

REFLECTIONS ON THOMAS FRANCK, *RACE AND NATIONALISM* (1960): “GENERAL PRINCIPLES OF LAW” AND SITUATED GENERALITY

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I. INTRODUCTION

In 1960, Thomas Franck published *Race and Nationalism: The Struggle for Power in Rhodesia-Nyasaland*.<sup>1</sup> Few international lawyers are familiar with this first book—perhaps because it is about federalism, perhaps because the Federation of Southern and Northern Rhodesia and Nyasaland proved to be a failure, or perhaps because the book simply has been overshadowed by Tom’s contributions since. In this Article, I suggest that *Race and Nationalism* shares a theme with several of Tom’s most influential books: *The Structure of Impartiality* (1968),<sup>2</sup> *The Power of Legitimacy Among Nations* (1990),<sup>3</sup> *Fairness in International Law and Institutions* (1995),<sup>4</sup> and now *Recourse to Force*

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\* Faculty of Law, University of Toronto; Senior Fellow, Center for International Studies, New York University School of Law, 2001–2002. The invitation to write about even one of Thomas Franck’s many contributions to international law is an intimidating honor. For conversations exploring the possibilities, I am grateful to Benedict Kingsbury and Nico Krisch. My thanks also go to Nathaniel Berman, James Crawford, Vaughan Lowe, Mayo Moran, John Tasioulas, and Robert Wai for their helpful comments and suggestions at various stages of the Article. This Article was revised and adapted from a presentation delivered at the New York University School of Law Conference *International Law and Justice in the Twenty-First Century: The Enduring Contributions of Thomas M. Franck*, held in New York City on October 4–5, 2002.

1. THOMAS M. FRANCK, *RACE AND NATIONALISM: THE STRUGGLE FOR POWER IN RHODESIA-NYASALAND* (1960) [hereinafter FRANCK, *RACE AND NATIONALISM*].

2. THOMAS M. FRANCK, *THE STRUCTURE OF IMPARTIALITY: EXAMINING THE RIDDLE OF ONE LAW IN A FRAGMENTED WORLD* (1968) [hereinafter FRANCK, *THE STRUCTURE OF IMPARTIALITY*].

3. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990) [hereinafter FRANCK, *THE POWER OF LEGITIMACY*].

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

(2002).<sup>5</sup> This is the theme of persuasion and diversity: the problem of formulating, interpreting, and applying legal norms so that they appear legitimate in the eyes of very different communities.<sup>6</sup>

While *Race and Nationalism* examines one concrete attempt at federalism, the four later books are about international law and are framed in the abstract. With this shift from persuading people and communities centered on a state to persuading states in the world, Tom's account of diversity thins. And over the course of *The Structure of Impartiality*, *The Power of Legitimacy*, *Fairness*, and *Recourse to Force*, Tom narrows the relevance of diversity, channeling it into some, but no longer all, aspects of persuasion. Commentary on *The Power of Legitimacy* and *Fairness* has targeted this result, criticizing Tom's sanguineness about his own standpoint and his unconcern for the differences in perspective and position produced by history, culture, and gender. Yet, to read *Race and Nationalism* is to remember that, as a scholar, Tom cut his teeth on colonialism. Part II of this Article, which describes the history and style of the book, reminds us of Tom's awareness of what it is to stake out a political position for and in a postcolonial society.

Part III begins with *Race and Nationalism's* clear-headedness about the deep difficulties of building and sustaining community in the face of colonial history. In this study of the dysfunctional Rhodesia-Nyasaland federation and Tom's subsequent edited collection *Why Federations Fail* (1968),<sup>7</sup> colonialism complicates any general commitment to the ideology of multiracial liberal democracy or the institutions of federalism.

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5. THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* (2002) [hereinafter FRANCK, *RECOURSE TO FORCE*].

6. Although the sociological prognosis for diversity and the growing ability in law to express one's difference through such choices as name and nationality are central to THOMAS M. FRANCK, *THE EMPOWERED SELF: LAW AND SOCIETY IN AN AGE OF INDIVIDUALISM* (1999), I do not discuss *The Empowered Self* in this Article because it is not concerned with persuasion or, at least, not in the same sense as these four books are. On *The Empowered Self*, see Martti Koskeniemi, *Legal Cosmopolitanism: Tom Franck's Messianic World*, 35 N.Y.U. J. INT'L L. & POL. 471.

7. *WHY FEDERATIONS FAIL: AN INQUIRY INTO THE REQUISITES FOR SUCCESSFUL FEDERALISM* (Thomas M. Franck ed., 1968) [hereinafter *WHY FEDERATIONS FAIL*].

He argues, for example, that the “gigantic common charismatic dream”<sup>8</sup> of the frontier lands cemented settler federations like Australia, Canada, and the United States, while African and Asian attempts at federation lacked the unifying promise of ever further territorial expansion. Part III then traces Tom’s theorization of persuasion from *Race and Nationalism* on, showing the diminishing relevance of diversity and touching on some of the criticisms that *The Power of Legitimacy* and *Fairness* have encountered on this ground.

While Tom himself has offered a reply to his critics,<sup>9</sup> Part III sets the stage for a reply in a different vein that seeks to integrate Tom’s earlier work into his later. It does so by making visible the heuristic of *The Structure of Impartiality*, *The Power of Legitimacy*, *Fairness*, and *Recourse to Force*—a dimension of Tom’s methodological contribution to international law that has gone virtually unnoticed. Although Tom himself never identifies or presents the methodology as such, each book uses domestic adjudication as a heuristic.<sup>10</sup> Between them, they implicitly take three of the main ways in which the interpretation and application of law are legitimated in domestic society—through the impartiality of the judge, the giving of reasons for judgment, and the role of the jury—and posit approximations or substitutes in international society.

Part IV looks at how the metaphor of adjudication might be adapted to respond to the sorts of diversity-based criticisms leveled at Tom’s post-1990 scholarship on persuasion in international law. By developing the metaphor to take fuller account of communities of judgment, we are able to recognize the emergence of a new model of legal sources that aspires to do justice to diversity without sacrificing universality. In particular, Part IV discusses several recent interpretations of “general principles of law.” While the texts and contexts differ and the methods of interpretation are not the same, this Part proposes a way of reading them that draws out a promising com-

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8. Thomas M. Franck, *Why Federations Fail*, in *WHY FEDERATIONS FAIL*, *supra* note 7, at 167, 188.

9. See generally Thomas M. Franck, *Epistemology at a Time of Perplexity*, 13 *EUR. J. INT’L L.* 1025 (2002). Tom also has continued to write on colonialism. See Nathaniel Berman, *The Quest for Rationality: The Recent Writings of Tom Franck*, 35 *N.Y.U. J. INT’L L. & POL.* 339.

10. Along related lines, see David Kennedy, *Tom Franck and the Manhattan School*, 35 *N.Y.U. J. INT’L L. & POL.* 397.

monality. It suggests that, in all of them, general principles of law are based on what I will call *situated generality*. Rather than finding a general principle of law by simply counting how many national legal systems contain that principle, the judge employs a differentiated or weighted process of generalization and justification that reflects where the court stands and for whom it judges. Thus, in Vice President Weeramantry's conception of sustainable development in the *Gabcikovo-Nagymaros* case,<sup>11</sup> we find a correction in the formulation of general principles of law for the distortions and exclusions of colonialism. While the provision on applicable law in the Rome Statute of the International Criminal Court<sup>12</sup> refers to "general principles of law derived . . . from national laws of legal systems of the world,"<sup>13</sup> it also specifies that they include "as appropriate, the national laws of the states that would normally exercise jurisdiction over the crime."<sup>14</sup> And in the capital extradition case of *United States v. Burns*,<sup>15</sup> the Supreme Court of Canada interprets the analogous "principles of fundamental justice" in the Canadian constitution<sup>16</sup> so as to give effect to Canada's bilateral relations with the United States in light of Canadian multilateral commitments not shared by the U.S. government.

## II. RACE AND NATIONALISM

*Race and Nationalism* is a remarkably detailed sociopolitical study of a federation that would have only a brief and bitter existence: the Federation of Southern and Northern Rhodesia and Nyasaland that existed from 1953 to 1963 before it fractured into Rhodesia (present-day Zimbabwe), Zambia, and Malawi.<sup>17</sup> Published at five minutes to midnight in the life of

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11. See *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, 88 (Sept. 25) (separate opinion of Vice President Weeramantry). For a discussion of the case, see generally Symposium, *The Case Concerning the Gabcikovo-Nagymaros Project*, 8 Y.B. INT'L ENVTL. L. 3 (1997).

12. Rome Statute of the International Criminal Court, *adopted* July 17, 1998, U.N. Doc. A/CONF.183/9 (entered into force July 1, 2002).

13. *Id.* art. 21(1)(c).

14. *Id.*

15. *United States v. Burns*, [2001] 1 S.C.R. 283 (Can.).

16. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7.

17. See generally Herbert J. Spiro, *The Federation of Rhodesia and Nyasaland*, in *WHY FEDERATIONS FAIL*, *supra* note 7, at 37.

the federation, *Race and Nationalism* was written when a genuine multiracial federation still looked like a faint possibility despite what Tom documents as the overwhelming hostility of the white settler minority to any degree of social integration or political power-sharing with the native African majority. Within three years of the book's publication, the federation had ended. To reveal the federation for what it was and to write against futility are what make *Race and Nationalism* a brave and considered intervention. "Many people in Central Africa will hate this book," the British Labour Party MP James Callaghan writes in his foreword.<sup>18</sup> "But if they do so, they will be failing to understand how their system strikes an unprejudiced and impartial observer who comes fresh to the scene."<sup>19</sup> For Henry J. Richardson III, Tom's exposé of the false multiracial federation remains one of his signal contributions.<sup>20</sup>

In *Race and Nationalism*, Tom argues from first-hand knowledge. "He spent much time in the Federation, went everywhere and talked to everybody."<sup>21</sup> While Tom followed the legislative ploys and parliamentary intrigues in the battle over voting rights,<sup>22</sup> he did not remain among the political élites. He toured places such as the segregated military camps, recording the grotesquely inadequate housing conditions of the African troops: families crowded into dank huts with rotted-away roofs, the floors turning to mud and then marsh in the

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18. James Callaghan, *Foreword to FRANCK, RACE AND NATIONALISM, supra* note 1.

19. *Id.*

20. Henry J. Richardson III, Remarks made in the discussion of this Article as presented at the New York University School of Law Conference *International Law and Justice in the Twenty-First Century: The Enduring Contributions of Thomas M. Franck* (Oct. 5, 2002). In his response to proposals in the early 1990s to save "failed states" by developing new forms of U.N. conservatorship, Richardson relatedly criticizes the unquestioning attachment to preserving the claimed authority of the "failed" state or government, including where that state or government is systematically racist, and to the indiscriminate ascribing of its failures exclusively to its local population. As an alternative, he outlines a strategy of preventive diplomacy based on the right of self-determination of the constituent peoples and designed to ensure an equitable accommodation. See Henry J. Richardson III, "Failed States," *Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations*, 10 TEMP. INT'L & COMP. L.J. 1, 51, 60-68 (1996).

21. Callaghan, *supra* note 18.

22. See FRANCK, *RACE AND NATIONALISM, supra* note 1, at 181-94.

rainy season, and the inhabitants perched on their beds to escape the inches-high rush of water across the floor.<sup>23</sup>

The book's acknowledgments testify that Tom sought out all sides and views. Among the mix of names mentioned are his friend George Nyandoro, Eleanor Roosevelt, and Lord Beaverbrook.<sup>24</sup> One of Zimbabwe's nationalist heroes,<sup>25</sup> George Nyandoro was at the time the second-in-command of the African National Congress in Southern Rhodesia.<sup>26</sup> Lord Beaverbrook was a Canadian-born newspaper magnate, a British cabinet minister in both wars, and the politically controversial editor of the immensely popular *Daily Express* in Britain.<sup>27</sup> Thoroughly detested by the novelist Evelyn Waugh,<sup>28</sup> he was said to be the model for Lord Copper, editor of the *Daily Beast* in Waugh's satire *Scoop*.<sup>29</sup> In the early pages of *Scoop*, Lord Copper tells his foreign editor, "*The Beast* stands for strong, mutually antagonistic governments everywhere."<sup>30</sup> On the ground, Tom polled over one thousand members of the European population on their attitudes to the segregation of such everyday institutions as post offices and railway dining cars, controlling for the factors of sex, religion, origin, length of residence in central Africa, and socioeconomic status.<sup>31</sup> Indeed, it is striking, just as postcolonial feminists have started to

23. See *id.* at 153.

24. *Id.* at acknowledgment.

25. See STEVEN C. RUBERT & R. KENT RASMUSSEN, HISTORICAL DICTIONARY OF ZIMBABWE 245 (3d ed. 2001).

26. See FRANCK, RACE AND NATIONALISM, *supra* note 1, at 253.

27. For general biographical information on Lord Beaverbrook, see the information provided by The Beaverbrook Foundation, at <http://www.beaverbrookfoundation.org/bbrook.htm>.

28. Evelyn Waugh remarked of Beaverbrook, "Of course, I believe in the Devil. How otherwise would I account for the existence of Lord Beaverbrook?" Alan Brien, *The Proprietor*, in THE BEAVERBROOK I KNEW 178, 186 (Logan Gourlay ed., 1984).

29. Views differ. Compare DOUGLAS LANE PATEY, THE LIFE OF EVELYN WAUGH: A CRITICAL BIOGRAPHY 158 (1998) (Beaverbrook was the "original of Lord Copper") and ROBERT R. GARNETT, FROM GRIMES TO BRIDESHEAD: THE EARLY NOVELS OF EVELYN WAUGH 124 (1990) (Lord Copper based on Beaverbrook) with CALVIN W. LANE, EVELYN WAUGH 81 (1981) (Lord Copper probably a composite of Beaverbrook and Lord Northcliffe) and A.J.P. TAYLOR, BEAVERBROOK 678 (1972) (on Waugh's authority, Lord Copper not based on Beaverbrook).

30. EVELYN WAUGH, SCOOP 14 (1938).

31. See FRANCK, RACE AND NATIONALISM, *supra* note 1, at 3, 237.

explore the uncomfortable facts of white women's role in empire,<sup>32</sup> that Tom's attitude survey shows that European women in Rhodesia-Nyasaland statistically were much more opposed to racial integration than were European men.<sup>33</sup>

### III. PERSUASION AND DIVERSITY

The title *Race and Nationalism* expresses what Tom saw as the only alternatives for the Federation of Rhodesia and Nyasaland in 1960. For him, the then 7,000,000-to-250,000 ratio of Africans to whites in the federation

confounds all dreams of white supremacy, places pious platitudes about "multiracialism" in proportion, and decrees that the country is irretrievably destined, eventually, to become an African state, and not an outpost of white Empire.

The only question is whether that destiny will be realized as the culmination of peaceful, orderly, planned cooperation between the races, or in violence and chaos . . . whether central Africa can find its way to independence as a free African state in friendly association with the western democratic community or whether it must undergo a stage of violent, introverted black nationalism.<sup>34</sup>

In this respect, the design of the federation and the achievement of the design were dependent on persuasion, and persuasion, dependent on diversity. Federation ought, we might think, to provide a set of institutions well suited to mediating among groups, identities, and interests. The same should be true of multiracial liberal democracy. Yet, in *Race and Nationalism* and particularly in his 1968 edited collection *Why Federations Fail*, Tom hypothesizes that the appeal of a federation depends not only on certain political, social, and economic conditions, but also on the ability to reconcile the different associations that the structuring idea itself holds for the communities involved—over and above any specific distributive implications for loyalties or resources. In *Why Federations*

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32. See, e.g., ANNE MCCLINTOCK, *IMPERIAL LEATHER: RACE, GENDER AND SEXUALITY IN THE COLONIAL CONTEST* (1995).

33. See FRANCK, *RACE AND NATIONALISM*, *supra* note 1, at 237-38.

34. *Id.* at 1.

*Fail*, Tom shows that in East Africa, where federation between the nations of Tanganyika, Zanzibar, Kenya, and Uganda never came about, the very meaning of federalism for Africans had first to be rescued from its association with mercantilist-colonialist methodological convenience without next becoming submerged in the larger anticolonial vision of pan-African federation.<sup>35</sup>

The history and context of colonialism matter no less to the success of a federation than to its initial appeal. In his conclusion to *Why Federations Fail*, Tom maintains that in stable settler federations like Australia, Canada, and the United States, colonialism aided in the vision of community. The colonists' dream of "opening up the land"—what were seen as the vast, vacant, lucrative frontiers—offered a common ideal "so big that it could accommodate . . . liberals and conservatives, slaveholders and abolitionists, French and English, Catholics, Anglicans and nonconformists."<sup>36</sup> In Africa and Asia, there was no such lure of land and hence no burgeoning sense of shared identity.<sup>37</sup>

*Race and Nationalism* and *Why Federations Fail* thus suggest the difficulty of determining generally what ground rules for political and legal engagement will be attractive to and function in a society made up of culturally distinct and historically unequal communities. In these early works on postcolonial federations, Tom's depiction of the complexity of persuasion recognizes diversity as raising issues of both subjectivity and inequality. Cultural differences between colonizer and colonized mean that not all communities involved will understand the same rule in the same way, and the inequalities produced by colonization mean that predicating rules on dominant patterns of meaning, as well as on the status quo of power and resources, will be problematic.

The theme of persuasion and diversity reappears in a number of Tom's later books on international legal theory. It can be traced from *The Structure of Impartiality*, published in the same year as *Why Federations Fail*; through *The Power of Legitimacy* and its companion *Fairness in International Law and Institu-*

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35. See Thomas M. Franck, *East African Federation*, in *WHY FEDERATIONS FAIL*, *supra* note 7, at 3, 26-33.

36. Franck, *supra* note 8, at 187.

37. See *id.* at 187-90.

tions in the 1990s; to the 2002 *Recourse to Force*. In *The Structure of Impartiality*, diversity is integral to the general analysis of persuasion. Indeed, Tom's subtitle is "Examining the Riddle of One Law in a Fragmented World." Here, however, diversity is addressed mainly as subjectivity. Moreover, while *The Structure of Impartiality* lays the groundwork for *The Power of Legitimacy*, *Fairness*, and *Recourse to Force*, the three later books are either silent on the relevance of diversity for persuasion or confine its relevance to certain aspects of persuasion only. Interestingly, in this respect, the Tom of *Race and Nationalism* and *Why Federations Fail*, and even the contemporaneous *The Structure of Impartiality*, may be seen to have more in common with critics of *The Power of Legitimacy* and *Fairness* than with their author. When I recently read *The Structure of Impartiality* for the first time, I was surprised to discover that Tom himself had made almost the same point about subjectivity as I had in a feminist critique of *The Power of Legitimacy*.<sup>38</sup>

In the remainder of this Part of the Article, I expand on these observations about the progression of Tom's thinking on persuasion and diversity. I first set out the contribution of *The Structure of Impartiality* and examine how its ideas are developed or modified in *The Power of Legitimacy*, *Fairness*, and *Recourse to Force* such that the importance of diversity to persuasion is lessened.

Second, and simultaneously, I highlight the originality and the continuity of Tom's frame of reference in these remarkable works. Although nowhere is he explicit about his cognitive modus operandi, his tool kit of concepts and stock of examples demonstrate that his most profound insights in the four books derive from the metaphor of domestic adjudication. In each book, he takes a principal way in which the interpretation and application of law are legitimated in the domestic judicial system—the impartiality of the judge, the function of the jury, the nature of justifications for judicial decision—and theorizes its approximation or substitute in an international society where the genuine article is rare.

In light of Tom's turn away from diversity, I discuss, thirdly, two examples of the identity-based criticisms that *The Power of Legitimacy* and *Fairness* have encountered and Tom's response to this genre of critique. Finally, I return to *Race and*

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38. See *infra* notes 65-67 and accompanying text.

*Nationalism* and suggest that it can inspire constructive engagement with the metaphor of adjudication and thus a different line of response to the charge of ethnocentrism.

*The Structure of Impartiality* takes up one of the forms of persuasion within adjudication. Here, the judge is the paradigm of both third-party law and its requirement of impartiality. On the one hand, Tom argues that until all members of the world community subscribe to the idea and the possibility of impartiality, courts and tribunals will not figure prominently in international lawmaking.<sup>39</sup> On the other, because he examines impartiality as a quality of thought characteristic of, but not limited to, the judiciary, he finds some degree of impartiality and hence adjudication in other parts of the international system.<sup>40</sup>

Tom modifies and applies this idea of quasi adjudication in his latest book, *Recourse to Force*. His thesis here is that the principal U.N. political organs perform a “jurying” function in the development of the Charter’s norms on the use of force.<sup>41</sup> In *The Structure of Impartiality*, his analysis of the Security Council and the General Assembly as demonstrating “the impartiality syndrome” and therefore traits of third-party decision making was based on the mindset of the judge. Tom’s adjudicative frame of reference in *Recourse to Force* is the jury. This permits him to refine the observation that, in the U.N. system, where disputed cases rarely come before the International Court of Justice, there “are a variety of important decision-makers, other than courts, who can pronounce on the validity of claims advanced.”<sup>42</sup> Tom elaborates:

Pronouncing on the validity of claims advanced in mitigation of an unlawful but justifiable recourse to force is the task of these decision-makers. Some of this fact-and-context specific calibration goes on in international tribunals, but most of it occurs in the political organs of the U.N. system, which constitutes something approximating a global jury: assessing the

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39. See FRANCK, THE STRUCTURE OF IMPARTIALITY, *supra* note 2, at 82-87.

40. See *id.* at 318-28.

41. See FRANCK, RECOURSE TO FORCE, *supra* note 5, at 186.

42. *Id.* at 185-86 (quoting Rosalyn Higgins, *International Law and the Avoidance, Containment and Resolution of Disputes*, 230 RECUEIL DES COURS 9, 316 (1991-V)).

facts of a crisis, the motives of those reacting to the crisis, and the *bona fides* of the plea of extreme necessity. This jurying goes on not only in instances of humanitarian intervention but whenever there is a confrontation between the strict, literal text of the Charter and a plea of justice and extenuating moral necessity.<sup>43</sup>

If impartiality is a quality of thought, as Tom claims in *The Structure of Impartiality*, then what is that quality? Tom's definition of impartiality begins with the familiar maxim *nemo iudex in causa sua*.<sup>44</sup> But it also encompasses a recognition that such disinterestedness cannot guarantee objectivity because judgment is inevitably subjective. The judge is engaged in and must be accepted as being engaged in "primarily a pragmatic process of problem-solving, rather than a system of revealed truth."<sup>45</sup> For third-party law to work, all involved must recognize this.<sup>46</sup> The importance of impartiality is therefore not that it permits objectivity. Instead, it is that the absence of a direct stake in the outcome fosters a detachment that, in turn, gives the judge "an opportunity to make a subjective determination on the basis of the greatest possible openness, sensitivity and reciprocity."<sup>47</sup>

Beyond controlling for bias or prejudice, Tom's understanding of impartiality makes inroads into the subjectivity of adjudication through its requirement of consistency: deciding like cases alike and thus establishing neutral principles for future decisions.<sup>48</sup> Some twenty years later, in his first foray into teleology since *The Structure of Impartiality*,<sup>49</sup> Tom picks up the notion of consistency again. In *The Power of Legitimacy*, Tom identifies coherence as one of the features of a rule that makes the rule legitimate and that therefore persuades states to comply with it.<sup>50</sup> The shift from the consistency required for a judgment to be regarded as impartial to the coherence re-

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43. *Id.* at 186.

44. See FRANCK, *THE STRUCTURE OF IMPARTIALITY*, *supra* note 2, at 251.

45. *Id.* at 306.

46. See *id.* at 307-09.

47. *Id.* at 307.

48. See *id.* at 309-12.

49. See FRANCK, *THE POWER OF LEGITIMACY*, *supra* note 3, at vii.

50. See *id.* at 135-49. On the relationship of consistency to coherence, see *id.* at 143-44.

quired for a rule to compel obedience as legitimate is a methodologically revealing one. *The Power of Legitimacy* is continuous with *The Structure of Impartiality* in that it attends to the nature of justification for an interpretation or application of the law. The change and unseen methodological mainspring of *The Power of Legitimacy* is the projection onto the rule itself of the kinds of reasons for its interpretation that a court or adjudicative body might give.

In *The Power of Legitimacy*, Tom asks, “Why do powerful nations obey powerless rules?”<sup>51</sup> In arguing that compliance depends not only on the availability of enforcement mechanisms but also on certain properties of the rule in question, Tom switches our lens of understanding from coercion to persuasion. This central insight has paved the way for a new literature on compliance in both international law and international relations.<sup>52</sup> What seems to have gone unremarked is that the insight is achieved by notionally transforming the different sorts of justificatory reasons given for the interpretation of a rule in a judicial decision into different properties of the rule itself. Tom’s thesis in *The Power of Legitimacy* is that, in considering whether to obey a given rule of international law, a state is influenced by the extent to which the rule exhibits four inherent properties. The pull on the state to comply with the rule is a function of the aggregated properties, which Tom refers to as the “legitimacy” of the rule.<sup>53</sup> These properties are chiefly aspects of “fit” that we associate with the description

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51. *Id.* at 3.

52. Jutta Brunnée and Stephen Toope describe Tom’s account of compliance in *The Power of Legitimacy, Fairness, and related articles* as “a touchstone for most work on compliance since.” Jutta Brunnée & Stephen J. Toope, *Persuasion and Enforcement: Explaining Compliance with International Law*, FINNISH Y.B. INT’L L. (forthcoming) (manuscript at 16, on file with author). For a sense of Tom’s importance among theorists of compliance in international law and international relations, see, for example, Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT’L L. 345 (1998); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995) and THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995)); Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in *HANDBOOK OF INTERNATIONAL RELATIONS* 538 (Walter Carlsnaes et al. eds., 2002), available at [http://ssrn.com/abstract\\_id=347260](http://ssrn.com/abstract_id=347260).

53. See FRANCK, *THE POWER OF LEGITIMACY*, *supra* note 3, at 25-26, 49.

and evaluation of judgments. In addition to the rule's clarity,<sup>54</sup> Tom singles out its pedigree (longitudinal fit with a line of authority),<sup>55</sup> coherence (horizontal fit with other principles and rules of the international legal system),<sup>56</sup> and adherence (vertical fit with the higher rules on how rules are made in international law, for example, *pacta sunt servanda*; and with higher rules such as sovereign equality and other incidents of statehood).<sup>57</sup>

While the property of coherence recalls the discussion of consistency in *The Structure of Impartiality*, *The Power of Legitimacy* is silent on two difficulties with consistency that Tom raises in *The Structure of Impartiality* and that also apply to coherence. The one difficulty is that this style of reasoning derives from and may be more natural to the common law,<sup>58</sup> and the other is that patterns of consistency are subjectively perceived.<sup>59</sup> *The Power of Legitimacy* is thus less attentive than *The Structure of Impartiality* to the relevance of legal and cultural diversity for a theory of persuasion in international law. Instead, its inclination, like that of the newer *Recourse to Force*, is to deal with the problems created for persuasion by interests, alliances, animosities, sympathies, and other wants of neutrality.<sup>60</sup>

Yet another aspect of *The Structure of Impartiality* that appears in Tom's later work is the requirement that all participants in adjudication accept the subjective and fallible nature of the enterprise. In *Fairness*, this requirement is echoed in one of the principles that act as gatekeepers to the discourse on substantive fairness.<sup>61</sup> I discuss Tom's gatekeeper principles shortly, so, for now, let me just introduce the *Fairness* schema. Building on *The Power of Legitimacy*, *Fairness* expands

54. See *id.* at 50-90.

55. See *id.* at 91-134. See also FRANCK, FAIRNESS, *supra* note 4, at 37 ("In the international rule system, as in most national legal systems, the law accords a particular veneration to rules which have withstood the test of time.").

56. Tom references Ronald Dworkin's concept of "integrity" here. See FRANCK, THE POWER OF LEGITIMACY, *supra* note 3, at 15, 143, 175.

57. See *id.* at 183-94.

58. Tom signals this in FRANCK, THE STRUCTURE OF IMPARTIALITY, *supra* note 2, at 50, 51, 52, 54-55.

59. See *id.* at 328-29.

60. See FRANCK, RECOURSE TO FORCE, *supra* note 5, at 187.

61. See FRANCK, FAIRNESS, *supra* note 4, at 16-18 (discussing the "no trumping" principle).

Tom's account of a rule's persuasiveness beyond its more structural properties of pedigree, clarity, coherence, and adherence to include greater consideration of its justness. What is packaged as the four-part "legitimacy" of a rule in *The Power of Legitimacy* is repackaged as the procedural aspect of its "fairness." And the persuasiveness of the rule that results from this appraisal is now combined with the persuasiveness that flows from its distributive justice implications, which Tom equates to the substantive aspect of fairness.<sup>62</sup>

The addition of substantive fairness to legitimacy (procedural fairness) returns Tom's attention to diversity. While diversity does not figure in his analysis of legitimacy in *The Power of Legitimacy* nor in his analysis of the same set of properties as procedural fairness in *Fairness*, it does inform his conception of substantive fairness. Nevertheless, this is a more limited treatment of the importance of diversity to persuasion than in *The Structure of Impartiality*, where the subtitle "Examining the Riddle of One Law in a Fragmented World" heralds the all-pervasiveness of the issue in the book.

Thus far, I have suggested that, over the course of *The Structure of Impartiality*, *The Power of Legitimacy*, *Fairness*, and *Recourse to Force*, diversity tends to play an increasingly minor and sketchy role in Tom's account of persuasion. I next use two examples to show that part of the debate about Tom's more recent work stems from this tendency. The first is a short example from *The Power of Legitimacy*, where, as we saw, persuasion is theorized without reference to diversity. The second, longer example draws on John Tasioulas's criticism of *Fairness*. I have already indicated that, in *Fairness*, diversity informs the theorization of only one of persuasion's two dimensions. As distinct from this limitation—which the first example would lead us to question—Tasioulas argues that, insofar as Tom does recognize diversity, he does so in a way that does not overcome the charge of ethnocentrism.<sup>63</sup>

The main ideas in *The Power of Legitimacy* are that compliance is at least in part a function of persuasion and that the

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62. The instrumental focus on compliance through persuasion, *see id.* at 13, is presumably not the only reason that Tom develops his framework in *Fairness*.

63. *See* John Tasioulas, *International Law and the Limits of Fairness*, 13 EUR. J. INT'L L. 993, 998-99 (2002).

four properties of rules that Tom identifies are at least some of the most salient ones when it comes to persuasion. The optic here is on the state as citizen and how to convince the citizen to follow the law in a society where sanctions are scarce. From the perspective of diversity, we might wonder—as Tom himself anticipates in *The Structure of Impartiality*—whether some of the four properties rely too heavily on a thesis about law as integrity that is inspired by a theory of common-law judging.

Moreover, the act of autointerpretation involved in Tom's thesis about compliance places the state in the role of judge as well as citizen. The question for a state is not only whether to obey, but also what understanding of the rule to obey.<sup>64</sup> In the case of the right of self-determination in international law, for example, I have suggested elsewhere how Tom's indicators of legitimacy vary with viewpoint.<sup>65</sup> On his account of liberal self-determination and democracy, pedigree, determinacy, coherence, and adherence all support the emergence of these norms. "The persuasive power of self-determination lay in its deep hold on our historical and political imagination, its increasing elaboration in legal texts, the pull to eliminate arbitrary restrictions borne of realpolitik, and its promotion of the higher principle of peace."<sup>66</sup> If we trace the power of self-determination for women, however, it becomes apparent that indicators such as coherence and adherence did not automatically point to women's equal right to participate in the exercise of self-determination. Sometimes just the opposite, as I have shown in the context of women's campaign for the right to vote in the plebiscites held to decide the sovereignty of a number of disputed territories in Europe after World War I.<sup>67</sup>

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64. While an individual citizen also has to interpret the law in order to obey it, it seems highly unlikely that an individual would engage in the quadripartite judicial style of reasoning that Tom describes. See generally John Eekelaar, *Judges and Citizens: Two Conceptions of Law*, 22 OXFORD J. LEGAL STUD. 497 (2002) (arguing that one conception of law may apply to the relationship between law and the citizen and another to how judges decide cases). It is much more plausible for a state to obey or not as a citizen might and to think about this decision as a judge might because a state's actions have consequences for the rule itself in the way that a judgment might.

65. See Karen Knop, *Of the Male Persuasion: The Power of Liberal Internationalism for Women*, 93 AM. SOC'Y INT'L L. PROC. 177 (1999).

66. *Id.* at 183.

67. *Id.* at 179-83.

Because it is the state as judge that decides the rule and attributes properties to it in *The Power of Legitimacy*, the likelihood of a broadly persuasive interpretation is less than it would be in a real judgment, which would address the competing interpretations actually argued by the parties. In Tom's projection of reasons onto rule, something is lost of the equal consideration of alternative meanings and the need to justify the meaning decided on in light of these alternatives and in the eyes of those who hold them.

If the focus on convincing a state, rather than on developing an interpretation that convinces many different states and groups, means that Tom does not pursue the dilemmas of diversity in *The Power of Legitimacy*, he takes them on directly in *Fairness*. As mentioned earlier, *Fairness* builds a second wing onto the structure of compliance developed in *The Power of Legitimacy*. It adds an account of distributive justice to the account of legitimacy to form fairness. Whereas legitimacy (procedural fairness) focuses on obedience by a relatively generic state, distributive justice (substantive fairness) grapples with cultural difference.

In *Fairness*, Tom begins from the premise that what is considered substantively fair is a product of social context and history. In his view, this does not mean that we are progressively discovering the single correct idea of fairness. Rather, it means that no such objective notion exists; fairness is relative and subjective. Accordingly, fairness is best regarded as "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>68</sup>

It follows for Tom that one of the principles that governs this process is the "no trumping" principle. Since the formula for fairness is defined as the product of a negotiated agreement among a community of states, groups, and persons, the discussion cannot include positions based on the automatic supremacy of a particular religious dictate, scientific belief, or other stance held as true, infallible, and therefore nonnegotiable ("trumping"). Such trumping arguments do not necessarily preclude agreement since different trumping arguments may support the same principle of allocation. What they pre-

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68. FRANCK, FAIRNESS, *supra* note 4, at 14 (emphasis in original).

clude is negotiated agreement, which Tom makes integral to his definition of fairness.

John Tasioulas argues that the no trumping principle is vulnerable to the charge of ethnocentrism.<sup>69</sup> His criticisms are not that it ignores diversity, but that in accommodating diversity it takes both too much and too little off the table. According to Tasioulas, by closing the door on the controversy over whether there is an objective notion of fairness, Tom excludes and thus effectively decides a debate that is very much alive around the world as well as in philosophical circles.<sup>70</sup>

One might add that it is not clear why Tom's underlying definition of fairness excludes as much as it does. Why is negotiation required if a consensus on allocation is possible based on the initial overlap between different trumping systems of knowledge and belief? In a similar vein, Tasioulas questions Tom's exclusion of positions held as objectively true, but not as infallibly certain. He observes that Tom's illustration of the no trumping principle does not take into account that positions believed to be true may not be negotiable in the give-and-take sense, but they are not necessarily impervious to the demonstration that they are not correct. A participant in the discussion can believe in objective ethical knowledge and yet be open to revising or even rejecting her "objective" position on allocation in light of what others have said. Hence, the formulation of the no trumping principle may, in this respect, eliminate too much and too many from the discussion.<sup>71</sup>

Alternatively, Tom may actually mean to include the open-minded objectivist in his discourse on fairness. Whether he does depends on the relationship between the elements of reasoning and negotiation that he envisages in the discursive process. If the element of negotiation requires, for example, a willingness to compromise or horse-trade, then there is presumably no room for an objectivist swayed only by reasoning. Relatedly, Tasioulas asks what the process of reaching a consensus would look like. From Tom's recognition of the contin-

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69. See Tasioulas, *supra* note 63, at 998-99. Tasioulas also offers a more comprehensive critique of ethnocentrism in *Fairness*. See *id.* at 995-1006. I draw from his discussion of the no trumping principle as representative of the diversity-based critiques that Tom's work theorizing persuasion has attracted.

70. See *id.* at 999.

71. See *id.*

gency of any formula for fairness, Tasioulas speculates that participants would be conscious of working toward a subjective result. If so, he asks, what prevents the imposition of Western views through manipulation or coercion? Here Tasioulas worries that without the aspiration to objectivity, Tom's ground rules for the discussion could not eliminate enough and hence would not do justice to the equality of those involved.<sup>72</sup> The other possibility consistent with contingency is that the goal of the discussion is an objective principle of allocation, but with the recognition that the principle is defeasible.<sup>73</sup> In other words, based on what the participants think now, the principle arrived at is objective, even if it later proves to be merely subjective. On this possibility, the discussion would be driven, at least in part, by the demonstration of objectivity; that is, by the force of reasons.

Insofar as the two criticisms of Tom's work just given depend on an absence of shared standards of reasoning or viewpoints, Tom's response has been to counter by pointing to an emerging sense of global community and to general agreement among societies on a broad range of first principles.<sup>74</sup> While cultural differences continue to exist between communities, the globalizing components of modernity—scientific, technical, and economic—have narrowed the gaps between them.<sup>75</sup>

The comparison with *Race and Nationalism* underlines what many might question in Tom's response. Given the progress of globalizing modernity, what relevance does its historical imposition through colonialism have? Tom offers the options of respecting cultural difference within acceptable parameters<sup>76</sup> and, beyond those parameters, undermining its authenticity and the very notion thereof.<sup>77</sup> How else might we design and apply norms that engage with diversity without sacrificing universality?

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72. *See id.*

73. *Cf.* Neil MacCormick, *Rhetoric and the Rule of Law*, in RECRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER 163, 176 (David Dyzenhaus ed., 1999) (arguing that law's certainty is defeasible certainty).

74. *See* Franck, *supra* note 9, at 1027.

75. *See id.* at 1028.

76. *See id.* at 1029.

77. *See id.*

The paradigm of judge, judgment, and jury offers one way to read the importance of history and context in Tom's earlier, case-specific treatment of persuasion and diversity into his later, more theoretical work on persuasion. One of the remarkable features of *Race and Nationalism* is its detailed attention to a range of ways that commonality might be constructed across communities differentiated by historical injustice and by culture. In the next and last Part of the Article, I show how developing the metaphor of adjudication to make it similarly attentive to communities of judgment enables us to appreciate new practices of interpreting "general principles of law" and the broader significance of such practices.

#### IV. SITUATED GENERALITY<sup>78</sup>

In this Part, I give three illustrations of how "general principles of law" are coming to offer a model of *situated generality* in the context of cases that implicate a range of communities from international to regional to various national and subnational communities, each with its own history and culture.<sup>79</sup> Although the methods of interpretation vary, the reasoning in all three is based on or amenable to the intuition that generalization involves choices about history and community and that the persuasiveness of the generalization may, therefore, require the differentiation of communities as opposed to the totting-up of their norms on an identical basis.

Article 38(1)(c) of the Statute of the International Court of Justice makes "the general principles of law recognized by

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78. This Part of the Article contributes to a larger project with Mayo Moran on the changing nature of legal judgment, sources of law, and the role of justification. See generally Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501 (2000); Mayo Moran, *An Uncivil Action: The Tort of Torture and Cosmopolitan Private Law*, in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 661 (Craig Scott ed., 2001) [hereinafter Moran, *An Uncivil Action*]; Mayo Moran, *Authority, Influence and Persuasion: Baker, Charter Values and the Puzzle of Method*, in THE UNITY OF PUBLIC LAW (David Dyzenhaus ed., forthcoming).

79. It should be noted that, while all three examples generically involve the development of general principles of law from, across, and for different communities, not all involve general principles of law in the usual international law sense.

civilized nations” a source of international law.<sup>80</sup> While a number of meanings have been mooted for the category, one of the accepted meanings involves the derivation of general principles of law from national law.<sup>81</sup>

In *North Sea Continental Shelf*, Judge Ammoun describes the distinction in Article 38(1)(c) between civilized and uncivilized nations as

the legacy of the period, now passed away, of colonialism, and of the time long-past when a limited number of Powers established the rules, of custom or of treaty-law, of a European law applied in relation to the whole community of nations.<sup>82</sup>

Despite a consensus that the civilized/uncivilized distinction no longer operates to exclude all or some non-Western legal systems from consideration,<sup>83</sup> practice has tended to have the same discriminatory effect. Ironically, Sir Humphrey Waldock regarded this effect as precisely what made the concept of general principles of law workable. In a still-quoted<sup>84</sup> passage, written in 1962, he gives two reasons why common principles can be found in such a multiplicity of legal systems:

First, by the accidents of history, some of the principal European systems of law have penetrated over large areas of the globe, mixing in greater or less degree with the indigenous law and often displacing it in just those spheres of law in which we have seen that international law has most readily borrowed from domestic law. In consequence, there is a much

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80. Statute of the International Court of Justice, June 26, 1945, art. 38(1)(c), 59 Stat. 1055, T.S. No. 993.

81. See OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 50-55 (1991).

82. *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 132-33 (Feb. 20) (separate opinion of Judge Ammoun). In *North Sea Continental Shelf*, Judge Ammoun finds the principle of equity in the laws of Western Europe and Latin America, the common law as tempered by equity, Muslim law, Chinese law in harmony with Marxist-Leninist philosophy, Soviet law, Hindu law, the law of other Asian countries, and African customary law. *Id.* at 139-40.

83. See, e.g., Sir Humphrey Waldock, *General Course on Public International Law*, 106 RECUEIL DES COURS 1, 65 (1962-II).

84. See D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 47, 49 (5th ed. 1998).

larger unity in the fundamental concepts of the legal systems of the world to-day than there might otherwise have been . . . .

Secondly, it was never intended under paragraph (c) that proof should be furnished of the manifestation of a principle in every known legal system . . . and certainly it has never been the practice . . . . Truth to tell, arbitral tribunals, which usually consist of one, three or five judges, have probably done no more in most cases than take into account their own knowledge of the principles of the systems in which the arbitrators were themselves trained, and these would usually have been Roman law, Common law, or Germanic systems.<sup>85</sup>

Put differently, either non-Western legal systems are simply not factored into general principles of law because the judges rely on their own, usually Western backgrounds as representative, or non-Western legal traditions are modified and thus more insidiously excluded by “the accidents of history” sometimes known as imperialism.<sup>86</sup>

Vice President Weeramantry’s separate opinion in the *Gabcikovo-Nagymaros* case<sup>87</sup> between Hungary and Slovakia is an instructive comparison with Waldock’s matter-of-fact recognition of structural bias. In *Gabcikovo-Nagymaros*, Vice President Weeramantry concludes that there is a principle of sustainable development in international law. According to this principle, “development can only be prosecuted in harmony with the reasonable demands of environmental protection.”<sup>88</sup> One of

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85. Waldock, *supra* note 83, at 66.

86. Although not pursued here, another postcolonial perspective on general principles of law in practice may be their use in the settlement of disputes arising out of natural resource concessions between Western corporations and the governments of developing states. For an argument dating from the 1950s in favor of such a choice of law, see generally Lord McNair, *The General Principles of Law Recognized by Civilized Nations*, 1957 BRIT. Y.B. INT’L L. 1. Derek Bowett examines the different theories regarding the law applicable to this type of contract in *State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach*, 1988 BRIT. Y.B. INT’L L. 49, 49-59.

87. *Gabcikovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7, 88 (Sept. 25) (separate opinion of Vice President Weeramantry).

88. *Id.* at 92.

the methods he uses to establish the principle of sustainable development as part of international law is what he describes as tapping into the wisdom of the past in order to draw from it some principles that can strengthen the concept of sustainable development in international law.<sup>89</sup> For Vice President Weeramantry, the inclusion of general principles of law among the sources of international law expressly opens the door to his methodology.<sup>90</sup> He canvasses traditional legal systems, particularly in historically irrigation-based cultures, including Sri Lanka with its Buddhist precepts,<sup>91</sup> sub-Saharan Africa,<sup>92</sup> Iran,<sup>93</sup> China,<sup>94</sup> the Inca civilization,<sup>95</sup> aboriginal beliefs and practices relating to development,<sup>96</sup> Europe prior to the Industrial Revolution,<sup>97</sup> and principles of Islamic law.<sup>98</sup> With respect to the West, his survey uses the commonality that he finds among non-Western legal traditions to recover a similar tradition marginalized by industrialization: “Wordsworth in England, Thoreau in the United States, Rousseau in France, Tolstoy and Chekhov in Russia, Goethe in Germany spoke not only for themselves, but represented a deep-seated love of nature that was instinct in the ancient traditions of Europe . . . .”<sup>99</sup> As we shall see, the Supreme Court of Canada’s analysis of principles of fundamental justice in *Burns* also employs this “mirroring” technique of showing alternative authoritative positions inside a society by holding it up to a virtual consensus among outside societies.<sup>100</sup>

In comparison with what Waldock describes, Vice President Weeramantry’s is a much more thoroughgoing attempt

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89. *See id.* at 96.

90. *See id.* at 109-10.

91. *See id.* at 98-104.

92. *See id.* at 104-05.

93. *See id.* at 105.

94. *See id.* at 105-06.

95. *See id.* at 106.

96. *See id.* at 107-08.

97. *See id.* at 108.

98. *See id.*

99. *Id.*

100. *See* Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 6 Wisc. L. REV. 1425, 1513 (1994) (“What always seemed simple and natural becomes, through force of comparison, complex and problematic . . . .”).

to establish the generality of general principles of law.<sup>101</sup> His examples suggest an effort to correct as the judge sees fit for historical and cultural biases. They encompass the past as well as and even in contrast to the present; cultures as opposed to just states; living law as opposed to exclusively written; underlying cultural values as well as the legal rules they validate. Indeed, Vice President Weeramantry applies to a Communist-era engineering project in Central Europe environmental wisdom that he seeks to show has been law for centuries in non-European, and once in European, parts of the world.

In a second example of situated generality, the provision on applicable law in the 1998 Rome Statute of the International Criminal Court redefines general principles of law. Article 21 reads:

1. The Court shall apply:

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101. For an endorsement of Vice President Weeramantry's approach to the concept of sustainable development in "a multicultural world marked by South-North tensions, cultural differences and disagreements on the *modus operandi* of sustainable conservation of floral and faunal resources across societies," see Obijiofor Aginam, *Saving the Tortoise, the Turtle, and the Terrapin: The Hegemony of Global Environmentalism and the Marginalization of Third World Approaches to Sustainable Development*, in *HUMANIZING OUR GLOBAL ORDER: ESSAYS IN HONOR OF IVAN HEAD* (Obiora Chinedu Okafor & Obijiofor Aginam eds., forthcoming 2003).

Vaughan Lowe registers the same features of Vice President Weeramantry's analysis as Aginam and I do, but sees them as particular to the process of creating those norms of international law that operate interstitially. See Vaughan Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 207, 219-20 (Michael Byers ed., 2000). By interstitial norms, Lowe means norms that operate between other, primary norms of international law to resolve problems of overlap and conflict. The principle of sustainable development fits this description because it mediates between the right to development and the need to protect the environment. *Id.* at 212-17. Lowe employs Vice President Weeramantry's opinion in *Gabcikovo-Nagymaros* to illustrate the method of norm creation associated with norms of an interstitial character and thus a change in the kinds of international legal norms that are developing and the processes by which they develop. It may be that Lowe recognizes the ambition of the opinion as otherwise, perhaps as an effort to legitimate one of the three traditional sources of international law along the lines I suggest, but that he considers it better analyzed as the distinct and limited enterprise of developing interstitial principles of international law.

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
  - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
  - (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
  3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.<sup>102</sup>

The general principles of law derived from national laws of legal systems of the world thus occupy an explicitly subsidiary place. They rank third, after the Rome Statute and its associated rules and after applicable treaties and other international law principles and rules. Article 21 further departs from Article 38(1)(c) of the ICJ Statute by capping general principles of law in two ways: Those principles must be consistent with the Rome Statute and with international law and internationally recognized norms and standards,<sup>103</sup> and their interpretation and application must be consistent with internationally recognized human rights and be without any adverse dis-

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102. Rome Statute of the International Criminal Court, *supra* note 12, art. 21.

103. *Id.* art. 21(1)(c).

inction founded on grounds such as gender, age, race, color, language, religion or belief, political or other opinion, national, ethnic, or social origin, wealth, birth, or other status.<sup>104</sup> Equally significant is the specification that the concept of general principles of law includes, “as appropriate, the national laws of States that would normally exercise jurisdiction over the crime.”<sup>105</sup> The process of generalization is thereby both differentiated by including “as appropriate” the laws of the states most directly affected by the crime, in the sense of those ordinarily having jurisdiction over it; and limited by the required consistency with the interstate community’s laws.

Although depicted by the chair of the working group, Per Saland, as achieving compromise at the price of contradiction,<sup>106</sup> Article 21 of the Rome Statute may instead be read as improving on the two opposed views of what the International Criminal Court (ICC) should be.<sup>107</sup> On an internationalist view of the ICC, national and international prosecutions alike represent an exercise of universal jurisdiction and an application of international law. Both address the international community’s uniform interest in ensuring that the most heinous international crimes do not go unpunished. Internationalists envisage an autonomous international criminal law for the ICC; that is, one in which national laws have no place. Accordingly, any gaps in this body of law can be filled only by general principles of law derived equally from all national legal systems.

On the opposite view of the International Criminal Court, its main selling point is its disinterestedness. Rather than corresponding to an international community with a universal interest, the ICC may be justified by its lack of an interest and thus its evenhandedness. These two views are not necessarily irreconcilable. For example, supporters of the ICC often equate universality with impartiality, while critics argue that

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104. *Id.* art. 21(3).

105. *Id.* art. 21(1)(c).

106. See Per Saland, *International Criminal Law Principles*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 189, 213-16 (Roy S. Lee ed., 1999).

107. For these two views, I draw on JAMES CRAWFORD, *The Drafting of the Rome Statute*, in *INTERNATIONAL LAW AS AN OPEN SYSTEM: SELECTED ESSAYS* (forthcoming Dec. 2002) (manuscript at 383, on file with author) (the international criminal justice system model and the procedural model).

the ICC will not be evenhanded precisely because a pseudointernational community has an agenda for its prosecutions. On the second view, however, the center of gravity is national. The state most scarred by the crimes prosecutes under its jurisdiction and notionally under its law. International law and the prospect of international prosecution serve to promote impartiality in the national proceedings. Failing that, the ICC will step into the shoes of the national court, exercising jurisdiction delegated by the state and applying the state's law to the extent that international law does not cover all the issues.

As against the privileging of the international community, this second view reminds us that an international crime takes place in a certain state or among certain states and that their perspectives, priorities, and interests are not necessarily identical to or even entirely consistent with those of the broader community of states. In contrast to the baseline of national community, the first view reminds us that the state of the perpetrator and the state of the victim may be different. It does not follow, however, that the international by itself offers a shared perspective.

In this light, the formulation of general principles of law in Article 21 of the Rome Statute reflects primarily the internationalist view but may be read as seeking to incorporate the value of both. Where the Statute and international law run out, the International Criminal Court can generalize across domestic legal systems, with particular attention to the legal systems of, for example, both the perpetrator's state and the victim's state. If this seems vague or unworkable, we will see in a moment that the Canadian Supreme Court does something very similar in its recent death penalty extradition case. At the same time, the ICC cannot adopt some hybrid of the perpetrator's and the victim's laws where those laws are contrary to international legal standards,<sup>108</sup> thus preventing the possibility of deriving general principles of law from a system that may

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108. This limitation applies to any derivation from national legal systems because the proviso in Article 21(1)(c) modifies general principles of law as follows: "*general principles of law* derived . . . from national laws . . . of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, *provided that those principles* are not inconsistent with this Statute and with international law and internationally recognized norms and standards." Rome Statute of the International Criminal Court, *supra* note 12, art. 21(1)(c) (emphasis added).

condone the perpetrator's actions or the contrary. Particularly where a case involves several states directly and some remain to be convinced about such things as the integrity of the law applied, Article 21 provides an interesting, albeit residual, new definition of general principles.

My last example of situated generality is the interpretation given to the phrase "the principles of fundamental justice" in the Canadian constitution in a recent capital extradition case. In the Supreme Court of Canada case *United States v. Burns*,<sup>109</sup> the issue is whether the minister of justice should obtain assurances that the death penalty will not be imposed before he extradites two Canadian teenage boys who are wanted in connection with the gruesome baseball bat murder of the one boy's parents and sister in the State of Washington. Departing from its previous case law,<sup>110</sup> the Supreme Court ruled that assurances are constitutionally required in all but exceptional cases.<sup>111</sup>

Under the Canadian Extradition Act, the minister of justice has broad discretion whether to surrender a fugitive and, if so, on what terms.<sup>112</sup> His authority to extradite under the Act is predicated on the existence of an extradition treaty. The extradition treaty in *Burns* is between Canada and the United States. The treaty specifically provides for a request for assurances that the death penalty will not be imposed or, if imposed, will not be executed.<sup>113</sup> While there is no limitation on the right to ask for assurances, there is also no obligation to provide them. Thus, to ensure that the United States will do so, the minister's statutory discretion must be exercised in a way acceptable to the United States as well as to Canada. In addition, his discretion is limited by the constitutional bill of rights: the Canadian Charter of Rights and Freedoms.<sup>114</sup>

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109. *United States v. Burns*, [2001] 1 S.C.R. 283 (Can.).

110. *See* *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 (Can.); *Reference Re Ng Extradition*, [1991] 2 S.C.R. 858 (Can.).

111. *See Burns*, [2001] 1 S.C.R. at 296.

112. *See* Extradition Act, R.S.C., ch. E-23, § 25(1) (1985); amended. by ch. 13, 1992 S.C. 40-41 (Can.).

113. *See* Extradition Treaty, Dec. 3, 1971, U.S.-Can., art. 6, 27 U.S.T. 983, 989, amended by Exchange of Notes, June 28-July 9, 1974 (entered into force Mar. 22, 1976).

114. *See Burns*, [2001] 1 S.C.R. at 308; CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).

Earlier Supreme Court of Canada decisions have established that each of these limitations on the minister of justice's statutory discretion to extradite is informed by international law, but by different aspects of international law. The constraint of mutual acceptability is grounded in the need to respect sovereignty and the goal of international criminal law enforcement.<sup>115</sup> And, in a number of Charter cases, the Supreme Court has emphasized that Canada's international human rights obligations should inform the interpretation of the content of the rights guaranteed by the Charter and thus the constitutional constraints on the minister's discretion.<sup>116</sup> Accordingly, the Court in *Burns* states:

Although this particular appeal arises in the context of Canada's bilateral extradition arrangements with the United States, it is properly considered in the broader context of international relations generally, including Canada's multilateral efforts to bring about changes in extradition arrangements where fugitives may face the death penalty, and Canada's advocacy at the international level of the abolition of the death penalty itself.<sup>117</sup>

Schematically, then, the analysis in *Burns* implicates at least three communities: Canadian, U.S., and international. However, the evidence regarding European countries that routinely seek such guarantees indicated that the United States would be unlikely to refuse them.<sup>118</sup> For this reason, we might assume that the U.S. position on the death penalty, along with any fear of jeopardizing Canada-U.S. relations or compromising international cooperation in criminal matters, would be irrelevant. Instead, the Canadian top court would be concerned with the permissibility of extradition to a death-penalty country under the Canadian constitution, as shaped by international human rights.<sup>119</sup>

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115. See *Kindler*, [1991] 2 S.C.R. at 843-45, 852-56 (McLachlin, J.).

116. See *Burns*, [2001] 1 S.C.R. at 330 (quoting *Slaight Communications, Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 1056-57 (Can.)).

117. *Burns*, [2001] 1 S.C.R. at 331.

118. *Id.* at 359.

119. For such an approach, see *Kindler*, [1991] 2 S.C.R. at 793 (Cory, J. dissenting).

To the contrary, the Supreme Court of Canada's interpretation of "principles of fundamental justice" in Section 7 of the Charter incorporates an awareness of the United States not only as a state but also as a heterogeneous federation where the controversy over the death penalty is increasing, especially in some of the retentionist states, and where the criminal justice system is troubled by error and racial bias. As will be seen, this in-depth look at the United States suggests that the judgment is aimed at a U.S. audience as well as those of Canada, Western democracies, and the international community generally.

Section 7 reads, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."<sup>120</sup> In *Burns*, it is evident to the Supreme Court that the extradition order is a deprivation of liberty and security of the person because life is potentially at risk. The question is, therefore, whether the threatened deprivation is in accordance with the principles of fundamental justice,<sup>121</sup> and the Court finds that it is not. The Court derives the principles of fundamental justice from the basic tenets of the Canadian legal system,<sup>122</sup> informed by international initiatives opposing extradition without assurances and opposing the death penalty, by Canadian participation in such international initiatives, and by the practice of other states, especially Western democracies.

What is this methodology exactly? The Supreme Court's style of reasoning has no obvious precedent either in international law or in its own jurisprudence. To an international lawyer, the Court's assemblage of state practice and international

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120. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7.

121. See *Burns*, [2001] 1 S.C.R. at 321. Because Section 7 of the Charter is subject to the general limitation in Section 1, the Supreme Court can still uphold the minister's decision to extradite to face the death penalty in violation of Section 7 if it finds that the decision is reasonable and demonstrably justifiable in a free and democratic society as required by Section 1. It does not. See *id.* at 357-60. Since my interest is in the community-based construction of "fundamental" in "principles of fundamental justice," I do not discuss the Section 1 analysis other than to cite its rejection of the comity and crime-prevention arguments as allowing the Court to disregard U.S. attitudes toward the death penalty. See *supra* note 118 and accompanying text.

122. See *Burns*, [2001] 1 S.C.R. at 326.

opinion in the form of treaties and resolutions<sup>123</sup> has the feel of customary international law manqué because the Court canvasses this evidence and concludes that it falls short of an international law norm against the death penalty or against extradition to face the death penalty.<sup>124</sup> “It does show, however, significant movement towards acceptance internationally of a principle of fundamental justice that Canada has already adopted internally, namely the abolition of capital punishment.”<sup>125</sup>

Whereas a finding of customary international law might have been downloaded directly into the meaning of principles of fundamental justice in Section 7, the existence of an international trend against the death penalty and Canada’s participation in that trend operate more reflexively. For the Supreme Court, the principles of Canadian criminal justice that led to the outlawing of capital punishment in Canada are manifested in Canada’s international abolitionist efforts. In this respect, the international may simply expand on the national. The passage of almost forty years since the last execution in Canada confirms Canada’s principles of justice temporally, as more than just the government policy of the day.<sup>126</sup> In terms of spatial reach, Canada’s advocacy of abolition of the death penalty worldwide demonstrates that, for Canada, the principles are also fundamental because they are universally applicable.<sup>127</sup>

In addition, the fact of an emerging international consensus against the death penalty confirms the fundamental nature of the principles cross-culturally through comparison with the national and international actions of other states.<sup>128</sup> In a passage striking for its “mirroring” language, the Supreme Court of Canada states:

The existence of an international trend against the death penalty is useful in testing our values against

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123. *See id.* at 331-37.

124. *See id.* at 334.

125. *Id.*

126. *See id.* at 329.

127. *See id.* at 332.

128. There is a clear resemblance here to general principles of law as a source of international law: General principles of law also establish their generality, and hence their status as international law, through comparison across national legal systems.

those of comparable jurisdictions. This trend against the death penalty supports some relevant conclusions. First, criminal justice, according to international standards, is moving in the direction of abolition of the death penalty. Second, the trend is more pronounced among democratic states with systems of criminal justice comparable to our own . . . . Third, the trend to abolition in the democracies, particularly the Western democracies, mirrors and perhaps corroborates the principles of fundamental justice that led to the rejection of the death penalty in Canada.<sup>129</sup>

Up to this point, the Supreme Court's empirical investigation into principles of fundamental justice in the judgment concentrates on Canada in the context of liberal democratic states and the wider, undifferentiated international context. The Court's reasoning does not take account of the bilateral context, specifically, U.S. legal attitudes towards the death penalty. However, the decision goes on to dwell on the increased public awareness of the potential for wrongful convictions since the Supreme Court's earlier cases allowing extradition without assurances.<sup>130</sup> The concern about wrongful conviction "begins at home," as the Court puts it,<sup>131</sup> describing a well-publicized handful of wrongful murder convictions, starting with the case of Donald Marshall, where a Royal Commission later found that the criminal justice system had failed Marshall at virtually every turn and that the failure was due in part to the fact that Donald Marshall was aboriginal.<sup>132</sup>

Holding the United States up to this Canadian mirror, the Supreme Court continues, "[W]hen Canada looks south to the present controversies in the United States associated with the investigation, defence, conviction, appeal and punishment in murder cases, it is with a sense of appreciation that many of the underlying criminal justice problems are similar."<sup>133</sup> The Court then details the scale and recent escalation of the controversy over the death penalty in the United States, based on

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129. *Burns*, [2001] 1 S.C.R. at 335.

130. *See id.* at 337-50.

131. *Id.* at 337.

132. *See id.* at 337-38.

133. *Id.* at 341.

the same concerns about error and bias.<sup>134</sup> It points out that the controversy has increased particularly in some of the retentionist states, including Washington, the state to which the boys in the case would be extradited. While the Court is careful not to decide the controversy,<sup>135</sup> it seeks to show that support for abolition is growing in the United States and can be justified on the body of U.S. evidence.

Rather than dwelling on the nature of capital punishment itself, the Supreme Court ultimately bases its decision on the recognition of the chances and patterns of error, the ground that has emerged as the strongest argument against the death penalty in the United States.<sup>136</sup> It similarly substantiates increasing concern about the “death row phenomenon” with information from a report by the Chief Justice of the State of Washington on the long delays before execution<sup>137</sup> and with dissenting opinions by Justices of the United States Supreme Court, past and present.<sup>138</sup>

The Supreme Court of Canada in *Burns* thus constructs principles of fundamental justice in a way that seeks to persuade transnationally by differentiating between and within the relevant communities as well as generalizing across them. Reminiscent of Vice President Weeramantry’s approach to retrieving America and Europe’s lost tradition of environmentalism in *Gabcikovo-Nagymaros*, the Court negotiates the meaning of “fundamental” in the face of U.S. exceptionalism by using the consensus among and experiences of Canada and other states to highlight the widespread and heightened controversy about the death penalty within the United States, and the recent statistical data on wrongful convictions that problematizes this most final of punishments. Akin to the “compromise” between national laws generally and those of the states that would normally exercise jurisdiction over the crime in the

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134. See *id.* at 342-47.

135. See *id.* at 346.

136. Since the judgment in *Burns* was handed down, Governor George Ryan of Illinois has commuted the death sentences of all prisoners on his state’s death row. Governor Ryan explained, “Our capital system is haunted by the demon of error: error in determining guilt and error in determining who among the guilty deserves to die.” *Excerpts from Governor’s Speech on Commutations*, N.Y. TIMES, Jan. 12, 2003, at A22.

137. See *Burns*, [2001] 1 S.C.R. at 350-51.

138. See *id.* at 353.

Rome Statute's definition of general principles of law, the interpretation of principles of fundamental justice in *Burns* is textured so that the sheer fact of opposition to capital punishment in Canada, among democratic states, and in the international community generally is combined with the bilaterally oriented reasons most likely to sway U.S. retentionists.<sup>139</sup>

In the three examples given in this last Part of the Article, we can see how "general principles of law" has come to house a model of situated generality for an age where the cross-community dimensions of judgment are increasingly evident. It seems only appropriate to conclude with examples because Thomas Franck is the master of examples. His liking for them, I suspect, is no accident and in the best sense. Examples are prone to escape the control of those who rally them in support of an argument, and to nourish their critics as well. It is typical of Tom to know and thrive on this unruliness. From *Race and Nationalism* on, his wealth of case studies and provocative examples ("what, eat the cabin boy?")<sup>140</sup> both reflect and anticipate his ease and generosity in discussion, the room that he makes for others under the big tent of ideas, and the imaginative engagement that is his hallmark. The theme of persuasion and diversity *is* the man.

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139. Cf. Moran, *An Uncivil Action*, *supra* note 78, at 669-76 (identifying a similar combination of international and national law sources in civil actions brought in the United States for torture committed abroad).

140. The title of Tom's last chapter in FRANCK, *RECOURSE TO FORCE*, *supra* note 5, at 174.

