop, *supra* note 8, at 446.

whether by the U.S. federal courts in foreign relations questions or by the International Court of Justice in reviewing the legality of Security Council acts. The vision of the role of the judge in his academic writing has, to some, seemed too Herculean, too much within the common law tradition of judging as theorized by his colleague Ronald Dworkin,¹⁴ to apply to international judging.¹⁵ Karen Knop's call for a greater accommodation of diversity echoes this concern. In recent years, however, as he has become increasingly involved in the practice of the International Court of Justice as counsel and judge, he has characteristically sought to adapt this theory to the practical operations of the institution. A particular example is found in his dissenting opinion in the merits phase of the Indonesia/Malaysia case, which opens with a thoughtful constitutionally inspired but not particularly Dworkinian explication and defense of the role of the party-appointed ad hoc judge of the ICJ.¹⁶ This is consistent with the inescapable observation as to international tribunals more generally, that the current weaknesses of arrangements for appointment of judges, the great variation among such tribunals in the effectiveness and legitimacy constraints of their operations, and the need for a fine-grained theory of institutional roles each require a highly variegated theory as to the proper roles and future aspirations of differently situated tribunals.

The idea that the fifteen-member United Nations Security Council should understand itself as, and be interpreted as, fulfilling a jury function when it responds to a state's argument for the legality or illegality of a particular resort to force is an enriching neo-Madisonian variant of Tom's view that the U.S. Congress performs a jurying function in relation to executive acts.¹⁷ Both are checks upholding separation of powers in situations where an authoritative judge is unlikely to rule. For

14. See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986).

15. See Knop, *supra* note 8, at 451; Koskenniemi, *supra* note 4, at 483.

16. Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), Judgment on Merits, Case No. 102 (Int'l Ct. of Justice, Dec. 17, 2002), at http://www.icj-cij.org/icjwww/idocket/iinma/iinmajudgment/iinma_ijudgment_20021217.PDF; *id.*, Dissenting Opinion by Judge Franck, at http://www.icj-cij.org/icjwww/idocket/iinma/iinmajudgment/iinma_ijudgment_20021217_Franck.PDF [hereinafter Dissenting Opinion].

17. See THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 186 (2002).

Tom, the jurying function is performed not only by the Security Council but also by various intergovernmental bodies in their spheres of competence. The jury cannot always be relied upon to reach a rational result, and even juries that reach the right result may reach that result for incoherent or wrong reasons. This raises the problem of how far these composite bodies can or should enunciate general norms through cases. One of the major contemporary arguments in favor of legislatures as against courts is exactly that different members of the legislature can unite on a decision while giving incompatible reasons that express the multiplicity of voices in a diverse society. But Nathaniel Berman makes the case that Tom is committed, above all, to rationalism in addressing and pursuing the goals of an international legal system.¹⁸ As Karen Knop emphasizes, this rationalism attaches great value to the requirements of coherence and reasoned justification.¹⁹ The derivation of clear legal rules from the episodically incoherent deliberation of collectivities on isolated cases cannot be a major objective, except where more rational possibilities are absent. (David Malone's paper, evaluating U.N. Security Council practice in terms of shared understandings rather than norms in most cases and chronicling shifts in these understandings as the challenges and the political constellations change, gives a revealing practice-informed account of the self-understandings of the participants in the day-to-day work of the institution.)²⁰ Tom does not expect the jury to make general and clear rules supported by coherent reasons, but rather sees the jury functioning to bridge the gap between law and legitimacy, to provide an indicative response to hard cases, to decide what to accept and what to denounce in the messy world of the possible.

The argument that Tom's project has been about the quest for the most rational structures within prevailing operational constraints is buttressed in Nathaniel Berman's analysis of two of Tom's substantive opinions as an ad hoc judge in the

18. Nathaniel Berman, *The Quest for Rationality: The Recent Writings of Tom Franck*, 35 N.Y.U. J. INT'L L. & POL. 339 (2003).

19. See Knop, *supra* note 8, at 448-49 (referring particularly to THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990)).

20. David M. Malone, *The Security Council in the Post-Cold War Era: A Study in the Creative Interpretation of the U.N. Charter*, 35 N.Y.U. J. INT'L L. & POL. 487 (2003).

Indonesia/Malaysia Pulau Ligitan and Pulau Sipadan case in the ICJ.²¹ Tom's dissenting opinion on the merits of this dispute argued that a presumption of complete resolution of outstanding territorial issues should have been employed as an interpretive device to decide upon the meaning of the 1891 U.K.-Netherlands treaty,²² it being unclear whether the treaty makers themselves intended this.²³ There being no evidence of a contrary intention, this presumption should have applied, resulting in the 1891 boundary line's extending far enough to resolve the allocation of the disputed islands.²⁴ In the earlier proceedings on the application of the Philippines to intervene in the case, Tom's separate opinion argued that the Philippines' claims to the North Borneo area, rooted in complex feudal connections and early colonial dealings, have been eclipsed by the more recent exercise by the people in the territory of their modern right to self-determination.²⁵ Berman suggests that these opinions embody the pursuit of rationality within the pragmatic constraints of doing the best that can be done in any particular circumstance. The pragmatic element gives Berman pause. How could Tom say of the dealings of the Sultan of Sulu in 1878 that these "historic claims and feudal pre-colonial titles are merely relics of another international era, one that ended with the setting of the sun on the age of colonial imperium,"²⁶ and then propose to decide the case based on a presumption about the 1891 colonial treaty? Or, referring to Tom's *Recourse to Force* and other works,²⁷ why should India's incorporation of Goa without ever consulting the Goans be treated as legitimated by the jury of states in the United Nations, whereas Indonesia's incorporation of East Timor, which a few years after the invasion ceased to be the subject of further condemnatory U.N. resolutions, was always regarded by Tom as illegitimate? The answer to both questions,

21. See Berman, *supra* note 18.

22. See Dissenting Opinion, *supra* note 16, ¶ 43.

23. See *id.* ¶ 36.

24. See *id.* ¶ 43.

25. Application by the Philippines to Intervene (Indon. v. Malay.), Separate Opinion by Judge *ad hoc* Franck, Case No. 102, ¶ 15 (Int'l Ct. of Justice, Oct. 23, 2001), at http://www.icj-cij.org/icjwww/idocket/iinma/iinmajudgment/iINMA_ijudgment_20011022.PDF.

26. *Id.* ¶ 15.

27. See FRANCK, *RECOURSE TO FORCE*, *supra* note 17, at 127.

it appears, is "democracy." The Philippines' claim based on the Sultan of Sulu's activities has been eclipsed by self-determination for the people of Sabah, exercised (according to the United Nations, anyhow) through a democratic election to join Malaysia. The incorporation of Goa is more legitimate because the Goans thereafter had the benefits of India's democracy.

The democratic entitlement is one of the international law ideas with which Tom has been most deeply concerned. His 1992 article about the emerging right to democratic governance²⁸ was, at the time, greeted by some of the worldwise, especially those living in other well-established democracies, as a naive example of American liberal utopian overenthusiasm. But this attitude of polite condescension has declined with increasing acknowledgment that he put on the table a great question of world constitutional order. Important concerns remain about the dangers and difficulties of democratic institutional design in deeply divided societies, and about problems of transition, emergency, and the limitations of a rights-based approach. Even more fundamental are the implications of extrapolating from a democratic commitment in national constitutionalism to ideas for a democratic international order. Philip Allott's paper joins this debate but differs profoundly from Tom's neo-Madisonianism.²⁹ Allott's characterization of the current national practice of "democracy" as merely the orchestration of oligarchies,³⁰ and of current international society as an oligarchy of oligarchies³¹ whose personnel are the international *Hofmafia*,³² is a diagnostic Tom seems unlikely to share. Allott's prescription—the construction in the world of ideas of a new international social reality by a small intellectual aristocracy around whom the masses may rally in a democratic postdemocracy—is open-textured enough that Tom's ideas might be among the chosen, but Allott's vision seems far from Tom's focus on ideas that engage directly with the problems and possibilities of a real-world con-

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

29. Philip Allott, *The Emerging International Aristocracy*, 35 N.Y.U. J. INT'L L. & POL. 309 (2003).

30. *See id.* at 334.

31. *See id.* at 336.

32. *See id.* at 334 n.50.

juncture. Even Tom's call for a popular second chamber alongside the interstate chamber in the United Nations General Assembly³³ is programmatic and reformist, whereas Allott's thinking is idealist and emancipatory. Tom's interest in democracy as freedom is well captured in Martti Koskenniemi's suggestion that Tom "falls back on international law, not as a resigned second best, but rather as an articulation of a utopia turned into a project of freedom, a key aspect of which is its indeterminacy or openness."³⁴

Koskenniemi properly associates Tom's international law with cosmopolitanism. This is a fraught term in Central and Eastern Europe especially, long used pejoratively to denigrate antinationalism, and at times a code for anti-Semitism. Koskenniemi, of course, intends a different reference: a reference to the tradition of international law as a profession, which he associates with the founding of the *Revue de Droit International et de Législation Comparée* and of the *Institut de droit international* in the early 1870s.³⁵ Many of these founding figures were avowedly cosmopolitan, although they had various national passions and by and large lived in the privileged portions of a grossly unequal world. Karen Knop's proposal that diversity and multiplicity may be achieved by giving much richer content and greater international salience to "general principles of law" juxtaposes neatly with Martti Koskenniemi's discussion of Hersch Lauterpacht's interest in general principles as means to free international law from dependence on sovereignty and governmental internationalism.³⁶ Yet Koskenniemi locates Lauterpacht not in a tradition of celebrating diversity, but rather in one directed largely at transcending it. He is an heir of the cosmopolitan founders of the *Institut de droit international*, who "were not looking for more treaties be-

33. See THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 483-84 (1995).

34. Koskenniemi, *supra* note 4, at 478.

35. See *id.* at 471-72. Koskenniemi's view—that this professionalization in the 1860s and 1870s is the key shift through which modern international law emerges—is open to contestation. Some see the key break as occurring with international institutionalization in the immediate aftermath of World War I; others look to the end of European extra-European empires; others see much more continuity across these divides; others see simply one thing after another; and still others think it depends on who looks and where.

36. See *id.* at 475.

tween states, but rather for professional codification of universal principles."³⁷ When Karen Knop gently chides Tom for implying in his more recent work that diversity is simply a problem of deep disagreement that can potentially be overcome by persuasion and accommodation,³⁸ and when she calls for recognition of diversity as a function of inequality that requires much more than persuasion and accommodation, her critique is of a long cosmopolitan tradition as much as it is of Tom.

Knop shifts the focus away from the limitations of this tradition of international law and toward a broader global view of constitutionalism when she draws attention to Tom's early concern with constitutionalism as a means to manage and perhaps take advantage of diversity, and to his preoccupation with the problem of persuading people to "buy in" to a particular constitution or constitutional institutions more generally.³⁹ Knop expresses regret that the earlier, fuller iterations of these concerns were, in her view, attenuated in some of Tom's later international law writing, and she makes a critical case for highlighting and renewing these constitutionalist commitments in Tom's work.⁴⁰

What is the character of the commitments that shape this particular but vital constitutionalism? Koskenniemi concludes, in the end, that Tom's thought is both messianic and Christian. Slouching toward Jerusalem, he seems to imply. But Tom's constitutionalism is more provisional than revelatory. Not salvation, but an eternity of becomings. This is perhaps the key to Tom's global constitutionalism, and why it must be partial, not fully written. It is a constitutional vision, but it is one of beginnings. Not an end-state constitution, but a constitutionalism of becoming. It is kin to Shahrazad's tale, the tale that succeeds because it cannot be completed—and it is just as entrancing, just as wise.

37. *Id.* at 472.

38. See Knop, *supra* note 8, at 452-54.

39. See *id.* at 443-45.

40. Compare this with the increasing body of constitutionalist work on diversity. See, e.g., JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* (1995).

