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The Role of History in Thomas Franck's Fairness in International Law and Institutions

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1 Introduction

In *Fairness in International Law and Institutions*¹ Thomas Franck presents an argument for a particular understanding of the development of international law during the twentieth century. He argues that international law has progressively moved towards the recognition of a right to democratic governance, and towards true governance at the international level. This paper will evaluate Franck's approach to the history of international law.

Franck is unusual, although not unique,² in contemporary English-language international law scholarship in his use of history.³ Charlesworth has noted the tendency of international law to rediscover itself with each new crisis, therefore running the risk of fulfilling the old adage that those who do not learn from history are condemned to repeat it.⁴ While Franck takes a historical perspective in his work, he does not explicitly provide an explanation of the nature of that perspective. Furthermore, Franck's history is primarily that of international institutions, rather than of international law itself. His concern is with governance systems rather than sources of law. He therefore largely ignores a wealth of debate before the twentieth century, except in his chapter on the law of war. Even there, his emphasis is on

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¹ T. M. Franck, *Fairness in International Law and Institutions* (1995) [hereinafter *Fairness*].

² Some notable examples of historically informed scholarship include M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989); A. Cassese, *International Law in a Divided World* (1986); M. Evans, *Religious Liberty and International Law in Europe* (1997); Nathaniel Berman's work such as "'But the Alternative is Despair": European Nationalism and the Modernist Renewal of International Law', 106 *Harvard Law Review* (1993) 1792, which is cited by Franck in *The Empowered Self* (1999) [hereinafter *The Empowered Self*], at 228–229.

³ A historical viewpoint has been more common in the past: see Allott's discussion of the origins of modern international law in P. Allott, *International Law and International Revolution: Reconciling the World* (1989).

⁴ Charlesworth, 'International Law: A Discipline of Crisis', 65 *Modern Law Review* (2002) 377.

post-World War II developments. He also fails to consider twentieth-century discussions of the theory of sources, notably that of Koskenniemi.⁵ A focus on the twentieth century allows Franck to present international law as a uniform body of law. Arguably, a longer historical view would demonstrate the inherent diversity of approaches to international law which has been largely eliminated by the predominance that European approaches acquired during the nineteenth century.⁶

Franck divides the twentieth century into three periods for his purposes: the League of Nations era, the Cold War United Nations era (1945–1989) and 1990 and after. This division reinforces the institutional rather than statist approach to international law. Mazower, in his account of the history of twentieth-century Europe, concludes with a defence of the nation-state and a limited view of the role of international institutions.⁷ He argues that the nation-state was never the source of Europe's problems during the twentieth century. Instead, he posits, the relatively peaceful second half of the twentieth century seems as much a creation of nation-states as was the carnage of the first half.⁸ This is both a paradox and a problem. In particular, for Mazower, it is a problem for a particular approach to history, that events of the past provide a basis for predicting the future.

Franck has argued that his approach to history is not deterministic, but rather causal.⁹ He asserts that certain developments, such as the rapid development of communications technology, have an effect on international politics and law. The spread of liberal democracy in recent years, in his view, is traceable, at least in part, to improvements in communications. There are two important points to be made in response to this argument. First, this argument holds sway much more for the past decade or so than for the remainder of the twentieth century, and I will argue that it is in his analysis of the League of Nations era and the earlier United Nations era that Franck's approach is most open to criticism, because he isolates his significant developments from their context. Second, the distinction between a causal view of history and a deterministic view may be one of degree rather than kind. A causal view still leads us to an end, even if we call it an effect. This is a problem of perspective, whereby we take our contemporary viewpoint too much for granted and impose it on our view of international law.

2 The Models of History in *Fairness in International Law and Institutions*

Whether one uses the term deterministic or causal, Franck's approach to history in *Fairness* is, at first glance, directional. It presents human history as a move forwards

⁵ Koskenniemi, *supra* note 2.

⁶ Yasuaki, 'The Birth of International Law as the Law of International Society', 94 *ASIL Proceedings* (2000) 44.

⁷ M. Mazower, *Dark Continent: Europe's Twentieth Century* (1998).

⁸ *Ibid.*, at 407.

⁹ Commentary to an earlier version of this paper, given at a colloquium at the University of Glasgow, 1 June 2001.

towards a particular end. Franck argues that the history of the democratic entitlement in international law is directional and progressive. For Franck's purposes, history has led international law to a recognition of democracy. This has two elements: the emergence of a democratic entitlement for individuals within their own states and the emergence of global governance. Not surprisingly, Franck ends *Fairness* by arguing for democratically-elected elements to global governance. However, a fuller examination of *Fairness* reveals that Franck departs from the directional model in his analysis of two important issues: self-determination and the role of the Security Council.

A *The Democratic Entitlement*

The phrase 'democratic entitlement' is an interesting one. Franck largely avoids using the term 'right' to describe this entitlement. However, it is difficult to see the point of his argument if anything less than a legal right is envisaged. He certainly argues that democracy is becoming a rule of the international system.¹⁰ In *The Empowered Self*, furthermore, Franck removes the ambiguity. He clearly states that democratic governance is a human right at least three times.¹¹ Franck deploys the directional approach to history most openly to the development of the democratic entitlement by presenting the individual entitlement to democratic governance in international law as a three-stage development. These three generations of development of the democratic entitlement are:

1. Self-determination of peoples (League of Nations era)
2. Freedom of (political) expression (Cold War United Nations era)
3. International monitoring of elections (post-1990 United Nations era)

1 *The League of Nations Era*

In his discussion of self-determination in the League of Nations era, Franck focuses on the consultation procedure which was generally applied when deciding whether a group should be allowed to become a separate state. This involved consultation of representatives of the people affected and plebiscites. Franck recognizes that self-determination is about self-government rather than democracy in particular.¹² By focusing on the process of granting self-determination, however, he argues that we can see the origins of international supervision of elections.

Other historians have seen this period as one of crisis for democracy rather than one where foundations were laid. Hobsbawm, in particular, argues that this period saw the collapse of the liberal ideal.¹³ The fragility of democracy in this period, in his view, is borne out by the number of European states which dissolved or were rendered

¹⁰ *Ibid.*, at 84.

¹¹ *The Empowered Self*, at 262, 267 and 284.

¹² *Ibid.*, at 92.

¹³ E. Hobsbawm, *Age of Extremes: The Short Twentieth Century* (1994).

ineffective between 1918 and 1939, namely 17.¹⁴ Furthermore, Hobsbawm's identification of nationalism as a central feature of the radical Right attack on the liberal order in the 1920s and 1930s would challenge Franck to distinguish such destructive deployment of national identity from the concept of self-determination linked to democratic self-government.

Franck attempts to bring self-determination in the League of Nations era into the fold of democratic developments. Liberalism rather than democracy, however, would tend to provide a better basis for an understanding of self-determination pre-United Nations. Kymlicka argues that a recognition of identity issues was once central to liberalism's concerns, although liberalism turned away from group rights partly because of the failure of the League of Nations successfully to regulate group rights in a liberal framework.¹⁵

2 1945–1989

In the Cold War era of the United Nations, Franck's second development occurs: the development of freedom of expression, or discursive rights as he describes them. He focuses primarily on the United Nations versions of freedom of expression, particularly the ICCPR. However, the very general statements of rights in international human rights instruments are insufficient to meet the requirements of fairness set out in the earlier part of *Fairness*, particularly the requirement of determinacy. Franck therefore emphasizes the role of the Human Rights Committee in providing the right with greater determinacy and therefore legitimacy.¹⁶ However, Franck overstates the extent of protection of freedom of expression in practice. The Human Rights Committee has been more conservative in its interpretations than Franck's argument would imply.¹⁷

It is important to distinguish between liberalism and democracy in political and legal theory. International law is probably oriented more towards improving liberal institutions through a strengthened rule of law than by increasing democracy. As Mazower notes in discussing the development of the United Nations: 'A revival and reinvigoration of international law thus emerged as the natural adjunct to liberal concern for world peace and, in particular, for the safeguarding of human rights.'¹⁸ Peace, international law and human rights were inextricably linked in creating the United Nations, but this was broader than a desire to foster democracy. World government was explicitly rejected as an option.¹⁹

As a result of his conflation of liberalism and democracy, Franck is able to deploy liberalism (the development of individual human rights) to support democracy because he isolates freedom of expression from the other rights in the Universal

¹⁴ *Ibid.*, at 111.

¹⁵ W. Kymlicka, *Multicultural Citizenship* (1994).

¹⁶ *Fairness*, at 100–104.

¹⁷ Simpson, 'Is International Law Fair?', 17 *Michigan Journal of International Law* (1996) 615.

¹⁸ Mazower, *supra* note 7, at 200.

¹⁹ *Ibid.*, at 201.

Declaration of Human Rights.²⁰ Other rights, such as the right to a fair trial, relate clearly to the rule of law. A more general evaluation of the development of international human rights would have given less support to Franck's argument for the democratic entitlement.

3 Post-1990

These two developments set the stage for the post-1990 United Nations, where voting rights are the focus. The treaty law on the right to vote is undeveloped when compared with other international human rights, as even Franck acknowledges.²¹ He relies on the increased use of international election monitoring by states to justify his argument for an *emerging* norm of democratic entitlement. It is worth noting, however, that he downplays the role of state consent in international election monitoring, while acknowledging that in practice it is relevant.²² Where the monitoring has failed to take place, he attributes the failure to concerns about the potential fairness of the elections on the part of international institutions rather than states being entitled to refuse the monitoring because there is not yet a binding norm.²³ In *The Empowered Self*, the emergence of a right to democracy is justified by a wider range of recent sources, including acts adopted by the CSCE/OSCE.²⁴ In this later analysis, as noted above, it appears that Franck presents the democratic entitlement as a legal right, although he makes no claims about the justiciability of such a right.

B Global Governance

To some extent Franck's argument that international law is moving towards global governance is a part of his argument about democracy by extending it from the individual entitlement to institutional design. He is not alone in theorizing a move towards cosmopolitan democracy. Held has examined the trends in international relations which lead to a weakening of internal democracy and accountability and therefore at the very least raise the issue of a compensating cosmopolitan democracy.²⁵ He cites international law as one of the factors which has reduced state control over individual behaviour.²⁶ There has been a link between democracy and the nation-state in the twentieth century and therefore with sovereignty.²⁷ Changes in the international system, including international law, give cause to question that link. Unlike Franck, however, Held presents the prospect of cosmopolitan democracy as a complex problem of relatively recent emergence, rather than as a historical trend.

²⁰ *Ibid.*, at 86.

²¹ *Fairness*, at 110.

²² *Ibid.*, at 124, 126–127.

²³ *Ibid.*, at 119.

²⁴ *The Empowered Self*, at 265–267.

²⁵ D. Held, *Models of Democracy* (1996), at 353, where he makes the important distinction between forms of accountability in general and democracy in particular, which is both a form of accountability and a form of participation.

²⁶ *Ibid.*, at 348–350. See also D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (1995), at 101–107.

²⁷ Held, *supra* note 25, at 336–337.

The development of international governance is the focus of the chapter on collective security. Here, Franck argues that the Security Council has progressed from conventional statal international relations to becoming an international legislature. The Security Council's acts are binding, in the same fashion as legislation, even on the Permanent Five, since once an act is adopted they may not act in contravention of it. The system established by the United Nations Charter — the 'radical vision' — is seen as an improvement on the League of Nations system in terms of eroding state sovereignty in favour of global governance. Nonetheless, it contains elements of the old Westphalian system, such as Article 51, which Franck argues now should be abandoned in favour of collective security. Collective security implemented by a global governing system, in Franck's view, will replace just war as the moral foundation of the international system.²⁸ For this to occur, the United Nations must have its own troops, rather than using those of the Member States. In other words, its enforcement monopoly should be complete, thus giving the United Nations the essential feature of a state in the Weberian sense: the monopoly over the legitimate use of force. Franck does, however, recognize that the Security Council as presently constituted is not a suitable legislature for global governance based on fairness, as it does not engage in fairness discourse.

Franck's study of the law of war is presented as a case study of the development of international governance: "Through study of this aspect of international law, we can understand the evolution of socio-political institutions from the tribal and civil to the international and global."²⁹ For Franck, the effectiveness of the League of Nations era prohibitions on the use of force was limited by the lack of any credible decision-making process.³⁰ It was therefore a false start which set the stage for the United Nations, as history progresses towards international institutions which amount to global governance.

The development of the law of war also demonstrates, for Franck, the progressive undermining of the concept of state sovereignty. Article 10 of the League of Nations Covenant, which provided for collective action to enforce the rule requiring peaceful settlement of disputes, is presented as a limitation on state sovereignty. The United Nations Charter goes further by repealing 'the sovereign right to make war',³¹ although, as Franck acknowledges, the reservation of the right of self-defence demonstrates the limits of the willingness of states to transfer sovereignty to international institutions.³²

The end of Franck's argument about the directional history of international law towards global governance is his advocacy, in the Conclusion to *Fairness*, of a second chamber to the United Nations General Assembly. This advocacy arises from a deep personal dedication to global governance, as is demonstrated by his reluctant

²⁸ *Ibid.*, at 313.

²⁹ *Ibid.*, at 283.

³⁰ *Ibid.*, at 257–259.

³¹ *Ibid.*, at 259.

³² *Ibid.*, at 267.

relinquishing of the idea, due to lack of support, in *The Empowered Self*. This chamber would be directly elected by the world's peoples. The seats would be based on population, so that the United States would have more seats than Luxembourg. This proposal challenges not only state sovereignty itself, in that people would be directly represented rather than through their states, but to sovereign equality of states, in that there would no longer be equality of representation per state. Franck sees sovereign equality as inherently unfair because it results in inequality of voice. He also sees the representation of people by states as promoting secession, since only through becoming the people of a separate state can groups gain voice at the international level.

Very recent events, such as the disputatious World Conference on Racism and the terrorist attacks on the United States, have quelled an emerging sense of optimism about the development of international law. However, most of the fairness-oriented developments of recent years suggest that the liberal idea of rule of law may be emerging in international law rather than consensus on democracy.³³ Franck generally fails to isolate rule of law and democracy. He uses rule of law developments (such as international criminal law) to demonstrate the development of international institutions, and thereby to argue that those institutions are governmental in character. In addition, Franck's argument for a democratic entitlement begs questions about the link between liberalism and democracy. The existence of democratically-elected governments made up in whole or in part of illiberal nationalists is not a problem that can be resolved by more democracy. Franck acknowledges this problem in *The Empowered Self*, but relies on the argument that many human rights norms are now *jus cogens*, and that there exist international tribunals for the evaluation of individual complaints against states.³⁴ These tribunals, however, are a weak solution since they can only address a small fraction of human rights violations, and have no powers to enforce their judgments.

Franck is often unclear as to whether he is arguing for the empirical existence of the democratic entitlement or for the ideal of liberal democracy. His admission in *Fairness* that the norm is merely emerging tends to suggest prediction rather than description, despite his impressive marshalling of international practice,³⁵ but in *The Empowered Self*, as noted above, he asserts that the right to democracy already exists. Nonetheless, Franck's account must be understood as at least partially normative. The presentation of evidence leading to the conclusion that the right exists itself involves evaluation rather than simple observation.³⁶

³³ C. Warbrick, 'The Public Law of Public International Law', inaugural lecture, Durham University, May 1998.

³⁴ *The Empowered Self*, at 276.

³⁵ Simpson, *supra* note 17.

³⁶ S. Marks, *The Riddle of All Constitutions: International Law, Democracy and The Critique of Ideology* (2000), at 142.

C A Second Model, or an Internal Critique?

Franck does not exclusively employ the directional model of history in *Fairness*. In the developments since 1990, Franck sees regression as well as progress towards his goal of democratic and international governance. The re-emergence of self-determination as a significant norm of international law fits badly with Franck's argument that international law is moving towards *individual* democratic entitlement.³⁷ Self-determination as a norm gives status to peoples, not individuals. The revival of the Security Council as an international law-making body also conflicts with Franck's directional model. The revival of the Security Council rebalances international governance towards states, and in particular the Permanent Five. As a result, when *Fairness* is taken as a whole, two views of history are presented: one directional and another complex. Franck, understandably, in his effort to study the full range of developments affecting international institutions, can be seen as ambivalent towards the directional account of history. While in the area of the democratic entitlement, a progressive approach is advocated, for self-determination and the Security Council, the presence of progress is questioned.

The strengthening of self-determination and the Security Council cannot be dismissed as insignificant deviations from a general progressive trend. They are amongst the most important developments of the 1990s. Franck's discussion of self-determination and of the role of the Security Council provides a critical supplement to the directional model.

For Franck, self-determination is particularly regressive, as its proper role in his account was during the League of Nations era, although he argues that self-determination 'entered its normative zenith' in the Cold War United Nations era.³⁸ In the post-1990 era, self-determination is nothing more than 'post-modern neo-tribalism'.

While Franck is clearly against the development of self-determination after 1990, he is more ambivalent about the revival of the Security Council. On the one hand, it means that the promise of the United Nations Charter is being fulfilled. On the other, state interests are represented by the Security Council, particularly through the veto. International governance, Franck argues, was better served in the Cold War era by the Secretary-General's relatively unfettered use of his good offices function to resolve international disputes. Franck's account of progress towards global governance implies that states should, over time, have a reduced role in international governance. Hence he disapproves of post-1990 developments which have reinforced ideas of statehood and sovereignty as central to international law.

³⁷ Franck's treatment of self-determination is dealt with more fully by Stephen Tierney, in his contribution to this symposium 13 *EJIL* (2002) 941.

³⁸ *Fairness*, at 150.

3 The Problem of Context

Franck's emphasis on international institutions rather than international law as a whole means that his account is partial in some respects, even from a first glance. The problem of context, however, goes further. Franck is selective in the elements on which he focuses in each of the three periods he studies. The result is that he is able to attach more and different meanings to these features than might be sustainable if a broader approach was taken.

In Franck's discussion of the development of self-determination in the League of Nations era, he ignores the minorities treaties sponsored by the League. These treaties demonstrate a larger commitment to collective rights, such as rights to protection for minority churches and schools, including national rights, rather than individual democratic rights. Franck also fails to note the partial application of self-determination, particularly the fact that it was only applied to national groups lying within the territory of defeated powers.

The Empowered Self demonstrates a more complete account of group rights in international law. In *Fairness*, Franck linked League of Nations era self-determination to democracy, and only criticizes later manifestations of self-determination. In *The Empowered Self*, his emphasis is on the individual. As a result, he provides a more sustained critique of group rights, including those contained in the League of Nations minorities treaties.

Mazower provides a fuller account of the League's concern with group rights, including the development of minority rights treaties as the counterbalance to the promotion of self-determination.³⁹ In his analysis of the minority rights treaties, which cannot be detached from an analysis of League-era problems of ethnic and ideological conflict, Mazower highlights the reasons for their failure. First, Germany set itself up as the defender of diffused German minorities. Second, the international law means of enforcement, with few exceptions, were ineffective. The factors which contributed to this ineffectiveness were: individuals and non-state groups had no presence in international law, the UK and France were politically indifferent to the minorities treaties and there was a lack of universality in the system.

In his discussion of the development of international human rights after 1945, Franck fails to discuss economic, social and cultural rights at all, and isolates freedom of expression from other civil and political rights. Isolating 'discursive' rights from other human rights does not seem to be justified, particularly since other rights, especially those relating to the prohibition against inhuman and degrading treatment and the right to a fair trial, have been developed in greater detail. It is also important to remember that the main human rights debate during the Cold War era was over the separation of civil and political rights on the one hand, and economic, social and cultural rights on the other, especially with regard to the priority of one set of rights over the other.⁴⁰

Franck not only isolates freedom of expression from other rights, he over-

³⁹ Mazower, *supra* note 7, at 51–63.

⁴⁰ P. Hunt, *Reclaiming Social Rights* (1996).

emphasizes the version in the ICCPR. While it is understandable that Franck chooses to focus on a universal treaty rather than a regional one, the close textual relationship between the ICCPR and other formulations would justify a broader examination of the interpretation of freedom of expression. Ironically, Article 10 ECHR provides better support for Franck's argument than Article 18 ICCPR. The case law has often referred to the instrumental role of freedom of expression and related rights in protecting democracy.⁴¹ The European Court of Human Rights has linked democracy to the Convention system as a whole, stating that 'Democracy ... appears to be the only political model contemplated by the Convention and accordingly, the only one compatible with it.'⁴²

The link between freedom of expression and democratic values has been explicit in Convention case law going back to *Handyside*.⁴³ In that case, the European Court of Human Rights asserted that freedom of expression 'constitutes one of the essential foundations' of a democratic society.⁴⁴ This meant, for the Court, that pluralism and tolerance must be watchwords,⁴⁵ and that all limitations on freedom of expression must be proportionate to their aims. This formula has been repeated constantly in later case law. As a result, political expression has become a privileged category under Article 10 ECHR, and attracts the highest level of protection.⁴⁶

Does this case law recognize a change in the development of European democracy after 1990? From one point of view it should, as the environment in which European democracy existed had changed. Europe was no longer divided in the same way into democratic and undemocratic countries, and many of those previously undemocratic countries had become parties to the ECHR. One suggestion that this might be the case arises from the Court's decision in *Vogt v. Germany*,⁴⁷ where the Court was more critical than it had been in the past of Germany's restrictions on civil servants' membership of political parties of the extreme left or right. A further development is suggested by *Bowman v. United Kingdom*.⁴⁸ This case presents an example of the Court using freedom of expression to reinforce democratic participation rights. The United Kingdom's laws, severely restricting the right of persons other than candidates and parties to spend money on persuading electors to give or to withdraw their support for a candidate, were found to violate Article 10: 'it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to

⁴¹ See, e.g., Cullen, 'Freedom of Association as a Political Right' 23 *EL Rev.* (1999) HR/30; D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (1995), at 397–401, 408–411.

⁴² *United Communist Party of Turkey v. Turkey*, 26 EHRR (1998), 121 at 148.

⁴³ 1 EHRR (1976) 737.

⁴⁴ *Ibid.*, at para. 49.

⁴⁵ On this point, see also the case law on the right to education, Article 2 of Protocol 1 of the ECHR, such as *Kjeldsen et al. v. Denmark*, 1 EHRR (1976) 711, at para. 53, where the Court notes that the right to respect for beliefs in the educational context is intended to protect children from indoctrination.

⁴⁶ See Harris, O'Boyle and Warbrick, *supra*, note 41.

⁴⁷ 20 EHRR (1995) 20. For more detailed comment, see Cullen, 'Articles 9–11 ECHR in 1995: A "New Europe" Approach to Fundamental Freedom', 21 *EL Rev.* (1995) HRC/29 at HRC/34–38.

⁴⁸ 26 EHRR (1998) 1.

circulate freely'.⁴⁹ This case could be used by Franck to support his contention that in the past decade, international law has moved towards a recognition of the right to democratic elections.

The role of democracy in ECHR case law has not always been progressive, however. Because the states parties to the Convention are democratically governed, the Commission and Court of Human Rights have allowed them a large 'margin of appreciation' in their application of ECHR rights, including freedom of expression.⁵⁰ In other words, limitations which are the product of a majoritarian democratic political process are often presumed to be legitimate, even where those limitations are anomalous amongst Council of Europe member states. Two examples will suffice to demonstrate this problem. In *Ahmed v. United Kingdom*,⁵¹ the European Court of Human Rights ruled that a law severely restricting the political activities (although not political *membership*) of local government officers was within the United Kingdom's margin of appreciation under Article 10. Notable was the fact that the Court considered that the law served a legitimate aim, namely protecting the rights of others to effective political democracy by guaranteeing the neutrality of senior local government employees. In *Otto-Preminger-Institut v. Austria*,⁵² the Court similarly found that the seizure of a film was justified on the grounds that its subject matter would offend the religious sensibilities of a majority of the local population.⁵³ These decisions demonstrate the difficult relationship between human rights and democracy: sometimes, the majoritarian principle fundamental to democracy may undermine individual rights.

The case law on Article 10 ECHR, for better and for worse, is heavily influenced by an idea of democratic values. As a result, it could provide an argument to support the evolution of a democratic entitlement without resorting to a decontextualized approach, since the democratic values argument can be seen in decisions on other rights as well, such as the right to education.⁵⁴

The third stage of Franck's account is less vitiated by lack of context. Nonetheless, in this part Franck tends to underplay the role of consent.⁵⁵ In particular, with regard to the United Nations supervision of elections, he argues that it is the decision of the United Nations whether or not to monitor an election, rather than the decision of a state to allow the monitoring. In this area, where consent is clearly involved, it seems difficult to accept his argument that there is a rule of international law relating to the 'democratic entitlement'.

⁴⁹ *Ibid.*, at para. 43.

⁵⁰ In addition, the Convention allows for derogations in time of emergency (Article 15), limitations of the political activities of aliens (Article 16) and restrictions on the use of rights to subvert other rights (Article 17).

⁵¹ 29 EHRR (2000) 1.

⁵² (1994) Series A294-A.

⁵³ For a criticism of this judgment, see Harris, O'Boyle and Warbrick, *supra* note 41, at 402.

⁵⁴ See *Kjeldsen et al. v. Denmark*, *supra* note 45.

⁵⁵ See, e.g., *Fairness*, at 108.

4 The Problem of Perspective

It is worth noting that the debate over whether history is progressive in the sense of constant improvement is not a post-Cold War phenomenon.⁵⁶ Collingwood argued that the idea of historical progress was a fallacy based on the application of evolutionary theory from the natural sciences to human history.⁵⁷ He recognized that this approach involved value judgements which were contingent on the historian's own viewpoint.⁵⁸ The directional version of history is essentially, therefore, a problem of perspective. What is important, according to Collingwood, is to understand a historical period sympathetically, in other words, from within its own terms.⁵⁹ A straight comparison of the practice of the international norms on self-determination in different periods of the twentieth century may simply tell us what the writer thinks about self-determination, rather than about the principle's history. Collingwood did not deny the possibility of progress, but rejected the idea of its *inevitability*. Nonetheless, he argued that asking questions about whether humanity has progressed over time was an essential task not only for the purpose of good history, but also as the basis on which future progress could be built.⁶⁰

The progressive nature of history is demonstrated, for Franck, by the development of the prohibition on the use of force. Each development is seen as an improvement on the previous one. The lessons of the League of Nations were learned in developing the prohibition in the United Nations Charter, which has, since 1990, become effective. The United Nations, unlike the League, is a 'dynamic normative system'.⁶¹ Similarly, the institution of the Nuremberg trials after World War II is contrasted favourably with the view taken after World War I that such war crimes trials were not legally possible,⁶² and the ICTY is presented as an improvement over Nuremberg due to its greater neutrality.⁶³

History becomes relevant to international positive law in the problem of intertemporality. Because international disputes often develop over a period of years, the question of which law to apply can be a difficult one. Should the law of the time when the facts first arose be the applicable law, or the law of the time when the dispute is being considered? Most notably in the *Western Sahara* case, the International Court of Justice has favoured the law in force at the time of the dispute.⁶⁴

The intertemporality issue has become more problematic in wider debate than it has been for the International Court of Justice. In the preparatory commission for the

⁵⁶ See Allott, 'International Law and the Idea of History', 1 *Journal of the History of International Law* (1999) 1, at 12–15.

⁵⁷ R. G. Collingwood, *The Idea of History* (1992, ed. T. M. Knox).

⁵⁸ *Ibid.*, at 327.

⁵⁹ *Ibid.*, at 329.

⁶⁰ *Ibid.*, at 333.

⁶¹ *Ibid.*, at 260.

⁶² *Ibid.*, at 263–264.

⁶³ *Ibid.*, at 279–280.

⁶⁴ ICJ Reports (1975), at 14.

World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, the question of the transatlantic slave trade several centuries ago was raised. The United Kingdom objected to the inclusion of this historical issue in the conference. Some countries, including South Africa, argued that slavery in the past should be judged by the international law standards of the present, while the United Kingdom argued that it should only be judged by the standard of international law at that time.⁶⁵ This issue proved to be one of the most difficult facing the Conference. Ultimately, it was agreed by the Conference that slavery could only be considered a crime against humanity now, but in the following pointed way: '[we] further acknowledge that slavery and the slave trade are a crime against humanity and *should* always have been so'.⁶⁶

Franck accepts the version of intertemporality given in the *Western Sahara* case.⁶⁷ On the slavery issue, he suggests that the fairness test which should be applied is the one based on the international context of the time. For example, the United States could be accused of unfairness in continuing the practice of slavery after other countries had abolished it.

While as a matter of positive law, international law may be clear about intertemporality, as a matter of theory of international law, clarity is difficult to achieve. As Koskeniemi notes, the tension between different approaches to the relationship between past and present law demonstrates the wider tension in international law between stability and change.⁶⁸ It is not clear that Franck's concept of fairness shows us a way out as he sees fairness itself as variable over time. Such a view would suggest that fairness is essentially conservative rather than transformative. Furthermore, Franck may be seen as making an intertemporal mistake himself. In his treatment of self-determination during the League of Nations era, as noted above, he links self-determination to democracy rather than to collective rights, which projects his contemporary ideas of democracy on to a situation where democracy was not the pre-eminent value.

5 Conclusion

'We emphasise that remembering the crimes or wrongs of the past . . . unequivocally condemning its racist tragedies and telling the truth about history are essential elements for international reconciliation and the creation of societies based on justice,

⁶⁵ 'Britain Accused over Slave Trade', *The Guardian* (London), 21 May 2001: "'It doesn't mean we are ignoring history" said one British official "the legal analysis is that you can't apply [international law] retrospectively and [the practice] must be tested against the legal standards of the time. Customary international law at the time did not oppose slavery."

⁶⁶ World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration, available at www.unhchr.ch/html/racism/Durban.htm (emphasis added).

⁶⁷ Comment made at Glasgow seminar, *supra* note 9.

⁶⁸ *Supra* note 2, at 404–406.

equality and solidarity.’⁶⁹ These words, from the final Declaration of the World Conference on Racism, remind us both of the importance of history in shaping our concept of international law and the difficulties in finding an account which does more than show us the historian’s perspective. Allott has argued that history is both a form of remembering and a form of forgetting.⁷⁰ He sees history as an act of interpretation and, in particular, a transformative act.⁷¹ Franck’s approach to history is both less interpretative and less transformative. One view of his account of the history of international law in the twentieth century is that it is part of his justification for the democratic entitlement. However, it is important to remember that *Fairness* also contains examples of a less directional account of history than is presented in the argument for the democratic entitlement. Franck’s history raises questions about context and perspective, but *Fairness* nonetheless represents a significant contribution to the growing debate on history in international law.

⁶⁹ Declaration, *supra* note 66.

⁷⁰ Allott, *supra* note 56, at 3.

⁷¹ *Ibid.*, at 20.