

# Responsabilité, fraternité et développement durable en droit:

Une conférence en mémoire de l'honorable Charles D. Gonthier

# Responsibility, Fraternity, and Sustainability in Law

A Symposium in honour of Charles D. Gonthier

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**...Where Angels Fear to  
Tread : Idealising an  
International Law of the  
Ordinary**

**Duncan French**

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**Í...where angels fear to treadÎ :**

**idealising an international law of the ordinary**

**Duncan French\***

**Introduction**

This paper has one objective and one caveat. The objective is to consider the role and function of international law in supporting the developmental opportunities of developing States and, more importantly, in improving the life-chances of the peoples of such countries. It is a subject that is . admittedly rather obliquely . referred to in the title of this paper as the %international law of the ordinary+. The caveat is that the paper does not intend to engage with the detail and the minutiae of the law in this area. Undoubtedly, there is a not insignificant amount of law which could be dissected and analysed<sup>1</sup> . though, as the paper goes on to note, the adequacy and scope of which must be considered debatable . that is however not the aim of this paper. Rather, the

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<sup>1</sup> See, for instance, R. Sarkar, *International Development Law: Rule of Law, Human Rights and Global Finance* (Oxford US, 2009).

purpose is to dealise+this law; to raise one's eyes above the day-to-day parapet and to ponder some of the broader themes that comprise the principled framework within which such law should operate.

But before entering into the substance of the paper, there is a need to set out two relatively uncontroversial arguments which provide a certain amount of background context to what the paper will subsequently go on to discuss. The first is that law, as with most disciplines, suffers from a certain tendency to compartmentalise its topic-areas into discrete, reasonably manageable, components. If this is a general characteristic of law, international law might be thought of as a particularly good (or should that be poor?) example of this trend.<sup>2</sup> Indeed, without fear of too much contradiction or irony, one will usually speak of being an expert in the international law of %ot; %ot+here representing international trade, the environment, the rules regulating the use of force, human rights, international crimes, and so one might go on. Specialism is, of course, part of the course; and undoubtedly international law (like all disciplines) has benefited from the value of individual expertise. As a reaction to this specialism, however, there has been a notable trend back towards the general . towards the systemic . nature of international law. And again, this must be considered a positive thing; what specialism brings, it also takes away through the risk it poses of fragmentation in the law.

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<sup>2</sup> See Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission (Report of the 58th Session of the International Law Commission, 13 April 2006 (A/CN.4/L.682)).

Thus, in suggesting in the title that the purpose of the paper is to discuss the 'international law of the ordinary', I am very conscious of placing myself within this broader debate and, indeed, of adding to the endless list of 'international law of(s)' already in existence. However, the subject of this paper is of a fundamentally different order to most of those that I have previously listed. All of those titles, to a greater or lesser extent, are merely descriptive of the scope and content of the law. However, with the exception of such matters as human rights, international crimes and perhaps international environmental law, the titles do not of themselves say very much about the normative direction or moral parameters of the law. On the other hand, referring to something as 'international law of the ordinary' would seem to suggest the very opposite. It is clearly not descriptive of a readily definable area of law, but as will hopefully become apparent, it has undoubtedly a strong moral component.

The second reasonably non-contentious argument is that international lawyers, like other scholars interested in international affairs, have historically focused much of their attention on those perennial difficult situations and one-off global events that are controversial, contradictory or topical.<sup>3</sup> We thrive on illegality; compliance with perfunctory treaties is uninteresting; direct contravention of norms that are politically contentious, such as the rules of war, is another matter altogether. Should we be criticised because we focus more often than not on the bads rather than what works? I am not sure. Certainly, I think it says something about international lawyers that we

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<sup>3</sup> See D. French, 'Iraq and Climate Change: The Mainstream Lawyer's Survival Guide' 44 *The International Lawyer* (Fall 2010) 1019-1033.

have a tendency to do so; but to some extent I would argue that it is as much part of the human psyche as anything specific to the international lawyers' DNA.

Thus, it is reasonably easy to create a caricature of the international lawyer; we can appear overtly-specialised and reactive to global events. Moreover, we can seem paradoxically to be both overly sure of our own prescriptions (the supposed perennial arrogance of the lawyer) while concurrently ambiguous in our replies (our ubiquitous statement that there is a qualification to any rule). Caricatures are, by their very nature, superficial and generalised but that does not necessarily make them wrong or unhelpful. Indeed, even if the caricature is accurate, one must wonder whether it is one that should apply to international lawyers alone, or whether it might have resonance more generally across those who are interested in global events?

### **International development law: an international law of the ordinary**

These initial comments assist in providing a context for the remainder of the paper; namely, that because of its pre-occupation with the exciting and the topical, international law has largely failed to engage . and when I say engage I mean engage positively, proactively and systematically . with the concerns of the global majority: the peoples of developing countries, most especially those of the poorest, least developed, countries. In other words, this is about international law's failure to respond to the ordinary situation that the vast majority of the world's population find themselves in; including, but certainly not limited, to systemic poverty, extreme deprivation, poor health and education, and (something which is often missed) inadequate opportunities (both

societally and individually) to prosper, grow and succeed.<sup>4</sup> Related to this, is the (arguably obscene level) of inequality between developed and developing countries. Professor Hilary Charlesworth, Australian National University, makes a similar point when she remarks that international lawyers should refocus our discipline into [a]n international law of everyday life<sup>5</sup>

Of course, the days of referring to all developing States as a homogenous whole are past, indeed if it ever were truly accurate. However, though differences between them are increasingly evident . and the gaps in wealth between (the middle class of) middle-income developing countries and the least developed have reached new and staggering proportions . various aspects of international law are still premised (at least for now) upon this rough-and-ready demarcation. For that reason, this paper will continue to inaccurately and in an overly-general fashion refer to them collectively as the Global South+. As Mickelson recently wrote: what may be most remarkable about the idea of the South is its staying power. The idea that developing countries are united by more than what divides them has a resonance that somehow transcends the passage of time as well as changes in circumstances<sup>6</sup>

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<sup>4</sup> This broader understanding of development can equally be seen in the UN Development Programme's understanding of human development: 'Human Development is a development paradigm that is about much more than the rise or fall of national incomes. It is about creating an environment in which people can develop their full potential and lead productive, creative lives in accord with their needs and interests. People are the real wealth of nations. Development is thus about expanding the choices people have to lead lives that they value. And it is thus about much more than economic growth, which is only a means —if a very important one —of enlarging people's choices' (<http://hdr.undp.org/en/humandev/>) (last accessed: March 2011).

<sup>5</sup> H. Charlesworth, 'International Law: A Discipline of Crisis' 65 *Modern Law Review* (2002) 391.

<sup>6</sup> K. Mickelson, 'Beyond a Politics of the Possible? South-North Relations and Climate Justice' 10 *Melbourne Journal of International Law* (2009) 422.

Though international law has become increasingly sophisticated in many areas, primarily since 1945 but even more especially since the early 1990s (including notably in relation to regulating humanity's use of its natural environment<sup>7</sup>), on this most fundamental of issues – development – the response of international law is, at best, patchy, piecemeal, *ad hoc*; altogether inadequate at best. One measure, however crude and proximate, to assess the (in)adequacy of international endeavour (including, but not limited to, international law) in this area is to measure its results. Though, according to the United Nations, overall poverty is falling so as to likely meet Millennium Development Goal (MDG) 1 of halving the proportion of people living on less than a US \$1 a day by 2015,<sup>8</sup> which is still 920 million people below this particularly low poverty line. There are, of course, many other examples of starker statistics, though it is depressing how easily one becomes detached from the global litany of death, disease, malnourishment and hunger. As will be noted in the conclusion, despite our best intentions, we can so easily separate ourselves from those who are unfortunate enough to be considered as the ‘others’.

Moreover, though this and other statistics tell us little about the state of international law and development *per se*, such statistics at least remind us as to the human cost of collective failure. Rather, this paper's assessment of international law in this area is much more qualitative in nature; my personal sense that the dominant actors in the international community continue to marginalise the voices and concerns of the

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<sup>7</sup> P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment* (Oxford, 2009, 3rd ed).

<sup>8</sup> Millennium Development Goals Report 2010

(<http://www.un.org/millenniumgoals/pdf/MDG%20Report%202010%20En%20r15%20-low%20res%2020100615%20-.pdf>) (last accessed: March 2011).

majority; that in its lack of focus, lack of urgency and indeed its lack of substantive content, the international legal system remains, at best, inchoate and, at worst, wholly inadequate. And this is why I have few qualms writing about the position of the global South as a white middle-class male from a European country<sup>9</sup>. This interest in humanity is (or should be) a universal moral concern.

But as an issue of the first order, how might one determine the scope of this area of the law? One can point to a vast array of topics that together go to make up what has traditionally been known as international development law (another international law of+). Though the influence of this particular sub-discipline may now have waned following a previous high-point in the late 1970s and early 1980s, it undoubtedly reflected . and I would argue still does . an acceptance that international law is an important element in any convincing political and economic strategy towards global development. Moreover, though seeking to define or describe development law is not an easy task, it is certainly not an impossible one.<sup>10</sup> It would certainly include, but not be limited to, the operation of the Bretton Woods Institutions (the World Bank and the International Monetary Fund), the terms and rules of international trade that developing countries are subject to (including any preferential arrangements), the legal framework

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<sup>9</sup> Cf. the 1997 TWAIL (Third World Approaches to International Law) 'Vision Statement': 'the promotion of the constructive dialogue among international scholars from diverse regions of the third world'. As Mickelson notes, 'dialogue with scholars in the North was not explicitly mentioned; it is unclear how such connections would fit into the overall TWAIL project' (K. Mickelson, 'Taking Stock of TWAIL Histories' 10 *International Community Law Review* (2008) 359 (also including the TWAIL Vision Statement)).

<sup>10</sup> Cf. A. Qureshi and A. Ziegler, *International Economic Law* (Sweet and Maxwell, 2007, 2nd ed) 487: 'International development law (IDL) covers a number of spheres. Indeed, it covers as many spheres as there are ways of facilitating development. Further, the goal of development can be realized both at the domestic level, as well as through international efforts. Thus, IDL straddles both domestic and International Law'. See also D. Bradlow, 'Development Decision-Making and the Content of International Development Law' 27 *Boston College International and Comparative Law Review* (2004) 195.



surrounding foreign direct investment, various aspects of human rights, environmental features of development, and increasingly, though still very tentatively, the regulation of the activities of multinational corporations in developing countries. This is an incomplete list, and some aspects . ie. human rights and environment . have been incorporated rather later in the debate, but it at least gives a sense both of the breadth of the topic and how it combines treaty law, which is agreed between States with the operational practice of key international institutions in this area, such as the World Bank.

But despite the existence . admittedly contested . of a body of law entitled international development law, success has been in short supply. Traditional international law arguably continues to frustrate the developmental opportunities of developing States. This inadequacy can be seen in both the failure to adopt (and then implement fully) bespoke, positive, rules of law to support development and, concurrently, the failure to ameliorate the negative developmental externalities generated by pre-existing rules of international law. In the former category, one might mention such things as the continued discretionary nature of the provision of official development assistance, the continued disagreement over the scope of special and differential treatment for developing countries in international trade law and, more generally, the failure to secure agreement on a comprehensive development trade round within the World Trade Organization. And in the latter category, one might mention the failure to tackle adequately the agricultural support developed States can still legitimately provide to their own farmers to the detriment of Southern farmers and the difficulties developing countries face in the application of various investment, service and intellectual property

treaties now in force. In this regard, the concept of sustainable development has much to add to the debate,<sup>11</sup> though that is not *per se* the focus of this paper. Nevertheless, it is important to acknowledge that one cannot now understand economic development without recognising its ecological and social connexions.

But beyond these . always controversial . instances of either the lack of supposedly good law or the existence of bad law, there is a much broader debate about the very system of law, regulation and governance that is currently in place. The structure, decision-making and operational policies of key international institutions, such as the World Bank and the International Monetary Fund, weaknesses in the international coordination of development financing, and systemic imbalances in the rules on foreign direct investment are all arguably indicative of an international legal system that favours the global haves over the global have nots.

Of course, the failure of international law in this area reflects a more general lack of political will, as well as undoubtedly strategic and policy incoherence within the collective approach of the global South itself over the years. If one accepts the argument that international law is instrumental of global politics and State agendas, then it is no real surprise that international law has fallen short in this regard. But from a legal perspective this, to me, seems too much like an easy answer. Of course, international law is, in part, the outcome of what States are jointly prepared to achieve; but

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<sup>11</sup> See, for instance, N. Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (The Hague Academy of International Law, 2008).

concurrently this does not excuse the international lawyer simply because it is also a matter of international politics and global economics.

To do so would seem to me to accept the view that international lawyers are unable to understand and manage moral, political and economic complexity. But isn't it a rather jaded perception of the international lawyer to suggest he or she is unable to cope with such challenges? I would argue that far from being uncritical believers in the normative force of international law<sup>12</sup> we are more than capable of bringing together our belief in a normative system of international law, on the one hand, with appreciating the day-to-day reality of global politics, on the other.

But while we acknowledge such political realities, this does not require international lawyers to be indeterminate, forever caught between what we want to believe and what we would seem to be required to accept. Though we are cognisant of the politics . and economics . of the global situation, this does not mean that we should be swayed in all directions because of them. There is nothing odd in the argument that as lawyers we continue to prefer to work towards an international system that is built on the precepts and rules of law, rather than one forever directed by structurally uneven power relations. Even in those situations where law is purposively or recklessly absent, it is the role of the international lawyer (amongst others) to seek to bring it back to a legal framework or reference point as soon as is possible.

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<sup>12</sup> D. Bodansky, 'International Law in Black and White' 34 *Georgia Journal of International and Comparative Law* (2006) 288. Professor Bodansky himself did not believe this but was presenting it as a caricature that others hold of international lawyers.

In this regard, one foundational issue is how far should international law be concerned not just with the mechanics of development . trade, investment, finance . but also seek to instil an overarching moral framework to such rules? In this respect, international human rights law has a key role to play. Human rights law has from the very outset been as concerned with social and economic rights of persons as it has with their civil and political rights. To give one example, article 11 of the 1966 International Covenant on Economic, Social and Cultural Rights<sup>13</sup> affirms the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. Though the more broadly-conceived right to development+ . first enunciated by the United Nations General Assembly in 1986<sup>14</sup> . may be a later and more controversial addition, the general capability for human rights to be used to support development is widely accepted and endorsed, if rarely fully implemented.<sup>15</sup> What perhaps the right to development+ has added is a broader canvas in which individual rights, such as article 11, might find more complete societal and global fruition. As the 1986 UN Declaration on the Right to Development states, the human person is the central subject of development and should be the active participant and beneficiary of the right to development<sup>16</sup>

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<sup>13</sup> 993 UNTS 3.

<sup>14</sup> UN GA Res. 41/128 (4 December 1986) (UNDRD).

<sup>15</sup> The general discussion on the role of law and development is supplemented by more detailed consideration of the relevance of legal instruments in the push towards eradicating poverty, on which see M-C. Cordonier Segger and A. Khlafan, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford, 2004) 312: 'International law...has traditionally given less attention to poverty eradication...However, there is a growing awareness that international legal arrangements, particularly on economic and environmental issues, have a significant impact on levels of poverty'.

<sup>16</sup> Article 2(1) UNDRD.

Despite this, (at least) two further questions need to be asked. First, whose development are we talking about? And second, how far is this broader understanding of development law accepted by States. As regards whose development we are, in fact, referring; it is important to acknowledge that traditional understandings of international development law have focused upon the economic growth of developing States with little concern for internal structural inequalities, governance failures and infringements of civil and political rights therein. One could rightly ask how progressive were those international lawyers who sought the advancement of the global South whilst ignoring gender inequality, violations of basic human rights, the lack of participatory governance, and systemic corruption. More recently, international development lawyers have arguably woken up and begun to recognise . largely through the clearer connections made with human rights and the environment . that development is a comprehensive process<sup>17</sup> and that equality within a State, respect for human rights and good governance are as important as equality at the inter-governmental level.

The second question concerns how far international development law has consistently failed to meet the traditional requirements demanded of any form of international law before obligations are accepted as binding on States. In other words, because some people wanted to believe international development law should exist (for explicit or

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<sup>17</sup> See also the International Law Association (ILA)'s 2002 New Delhi Principles of International Law relating to Sustainable Development (ILA resolution 3/2002, annex as published as UN Doc. A/57/329 ): 'EXPRESSES the view that the objective of sustainable development involves a comprehensive and integrated approach to economic, social and political processes, which aims at the sustainable use of natural resources of the Earth and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realize the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of future generations'.

implicit reasons of moral imperative), so it must. Thus, one of the most stinging criticisms of international development law might be that it has significantly . and purposely . conflated the law as it was and the law as some people would like it to have been. This was done, either in ignorance of how general international law operated, or more likely, in open defiance of it. Critics also accused those interested in development law of simply rewriting the rules to frame what they thought ought to be the legal landscape, as well as often being unduly partisan.<sup>18</sup>

In seeking global economic justice, development lawyers might have been accused of being idealistic, utopian and perhaps, as a consequence, naive of political realities. In particular, critics might point out that the solutions authoritatively stated in the 1970s by such lawyers (and others) would now seem archaic in the light of market liberalism, globalization and, specifically, the increased role of the private sector in securing development opportunities. The role of the State as the sole author of public goods . long viewed as the basic tenet of international development law . would seem to be long gone, though following the recent financial crisis, by no means dead.

In light of such criticism, am I now (by still being interested in developmental issues from a legal perspective) . and as the phrase goes . %a] fool rush[ing in] where angels fear to tread+? Perhaps, and certainly am sufficiently humble, or should that be conservative,

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<sup>18</sup> This criticism has a long history, stretching back to the attempt to establish the New International Economic Order in the 1970s. See S. Schwebel, 'A Commentary' in TMC Asser Institute (ed.), *International Law and the Grotian Heritage* (TMC Asser Institute, 1985) 142: -I see those documents [the 1974 resolutions of the United Nations] as very mixed, containing progressive elements, but regressive elements as well. The resolutions of the NIEO were forced through the General Assembly in a lamentable atmosphere. They were not negotiated solutions but a partisan set of demands...As for the Charter of Economic Rights and Duties of States, it is not international law, and happily so, for in some respects it is sound, but in other respects, quite nationalistic and unsound'.

enough to acknowledge the limitations of the law and the lawyer in the development endeavour. But admitting one's limitations is not the same as admitting complete irrelevance or out-and-out failure.

In particular, I would argue that there are a number of principles which are fundamental to a coherent and cogent understanding of international development law and which should guide the international community in this regard.<sup>19</sup> For reasons of time, I briefly just mention two. First, is the affirmation of the rule of law in the conduct of international economic relations and second, is the principle of substantive equality (or the argument that to be fair, it is ultimately not always beneficial to treat all States the same in all respects). Together they reflect a more positive view of the role of law in the international economic sphere.

In the light of these and other principles, it seems to me that international law has the potential to play two key functions. First, law can provide the overarching framework through which to govern State behaviour (namely, through the continual assertion that *all* State behaviour, including *economic* activity, is subject to the international rule of law). And secondly, and more pro-actively, that this law should be utilised as a mechanism to promote real change within the international system (namely, finding ways to implement a broader spectrum of equity, rather than always formal equality, between different types of States). But the paper is still left with the previous question as to whether there has been a conflation of the law as it is (*lex lata*) and the law as one

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<sup>19</sup> See, for instance, the ILA's 1986 Seoul Declaration on Progressive Development of Principles of Public International Law relating to a New International Economic Order, to be found in ILA, *Report of the Sixty-Second Conference* (Seoul, 1986) (ILA, 1987) 1-11.

might like it to be (*de lege ferenda*). Haven't I just imagined the legal framework as I would like to see it?

As someone who seeks the attainment of social objectives through law, but who is equally reflective of the risks that this entails, I am continuously struck by the following passage:

Without higher moral values, international law is but a soulless contrivance. Vigilance, however, is imperative, lest too high a price be paid for the progress of international law towards greater moral substance and greater solidarity. The waning of positivity in favour of ill-defined values might well destabilize the whole international normative system and turn it into an instrument that can no longer serve its purpose.<sup>20</sup>

In seeking to respond to this injunction, I have numerous thoughts, but perhaps the most overriding question for me is how far should international law seek to achieve an amorphous ideal such as fairness when, concomitantly, in seeking such fairness there is the danger of jeopardising international law's essential normative attributes? Of course, there is some sense of arbitrariness in selecting fairness at all as the yardstick by which to assess international law. Other potential external markers might include economic efficiency, legitimacy or even something as esoteric as simply of it being right. But despite being one of a number of options, fairness nevertheless has a certain natural currency within the law. Moreover, this is not a shallow form of fairness, but rather something that must invariably prompt fundamental change in both individual and social behaviour. As Charles Gonthier had cause to note:

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<sup>20</sup> P. Weil, 'Towards Relative Normativity in International Law' 77 *American Journal of International Law* (1983) 423.



fraternity within a community evokes the idea of cooperation: the pursuit of common interests by combining one's resources . a notion that itself calls for a redistribution of wealth in so far as this is compatible with the notion of individual responsibility.<sup>21</sup>

For someone interested in how far international law can promote social development, whether it is fair or not still seems an obvious question to ask. Fairness is, of course, a highly emotive and indeed value-laden concept. John Rawls, in his later work, *The Law of Peoples*,<sup>22</sup> dismissed the idea that his liberal theory of justice could apply to relations between different international societies. He felt that all that could be promoted was a singularly weaker duty on societies to assist each other to become more self-sufficient. Others, unsurprisingly have taken objection to this limited vision. As Thomas Pogge notes, "[i]t is not easy to convince oneself that our global order, assessed from a Rawlsian perspective, is moderately just"<sup>23</sup>

Be that as it may, can and should international law be a conduit for fairness? The most strident response would be that even as it currently is comprised international law requires . even demands . a sense of justice to exist in the relations between States. Some have sought to argue, perhaps persuasively, that this is the case. Though there are reasons to be tempted by such rhetoric, I would suggest that one should remain somewhat reticent about endorsing this viewpoint entirely. It seems that such an approach confuses the role the law has in providing a *framework* for global economic

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<sup>21</sup> C. Gonthier, 'Fraternity: A Global Value underlying Sustainable Development' in M.-C. Cordonier Segger and C. Weeramantry (eds.), *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (Martinus Nijhoff, 2005) 41.

<sup>22</sup> J. Rawls, *The Law of Peoples* (Harvard, 1999).

<sup>23</sup> T. Pogge, *Realizing Rawls* (Cornell, 1989) 36.

justice with also setting its *objectives*.<sup>24</sup> The argument would seem to go that if one wants to know what justice means in this context, one need only analyse the rules on which international law in this area is based. However, this seems to ignore almost completely the fact that law is more often than not the outcome of a deliberative political debate, including within it the inevitable political stitch-ups and quick-fixes that are associated with that. Thus, while law may be able to answer the question *how* the international community is hoping to achieve a fairer system, it ultimately cannot answer *why* there is this belief in . this desire for . fairness and global justice? Law as the formal instrument of a political community cannot on its own motion, and from its own normative depths, mandate the achievement of such a societal good. We must look elsewhere for this.

But we need not look far. As Thomas Franck once said:

[t]he moral pursuit of distributive justice should engage us all. The question of fairness encompasses that moral issue because fairness supposes a moral compass, a sense of the just society. The law must create solutions and systems which take into account society's answers to these moral issues of distributive justice, for we are moral as well as social beings.

We desire justice because we, as humans, instinctively seek it,<sup>25</sup> and we seek it in all levels of our relationships: individual, societal, national and global. Thus, to continue to be relevant, the international community must be willing to reflect this instinctive desire, and to engage in a serious debate about the nature and scope of international law to incorporate more accurately the ordinary needs and priorities of the majority . the poor

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<sup>24</sup> D. French, 'Global Justice and the (Ir)relevance of Indeterminacy' 8 *Chinese Journal of International Law* (2009) 609.

<sup>25</sup> T. Franck, *Fairness in International Law and Institutions* (Oxford, 1995) 8.

of the global South. It hardly needs saying that this is no easy task, but it is also a supremely important one. Because, for those of us who think . or should that be want . the international community to use the law to address more effectively the concerns and interests of its weakest members, the international community risks increasingly drifting somewhere between hypothetical idealism and ineffective politicking if it fails to move beyond just focusing on the dramatic and one-off global event.

## **Conclusion**

In drawing to conclusion, this paper is left with two rather different strands of thought. The first is, by definition, defensive; by ~~idealising~~ idealising an international law of the ordinary, one could be criticised for departing from established norms . that in the search for *de lege ferenda* one has ranged significantly beyond the *lex lata*. This might be true; however, law cannot be static. Surely, it is the responsibility of the lawyer to think; to reflect; to idealise. I hope I am no fool; and I hope that wondering how international law might be made better for the lot of the majority of humanity is not reserved for the angels.

The second strand of the conclusion is perhaps more realist in nature. It is to recognise that however aspirational one might like international law to become . and whatever autonomous normative authority one may believe it to possess . it does not yet have a mandate to coerce States to accept that which they do not voluntarily subscribe. And States, especially in the developed world, seem currently more than prepared to keep the goal (if not the mechanics) of global development, by-and-large, outside the legal

sphere. Moreover, the current lack and disparate nature of the law as it stands is reflective of the omission of something much more important, namely, a sense of urgency that should grip the political elites, and indeed chattering classes, of both South and North alike. We must also be equally conscious of the primary motive for failure . when we refuse to move beyond the parochial view that ~~they~~ are not ~~us~~; when we shield ourselves (often through the formalistic niceties of the law) from the plight of others. However, Charles Gonthier's writings remind us that fraternity is not an altruistic motive, but a societal imperative.

Fraternity obviously has its limits; laws based on this value cannot assure the resolution of all disputes between individuals, communities and whole nations. However, it remains our duty to do all we can so that the spirit of fraternity may provide support to the efforts of those who seek to promote harmony.<sup>26</sup>

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<sup>26</sup> Gonthier, above n21, 43.