Responsibility, Fraternity, and Sustainability in International Law

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Abstract

This article presents an account of international law and its possible future that revolves around three key themes: responsibility, fraternity, and sustainability. These three themes were promoted by Charles Doherty Gonthier, visionary justice of the Supreme Court of Canada from 1989 to 2003, for whom the inaugural lecture where this article was presented is named.

Keywords: International legal theory; responsibility; fraternity; sustainability; Charles Doherty Gonthier.

Résumé

Cet article présente un récit du droit international et de son éventuel avenir qui est ancré dans trois thèmes principaux: la responsabilité, la fraternité et la durabilité. Ces trois thèmes ont été promus par Charles Doherty Gonthier, juge visionnaire de la Cour suprême du Canada de 1989 à 2003, pour qui est nommé la conférence inaugurale où cet article a été présenté.

Mots-clés: Théorie du droit international; responsabilité; fraternité; durabilité; Charles Doherty Gonthier.

Self-reverence, self-knowledge, self-control,
These three alone lead life to sovereign power.
Yet not for power … but to live by law,
Acting the law we live by without fear;
And, because right is right, to follow right
Were wisdom in the scorn of consequence.

Alfred Tennyson, *Oenone* (1829)[1]

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[1] Alfred Lord Tennyson, *The Works of Alfred Lord Tennyson* (Hertforshire, UK: Wordsworth, 1994) at 72.

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Introduction

I will attempt today to present an account of international law and its possible future that revolves around three key values: responsibility, fraternity, and sustainability. These three are themes promoted by Charles Doherty Gonthier, visionary justice of the Supreme Court of Canada from 1989 to 2003, for whom this inaugural lecture is named. A product of Canada's bilingual and bijuridical culture, Justice Gonthier's jurisprudence and writings reflect an abiding interest in the idea of a community and law's place in constituting and sustaining communities.[2] The values he espoused are as important in the international sphere as they are in the domestic.

This inaugural lecture comes at a time of challenge and confrontation for international law. Since the events of 11 September 2001, it has been the subject of sustained doctrinal attack, particularly from the US academy.[3] It has seen the invasion

[2] See eg Charles D Gonthier, "Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy, or Fraternity: The Unspoken Third Pillar of Democracy" (2000) 45 McGill LJ 567 [Gonthier, "Fraternity"]; Charles D Gonthier, "Law and Morality" (2003) 29 Queen's LJ 408 [Gonthier, "Law and Morality"]; Charles D Gonthier, "Sustainable Development and the Law / Le développement durable et le droit" (2005) 1 McGill JSDLP 11 [Gonthier, "Sustainable Development"]. On Gonthier's legacy as a judge, see DeLloyd J Guth, "Method and Matter in the Gonthier Legacy: Legal History and Judgment Writing, 1989–2003" in Michel Morin et al, eds, *Responsibility, Fraternity and Sustainability in Law: In Memory of the Honourable Charles Doherty Gonthier* (Markham, ON: LexisNexis Canada, 2012) 39. On his contribution to the law and policy of sustainable development, see Marie-Claire Cordonier Segger, "Sustainability, Global Justice and the Law: Contributions of the Hon Justice Charles Doherty Gonthier" (2010) 55 McGill LJ 337.

[3] See eg Eric Posner, "Do States Have a Moral Obligation to Obey International Law?" (2002–03) 55 Stanford LR 1901; Curtis A Bradley & Mitu Gulati, "Withdrawing from International Custom" (2010) 120 Yale LJ 202; Jack L Goldsmith & Eric A Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005); Robert J Delahunty & John Yoo, "Executive Power v. International Law" (2006–07) 30 Harvard JLPP 73; Eric Posner, *The Twilight of Human Rights* (Oxford: Oxford University Press, 2014). See most egregiously John Bolton, "Is There Really 'Law' in International Affairs?" (2000) 10 TLCP 1. Ohlin regards this movement as part of a wider neoliberal project to bolster US executive power at the expense of international and congressional authority: Jens David Ohlin, *The Assault on International Law* (Oxford: Oxford University Press, 2015) ch 1. For a partial rebuttal see James Crawford, "International Law as Discipline and Profession" (2012) 106 ASIL Proc 471.

of Iraq,[4] the practice and even the apparent endorsement of torture, putatively under the colour of law,[5] the events in the Ukraine,[6] Syria, and Libya, as well as serial atrocities committed ostensibly in the name of religious belief. The aftermath of the Arab Spring has been almost uniformly disappointing.[7]

But, despite such antagonistic, often parochial voices, international law endures. Notwithstanding the popular focus on singular, high-profile events,[8] international law works — and may be seen to work — on a daily basis in a multitude of different, often mundane ways. One may take solace in the words of Ian Brownlie, who said in 2003 that "[t]he system of international law will survive, as it has done before, both terrorism and breaches of international law by powerful states.... In the long run, it is the attitude of the actors to the rule of law, and not the rule as such, that is the threat."[9]

Responsibility and Participation

international law and the responsibility of states

I turn, first, to the theme of responsibility. International law, at its core, is a system designed to allow states to be held responsible for their actions. As a rules-based system, international law may be conceived of as a web of obligations that states owe to each other

[4] See eg James Crawford, et al, "War Would Be Illegal," *The Guardian* (7 March 2003), online: <http://www.theguardian.com/politics/2003/mar/07/higher-education.iraq>; Vaughan Lowe, "The Iraq Crisis: What Now?" (2003) 52 ICLQ 859. Contra TF Buckwald & WH Taft, "Preemption, Iraq and International Law" (2003) 97 AJIL 557.

[5] See Karen L Greenberg & Joshua L Dratel, eds, *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005); Philippe Sands, *Torture Team: Deception, Cruelty and the Compromise of Law* (London: Allen Lane, 2008).

[6] Thomas D Grant, *Aggression against Ukraine: Territory, Responsibility, and International Law* (London: Palgrave Macmillan, 2015). This is not to mention Russia's earlier action against Georgia, the legality of which was contested: *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Preliminary Objections, [2011] ICJ Rep 70.

[7] Rosa Brooks, "Lessons for International Law from the Arab Spring" (2013) 29 Am UILR 713.

[8] *Cf* Hilary Charlesworth, "International Law: A Discipline of Crisis" (2002) 65 Modern LR 377.

[9] Ian Brownlie, *Principles of Public International Law*, 6th ed (Oxford: Oxford University Press, 2003), preface. This remark was not repeated in the seventh edition of 2008.

and to other actors. In this respect, the achievements of the latter part of the twentieth century are considerable: the creation of an enduring international organization of universal membership, the process of decolonization, the codification and progressive development of international law, especially through the work of the International Law Commission, the growth of international courts and tribunals and their increasing utilization, new fields and specializations, and the consolidation of old ones — human rights, state responsibility, the law of the sea, international iterations of environmental, trade, economic, and criminal law.

One example, which is appropriate given our present location, is the *Montreal Protocol on Substances That Deplete the Ozone Layer* (*Montreal Protocol*).[10] Signed in 1987, the protocol was intended to provide a binding regime whereby the release of chlorofluorocarbons (CFC) in the Earth's atmosphere could be drastically reduced so as to prevent and repair damage to the ozone layer. The protocol entered into force in 1989, and today — a quarter of a century and 197 states parties later — CFC emissions are less than a third of their previous historic high.[11]

A sceptic might respond that coordinated action of this kind is easy to achieve where a vital common interest is at stake, transaction costs are not high, and there are no sectoral political advantages for particular states. So let us examine the much more difficult case of the use of force on an inter-state basis, as covered by Article 2(4) of the *Charter of the United Nations*.[12] Notwithstanding misadventures in the Middle East and Crimea, death through inter-state conflict (I make no comment as to intra-state conflict, in which the regulatory capacity of international law is limited[13]) has been virtually eradicated in the past two decades, as the work

[10] *Montreal Protocol on Substances That Deplete the Ozone Layer*, 16 September 1987, 1522 UNTS 28.

[11] See World Meteorological Organization, *Scientific Assessment of Ozone Depletion: 2014* (WMO Global Ozone Research and Monitoring Project — Report no 56, 2014), online: <http://www.esrl.noaa.gov/csd/assessments/ozone/2014/assessment_for_decision-makers.pdf>.

[12] *Charter of the United Nations*, 24 October 1945, 1 UNTS 16, art 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

[13] Cf Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge: Cambridge University Press, 2010).

of Stephen Pinker has demonstrated.[14] I do not mean to suggest that international law has single-handedly brought us to this point — a variety of historical, sociological, and economic factors have been involved — but it would appear equally insensitive to claim that international law has played no role at all.

THE OBLIGATION TO PARTICIPATE: STATES AS SUBJECTS AND LAW-MAKERS

However, within the international system, states must shoulder a variety of responsibilities if international law is to work as intended. At its most basic level, this entails an obligation of observation, a notion inherent within the very concept of 'law' itself. But a further corollary is that of participation. States are more than merely subjects of international law; they are also law-makers — both particle and wave.[15] In Martti Koskenniemi's words, the material of international law is affected by "a subtle process of learning and exchange," in which states generally play a key role.[16] For an old example, look at the circumstances surrounding the recognition of the continental shelf following the Truman Declaration of 1945[17] to realize how quickly such an exchange can coalesce into law, given the right conditions.[18] Such an exchange extends beyond the confines of state practice and includes within its ambit the engagement of a state, its institutions, and its citizens with the international arena. As Arnold McNair said in relation to British engagement with international law at the close of the Second World War:

[14] Stephen Pinker, *The Better Angels of Our Nature* (London: Penguin, 2012) at 228–86.

[15] Richard B Feynman, Robert B Leighton & Matthew Sands, *The Feynman Lectures on Physics*, vol 1 (New York: Addison-Wesley, 1964) ch 37.

[16] Martti Koskenniemi, "International Law in the World of Ideas" in James Crawford & Martti Koskenniemi, eds, *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012) 47 at 48.

[17] US Presidential Proclamation no 2667: Policy of the United States with Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf, 28 September 1945, 10 FR 12303.

[18] Humphrey Waldock, "The Legal Basis of Claims to the Continental Shelf" (1950) 36 GST 115; Hersch Lauterpacht, "Sovereignty over Submarine Areas" (1950) 27 BYIL 376; James Crawford & Thomas Viles, "International Law on a Given Day" in James Crawford, ed, *International Law as an Open System: Selected Essays* (London: Cameron & May, 2002) 69.

No person can be a good citizen today if his civic interests are confined to his own parish or even to his own country. He must spare some part of his time to be a citizen of the world. Is it not also true that no … lawyer can afford to ignore the principles which govern the legal relations of States and determine their legal disputes?[19]

Canada has historically demonstrated a firm commitment to this form of responsibility. The first prime minister, Sir John Macdonald, was one of the British representatives on the Joint High Commission that brokered the 1871 *Treaty between Great Britain and the United States for the Amicable Settlement of All Causes of Difference between the Two Countries*,[20] the agreement that formed the basis of the *Alabama Claims*,[21] the exemplar of inter-state arbitration.[22] In doing so, he campaigned successfully within the British delegation in relation to issues directly affecting Canada (principally, the US–Canada border and fisheries off Nova Scotia).[23] Justice Gonthier's grandfather, Charles Joseph Doherty,[24] was a committed internationalist, acting as negotiator and signatory of the Treaty of Versailles,[25]

[19] Arnold McNair, "International Law in Practice" (1946) 32 GST 154 at 165.

[20] *Treaty between Great Britain and the United States for the Amicable Settlement of All Causes of Difference between the Two Countries*, 8 May 1871, 143 CTS 145.

[21] *Alabama Claims (US/UK)* (1872), 29 RIAA 125. See generally JB Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol 1 (Washington, DC: Government Printing Service, 1898) at 495–682; Adrian Cook, *The Alabama Claims: American Politics and Anglo-American Relations, 1865–1872* (Ithaca, NY: Cornell University Press, 1975); Tom Bingham, "The *Alabama Claims* Arbitration" (2005) 54 ICLQ 1; Stephen C Neff, *Justice in Blue and Gray: A Legal History of the Civil War* (Cambridge, MA: Harvard University Press, 2010) ch 10.

[22] Another key Canadian involved in the episode was Sir John Rose, the Anglo-American businessman and sometime Canadian minister of finance. Rose developed the proposal for the Joint High Commission and the appropriate method by which the United States should approach Great Britain at a dinner with US Secretary of State Hamilton Fish and his assistant secretary, J Bancroft Davies, on 9 January 1871. Moore, *supra* note 21 at 507–36. To the regret of both sides, he declined to serve on the commission, principally due to his fear of being seen — through his wife, friends, and other business connections — as being partial to the United States. Cook, *supra* note 21 at 170–71.

[23] Cook, *supra* note 21 at 171–72. See also Margaret Conrad, *A Concise History of Canada* (Cambridge: Cambridge University Press, 2012) at 152–53.

[24] See Anonymous, "The Late C. J. Doherty, P.C., K.C., D.C.L." (1931) 9 Can Bar Rev 538.

[25] *Treaty of Versailles*, 28 June 1919, 225 CTS 188.

representing Canada at the League of Nations during its 1920 and 1921 sessions and remaining an enthusiastic supporter of the Permanent Court of International Justice (PCIJ). The inaugural bench of the International Court of Justice (ICJ), its successor, included John Read,[26] formerly legal advisor to Canada's Department of External Affairs. Three Canadians have served on the International Law Commission: Marcel Cadieux, J. Alan Beesley, and, presently serving, Donald McRae. Philippe Kirsch served as the first president of the International Criminal Court. Notwithstanding its observer status with respect to the *European Convention on Human Rights*,[27] another Canadian, Ronald St. John Macdonald, was a judge of the European Court of Human Rights for nearly two decades.

As a state, Canada has been elected as a non-permanent member of the UN Security Council on six occasions, most recently from 1999 to 2000. It has accepted the compulsory jurisdiction of the ICJ under Article 36(2) of the *Statute of the International Court of Justice*,[28] and appeared before the court in three contested proceedings, in two of which its jurisdictional objection was successful.[29] The court has had the benefit of its submissions in six advisory proceedings.[30] Canada has also appeared or intervened before other

[26] See John E Read, "The World Court and the Years to Come" (1964) 2 Can YB Int'l L 164. Read's election came at the expense of Sir Kenneth Bailey, one of the greatest Australian international lawyers of the twentieth century: James Crawford, "'Dreamers of the Day': Australia and the International Court of Justice" (2013) 14 MJIL 520 at 526–27. For a generous tribute, see Edward McWhinney, "In Memoriam: Sir Kenneth Bailey" (1972) 10 Can YB Int'l L 284.

[27] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 222 (as amended).

[28] See online: <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=CA>; *Statute of the International Court of Justice*, 26 June 1945, Can TS 1945 No 7 (in force 24 October 1945) [*ICJ Statute*].

[29] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/US)*, [1984] ICJ Rep 246; *Fisheries Jurisdiction (Spain v Canada)*, Preliminary Objections, [1998] ICJ Rep 432; *Legality of the Use of Force (Serbia and Montenegro v Canada)*, Preliminary Objections, [2004] ICJ Rep 429.

[30] *Conditions of Admission of a State to Membership of the United Nations (Article 4 of the Charter)*, [1948] ICJ Rep 57; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, [1950] ICJ Rep 65; *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, [1954] ICJ Rep 47; *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, [1962] ICJ Rep 151; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, [1969] ICJ Rep 177; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Rep 136.

international adjudicatory organs — notably the World Trade Organization's (WTO) Dispute Settlement Body,[31] investment arbitration tribunals,[32] and ad hoc inter-state arbitral bodies.[33] Canada has been successful in most of these cases, either outright or (in a few cases) by substantially reducing the incidence of liability. For example, in Chapter 11 arbitrations under the *North American Free Trade Agreement* (*NAFTA*),[34] Canada has been the subject of some eleven completed proceedings. Of these, it was victorious in five,[35] achieved consent awards in two others,[36] and settled two more.[37] It has so far been found liable in four, two of them technically incomplete because quantification is pending. In the first completed case, *Pope & Talbot v Canada*, Canada convinced the tribunal that its only breach arose from an administrative audit undertaken to verify the claimant's quota, leading to the relatively insignificant award of US $461,566 in damages, plus just over

[31] See eg *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc No WT/DS400/AB/R, WT/DS401/AB/R (Appellate Body, 22 May 2014). See further Elizabeth Whitsitt, "A Comment on the Public Morals Exception in International Trade and the *EC – Seal Products* Case: Moral Imperialism and Other Concerns" (2014) 3 CJICL 1372.

[32] See eg *SD Myers Inc v Canada*, Award (2000) 121 ILR 72 (*NAFTA*) [*SD Myers* award]; *SD Myers Inc v Canada*, Costs (2002) 126 ILR 161 (*NAFTA*) [*SD Myers* costs]; *Attorney-General of Canada v SD Myers Inc* (2004) 126 ILR 553 (Federal Court of Canada).

[33] *Delimitation of Maritime Areas Between Canada and the French Republic (St. Pierre and Miquelon) (Canada/France)* (1992) 95 ILR 645.

[34] *North American Free Trade Agreement*, 18 December 1992, 32 ILM 289 at 605.

[35] *United Parcel Service of America v Government of Canada* (2007) 46 ILM 922; *Merrill & Ring Forestry LP v Government of Canada*, UNCITRAL/*NAFTA* (Award, 31 March 2010); *Chemtura Corporation v Government of Canada*, UNCITRAL/*NAFTA* (Award, 2 August 2010); *Melvin J Howard, Centurion Heath Corporation & Howard Family Trust*, PCA Case no 2009-21 (Order for the Termination of Proceedings and Award on Costs, 2 August 2010); *Vito G Gallo v Government of Canada*, UNCITRAL/*NAFTA* (Award, 15 September 2011).

[36] *AbitibiBowaterInc v Government of Canada*, ICSID Case no UNCT/10/1 (Consent Award, 15 December 2010); *St Marys VCNA LLC v Government of Canada*, UNCITRAL/*NAFTA* (Consent Award, 12 April 2013).

[37] *Ethyl Corporation v Government of Canada*, UNCITRAL/*NAFTA* (Award on Jurisdiction, 24 June 1998); *Dow Agrosciences LLC v Government of Canada*, UNCITRAL/*NAFTA* (Settlement Agreement, 25 May 2011), online: UNCITRAL <http://www.uncitral.org/res/transparency-registry/registry/data/can/dow_agrosciences_llc_html/dow-03.pdf>.

US $120,000 in costs.[38] In the second completed case, *SD Myers v Canada*, Canada succeeded in limiting the award of damages to a little over US $6 million out of US $80 million claimed and limited costs to just over US $500,000 out of US $4 million claimed.[39] Currently, nine cases are pending before *NAFTA* tribunals, in two of which majority findings of liability have yet to be quantified.[40]

Canada has been one of the most active litigants before the Dispute Settlement Body of the WTO. It has been a party in thirty-four cases as complainant, eighteen as respondent, and 103 as a third party.[41] Of those cases in which Canada has been directly involved as a party, its most frequent sparring partners have been the United States (fifteen cases as complainant, five as respondent) and the European Union (EU) (nine cases as complainant, six as respondent).[42] Although it is difficult to talk about WTO disputes in terms of raw wins or losses, it is worth mentioning in passing a few of the Canadian successes in this forum: *Australia – Measures Affecting Importation of Salmon*,[43] *Brazil – Export Financing Programme for Aircraft*,[44] and

[38] *Pope & Talbot v Government of Canada*, Award (2001) 122 ILR 294; *Pope & Talbot v Government of Canada*, Costs (2002) 126 ILR 127.

[39] *SD Myers* award, *supra* note 32; *SD Myers* costs, *supra* note 32.

[40] See online: DFATD <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng>. The two cases pending quantification are *Mobil Investments Canada Inc & Murphy Oil Corporation*, ICSID Case no ARB(AF)/07/4 (Decision on Liability and Principles of Quantum, 22 May 2012) and *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc*, PCA Case no 2009-04 (Award on Jurisdiction and Liability, 17 March 2015).

[41] See online: WTO <https://www.wto.org/english/thewto_e/countries_e/canada_e.htm>.

[42] Other states against which Canada has been pitted include Brazil (one case as complainant, three as respondent), Japan (one case as complainant, two as respondent), China (three cases as complainant), South Korea (two cases as complainant), Taiwan (one case as respondent), India (one case as complainant), Australia (one case as complainant), Hungary (one case as complainant), and New Zealand (one case as respondent).

[43] *Australia – Measures Affecting Importation of Salmon*, WTO Doc WT/DS18/AB/R (Appellate Body Report, 20 October 1998).

[44] *Brazil – Export Financing Programme for Aircraft*, WTO Doc WT/DS46/AB/R (Appellate Body Report, 2 August 1999). Cf *Canada – Measures Affecting the Export of Civilian Aircraft*, WTO Doc WT/DS70/AB/R (Appellate Body Report, 2 August 1999); *Canada – Aircraft Credits and Guarantees*, WTO Doc WT/DS222/R (Panel Report, 28 January 2002).

United States – Certain Country of Origin Labelling.[45] (Perhaps the less said about the long-running softwood lumber dispute,[46] perchance to be renewed,[47] the better).

Mention must also be made of the contribution to international law made by Canadian courts.[48] The *International Law Reports* contain some ninety reported decisions from Canada. Several have global significance: *In re the Ownership and Jurisdiction Over Offshore Mineral Rights*,[49] concerning jurisdiction over the territorial sea

[45] *United States – Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc WT/DS384/AB/R (Appellate Body Report, 29 June 2012).

[46] *United States – Measures Treating Export Restraints as Subsidies*, WTO Doc WT/DS194/R (Panel Report, 29 June 2001); *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WTO Doc WT/DS236/R (Panel Report, 27 September 2002); *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WTO Doc WT/DS257/AB/R (Appellate Body Report, 19 January 2004); *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WTO Doc WT/DS277/R (Panel Report, 22 March 2004); *United States – Final Dumping Determination on Softwood Lumber from Canada*, WTO Doc WT/DS264/AB/R (Appellate Body Report, 11 August 2004). See further Gilbert Gagné & François Roch, "The US–Canada Softwood Lumber Dispute and the WTO Definition of Subsidy" (2008) 7 WTR 547.

[47] Cf *Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America*, 12 September 2006, Can TS 2006 No 23; *Agreement between the Government of Canada and the Government of the United States of America Extending the Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America*, 23 January 2012, Can TS 2012 No 9. See further Drew Hasselback, "The Granddaddy of All Canadian–US Trade Disputes Is About to Rear Its Ugly Head Again," *Financial Post* (31 October 2014), online: Financial Post <http://business.financialpost.com/news/economy/the-granddaddy-of-all-canadian-u-s-trade-disputes-is-about-to-rear-its-ugly-head-again>.

[48] Cf GV LaForest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) 34 Can YB Int'l L 89; Jutta Brunnée & Stephen J Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can YB Int'l L 3.

[49] *In re the Ownership and Jurisdiction Over Offshore Mineral Rights* (1967), 65 DLR (2d) 353, 43 ILR 93 (SCC); *Reference re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland* (1984), 5 DLR (4th) 385, 86 ILR 593 (SCC). See further IL Head, "The Canadian Offshore Minerals Reference" (1968) 18 UTLJ 131; N Caplan, "Issues of the Offshore Mineral Rights Dispute in Canada" (1968) 14 McGill LJ 475; Cameron A Miles, "The *Franconia* Sails On: Revisiting the Intellectual History of the Territorial Sea in the United States, Canada and Australia" (2014) 13 OUCLJ 347.

and continental shelf; *Bouzari v Iran*,[50] a decision concerning the interaction between peremptory norms and state immunity cited by the ICJ in its own ruling on the subject;[51] and, of course, *Re Reference by the Governor in Council concerning Certain Questions relating to the Secession of Quebec from Canada* (*Quebec Secession*),[52] which remains the definitive enunciation on the principle of self-determination in international law and was relied upon extensively in submissions before the ICJ in the advisory opinion in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*.[53]

This brief outline demonstrates an abiding sense of responsibility towards, and participation in, international law. It is well that this is so, as international law will increasingly be required to mediate inter-state disputes in a world of increasing interdependency and scarcity of resources. With this in mind, I turn to my second theme, fraternity.

Fraternity with Special Reference to the Arctic

fraternity as a political and legal concept

As a word, "fraternity" may seem somewhat old-fashioned. For Samuel Johnson and his eighteenth-century contemporaries, the term referred to a "corporation" or "society,"[54] though the various

[50] *Bouzari v Islamic Republic of Iran*, [2002] OJ No 1624 (QL), 124 ILR 427, aff'd (2004) 71 OR (3d) 675 (CA) (leave to appeal dismissed, [2005] 1 SCR vi). See further François Larocque, "*Bouzani v Iran*: Testing the Limits of State Immunity in Canadian Courts" (2003) 41 Can YB Int'l L 343; Noah Benjamin Novogrodsky, "Immunity for Torture: Lessons from *Bouzari v Iran*" (2008) 18 EJIL 939.

[51] *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, [2012] ICJ Rep 99 at 137.

[52] *Re Reference by the Governor in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada* (1998), 161 DLR (4th) 385, 115 ILR 536 (SCC) [*Quebec Secession*]. See further Daniel Turp & Gibran van Ert, "International Recognition of the Supreme Court of Canada's *Québec Reference*" (1998) 36 Can YB Int'l L 335; James Crawford, *The Creation of States in International Law*, 2nd ed (Oxford: Oxford University Press, 2006) at 119–21, 411–12; James Crawford, *Brownlie's Principles of Public International Law*, 8th ed (Oxford: Oxford University Press, 2012) at 141–42 [Crawford, Brownlie's Principles].

[53] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, [2010] ICJ Rep 403 at 425–26.

[54] Samuel Johnson, *Johnson's Dictionary* (reissue, Charles J. Hendee 1836) at 143.

elaborations or conjunctions of the word bore an unmistakable gender imbalance.[55] During the French Revolution, the term — *fraternité* — was deployed in the service of various causes, coming to reflect an ethical relationship rooted in solidarity or community.[56] On the one hand, it was an inclusive fraternity embodying the "emotionally empowering quality of moral obligation spontaneously assumed in relation to equals."[57] On the other hand, it was an exclusive conceptualization under which the leaders of the revolution systematically ostracized the Girondins and other moderates, as encapsulated in Robespierre's popular slogan "*fraternité ou la mort.*"[58]

As a political concept, fraternity is tied up with questions of boundaries: at what point does the community in question become something else to which (or to whom) the benefits of fraternity do not extend? This point was recognized by Justice Gonthier, who saw fraternity as a neglected pillar of democracy that nonetheless informed a wide variety of legal doctrines through values such as empathy, commitment, fairness, and cooperation.[59] To the question of boundaries, Justice Gonthier replied that "[t]he answer … depends in no small part on the nature of the interest in question."[60]

These thoughts on fraternity within a national legal system can be transplanted to the international plane. A regional free trade agreement such as *NAFTA* sets out the limits of a particular community and the benefits and obligations of membership. One can even see, in the device of the most favoured nation clause,[61]

[55] See eg Johnson's definitions for "fraternal" ("*a.* brotherly, becoming brothers"), "fraternize" ("*v. n.* to agree as brothers"), and "fratricide" ("*s.* the murder of a brother"). *Ibid.*

[56] See generally Gurion Taussig, "Fraternity" in CJ Murray, ed, *Encyclopedia of the Romantic Era, 1760–1850*, vol 1 (London: Routledge, 2013) 381.

[57] Felicity Baker, "Rousseau's Oath and Revolutionary Fraternity: 1789 and Today" (1991) 38 Romance Quarterly 273 at 276.

[58] Taussig, *supra* note 56 at 381.

[59] See generally Gonthier, "Fraternity," *supra* note 2 at 576–89.

[60] *Ibid* at 575. Cf *Donoghue v Stevenson,* [1932] AC 562 at 580 (HL), Lord Atkin: "In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply."

[61] See further Robin Geiß & Meinhard Hilf, "Most Favoured Nation Clause" in R Wolfrum, ed, *Max Planck Encyclopedia of Public International Law*, online ed (Oxford: Oxford University Press, 2014).

a commitment by State A to State B that, irrespective of any other community that State A joins in the future, it will not be at the expense of relevant interests of State B. A community of a different sort can be seen in the field of international human rights — a group of states united in the hope that their citizens will be subject to certain minimum standards of protection.[62]

FRATERNITY AND THE ARCTIC: A CASE STUDY

A third species of fraternity in international law arises from a different source, namely those occasions in which states, by reason of geographic proximity and common challenges, agree to some level of coordination — notwithstanding the potential for competition. Let me take the Arctic as an example. The Arctic comprises those regions above a latitude of 66°33'45.7" north — known more conventionally as the Arctic Circle.[63] Eight states — Canada, Denmark (through Greenland[64] and the Faroes), Norway (through its northern coast, Svalbard,[65] and Jan Mayen), Russia, the United States, Iceland, Sweden, and Finland — control territory or have maritime claims within this area, though eventually their sovereignty gives way to the polar icecap and international waters — deemed to form part of the common heritage of mankind under the terms of the *United Nations Convention on the Law of the Sea* (*UNCLOS*).[66]

[62] Gonthier, "Law and Morality," *supra* note 2 at 420–22. See eg *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, preamble i: "*Considering* that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

[63] This is drawn by no obvious reference to geographic circumstances, but rather represents the point north of which the sun may remain above or below the horizon for 24 hours continuously. As it depends on the Earth's axial tilt, the Arctic Circle has the potential to move over time. This may also vary domestically: the United States, for example, designates the Bering Sea and a portion of Alaska (eg, the Aleutians) below the Arctic Circle as being considered "the Arctic" for internal policy purposes. "'Arctic' Defined," 15 USC § 4111. Canada, for its part, draws the line at 60°N. *Arctic Waters Pollution Prevention Act*, RSC 1985, c A-12, s 2.

[64] See further Michael Byers, *International Law and the Arctic* (Cambridge: Cambridge University Press, 2013) at 22–24.

[65] Cf *Treaty Concerning Spitsbergen*, 9 February 1920, 2 LNTS 8. See further Byers, *supra* note 64 at 16–22.

[66] *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3, art 136 [*UNCLOS*].

Maritime Delimitation in the Arctic

The Arctic may not seem a likely candidate for the kind of fraternity just described. The announcement by the US Geological Survey in 2008 that the Arctic contained approximately 22 percent of the world's undiscovered and technically recoverable fossil fuel resources sparked speculation of a new "scramble" or "gold rush" for the Arctic.[67] Detailed predictions of states attempting to "carve up" or "annex" the region, leading to an "armed brinkmanship" or "anarchy," were made.[68] Certainly, a measure of sovereign braggadocio seemed to be in effect. In 2007, a Russian submersible planted a titanium flag under the polar icecap in support of Russia's claim to the Lomonosov Ridge.[69] Disputes over the Beaufort Sea and Northwest Passage between the United States and Canada[70] led to US nuclear submarines entering Canada's claimed maritime zone, implying that Canada does not maintain effective coastal sovereignty in those areas.[71] Hans Island, a rocky outcrop located between Canada's Ellesmere Island and the northwest coast of Greenland

[67] US Geological Survey, "90 Billion Barrels of Oil and 1,670 Trillion Cubic Feet of Natural Gas Assessed in the Arctic," Press Release (23 July 2008), online: <http://www.usgs.gov/newsroom/article.asp?ID=1980#.VUdYxhPF-iY>; Donald L Gautier et al, "Assessment of Undiscovered Oil and Gas in the Arctic" (2009) 324 *Science* 1175.

[68] See eg Scott G Borgerson, "Arctic Meltdown: The Economic and Security Implications of Global Warming" (2007) 87 Foreign Affairs 63; but cf Scott G Borgerson, "The Coming Arctic Boom: As the Ice Melts, the Region Heats Up" (2013) 92 Foreign Affairs 76.

[69] CJ Chivers, "Russians Plant Flag on Arctic Seabed," *New York Times* (3 August 2007), online: New York Times <http://www.nytimes.com/2007/08/03/world/europe/03arctic.html>.

[70] See further Nicolas C Howson, "Breaking the Ice: The Canadian–American Dispute over the Arctic's Northwest Passage" (1987–88) 26 Columbia JTL 337; Donald R Rothwell, "The Canadian–US Northwest Passage Dispute: A Reassessment" (1993) 26 Cornell ILJ 331; Donat Pharand, "The Arctic Waters and the Northwest Passage: A Final Revisit" (2007) 38 ODIL 3; Byers, *supra* note 64, ch 3.

[71] Doug Struck, "Dispute over NW Passage Revived," *Washington Post* (6 November 2006), online: Washington Post <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/05/AR2006110500286.html>; "U.S. Sub May Have Toured Canadian Arctic Zone," *National Post* (19 December 2005), online: National Post <http://www.nationalpost.com/story.html?id=fb21432a-1d28-415e-b323-ceb22d477732&k=69493>.

has long been the subject of the "flag war" between Canada and Denmark, with Denmark planting its colours on the island six times between 1984 and 2004, only to have them removed by Canada. On at least one of these occasions, the flag was sent back to Copenhagen by registered mail, where it now apparently hangs in the office of the legal adviser to the Danish Foreign Ministry.[72]

However, notwithstanding these external manifestations of nationalism, it is fair to say that the Arctic states prefer to settle disputes within the framework of international law and generally act in accordance with a certain *esprit de fraternité*. Unlike the Antarctic,[73] the Arctic states have consistently rejected the idea of a *sui generis* suite of agreements to govern the area.[74] The logic behind this is clear: multiple littoral states possess substantial territorial claims in the Arctic, the region is home to some four million people, and there is no land territory underlying the Arctic icecap that might plausibly be converted into a *res communis* space (beyond the existing *res communis* of the Arctic seabed). In 2008, the five Arctic coastal states — Canada, Denmark, Norway, Russia, and the United States — issued the Ilulissat Declaration, which identified the law of the sea as the dominant regime for the regulation of the Arctic and further noted that the relevant states "remain[ed] committed to this legal framework and to the orderly settlement of any overlapping claims"[75] — predicted "gold rush" notwithstanding. All of the Arctic states are members of *UNCLOS*, save the United States, which has signed, but not yet ratified, the treaty — even though ratification remains a priority of the White House[76] and the US judiciary considers a

[72] Byers, *supra* note 64 at 10–15.

[73] *Antarctic Treaty*, 1 December 1959, 402 UNTS 71. The most significant documents surrounding this regime can be found in Ben Saul & Tim Stephens, eds, *Antarctica in International Law* (Oxford: Hart, 2015). See further James Crawford, "The Antarctic Treaty after 50 Years" in D French et al, eds, *International Law and Dispute Settlement: New Problems and Techniques* (Oxford: Hart, 2010) 271; Crawford, *Brownlie's Principles*, *supra* note 52 at 345–46.

[74] See eg "US Directive on Arctic Policy," 9 January 2009, 48 ILM 374, para III.C.3.

[75] *Ilulissat Declaration*, 28 May 2008, 48 ILM 362.

[76] "US Directive on Arctic Policy," *supra* note 74, para III.C.4.

substantial portion of the convention to reflect customary international law.[77]

A testament to the commitment of the Arctic states to the international rule of law can be seen in the fact that nearly all of their boundary disputes have been settled by agreement.[78] In 1973, Canada and Denmark delimited a 1,450 nautical mile boundary between Canada and Greenland.[79] In 1990, the United States and Soviet Union negotiated a 1,600 nautical mile boundary in the Behring Sea, Behring Strait, and Chukchi Sea — the so-called "Baker-Shevardnaze Line."[80] In 2006, the 430 nautical mile boundary between Greenland and Svalbard was determined by an agreement between Denmark and Norway,[81] the boundary between Greenland and Jan Mayen having been determined by the ICJ in 1993.[82]

[77] See eg *United States v Alaska*, 503 US 568 at 588 (1992); *Sarei v Rio Tinto PLC*, 456 F.3d 1069 at 1078 (9th Cir, 2006). The United States is a party to the 1958 Geneva conventions, the predecessor agreements to *UNCLOS*, *supra* note 66: *Convention on the Territorial Sea and the Contiguous Zone*, 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964); *Convention on the Continental Shelf*, 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964); *Convention on the High Seas*, 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962); *Convention on Fishing and Conservation of the Living Resources of the High Seas*, 29 April 1958, 559 UNTS 285 (entered into force 20 March 1966).

[78] Byers, *supra* note 46, ch 2.

[79] *Agreement between the Government of Canada and the Government of the Kingdom of Denmark Relating to the Delimitation of the Continental Shelf between Greenland and Canada*, 17 December 1973, 950 UNTS 151. This arrangement left to one side the question of Hans Island, though certain commentators are of the view that this question will be shortly settled. Byers, *supra* note 46 at 15–16.

[80] *Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary*, 1 June 1990, 29 ILM 942. The boundary itself is based on the line described in the 1867 agreement that implemented the purchase of Alaska by the United States. *Treaty Concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of All the Russias to the United States of America*, 30 March 1867, 134 CTS 332, art 1.

[81] *Agreement between the Government of the Kingdom of Norway on the One Hand, and the Government of the Kingdom of Denmark together with the Home Rule Government of Greenland on the Other Hand, Concerning the Delimitation of the Continental Shelf and the Fisheries Zones in the Area between Greenland and Svalbard*, 20 February 2006, 2378 UNTS 21. See further Alex G Oude Elferink, "Maritime Delimitation between Denmark/Greenland and Norway" (2007) 38 ODIL 375.

[82] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)*, [1993] ICJ Rep 38.

Most significantly, in 2010, Norway and Russia concluded a treaty settling the question of sovereignty with respect to a 50,000 square nautical mile expanse of exclusive economic zone (EEZ) and continental shelf that constituted some 10 percent of the Barents Sea.[83] This treaty replaced the 1978 "Gray Zone" agreement between Norway and the Soviet Union that had enabled the provisional resolution of questions regarding the disputed area for over three decades.[84] After signing the *Treaty between the Kingdom of Norway and the Russian Federation Concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean* (*Barents Sea Treaty*), the Russian and Norwegian foreign ministers penned a joint opinion editorial highlighting the achievements of the agreement and further stating that "the challenges in the Arctic should inspire momentum in international relations, based on co-operation rather than rivalry and confrontation." In addition, the ministers expressed the view "that the Arctic can be used to demonstrate … how … peace and collective interests can be served through the implementation of the international rule of law."[85]

The *Barents Sea Treaty* is more than just a line in the sea — it is an instance of fraternity writ large. In the first place, the parties agree to "pursue close cooperation" in the sphere of fisheries and pledge to apply the precautionary approach[86] to the conservation,

[83] *Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean*, 15 September 2010, 50 ILM 1113 [*Barents Sea Treaty*]. See further Tore Hendriksen & Geir Ulfstein, "Maritime Delimitation in the Arctic: The Barents Sea Treaty" (2011) 42 ODIL 1; Byers, *supra* note 46 at 39–46.

[84] *Agreement between Norway and the Soviet Union on a Temporary Practical Arrangement for Fishing in an Adjacent Area in the Barents Sea*, 11 January 1978, Overenskomster med Fremmede Stater 436. Further agreements between Norway and the Soviet Union/Russia concerning the Varangerfjord area were also concluded in 1957 and 2007. Hendriksen & Ulfstein, *supra* note 83 at 2–4.

[85] Sergei Lavrov & Jonas Gahr Støre, "Canada, Take Note: Here's How to Resolve Maritime Disputes," *Globe and Mail* (21 September 2010), online: Globe and Mail <http://www.theglobeandmail.com/globe-debate/canada-take-note-heres-how-to-resolve-maritime-disputes/article4326372/>.

[86] Cf *Rio Declaration on the Environment and Development*, 14 June 1992, 31 ILM 974, Principle 15: "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." See further Antônio Augusto Cançado Trindade, "Principle 15: Precaution" in J Viñuales, ed, *The Rio Declaration on Environment and Development: A Commentary* (Oxford: Oxford University Press, 2015) 403.

management, and exploitation of shared fish stocks.[87] In the second, any cross-boundary hydrocarbon deposits will be treated in accordance with Annex II of the treaty,[88] which provides a comprehensive regime for the negotiation of a unitization agreement between the parties, backed by binding arbitration or the determination of an independent expert. The preamble to the agreement makes express mention of *UNCLOS*,[89] highlighting the importance of this treaty as a comprehensive legal framework underpinning the Arctic — a point stressed by the parties at the signing ceremony.[90] Following the conclusion of these agreements, there remains only one significant Arctic maritime dispute:[91] the Canada–US boundary in the Beaufort Sea. The *Barents Sea Treaty* could provide a template for a settlement.

The Role of the Commission on the Limits of the Continental Shelf

Notwithstanding the series of delimitations just described, the maximum maritime entitlement available to a state via unilateral action is as set out in Articles 57 and 76 of *UNCLOS*: an EEZ and continental shelf of 200 nautical miles, as measured from the relevant coastal baselines. The continental shelf has never been fixed at 200 nautical miles, but it represents a natural prolongation of the coastal state's land territory: a physical or geomorphological feature that possesses legal significance.[92] As a consequence, Article 76, paragraph 1 of *UNCLOS* enables a state, based on considerations of natural prolongation, to lay claim to the so-called "outer" continental shelf beyond the 200 nautical mile mark and sets out in paragraphs 4–6 a series of technical rules for the determination of that entitlement, which may not in any event exceed 350 nautical miles from the shore.

[87] *Barents Sea Treaty*, *supra* note 83, art 4.

[88] *Ibid*, art 5.

[89] *Ibid*, preamble, para 4.

[90] Hendriksen & Ulfstein, *supra* note 83 at 10.

[91] This leaves to one side the comparatively minor disputes between Canada and Denmark concerning Hans Island and the Lincoln Sea, which in any event appear to be close to resolution. Byers, *supra* note 46 at 46–54.

[92] Cf *North Sea Continental Shelf (FRG/Netherlands; FRG/Denmark)*, [1969] ICJ Rep 3 at 22; *Continental Shelf (Libya/Malta)*, [1985] ICJ Rep 13 at 32. See further Robin Churchill & Vaughan Lowe, *The Law of the Sea*, 3rd ed (Manchester: Manchester University Press, 1999) at 145–50; Crawford, *Brownlie's Principles*, *supra* note 52 at 291–92.

When a state wishes to claim an entitlement to a continental shelf beyond 200 nautical miles, it must submit the technical data underpinning its claim to the Commission on the Limits of the Continental Shelf, a standing body created under *UNCLOS* Annex II to review coastal state delineations.[93] On receipt of a state's technical data, the commission makes recommendations concerning the outer limit of that state's continental shelf — the limits established by the state on the basis of these recommendations are final, binding, and opposable to third parties. The commission is made up of twenty-one members who are experts in geography, geophysics, and hydrology. Although elected by the states parties to *UNCLOS*, the commission's members serve in an individual and non-representative capacity. Accordingly, the commission is a rare example of an independent scientific or technical body serving in an international legal and political environment.[94]

Of the five Arctic coastal states, Russia, Denmark, and Norway have made submissions to the commission. Canada, while it has made a submission to the commission regarding the Atlantic Ocean, has not yet detailed its claims in the Arctic — though it has indicated to the commission that such a submission will be forthcoming.[95] As it is not a party to *UNCLOS*, the United States is precluded from making a submission to the commission,[96] but it has been gathering data on the Alaskan continental shelf in anticipation of ratification. Its surveys in the Beaufort Sea have

[93] *UNCLOS*, *supra* note 66, art 76(8). On the work of the commission and the concept of the outer continental shelf more generally, see Øystein Jensen, *The Commission on the Limits of the Continental Shelf: Law and Legitimacy* (Leiden: Martinus Nijhoff, 2014).

[94] See further Ted L McDorman, "The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World" (2002) 17 IJMCL 301; Donald R Rothwell & Tim Stephens, *The International Law of the Sea* (Oxford: Hart, 2010) at 111–17. Cf Bjørn Kunoy, "The Terms of Reference of the Commission on the Limits of the Continental Shelf: A Creeping Legal Mandate" (2012) 25 LJIL 109. A snapshot of the commission's work to date (current as at 25 April 2015) can be found online: UN <http://www.un.org/depts/los/clcs_new/commission_submissions.htm>.

[95] See online: UN <http://www.un.org/depts/los/clcs_new/submissions_files/submission_can_70_2013.htm>.

[96] A diverse group of US lawmakers has urged ratification for this very reason. See eg Letter from Governors Palin & O'Malley to Senators Reid, McConnell, Kerry & Lugar, 15 June 2009, online: <http://www.oceanlaw.org/downloads/NGA_Letter_to_Senate_June2009.pdf>.

been conducted jointly with Canada, their overlapping claims in the region notwithstanding.[97] Such episodes provide context for events such as the aforementioned dropping of a Russian flag under the polar icecap in 2007, which drew unfavourable comparisons from some quarters to the tropes of fifteenth-century European exploration.[98] The gesture occurred in the context of Arktika 2007, a Russian expedition to collect further data in support of its submission to the commission. As such, it was a sideshow to a wider process conducted in accordance with international law[99] — diplomatically unhelpful, perhaps, but legally defensible.

The Arctic Council

Outside the context of territorial claims, the Arctic Council is another example of international fraternity. It was formed pursuant to the 1996 Declaration on the Establishment of the Arctic Council (Ottawa Declaration):[100] its procedural rules, terms of reference, and mandate were approved in 1998.[101] The council emerged from an earlier initiative, the Arctic Environmental Protection Strategy.[102] As its name suggests, the strategy was principally concerned with the Arctic environment and, to this end, established four working groups focusing on the monitoring and assessment of pollution, the conservation of Arctic flora and fauna, emergency prevention, preparedness, and response, and the protection of the Arctic marine environment. All of these were inherited by the council, which added a number of

[97] Sian Griffiths, "US–Canada Arctic Border Dispute Key to Maritime Riches," *BBC News* (2 August 2010), online: BBC <http://www.bbc.co.uk/news/world-us-canada-10834006>.

[98] "Russia Plants Flag under N Pole," *BBC News* (2 August 2007), online: BBC <http://news.bbc.co.uk/1/hi/world/europe/6927395.stm>.

[99] Evan T Bloom, "Introductory Note to the United States Directive on Arctic Policy and the Ilulissat Declaration" (2009) 48 ILM 370 at 372.

[100] *Declaration on the Establishment of the Arctic Council*, 19 September 1996, 35 ILM 1387. See further Evan T Bloom, "Establishment of the Arctic Council" (1999) 93 AJIL 712.

[101] See the *Iqaluit Declaration*, 19 September 1998, online: Arctic Council <http://www.arctic-council.org/index.php/en/document-archive/category/5-declarations?download=19:iqaluit-declaration-1998>.

[102] Arctic Environmental Protection Strategy, 14 January 1991, 30 ILM 1624.

other areas to its mandate, particularly with respect to sustainable development.[103]

Another innovation was that of indigenous participation:[104] the Ottawa Declaration recognized three indigenous groups as permanent participants in the Arctic Council's work: the Inuit Circumpolar Conference, the Saami Council, and the Association of the Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation. In 1998, a further group was added: the Aleut International Association.[105] Since then, the Arctic Athabaskan Council and the Gwich'in Council International have joined. As permanent participants, these groups are more than observers (though observers are themselves permitted) — they have the right to participate in all council meetings and other activities, their representatives sit alongside those of the Arctic states, and they have the capacity to submit proposals for cooperative action.

The Arctic Council is, by design, not an international organization possessing separate legal personality. Its decisions do not bind its members. Its mandate, moreover, is limited to the issues just adumbrated — it does not have the capacity, for example, to discuss matters pertaining to security. Its status as a high-level forum does not preclude a meaningful output, although its record to date is somewhat mixed.[106] It provides a forum for the coordinated collection of scientific data pertaining to the region, and its Arctic Marine Strategic Plan has led to promising developments in areas such as safety of navigation, application and implementation of an ecosystem approach, and the development of regional guidelines in a variety of environmentally sensitive areas. The council has sponsored the creation of a University of the Arctic,[107] and it

[103] But cf Bloom, *supra* note 100 at 715–16. See further Philippe Sands & Jacqueline Peel, *Principles of International Environmental Law*, 3rd ed (Cambridge: Cambridge University Press, 2012) at 593–96.

[104] On issues pertaining to indigenous peoples and the Arctic more generally, see Byers, *supra* note 46, ch 7.

[105] Bloom, *supra* note 100 at 716–17.

[106] See generally Timo Koivurova & David L Vanderzwaag, "The Arctic Council at 10 Years: Retrospect and Prospects" (2007) 40 UBCLR 121.

[107] The University of the Arctic is a circumpolar cooperative network consisting of universities, colleges, and other organizations with an interest in promoting education and research in the deep north. It currently has 170 member institutions crossing twenty-four time zones. See online: University of the Arctic <http://www.uarctic.org/>.

has taken steps to help preserve and develop indigenous ways of life and cultural knowledge.[108]

Where the Arctic Council has been less successful is in the production of agreements and standards. In the nineteen years since its inception, it has produced one treaty, the 2011 *Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic*,[109] itself largely based on the 1944 *Convention on International Civil Aviation*[110] and the 1979 *International Convention on Maritime Search and Rescue*.[111] Furthermore, although all eight Arctic states have ratified the 1990 *Convention on Oil Pollution Preparedness, Response and Cooperation*,[112] attempts to develop dedicated Arctic offshore oil and gas guidelines — in 1997, 2002, and 2009 — have largely avoided the difficult issues, such as whether oil companies active in Arctic waters should be required to maintain a same-season relief well capability.[113] Most recently, it has been suggested that as climate change causes the Arctic to become increasingly available for shipping and resource exploitation, inter-state competition will diminish the council to the point of irrelevance.[114]

In summary, the Arctic provides a vivid and evolving example of cooperation under international law. Dark prognostications of inter-state rivalry and conflict have not come to pass. As Michael Byers has said, 'In short, there is no state-to-state competition for territory or resources in the Arctic, and no prospect of conflict either. Instead, the Arctic is becoming a region marked

[108] The council's achievements during its most recent (Canadian-chaired) biennial are listed in the *Iqaluit Declaration* of 25 April 2015, signed during the Council's ninth ministerial meeting. See online: Arctic Council <http://www.arctic-council.org/index.php/en/document-archive/category/604-declaration-sao-report?download=2740:iqaluit-declaration-final-signed-version>.

[109] *Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic,* 12 May 2011, 50 ILM 1119.

[110] *Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 102.

[111] *International Convention on Maritime Search and Rescue*, 1 November 1979, 1405 UNTS 97.

[112] *Convention on Oil Pollution Preparedness, Response and Cooperation*, 30 November 1990, 1891 UNTS 51.

[113] Byers, *supra* note 46 at 212.

[114] See eg Editorial, "Thawing Ice and Chilly Diplomacy in the Arctic," *New York Times* (27 April 2015), online: New York Times <http://www.nytimes.com/2015/04/28/opinion/thawing-ice-and-chilly-diplomacy-in-the-arctic.html?_r=1>.

by cooperation and international law-making, during a period of significant geopolitical, environmental and economic change.'[115]

Sustainability and the Limits of International Law

I turn now to my third and final theme: sustainability. The term sustainability has multiple meanings, two of which are relevant here. In the first place, I refer to the sustainability of international law itself as a system of rules that are observed across time. In the second, I refer to sustainability as an outcome in its own right, towards which states may be guided by international law — and, more particularly, by international environmental law.

pragmatism and the evolution of international environmental law

In 1937, Hersch Lauterpacht admitted that "international law is a weak system of law, but nothing but good can come from such an admission so long as it is not maintained that the shortcomings of international law are permanent and inherent in its very nature."[116] Notably, Lauterpacht's legal method was that of "progressive interpretation,"[117] and his academic work very much consisted of attempting to subject international political processes to the rule of law, not always successfully.[118]

However, even Lauterpacht acknowledged the limits of a "progressive approach," admittedly at a very low point of time for international law and relations. In terms of ultimate political decision making, international law usually has a secondary, adjectival role, even as it constrains. When I was counsel, I would occasionally be amused when a minister of foreign affairs attempted to do my job for me — but the minister would rarely be amused if I tried to do hers. I could advise on what outcome would be best, all things

[115] Byers, *supra* note 46 at 5.

[116] Hersch Lauterpacht, "Règles générales du droit de la paix" in E Lauterpacht, ed, *International Law, Being the Collected Papers of Hersch Lauterpacht*, vol 1 (Cambridge: Cambridge University Press, 1970) 308.

[117] See generally Patrick Capps, "Lauterpacht's Method" (2012) 82 BYIL 248.

[118] See most notably Hersch Lauterpacht, *Recognition in International Law*, reissued ed (Cambridge: Cambridge University Press, 2013). On the success of that project, see James Crawford, "Recognition in International Law: An Introduction to the Paperback Edition 2013" in *ibid*, xxi.

considered — but it was not my job to decide the preferences or policies of the state. This rather reflects the bargain struck between international law and its subjects; in a very real sense, it remains the case that the common consent of states is the basis of international law.[119] If international law is to be perceived as sustainable — in that its system of rules are observed and perpetuated — it cannot ignore the constraints of consent and acceptability.

That being said, we are not (yet) at the depths of 1937: we have come a long way from the "crude atomism"[120] of *SS Lotus (Turkey v France)*, and the PCIJ's dictum that "rules of law binding upon States emanate from their own free will" such that "[r]estrictions upon the independence of States cannot therefore be presumed."[121] Nowhere is this more apparent than in the field of international environmental law.[122] The course of international environmental law from the late nineteenth to early twentieth century is one of novel approaches to state responsibility for environmental harm. In the *Behring Sea Fur Seal* arbitration of 1893,[123] the United Kingdom and United States agreed to arbitrate questions surrounding the taking of seals by Canadian fishermen on the high seas. This practice had greatly depleted the seal herds congregating annually in Alaska and diminished the value of the monopoly granted to the Alaska Commercial Company. The tribunal concluded that the United States did not have property in the seals and, accordingly, had no right unilaterally to regulate the sustainable management of stocks beyond its territorial waters. However, the parties also gave the tribunal the capacity to draft the necessary regulations to permit such management. This the tribunal did, creating a sixty-mile exclusion zone around the Pribilov Islands within which sealing was banned as well as a larger zone entailing a seasonal ban.[124] Following further negotiation, these regulations formed the basis

[119] Lassa Oppenheim, *International Law, A Treatise*, vol 1: *Peace*, 2d ed (London: Longmans, Green & Co, 1912) at 16–19.

[120] Vaughan Lowe, *International Law* (Oxford: Oxford University Press, 2007) at 241.

[121] *SS Lotus (Turkey v France)* (1927), PCIJ Ser A No 9, 18.

[122] Lowe, *supra* note 120, ch 7.

[123] *Behring Sea Fur Seals (US/UK)* (1893), 28 RIAA 263.

[124] *Ibid* at 270–72.

of an effective treaty that survived, in one form or another, from 1911 to 1984.[125]

In *Trail Smelter (US v Canada)*, Canada was held liable for transboundary harm caused to the United States via the operation of an industrial plant in British Columbia, resulting in the imposition of a detailed system of technical standards.[126] There is some similarity between the harm identified in both cases: in *Behring Sea Fur Seals*, activity on the high seas resulted in harm in Alaska; in *Trail Smelter*, the activity emanated from British Columbia, resulting in harm in Washington. In the latter case, however, the tribunal decoupled its reasoning from considerations of right, duty, or property and, for the first time, admitted environmental principles into international law on their own terms. It said:

> [U]nder the principles of international law … no state has a right to use or permit the use of its territory in such a manner as to cause injury by fumes to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[127]

This species of no-fault liability for environmental damage is now part of the international law of transboundary harm.[128]

A further step is the move towards trusteeship of resources.[129] Article 117 of *UNCLOS* provides, with respect to high seas fisheries, that parties "take, or cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas." Article 118 of the same provides that states must cooperate for the purpose of conserving or managing living resources on

[125] *Convention between the United States, Great Britain, Russia and Japan for the Preservation and Protection of Fur Seals*, 7 July 1911, 214 CTS 80 (as amended). See further Scott Barrett, *Environment and Statecraft: The Strategy of Environmental Treaty-Making* (Oxford: Oxford University Press, 2005), ch 2.

[126] *Trail Smelter (US v Canada)* (1938, 1941), 3 RIAA 1905.

[127] *Ibid* at 1965.

[128] See now "Articles on the Prevention of Transboundary Harm from Hazardous Activities" [2001] 2(2) ILC Ybk 148. See further Xue Hanqin, *Transboundary Damage in International Law* (Cambridge: Cambridge University Press, 2003).

[129] Lowe, *supra* note 120 at 243–50. On the protection of marine living resources in particular, see Sands & Peel, *supra* note 103 at 396ff.

the high seas.[130] Similar obligations exist in relation to fisheries located within the EEZ, with respect to which a coastal state possesses sovereign rights. Under Article 61, paragraph 1, of *UNCLOS*, a state must, "taking into account the best scientific evidence available to it[,] … ensure through proper conservation and management measures that the maintenance of living resources in [the EEZ] is not endangered by over-exploitation." Arguably, this is a provision of customary international law, and, as such, would apply even to states not party to the convention.[131]

SUSTAINABLE DEVELOPMENT

Thus, questions of environmental protection in international law can be approached from a variety of different angles: concepts of property, of no-fault liability, and of trusteeship may be implicated. States have realized that while agreements on specific topics and regions are important for the preservation of the environment, environmental issues arise as part of an interconnected web of issues.[132] This realization led, *inter alia*, to the 1992 UN Conference on Environment and Development, known also as the Rio Conference. The *Rio Declaration on Environment and Development* (*Rio Declaration*)[133] set out a series of principles designed to reconcile the needs of the environment, on the one hand, and development, on the other.[134]

Running through the *Rio Declaration* is the concept of sustainable development. The concept is stated most directly in

[130] Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009) at 100–3.

[131] See eg US Presidential Proclamation No 5030, Exclusive Economic Zone of the United States of America, 10 March 1983, 48 FR 10605: "Within the Exclusive Economic Zone, the United States has, to the extent permitted by international law … *sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources*, both living and non-living, of the seabed and subsoil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds" (emphasis added).

[132] Lowe, *supra* note 120 at 256.

[133] *Rio Declaration on Environment and Development*, *supra* note 86. On the historical background of the Declaration, see Jorge Viñuales, "The Rio Declaration on Environment and Development: A Preliminary Study" in Viñuales, *supra* note 86, 2 at 3–13.

[134] *Rio Declaration on Environment and Development*, *supra* note 86.

Principle 4,[135] which provides: 'In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.' Justice Gonthier himself gave sustained attention to the concept of sustainable development. In the first issue of the *McGill International Journal of Sustainable Development Law and Policy*, he wrote that:

> [h]uman activity in a society is determined and framed by its governance. Law is the ordering of and an instrument of governance. Sustainable development law seeks to bring together, rationalize, reconcile and harmonize the various strands of the law; of legal rules needed to govern the environment and human activity, economic and social … Its special concern is with "cross-cutting" issues. It is thus concerned with the proper role of law in governance as distinguished from, though in complement with, ethics: the law is the guardian of liberty, and ethics its inspiration — for liberty calls for responsibly.[136]

This quotation accurately describes the place of sustainable development in international law, at least as presently conceived. The principle was acknowledged in 1997 by the ICJ in *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*,[137] but, as Vaughan Lowe points out, the court stopped short of stating that sustainable development constitutes a binding norm of international law.[138] As a concept, sustainable

[135] See further Virginie Barral & Pierre-Marie Dupuy, "Principle 14: Sustainable Development through Integration" in Viñuales, *supra* note 86, 157; Marie-Claire Cordonier-Segger & Ashfaq Khalfan, eds, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford: Oxford University Press, 2004).

[136] Gonthier, "Sustainable Development," *supra* note 2 at 11–12.

[137] *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 7 at 78: "Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development."

[138] Vaughan Lowe, "Sustainable Development and Unsustainable Arguments" in A Boyle & D Freestone, eds, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 1999) 19 at 20–21.

development incorporates a further series of subtle ideas that can be difficult to apply, including inter-generational equity, sustainable use, and integration of environmental protection and development.[139] Thus, sustainable development is not law *per se* but, rather, a way of thinking about law and its relationship to policy. One may conceive of this, as Justice Gonthier did, in terms of structures of governance.

Another function of the rule is as a mode of structuring legal argument. It is necessary and proper for a court or tribunal to seek to limit the issues in dispute between the parties, to extract the "signal" from the "noise."[140] When sustainable development is involved, however, it may be that the principle operates to widen the issues in dispute, such that a question concerning a state's right to develop — as contemplated in *Pulp Mills on the River Uruguay (Argentina v Uruguay)*[141] — cannot be discussed independently of environmental concerns.[142] A further function is that of treaty interpretation. For example, in the final text of the *Canada–EU Comprehensive Economic and Trade Agreement*,[143] sustainable development has its own chapter,[144] and it is also referred to extensively in the preamble.[145] Under Article 31, paragraph 2, of the *Vienna Convention on the Law of Treaties*,[146] preambular references form part of the context of a treaty and thus have a bearing on the interpretation of substantive provisions — even where sustainable development is not specifically referred to.[147]

[139] See eg Sands & Peel, *supra* note 103 at 206ff.

[140] Nate Silver, *The Signal and the Noise: The Art and Science of Prediction* (London: Penguin, 2013).

[141] *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, [2010] ICJ Rep 14 at 74–75.

[142] Lowe, *supra* note 137 at 36. See also *Gabčíkovo-Nagymaros*, *supra* note 137 at 88ff (Vice-President Weeramantry, separate opinion).

[143] *Canada–EU Comprehensive Economic and Trade Agreement*, online: <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf>.

[144] *Ibid*, c 23.

[145] *Ibid*, preamble, para 4: "REAFFIRMING their commitment to promote sustainable development and the development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions."

[146] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

[147] References to sustainable development also appear in the preambles to *NAFTA* and the Canadian Model Foreign Investment Protection Agreement. See further Markus W Gehring & Avidan Kent, "International Investment Agreements and the Emerging Green Economy: Rising to the Challenge" in F Baetens, ed, *Investment Law within International Law: Integrationist Perspectives* (Cambridge: Cambridge University Press, 2013) 187 at 202–4.

CLIMATE CHANGE LITIGATION ON THE INTERNATIONAL PLANE

In light of these factors, international environmental law provides a potentially useful suite of norms and processes for confronting current challenges. This includes what many consider to be the most pressing environmental challenge since the *Montreal Protocol*, anthropogenic climate change. The retreating ozone layer was addressed through concerted common action, backed by treaty. However, climate change, for a variety of reasons, has not been susceptible to similar action.[148] Despite purporting to provide a comprehensive plan for the reduction of carbon emissions, the 1992 *United Nations Framework Convention on Climate Change* (*UNFCCC*)[149] and its 1997 *Kyoto Protocol*[150] have plainly not had the desired effect. Subsequent rounds of negotiation in Copenhagen, Cancun, Durban, and Doha have not resulted in meaningful progress,[151] although there are some glimmers of hope.[152] Another approach is perhaps required.

Over the past ten years, a number of studies have highlighted the regulatory effects of litigation on climate change.[153] Of course, litigation may impact in a variety of ways.[154] In terms of direct effects, litigation may affect legal rules — issues of constitutional or statutory interpretation or the development of new common law or

[148] *Cf* Sands & Peel, *supra* note 103 at 274ff. See further Anthony Giddens, *The Politics of Climate Change*, 2nd ed (Cambridge: Polity Press, 2011).

[149] *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 902.

[150] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 162.

[151] See eg Bodansky, 2010 Daniel Bodansky, "The Copenhagen Climate Change Conference: A Postmortem" (2010) 104 AJIL 230; Rowena Cantley-Smith, "Climate Change and the Copenhagen Legacy: Where to from Here?" (2010) 36 Monash LR 278; Lavanya Rajamani, "The Making and Unmaking of the Copenhagen Accord" (2010) 59 ICLQ 824.

[152] Eg the enhanced reducing emissions from deforestation and forest degradation (REDD+) initiative, which was the subject of relative consensus at Copenhagen. Sands & Peel, *supra* note 103 at 295–96.

[153] See generally William CG Burns & Hari M Osofsky, eds, *Adjudicating Climate Change: State, National and International Approaches* (Cambridge: Cambridge University Press, 2009); Jacqueline Peel & Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge: Cambridge University Press, 2015).

[154] *Ibid* at 37–52.

equitable principles. In terms of indirect effects, litigation may be emblematic, whatever its immediate effects on individuals. Think of *Somerset v Stewart*,[155] where Lord Mansfield found that slavery was unsupported by the common law of England. Think of *Brown v Board of Education*,[156] in which the US Supreme Court overturned its 1896 decision in *Plessy v Ferguson* and the perverse doctrine of "separate but equal."[157] Think, more recently, of the Supreme Court of Canada's *Quebec Secession* opinion, with its emphasis on a clear answer to a clear question[158] — a dictum that played a beneficial role in the 2014 Scotland independence referendum.[159]

Climate change litigation has yet to have its watershed moment, though there have been encouraging developments in some jurisdictions. One may point, for example, to the decision of the US Supreme Court in *Massachusetts v Environmental Protection Agency*,[160] which established a basis for federal regulation by the Environmental Protection Agency of motor vehicle and power plant emissions. At the same time, however, there is the risk of anti-regulatory litigation — a sort of global warming *Dred Scott v Sandford*.[161]

Despite repeated rounds of treaty negotiations, there has not been much in the way of climate change litigation on the international plane. One may point to a few isolated instances and fewer substantive outcomes: the Inuit petition (ultimately rejected) to

[155] *Somerset v Stewart* (1772), 98 ER 499 (KB); see also *Gregson v Gilbert* (1783), 99 ER 629 (KB). For the legal background to *Somerset*, see Tom Bingham, *Lives of the Law* (Oxford: Oxford University Press, 2011) at 221–38.

[156] *Brown v Board of Education of Topeka*, 347 US 483 (1954).

[157] *Plessy v Ferguson*, 163 US 537 (1896).

[158] *Quebec Secession*, *supra* note 52 at 575.

[159] Cf *Agreement between the United Kingdom Government and the Scottish Government on a Referendum for Independence in Scotland*, 15 October 2012, para 5, online: <http://www.gov.scot/resource/0040/00404789.pdf>. "The Scottish Independence Movement Learned from Quebec's Failed Votes for Separation," *Public Radio International* (16 September 2014), online: PRI <http://www.pri.org/stories/2014-09-16/scottish-independence-movement-learned-quebecs-failed-votes-separation>. See more generally Mark D Walters, "Nationalism and the Pathology of Legal Systems: Considering the *Quebec Secession Reference* and Its Lessons for the United Kingdom" (1999) 62 Modern LR 371.

[160] *Massachusetts v Environmental Protection Agency*, 549 US 497 (2007). See further David Markell & JB Ruhl, "An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?" (2012) 64 Fla LJ 15.

[161] *Dred Scott v Sandford*, 60 US 393 (1857).

the Inter-American Commission on Human Rights, for example.[162] However, other options may also be open — though of course I make no comment as to their prospects of success. In the first place, one may point to the ICJ itself,[163] which has jurisdiction over any question duly referred to it in accordance with its statute.[164] Contested proceedings could include actions under treaties, such as the *UNFCCC* or principles of customary international law, such as that established in a bilateral context in the *Trail Smelter* arbitration. An alternative is the possibility of an advisory opinion. Under Article 64 of the ICJ's statute, it may give an opinion "on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."[165] Such an opinion is not binding on individual states but provides a valuable means for the court to set out the applicable principles of international law in an authoritative way.

Another option arises under Part XV of *UNCLOS*. Unlike other international dispute settlement mechanisms, the system set out under Part XV is specifically designed to be compulsory — part of the overall "package deal" for the law of the sea that *UNCLOS* was intended to represent.[166] Under Article 192 of the *UNCLOS*, states are under a general obligation to preserve and protect the marine environment. Under Article 193, states also have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment — an expression of sustainable development. Under Article 197, states are also required to cooperate on a global and regional level in order to formulate

[162] See further Hari M Osofsky, "Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous People" (2006–07) 31 Am Ind LR 675. On climate change and human rights more generally, see Daniel Bodansky, "Climate Change and Human Rights: Unpacking the Issues" (2010) Ga JICL 511.

[163] See further Andrew Strauss, "Climate Change Litigation: Opening the Door to the International Court of Justice" in Burns & Osofsky, *supra* note 153 at 334.

[164] *ICJ Statute*, *supra* note 28, art 36(1).

[165] *Ibid*, art 64. Eg, the UN General Assembly. See eg *Legality of the Threat or Use of Nuclear Weapons*, [1996] ICJ Rep 226; cf *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, [1996] ICJ Rep 66. See further Robert Kolb, *The International Court of Justice* (Oxford: Hart, 2013), ch VIII.

[166] James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge: Cambridge University Press, 2011) at 44–46.

international rules, standards, and practices.[167] All could form a basis for further litigation,[168] possibly based on the damage to the marine environment caused by rising sea temperatures.

The WTO's Dispute Settlement Body may provide a further forum for litigating climate change.[169] For example, the Appellate Body in *Canada – Certain Measures Affecting the Renewable Energy General Sector* explored the relationship between subsidies and the green economy.[170] More general questions could yet arise. Article XX, paragraph b, of the *General Agreement on Tariffs and Trade* (*GATT* 1947)[171] provides that nothing in that agreement precludes the adoption or enforcement by a contracting party of measures "necessary to protect human, animal or plant life or health." Paragraph g similarly permits the adoption of measures "relating to the conservation of exhaustible natural resources." The Appellate Body has indicated that, provided that the terms of the chapeau of *GATT* Article XX are complied with, states may take action designed to protect air quality[172] and preserve endangered species.[173] The potential for states to raise tariffs or quantitative restrictions in response to carbon emissions has not yet been tested.

No doubt scenarios such as these are fraught with difficulty; there are no panaceas for the diffuse and pervasive issue of anthropogenic climate change and certainly no legal ones. In the long

[167] *UNCLOS*, *supra* note 66, art 297(1)(c). Cf Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge: Cambridge University Press, 2005) at 148–52.

[168] Concerns of a similar nature were raised in the *MOX Plant* case, although this was ultimately not the subject of adjudication under *UNCLOS*. *MOX Plant (Ireland v UK)*, Provisional Measures (2001), 126 ILR 260 (ITLOS); *MOX Plant (Ireland v UK)* (2003), 126 ILR 310 (Annex VII).

[169] See further Sands & Peel, *supra* note 3 at 808ff.

[170] *Canada – Certain Measures Affecting the Renewable Energy General Sector; Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R, WT/DS426/AB/R (Appellate Body Report, 6 May 2013). See further Sherzod Shadikhovjaev, "First WTO Judicial Review of Climate Change Subsidy Issues" (2013) 107 AJIL 864.

[171] *General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 194.

[172] *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Appellate Body Report, 26 April 1996) at 634.

[173] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Appellate Body Report, 12 October 1998) at paras 164ff.

run, any sustainable solution to climate change can only be generated in the same way as the *Montreal Protocol* — through collective action in the common interest.[174] There is no room for merely unilateral action.

Conclusion

In this lecture, I have focused on Justice Gonthier's three values of responsibility, fraternity, and sustainability and the meanings that might be given to each as they manifest themselves in international law. They are of symbolic, as well as practical, significance. Underpinning each of them is the idea that a state's best interests may best be served through "self-knowledge, self-reverence and self-control" rather than through rampant self-interest.

The three values are moral as well as legal. There is, I believe, a moral responsibility to contribute to collective action in the common interest, an obligation from which states are not exempt. To be sustainable over time, the collegiality this requires (called fraternity by Charles Gonthier) requires international legal action, among other things. International law provides one of the few mechanisms we have for coordinating and sustaining collective action. At the same time, international law must be mindful of its own sustainability as a legal system dependent on the consent of states, while not under-estimating the extent to which states, in their enlightened self-interest, have permitted international law to develop in new and unpredicted ways. It has the capacity to generate a regulatory response from states in situations where politics has (as yet) failed to produce a sustainable outcome.

As a jurist, Justice Gonthier had a philosophical, as well as a practical, bent. He wrote: "[A]s a complement to [the] rule of law, there is a spirit of the law. The spirit of the law is not concerned so much with setting down rules. Rather, it reflects the values which a society draws upon in its development of legal rules."[175] This is true for international law also. Responsibility, fraternity,

[174] But cf JM Keynes, *A Tract on Monetary Reform* (London: Macmillan, 1923) at 79–80. See further Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the IPCC* (2015), online: IPCC <http://www.ipcc.ch/report/ar5/syr/>.

[175] Gonthier, "Sustainable Development," *supra* note 2 at 13.

and sustainability reflect useful values upon which international lawyers — as practitioners, on the bench, in international, governmental, and non-governmental organizations, and in foreign or justice ministries — can draw in considering the development of their field. Certainly, the modern practice of states — notably that of Canada — bears out their continued relevance.