

## THOMAS M. FRANCK (1931–2009)

*By Rosalyn Higgins\**

### I.

Thomas M. Franck was born in 1931 in Berlin, Germany. His family left only in 1938, securing entry to Vancouver, Canada. He arrived speaking German, but rapidly acquired proficiency in English and completed his schooling there.

He graduated with a BA in 1952 and an LLB in 1953 from the University of British Columbia (which awarded him an honorary LLD in 1995). From there he went to Harvard Law School, receiving his LLM in 1954 and his SJD in 1959. He became assistant professor at the University of Nebraska College of Law in 1954–1956.

Upon the suggestion of Roland Brown, a prominent member of the British Labour Party whom he had met and who had become attorney general in Tanzania, Tom Franck went out to East Africa to see what role he could usefully play in the transition of these countries to independence. The short years at the University of East Africa Law School were very important, giving him easy access to the new generation of leaders in East Africa, and providing intellectual shape to his emerging ideas about the purpose of law. The goal of practical steps for the improvement of the human condition imbued his work over the years. It also inspired generations of students.

While at Dar es Salaam in 1963–1966, he became a counselor not only to the governments of Tanganyika and Zanzibar, but also to the government of Kenya. Most of this work related to the constitutions of these countries, either on the cusp of independence or recently independent. It was here that his contribution to the articulation of a constitutional architecture<sup>1</sup> began—national constitutional architecture in the early part of his career, and international constitutional architecture in the later part of his life.

Franck made the transition to public international law by immersing himself, for a period, in United States constitutional law as it affected foreign relations. He was to come back to such matters over the years. In 1985 Franck wrote *Nation Against Nation: What Happened to the U.N. Dream and What the U.S. Can Do About It*,<sup>2</sup> which received the Certificate of Merit of the American Society of International Law. In 1992 he published *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?*<sup>3</sup> This, too, received the Certificate of

\* Of the Board of Editors.

<sup>1</sup> A phrase usefully employed by Benedict Kingsbury, *Neo-Madisonian Global Constitutionalism: Thomas M. Franck's Democratic Cosmopolitan Prospectus for Managing Diversity and World Order in the Twenty-first Century*, 35 N.Y.U. J. INT'L L. & POL. 291, 294 (2003).

<sup>2</sup> THOMAS M. FRANCK, *NATION AGAINST NATION: WHAT HAPPENED TO THE U.N. DREAM AND WHAT THE U.S. CAN DO ABOUT IT* (1985).

<sup>3</sup> THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992).

Merit of the American Society. He was to receive the Certificate of Merit an astonishing four times.<sup>4</sup>

When his interests were later to turn to international law, he was attracted above all by international institutions. He had studied with Louis Sohn at Harvard, but his interest did not lie in blueprints or models. Franck's commitment was to identifying concepts to make a more reasoned discourse leading to the taking of decisions that affect national and international communities, as well as make more effective the working of institutions.

Franck's interest in the United Nations (and in regional and specialized bodies) was longstanding. It was the way law and politics played out within their walls that particularly attracted him. His interest in the role that the international judiciary might play came much later in his life.

That interest was probably triggered by the invitations he now began to get to act for particular countries in litigation before the International Court. He acted for Chad in the *Libya/Chad* litigation;<sup>5</sup> for Bosnia and Herzegovina in the case it brought against Serbia and Montenegro relating to the crime of genocide;<sup>6</sup> and for the former Yugoslav Republic of Macedonia in the case under preparation concerning the Application of the Interim Accord of 13 September 1995.<sup>7</sup>

He enjoyed this work. The camaraderie of being on a team preparing a case for the Court appealed to him. The vast volumes of written pleadings are the product of much research and animated discussion among the team members as to how a particular point of law, or piece of history, shall be handled. Franck was in his element with these efforts, making important contributions. They were, in a sense, an extension of his academic writings and lectures.

His presence as a counsel was relaxed and confident. He chose to invoke reason and morality, rather than emphasize the technical detail of precedents or other complex arguments of international law.

In 2001–2002 he changed the role of advocate to that of judge *ad hoc*, having been nominated by Indonesia to sit in that capacity in the *Indonesia/Malaysia* case, including in the proceedings concerning the request of the Philippines to intervene in that case.<sup>8</sup> He also sat as an arbitrator in the maritime boundary dispute between Guyana and Suriname under Annex VII of the UN Convention on the Law of the Sea. The award was handed down in 2007.<sup>9</sup>

## II.

In 1960 Tom Franck had joined the faculty of New York University (NYU). There he was to remain, deeply engaged, with Norman Dorsen and others, in bringing that law school up to the first rank. He inspired both his students and his colleagues with his boundless energy, warmth of personality, and original thinking.

<sup>4</sup> See note 17 *infra*.

<sup>5</sup> Territorial Dispute (Libya/Chad), 1994 ICJ REP. 6 (Feb. 3).

<sup>6</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), Preliminary Objections, 1996 ICJ REP. 595 (July 11); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Int'l Ct. Justice Feb. 26, 2007).

<sup>7</sup> Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece) (filed Nov. 17, 2008).

<sup>8</sup> Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), Application by the Philippines for Permission to Intervene, 2001 ICJ REP. 575 (Oct. 23); Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), 2002 ICJ REP. 625 (Dec. 17).

<sup>9</sup> Guyana/Suriname (UN Law of the Sea Annex VII Arb. Trib., Perm. Ct. Arb. Sept. 17, 2007).

The year 1965 marked the start of the Center for International Studies, which was to raise the reputation of the NYU School of Law still further. Tom Franck was its director, and Shelley Fenchel his invaluable assistant. She was to provide constant and practical support for all of Tom Franck's activities over the years. Among the many projects supported by the center were colloquiums of various sorts, where the student presenters enjoyed the tremendous bonus of having their work commented on by experts.

Most international lawyers have knowledge, greater or lesser, of the United Nations and the personalities who constitute its Secretariat or represent its member states. Tom Franck moved with exceptional ease in this milieu, having friends throughout the organization and the missions to it. He was thus able to gain insights into the various dramas there being played out. He was also in a position to ask the secretary-general, the UN legal counsel, and a great variety of ambassadors and national legal advisers to speak at, or otherwise participate in, colloquiums at the Center for International Studies. Indeed, the important themes he selected for these gatherings, and their reputation for off-the-record discussions of high quality, made invitations to attend them prized by international civil servants, national and international judges, and state representatives alike. Franck regarded the purpose of these colloquiums as furthering understanding and enlightenment, and he used them, *inter alia*, to expose selected national judges to the world of international law—an exposure he regarded as vital. (He also was at the heart of the “outreach” efforts of the American Society of International Law, initiated in 1999, directed at engaging leading U.S. judges, including those on the Supreme Court, in important contemporary issues of international law.)

From 1980 to 1982, Tom Franck took on the directorship of research at the United Nations Institute for Training and Research (UNITAR). Again, he engaged the students at NYU and supported UNITAR by bringing in his best students to assist on some UNITAR projects, for which activity they received credit at the law school.

While at NYU, from 1973 to 1979, he also took on the directorship of the international law program of the Carnegie Endowment for International Peace. In addition, from 1986 on, he served on the Department of State's Advisory Committee on International Law, an appointment in which he took pride and which he carried out faithfully.

In 2002, after having given service to New York University for a full forty-two years, Tom Franck became professor emeritus. But he continued to shoulder a teaching load almost as full as before: this was his choice. He did not wish to cut his ties with his students and his colleagues, which he cherished. While others looked back with appreciation on what he had accomplished—in 2003 he received an honorary DHL from the Monterey Institute of International Studies, and in 2004 an honorary LLD from the University of Glasgow School of Law—his life in international law continued as vigorously as before.

He now took on membership of the advisory boards of the Max Planck *Encyclopedia of Public International Law*, the *Oxford Reports on International Law in Domestic Courts*, the *Chinese Journal of International Law*, the *Global Community Yearbook of International Law and Jurisprudence*, and the *Journal of International Criminal Justice*. His writings continued to flow at an extraordinary pace. Two new books, *Recourse to Force: State Action Against Threats and Armed Attacks*<sup>10</sup> and *Law and Practice of the United Nations* (with Simon Chesterman and

<sup>10</sup> THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* (2002).

David Malone),<sup>11</sup> appeared after this nominal “retirement.” And so did some fifty articles, comments, and notes, in a variety of journals—the *American Journal of International Law*, the *Max Planck Encyclopedia of Public International Law*, the *Widener Law Review*, the *Washington University Global Studies Law Review*, the *Chicago Journal of International Law*, the *Brazilian Yearbook of International Law*, the *Columbia Journal of Transnational Law*, and the *Wisconsin International Law Journal*, among others. Tom Franck was never too grand to accept an invitation to publish with a less well known journal, and always had something to say.

He also, during these “retirement” years, wrote, sometimes with others, many chapters for books. Some of these were *liberi amicori* (for Jost Delbrück, for V. Đ. Degan, for Yoram Dinstein, for Ruth Lapidoth).<sup>12</sup> He was seemingly programmed to say yes to any request.

Nor was he, in his so-called retirement period, inclined to limit himself to particular venues. Having earlier spent time as a visiting fellow at Cambridge University (where he gave the Hersch Lauterpacht Memorial Lectures, later published as *Recourse to Force*),<sup>13</sup> he now accepted visiting professorships at the University of California, Hastings College of the Law (2004); the Georgetown University Law Center (2006); and the American University Washington College of Law (2008).

Tom Franck’s scholarly output has rightly been described as prodigious: “A book every 17.8 months for 43 years. Or 6.34 publications a year—one every 8.2 weeks—for more than four decades.”<sup>14</sup> This flow of writing continued unabated, regardless of the many, many other commitments he undertook and fulfilled.

### III.

Tom Franck was a pillar of support to the American Society of International Law, on a variety of issues. For nearly fifty-one years, he was an increasingly active member of the Society. He spoke willingly at meetings and, as he became more celebrated, at important dinners. He served on committees and readily took on chores. And his service as editor in chief of the *American Journal of International Law* was remarkable. Since 1978, when Louis Henkin and Oscar Schachter became joint editors in chief, only one person has assumed this position alone.<sup>15</sup> And that was, of course, Tom Franck.

<sup>11</sup> SIMON CHESTERMAN, THOMAS M. FRANCK, & DAVID M. MALONE, *LAW AND PRACTICE OF THE UNITED NATIONS: DOCUMENTS AND COMMENTARY* (2008). In 2008 there also appeared a new edition of his casebook THOMAS M. FRANCK, MICHAEL J. GLENNON, & SEAN D. MURPHY, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW* (3d ed. 2008).

<sup>12</sup> Thomas M. Franck, *The International Judge and the Principled Imperative*, in *WELTINNENRECHT: LIBERI AMICORUM JOST DELBRÜCK* 267 (Klaus Dicke ed., 2005); Thomas M. Franck, *Legitimacy After Kosovo and Iraq*, in *INTERNATIONAL LAW AND THE USE OF FORCE AT THE TURN OF THE CENTURIES: ESSAYS IN HONOUR OF V. Đ. DEGAN* 69 (V. Crnić-Grotić & M. Matulović eds., 2005); Thomas M. Franck, *Rethinking Collective Security*, in *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES: ESSAYS IN HONOUR OF YORAM DINSTEIN* 21 (Michael N. Schmitt & Jelena Pejic eds., 2007); Thomas M. Franck, *The Centipede and the Centrifuge: Principles for the Centralisation and Decentralisation of Governance*, in *THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY: ESSAYS IN HONOUR OF PROFESSOR RUTH LAPIDOTH* 19 (Tomer Broude & Yuval Shany eds., 2008).

<sup>13</sup> FRANCK, *supra* note 10.

<sup>14</sup> David Kennedy, *Tom Franck and the Manhattan School*, 35 *N.Y.U. J. INT’L L. & POL.* 397, 397 (2003).

<sup>15</sup> Michael Reisman and Jonathan Charney were elected together as editors in chief of the *Journal* for a five-year term from 1998 to 2003, but after the premature death of Professor Charney in 2002, Professor Reisman completed the term on his own.

From 1984 till 1993, he carried that immense burden by himself. From the large number of unsolicited manuscripts submitted to the *AJIL*, the editor in chief, having read them all, must select those to be sent to other members of the editorial board (and occasionally to other specialists on the topic concerned) for an assessment: those to be accepted, those to be accepted subject to editorial and other changes, those to be resubmitted after some reworking, and those to be refused.

He wrote for the *Journal* throughout his long association with the Society, including while he was editor in chief. His last major article appeared in the October 2008 issue,<sup>16</sup> prepared while he was stoically undergoing yet more chemotherapy.

This labor of love performed over nine years for the *Journal* in no way lessened Franck's prodigious scholarly output more generally or his multifaceted activities, which were pursued with his customary vigor and panache during this period.

He kept tight control of *Journal* affairs through two techniques. The first, through his ability to take the major decisions and then to delegate (in this particular case to Anna Ascher, whose service to various editors in chief has been of exceptional quality and whom Franck greatly trusted). Second, he carefully marshaled the apparently endless hours available to him in any given day. He ran the *Journal* tightly, making a schedule for what was to be accomplished each seven days. He set aside a block of time to meet with Anna Ascher every week, to plan the next week's schedule, and to determine manuscripts that were to be accepted, rejected, sent to readers, or otherwise dealt with. He stepped back from the implementation of most of those important decisions, knowing they would be meticulously carried out, with all the detail and complexity that that entailed.

He presided over the periodic editorial board meetings with humor and wit, making them enjoyable rather than tedious occasions. The appreciation of the Society for what Tom Franck had done for it, as well as for his great achievements more generally, was made clear by the multitude of Society honors that he received: Certificates of Merit for four separate publications (1981, 1986, 1994, and 1996);<sup>17</sup> and the Manley O. Hudson Medal for preeminent scholarship and achievement, and for the promotion of international relations on the basis of law and justice (2003).<sup>18</sup> He served as president of the Society from 1998 to 2000 and was made honorary president in March 2009.

#### IV.

Both the style and the content of Franck's writings had their own recognizable characteristics. He had a talent for conjuring up alluring and irreverent titles to his many essays. He coupled this with an initial short phrase to catch the eye, framed by a colon, followed by a further phrase to explain the subject matter under analysis. Classic examples would include *Of Gnats*

<sup>16</sup> Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 *AJIL* 715 (2008).

<sup>17</sup> MICHAEL J. GLENNON & THOMAS M. FRANCK, *UNITED STATES FOREIGN RELATIONS LAW: DOCUMENTS AND SOURCES* (1980); THOMAS M. FRANCK, *NATION AGAINST NATION*, *supra* note 2; THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS*, *supra* note 3; THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995).

<sup>18</sup> The Canadian Council of International Law awarded him its Read Medal for an outstanding contribution to international law and organizations in 1994.

*and Camels: Is There a Double Standard at the United Nations?*<sup>19</sup> *The Centipede and the Centrifuge: Principles for the Centralisation and Decentralisation of Governance*;<sup>20</sup> *The Return of Humpty-Dumpty: Foreign Relations Law After the Chadha Case*;<sup>21</sup> and *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*.<sup>22</sup>

The subject matter of his writings was invariably directed to the issues of the day, attracting a wide audience to see what he had to say on such topics.<sup>23</sup> And—because his ideas were always liberal, and his profession of the existence of some legal norms (e.g., the right to secession for an abused minority) not yet tested—his work has been affectionately characterized as the identification of law that was “always falling short of the law of the moment, always ‘emerging,’ not quite yet there, though well under way.”<sup>24</sup>

Franck was content to leave the technical aspects of international law to others. The fine points and necessary detail being grappled with at any given time by the International Law Commission (ILC), as it addressed such matters as the expulsion of aliens, the obligation to extradite or prosecute, and reservations to treaties, were not what attracted him. However, particular points arising from these and other complex topics of international law (whether on the ILC agenda or otherwise) would furnish him with examples that could be used in what really *did* interest him—namely, the building of institutions and the improvement of decision making—and all that for the improvement of the human condition.

*Fairness in International Law and Institutions*<sup>25</sup> was one of several of his books that received a Certificate of Merit from the American Society of International Law. The concept of “fairness” as an element of legitimacy became the subject of serious discussion.<sup>26</sup> In the last eighteen months of his life he was greatly taken up with refining and reworking the notion of proportionality, giving papers on different facets of this issue at different gatherings (including his important keynote address to the Annual Meeting of Legal Advisers of the Foreign Offices of Member States of the United Nations on October 27, 2008).

Phrases and concepts employed in his various writings—among them “compliance pull,” the “judging function” of UN institutions, the right to democratic governance,<sup>27</sup> and the notion of “trumping” factors—entered the language of international dialogue. (The concept of “trumping” is today widely used in a sense opposite to what Tom Franck intended. It is often invoked to suggest that one source or evidence, by its nature, “trumps” another. In *Fairness in International Law and Institutions*, Franck explained that there can be no “automatic trumping

<sup>19</sup> Thomas M. Franck, *Of Gnats and Camels: Is There a Double Standard at the United Nations?* 78 AJIL 811 (1984).

<sup>20</sup> Franck, *The Centipede and the Centrifuge*, *supra* note 12.

<sup>21</sup> Thomas M. Franck & Clifford A. Bob, *The Return of Humpty-Dumpty: Foreign Relations Law After the Chadha Case*, 79 AJIL 912 (1985).

<sup>22</sup> Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AJIL 809 (1970). Franck revisited this question in his Agora contribution on the Iraq conflict, *What Happens Now? The United Nations After Iraq*, 97 AJIL 607 (2003).

<sup>23</sup> On this, see Kennedy, *supra* note 14, at 406.

<sup>24</sup> Martti Koskenniemi, *Legal Cosmopolitanism: Tom Franck's Messianic World*, 35 N.Y.U. J. INT'L L. & POL. 471, 484 (2003).

<sup>25</sup> FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS*, *supra* note 17.

<sup>26</sup> Legitimacy was another subject on which Franck did innovative work. Thomas M. Franck, *Legitimacy in the International System*, 82 AJIL 705 (1988); THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

<sup>27</sup> See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46 (1992).

entitlement” or non-negotiable claims advanced by the parties in a fairness discourse: all elements had to be considered with an open mind.)<sup>28</sup>

Tom Franck’s scholarly output was truly extraordinary. It seems impossible to comprehend how this could have been achieved by a person constantly traveling from one continent to another, meeting eminent persons, teaching with full enthusiasm for his materials and his students, working with teams preparing for international litigation, speaking at conferences, leading a rich cultural private life. There seemed no moments left for solitary reflection and for the formulation of the precepts that peopled his writings. And yet he managed it all.

## V.

These remarkable accomplishments explain why Tom Franck was so admired and so appreciated. But they do not explain why he was so loved in the community of international lawyers.

For that, the answer lay not in his work, but in Tom, the man.

His was a generous spirit. He was interested in the ideas of all in his field, whether or not they coincided with his own. While his scholarly work was rooted in a commitment to achieving structures well suited to building a better world, and though he deplored certain policies of government and certain legal arguments made in their support, he never wrote unkindly of others.

He was deeply interested in, but not at all displeased by, the expression of other points of view.<sup>29</sup> His care for his students was legendary. They not only delighted in the “real life tales of international law” that he would share with them, but were made welcome in his home and had there evenings of discussion and debate that would remain with them forever.

He was, of course, “a character.” His quizzical but genial countenance, his bow ties and smartly striped shirts, his easy friendships with statesmen and students alike, his delight at a gin sling at Raffles Hotel in Singapore and at a seriously prepared martini in Greenwich Village, were all part—along with much else—of what constituted Tom Franck the man.

Tom Franck was ubiquitous. He was simply everywhere. A meeting of the American Society of International Law? Franck was sure to be there. Any legal event being held in the NYU School of Law? He was naturally present. If there was a major conference on an international law theme, he would be involved in some way. One minute he was in New York, the next on the West Coast, then in The Hague, or the Balkans, or in Canada, or in Cambridge, England. Tom Franck was the person most likely to be present at whatever gathering of international lawyers. It was only to be expected, as we all comforted each other as the news of his death so quickly spread, that the most common expression of dismay was: “I simply can’t believe that tomorrow he will not walk through this door.” He had walked through so many doors, opening dialogues and friendships around the world.

There seemed no city in the world unknown to Tom Franck, no place where good friends were not to be found. Although his network of friendships was vast, he nurtured each one of them. When some reason of work brought a friend to New York, plans would be made for drinks at Charlton Street, or dinner at a special restaurant, or an evening at the opera or ballet.

<sup>28</sup> FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS, *supra* note 17, at 16–18.

<sup>29</sup> See the sometimes stringent analysis of his writings made by certain of the contributors to the 2002 conference in his honor held at New York University, *International Law and Justice in the Twenty-first Century: The Enduring Contributions of Thomas M. Franck*, 35 N.Y.U. J. INT’L L. & POL. 291 (2003).

When he traveled abroad, his friends would receive early notification and time was always made for discussions that had been left in abeyance to be resumed over a fine meal, with carefully chosen wines.

Tom Franck's comportment these past two years (when he knew that his cancer had returned and would be terminal) can only be described as gallant. He continued to teach, to attend conferences, to nurture his friends, to be a marvelous companion. His colleagues in Europe were astonished and delighted when in December 2008 he nonetheless made the arduous journey across the Atlantic to participate in a conference in The Hague. He attended the Annual Meeting of the American Society of International Law—including its various committee meetings—in March 2009. Tom Franck also participated in a panel at the 2009 Annual Meeting<sup>30</sup> and there is no doubt that his presence and ideas attracted the exceptionally large audience of young people. And, though desperately ill and knowing that death was imminent, on May 20 and 21, he made important contributions at a meeting to further the work of the team preparing for the case the former Yugoslav Republic of Macedonia was bringing against Greece to the International Court of Justice. He died a mere six days later, on May 27, 2009.

In all of this he was undoubtedly sustained by his love of international law, but also by the great happiness of his private life. In 2008 he had married his partner of many years, Martin Daly, who supported him in every way. An invitation to drinks at their home, perhaps with dinner later in Greenwich Village, was a treat eagerly accepted by all their friends. The company there gathered guaranteed animated conversation, in an atmosphere of warm conviviality.

The essential point is that Tom Franck was intellectually appreciated and personally liked, both by those taken with his ideas and equally by those who might be critical of the ideas he expounded, perhaps finding his work too much imbued with idealism to be realistic. All he did for his students and for the subject of international law more generally is universally recognized. The value of his contribution over the years is appreciated by writers and scholars holding widely differing views: and that, as much as the extraordinary output, is perhaps the most remarkable accomplishment of all.

<sup>30</sup> Thomas M. Franck, Remarks, in *In What Sense Is International Law Law?* (Mar. 26, 2009), available at <http://www.asil.org/thomas-franck.cfm> (transcript). The panel can also be ordered in audio form from the ASIL Web site.