

SUSTAINABILITY, GLOBAL JUSTICE, AND THE LAW:
CONTRIBUTIONS OF THE
HON. JUSTICE CHARLES DOHERTY GONTHIER

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Introduction

As United Nations (UN) Secretary General Kofi Annan noted in the 2002 World Summit on Sustainable Development (WSSD) in Johannesburg, South Africa, it is time to face an uncomfortable truth:

[Our] model of development ... has been fruitful for the few, but flawed for the many. A path to prosperity that ravages the environment and leaves a majority of humankind behind in squalor will soon prove to be a dead-end road for everyone ... Unsustainable practices are woven deeply into the fabric of modern life ... [W]e can and must weave in new strands of knowledge and cooperation.¹

Evolving laws and justice systems form crucial elements of this global fabric. Within the study and practice of law, it is not enough simply to recognize the immensity of the challenges. As the life and contributions of Justice Charles Doherty Gonthier eloquently demonstrate, it is possible—and indeed necessary—to inquire, to inspire, and to act in solidarity with others.² Current legal systems are intricately woven into the shared values—and indeed the morality—of an increasingly interdependent world.

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¹ Marie-Claire Cordonier Segger & C.G. Weeramantry, eds., *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (Leiden: Martinus Nijhoff, 2005) at 1-2 [*Sustainable Justice*].

² Michel Robert, “Hommage à l’honorable juge Charles Gonthier à sa retraite de la Cour suprême du Canada” (2003) 48 McGill L.J. 175; Michel Morin, “Charles D. Gonthier, un juriste épris de justice”, *Le Devoir* (21 July 2009), online: *Le Devoir*, <<http://www.ledevoir.com>>.

A growing respect for the dignity and basic needs of humanity as one community is among these values, together with a sense of responsibility—perhaps even duty—toward a common future. With wisdom, integrity, generosity, courtesy, and compassion, Justice Gonthier served for many as beacon and guide to find, develop, and implement a path to a more just and sustainable development for Canada and for the world.

Justice Gonthier served law and society as a renowned jurist, both as president of a leading Canadian judicial institute,³ and as justice of Canada's highest court. He continued to serve upon his retirement. His contributions to society on all levels were tremendous. Among these contributions, in the eyes of jurists in Africa, the Americas, Europe, Asia, and across the world, he will be especially remembered for his sincere efforts to advance sustainable development as part of global justice. As a Wainwright Fellow at the McGill University Faculty of Law, he shared his wisdom, experience, and compassion with legal scholars of all ages. As the founding chair of an international legal research centre,⁴ he inspired deep and respectful collaboration among judges, academics, and lawyers, guided rigorous academic inquiries and publications in many languages, and hosted forums for civil national and international dialogue, becoming a beloved mentor to a global network of jurists across the world.

He was a man of great modesty and also great beliefs. In honour of his wisdom, his kindness, his integrity, as well as his ability to inspire and to guide, this brief tribute highlights some of the key challenges that Justice Gonthier, with courage and diplomacy, helped to identify and address in the world. In keeping with his approach as a global mentor, the paper does not dwell upon these problems, but instead highlights Justice Gonthier's values, principles, and future research agenda to illuminate how his work will continue to inspire a new generation of legal minds.⁵

³ Canadian Institute for the Administration of Justice (CIAJ), online : <<http://www.ciaj-icaj.ca>>.

⁴ Centre for International Sustainable Development Law (CISDL), online : <<http://www.cisd.org>>.

⁵ This tribute builds on several years of research. See e.g. *Sustainable Justice*, *supra* note 1; Marie-Claire Cordonier Segger & Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford: Oxford University Press, 2004) [Cordonier Segger & Khalfan, *Sustainable Development Law*]; Marie-Claire Cordonier Segger, "Sustainable Development in International Law" in Hans Christian Bugge & Christina Voigt, eds., *Sustainable Development in International and National Law* (Groningen: Europa Law, 2008) [Cordonier Segger, "Sustainable Development in International Law"]; Marie-Claire Cordonier Segger, "Sustainable Development in International Law" in David Armstrong, ed., *Routledge Handbook of International Law* (New York: Routledge, 2009) 355; Marie-Claire Cordonier Segger, *Roderick Haig-Brown Centennial Lecture* (delivered at the University of Victoria, Faculty of Law, 2008) [unpublished].

I. Facing the Challenges of Globalization with Fraternity

Driven by economic globalization, environmental change, and demands for social justice, the world is facing sweeping challenges. The risks for both humanity and the earth have never been greater. But current problems also present opportunities for global co-operation on an unprecedented scale. With courage, wisdom, and vision, as embodied in the thoughts and actions of Justice Gonthier, diverse societies can still learn to work together for a common future. This future must understand and respect environmental limits, use resources more sustainably, and address long-standing global inequalities. International law has in the past been part of the problem. But it can also be part of the solution.

It is almost a truism today that globalization has brought unprecedented change in the world with exponential growth in transboundary connections, integration of transportation and communication systems, increases in trade and investment flows, high commodity prices, global growth of extractive industries, and new technologies.⁶ The environment—a fragile chain of interconnected ecological systems upon which this planet's life-support systems depend—has been one of the most significant victims of present patterns of globalization.⁷ There is growing public understanding that current degradation may lead to the loss of many of humanity's greatest heritage treasures and thousands of species. This is true internationally and in Canada. In *Ontario v. Canadian Pacific Ltd.*, Justice Gonthier explained,

It is clear that over the past two decades, citizens have become acutely aware of the importance of environmental protection, and of the fact that penal consequences may flow from conduct which harms the environment. Recent environmental disasters, such as the Love Canal, the Mississauga train derailment, the chemical spill at Bhopal, the Chernobyl nuclear accident, and the *Exxon Valdez* oil spill, have served as lightning rods for public attention and concern. Acid rain, ozone depletion, global warming and air quality have been highly publicized as more general environmental issues. Aside from high-profile environmental issues with a national or international scope, local environmental issues have been raised and debated widely in Canada. Everyone is aware that individually and collectively, we are responsible for preserving the natural environment.⁸

⁶ Joseph E. Stiglitz, *Globalization and Its Discontents* (New York: Norton, 2002); World Bank, *Globalization, Growth, and Poverty: Building an Inclusive World Economy* by Paul Collier & David Dollar (Washington, D.C.: World Bank & Oxford University Press, 2002).

⁷ Klaus Bosselmann, Ron Engel & Prue Taylor, *Governance for Sustainability: Issues, Challenges, Successes* (Gland, Switzerland: IUCN, 2008).

⁸ *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 at para. 55, 125 D.L.R. (4th) 385.

In the past, international law could be described as part of the problem with respect to environmental protection. For instance, colonial rules and outmoded concepts of sovereignty allowed impunity for actors that interfered dangerously with the common atmosphere, eliminated entire species, fouled freshwater systems upon which millions of lives depended, or exploited resources such as fisheries or forests.

With regard to economic and social development, the globalization of communications has also brought stark notice of the grinding poverty suffered by a significant percentage of the population in the majority of the world. UN agencies and others have warned that conditions are deteriorating, as many countries hover on the brink of a global food crisis and recovery from a major financial crisis remains fragile. International law has not always been honourably engaged in these matters. After vastly unequal bargains, investment arbitration and odious debt contracts, for instance, often shifted risks and burdens onto those least equipped to bear them.⁹ And as recent events have shown, financial markets also have not always been managed with the requisite level of diligence or responsibility.¹⁰ The law has been used, in short, to defend the interests of the few against the needs and values of the many, including the earth.

Justice Gonthier was actively engaged for many years with international associations such as the International Union for the Conservation of Nature, the International Commission of Jurists, and l'Association des Hautes juridictions de Cassation des pays ayant en partage l'usage du français. He cared deeply about the duties that the world's peoples owe to one another and to the environment. For him, these duties were embodied in the concept of "fraternity", or what is sometimes called solidarity. His deep understanding and championing of this value, together with its complements of liberty and equality, has been illuminated excellently by others.¹¹ Here, it is important simply to underline that in the Gonthier conception, fraternity/solidarity leads to community:

In my view, fraternity is simply the forgotten element of democracy, which, although rarely identified, is nevertheless present throughout our legal system. It is the glue that binds liberty and equality to a civil society. It is intuitive. It is the forging element of a community.¹²

⁹ *Ibid.*

¹⁰ World Bank, *Global Monitoring Report 2009: A Development Emergency* (Washington, D.C.: World Bank, 2009).

¹¹ Fabien Gélinas, "Une justice fraternelle – éléments de la pensée de Charles Doherty Gonthier", (2010) 55 McGill L.J. XXX.

¹² Hon. Mr. Justice Charles D. Gonthier, "On Fraternity: An Unspoken Value of the *Charter* and Administrative Law" (Remarks presented to the Council of Canadian Adminis-

Respect for other members of a community implies not fragmentation, but rather recognition and inclusion of all in the laws of the community. This point was recognized in *Reference Re Secession of Quebec*, where the Supreme Court of Canada held that

[a] democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.¹³

The Gonthier conception of fraternity/solidarity was not small or national, but rather visionary; it extended out of the past, toward the future, and embraced the global community:

*Au delà de ses manifestations nationales, la fraternité peut s'étendre à l'humanité entière, comme en témoigne le droit international humanitaire, qui impose un respect minimum de la dignité humaine même dans la guerre. Elle peut également s'étendre dans le temps, en fondant des obligations envers les générations futures : obligations, notamment, de leur léguer un environnement viable et un ordre mondial fondé sur la paix entre les nations.*¹⁴

In the context of a globalized world, Justice Gonthier saw himself and all of us as citizens in a community, with common interests, rights, and duties toward one another. As his colleague serving as patron of his research centre, Justice C.G. Weeramantry (former Vice President of the International Court of Justice) has noted that

the current generation is thus acting, in relation to future generations, in a manner that breaks every precept of human compassion and morality ... [T]he environment has in the past century been subjected to human interference and future generations are being subjected to potential damage at an exponentially increasing rate. Another generation of such exponential increase will render uninhabitable the planet which has supported humanity for thousands of generations in the past. The present generation thus carries on its shoulders an awesome responsibility, the like of which has never been borne by any generation since the human race began.¹⁵

Justice Weeramantry has also remarked,

trative Tribunals, Ottawa Congress Centre, 12 June 2000) at 3-4, online: Council of Canadian Administrative Tribunals <<http://www.ccat-ctac.org>>.

¹³ *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 68, 161 D.L.R. (4th) 385.

¹⁴ Hon. Mr. Justice Charles D. Gonthier, "La fraternité comme valeur constitutionnelle" (*Rapport général* presented to the 3^{ème} congrès, Association des Cours Constitutionnelles ayant en Partage l'Usage du Français, June 2003) at 720, online: ACCPUF <<http://www.accpuf.org>>.

¹⁵ C.G. Weeramantry, *Tread Lightly on the Earth: Religion, the Environment and the Human Future* (Colombo: Stamford Lake, 2009) at xiv.

[W]e have passed out of the area of co-existence, into the era of cooperation. This is not merely passive cooperation, but rather, active cooperation. If we are to save our global inheritance, we must do so actively. We need, for this purpose, to be willing to surrender some part of sovereignty to the rest of the world, accepting common guidance by the global community.¹⁶

Justice Gonthier understood this sentiment deeply, and faced the challenge with courage, respect, and diplomacy. He sought to define the foundational values that could assist in constructing these new forms of cooperation: “[F]raternity 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.”¹⁷ As he knew, there are no simple solutions to complex problems. However, as was clear in his international efforts, global conservation and development challenges are not separate but rather fundamentally interwoven. They must be addressed together, engaging all of humanity’s collective knowledge, capacity, and creativity.

II. Fraternity, Global Justice, and Sustainable Development

It has been very difficult to find one universally acceptable definition for development. As a bijuridical judge, Justice Gonthier often recognized that societies, cultures, and geographies are diverse. However, as a global civil society is constructed, we confront the challenge of diversity. The Gonthier conception of fraternity/solidarity is contributing to this process as a means to respect collectivities and their diversity, while recognizing a profound common social responsibility:

*La fraternité peut demander de tenir compte, à l'encontre de l'efficacité des mesures envisagées, du respect des collectivités visées et de leur diversité. La fraternité est la valeur qui anime la responsabilité sociale des personnes, des institutions publiques et privées, de tous les paliers de gouvernement, des entreprises et des organismes non gouvernementaux.*¹⁸

¹⁶ H.E. Judge Christopher G. Weeramantry, “Foreword” in Cordonier Segger & Khalfan, *Sustainable Development Law*, *supra* note 5, ix at xi.

¹⁷ Hon. Mr. Justice Charles D. Gonthier, “*Fraternity: A Global Value Underlying Sustainable Development*” in Marie-Claire Cordonier Segger & C.G. Weeramantry, eds., *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (Leiden: Martinus Nijhoff, 2005) 33 at 41.

¹⁸ Charles Doherty Gonthier, “Sustainable Development and the Law”, Introductory Note (2005) 1 McGill J.S.D.L.P 11 at 17 [Gonthier, “Sustainable Development”].

Originally, development was judged crudely by national increases in gross domestic product. At present, most developing countries, the United Nations Development Program (UNDP), and other global development institutions including the World Bank, have taken a very different approach, focusing on the need for participatory progress toward improvements in quality of life.¹⁹ As Amartya Sen explains in his Nobel Prize winning book, *Development as Freedom*, development should increase our freedoms by opening capabilities and opportunities for people.²⁰

Global commitments to sustainable development have added an additional layer of complexity to development debates. In its origins in sixteenth-century German forestry laws (*Forstordnungen*), sustainable development meant using only the interest (the amount of forest that grew every year), rather than destroying the capital (the forest ecosystem itself).²¹ This was not an end to progress but rather a commitment to development of a different kind that respects the limits of the environment and the needs of all members of society. Sustainable development debates today centre upon respect for the needs of both present and future generations, which is sometimes called “intergenerational equity”.²² Justice Gonthier noted,

When we consider environmental measures, we act not in rational self-interest, for we as individuals often would not see the fruits of our sacrifice. Instead, we take these steps so as not to harm future inhabitants of this Earth—in essence, we are protecting the next generation. Forging a relationship between generations in a community is not rooted in liberty or equality, but rather, fraternity.²³

Indeed, upon an examination of the Quebec *Loi sur la qualité de l'environnement*, the Superior Court of Quebec has recognized,

[i]l s'agit d'une loi d'ordre public destinée à protéger la santé et le bien-être de la population non seulement en éliminant ou contrôlant

¹⁹ UNDP, Human Development Reports, *supra* note 9. See also UNDP, Human Development Indices, online: <<http://hdr.undp.org/en/humandev/hdi/>>.

²⁰ Amartya Sen, *Development as Freedom* (New York: Knopf, 1999) at xi-xiv.

²¹ “Die braunschweigischen Forstordnungen” (1913) 35 *Forstwissenschaftliches Centralblatt* 175; Hansß Carl von Carlowitz, *Sylvicultura oeconomica* (Leipzig: Verlegts Johann Friedrich Braun, 1713) at 105.

²² UN, *Agenda 21: Earth Summit – The United Nations Programme of Action from Rio* (New York: UN, 1993) [*Agenda 21*]; World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) (commonly known as the “Brundtland Report”).

²³ Hon. Mr. Justice Charles D. Gonthier, “Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy; or Fraternity: The Unspoken Third Pillar of Democracy” (2000) 45 *McGill L.J.* 567 at 573.

*les sources de contamination ou pollution actuelles mais en contrôlant les exploitations de façon à protéger le milieu de vie à l'avenir.*²⁴

The International Court of Justice, in the 1997 *Case Concerning the Gabčíkovo-Nagymaros Project*, has also recognized that “[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.”²⁵ And at the 2002 Johannesburg WSSD, over 190 countries further agreed that sustainable development involves the full integration of environmental and social concerns into economic development decision-making.²⁶ In essence, to commit to sustainable development is to commit to progress of a new kind on all levels, to development that respects ecological limits and human needs, and to development that can last.

III. Contributions to International Law and Scholarship

As explained above, international law has been a part of environmental and development problems. But many have come to understand, through the continuing and constructive efforts of mentors such as Justice Gonthier, that international law can also be part of the solution. Sustainable development is an important goal for both individual countries and the global community, and is part of the object and purpose of many important international treaty regimes.²⁷ These treaties are guided by principles, some of which may even be recognized as customary law.²⁸ In 1972,

²⁴ *Québec (P.G.) c. Carrière Landreville inc.*, [1981] C.S. 1020 at 1027.

²⁵ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] I.C.J. Rep. 7 at 78 [*Gabčíkovo-Nagymaros*].

²⁶ UN DESA, *Report of the World Summit on Sustainable Development*, c. I, res. 2 (Sales No. E.03.II.A.1) (“Johannesburg Plan of Implementation”), online: UN Department for Economic and Social Affairs <<http://www.un.org/esa>> [*JPOI*].

²⁷ See “ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development, 2 April 2002” (2002) 2 Int’l Environmental Agreements 211 [*New Delhi Declaration*]. See also *Agenda 21*, *supra* note 23; *JPOI*, *supra* note 26. See Cordonier Segger & Khalfan, *Sustainable Development Law*, *supra* note 1.

²⁸ Some have suggested that sustainable development should be recognized as a principle of customary law in itself. See e.g. *Gabčíkovo-Nagymaros*, *supra* note 25. Vice-President Weeramantry, in a separate opinion, wrote:

It is clear that a principle must be followed which pays due regard to both [the needs of environment and development]. Is there such a principle, and does it command recognition in international law? I believe the answer to both questions is in the affirmative. The principle is the principle of sustainable development and, in my view, it is an integral part of modern international law. It is clearly of the utmost importance, both in this case and more generally (*ibid.* at 89).

But see Vaughan Lowe, “Sustainable Development and Unsustainable Arguments” in Alan Boyle & David Freestone, eds., *International Law and Sustainable Development*:

the *Stockholm Declaration* laid out twenty-six principles for the protection of the human environment.²⁹ In 1992, the *Rio Declaration* further agreed on twenty-seven principles on environment and development. After a decade of comprehensive study and analysis by the International Law Association (ILA), the 2002 *New Delhi Declaration* highlighted seven key principles of international law on sustainable development.³⁰ These principles were reflected in the 2002 *Johannesburg Principles on the Role of Law and Sustainable Development*.³¹ They were developed and adopted by the chief justices and senior judges from over sixty countries at the 2002 Global Judges Symposium in South Africa during the 2002 World Summit process in which Justice Gonthier, other civil law judges, and his research centre played key roles. Providing a keynote address to the assembled jurists, Justice Gonthier explained,

Fraternity is the heart of sustainable development. It calls for not imposing solutions determined by one's own agenda rather than regard for the needs as experienced and perceived by the recipients. Where there is no fraternal impulse in the development endeavour, there is no true understanding and commitment to the problems of those in need.³²

These principles were included in the outcomes of the 2002 World Summit on Sustainable Development. They are an important expression of the wisdom and perspectives shared by the judges and the rest of the world, forming a collective call for understanding, knowledge, and action. As Justice Gonthier has noted, “[j]udges cannot be afraid to look beyond their national borders for tools that will assist in the analysis and interpreta-

Past Achievements and Future Challenges (Oxford: Oxford University Press, 1999) 19. Whether or not there is yet a customary obligation to develop sustainably, there is growing customary recognition of the need to integrate environmental and social concerns into economic development in order to achieve sustainable development. See Cordonier Segger, “Sustainable Development in International Law”, *supra* note 1.

²⁹ *Declaration of the United Nations Conference on the Human Environment*, 16 June 1972, UN Doc. A/Conf.48/14/Rev.1 (1973), 11 I.L.M. 1416, online: United Nations Environment Programme <<http://www.unep.org>> [*Stockholm Declaration*].

³⁰ See *New Delhi Declaration*, *supra* note 27.

³¹ *Johannesburg Principles on the Role of Law and Sustainable Development* (Statement adopted at the Global Judges Symposium, Johannesburg, South Africa, 18–20 August 2002), online: United Nations Environment Programme, <<http://www.unep.org>> [*Johannesburg Principles*]. See also “Johannesburg Principles on the Role of Law and Sustainable Development” (2003) 15 J. Env'tl. L. 107.

³² Hon. Justice Charles D. Gonthier, “National Environmental Governance and the Role of Law” (Remarks delivered to the Global Judges Symposium, Johannesburg, South Africa, 19 August 2002) at 12, online: United Nations Environment Programme <<http://www.unep.org>> [Gonthier, “National Environmental Governance”].

tion of vague or complex matters in environmental cases.”³³ The principles adopted in the 2002 ILA *New Delhi Declaration* and in South Africa address today’s concerns about advancing sustainability and are incorporated into law by treaties, parliaments, and judiciaries across the globe. They were deeply meaningful to Justice Gonthier in his public and personal life,³⁴ and they continue on as a testament to his international diplomacy and beliefs. Here, it is possible to highlight only a selection that forms essential elements of his legacy, as jurists continue to inquire, develop, and implement international law on sustainable development.

First, as emphasized in the *Stockholm Declaration*³⁵ and the *Rio Declaration*³⁶, states have sovereign rights over their natural resources,³⁷ but they also have a related duty not to cause (or allow) undue damage to the environment of other states in the use of these resources. This principle is gaining increasing global recognition by courts and tribunals.³⁸

Second, as judges have emphasized, there is a need to promote a just distribution of resources among members of the present generation while taking into account the needs of future generations in making decisions about allocations of resources.³⁹ As Justice Gonthier noted, “[a] moral approach might even suggest that what we do is always under fiduciary duty of some kind to manage the planet for the needs of future generations.”⁴⁰ Furthermore, the principles and their associated programs support the recognition of a duty to reduce poverty progressively.⁴¹ The prin-

³³ Gonthier, “Sustainable Development”, *supra* note 18 at 14.

³⁴ See L’Hon. Charles Gonthier, “L’action du juge en matière d’environnement : quelques réflexions sur les principes et leur mise en oeuvre” (Presentation made to the Conférence des présidents des Cours suprêmes des états francophones d’Afrique sur la contribution du droit au développement durable, Paris, France, 4 February 2005), online: Association des Hautes juridictions de cassation des pays ayant en partage l’usage du français <<http://www.ahjucaf.org>> [Gonthier, “L’action du juge”].

³⁵ *Supra* note 38.

³⁶ *Rio Declaration on Environment and Development*, 14 June 1992, UN Doc. A/Conf.151/26 (Vol. I) (1992), 31 I.L.M. 874, online: United Nations Environment Programme <<http://www.unep.org>> [*Rio Declaration*].

³⁷ See generally Nico Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997).

³⁸ See e.g. *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 23 January 2007, [2006] I.C.J. Rep. 3, online: International Court of Justice <<http://www.icj-cij.org>>. See also Cordonier Segger, “Sustainable Development in International Law”, *supra* note 5.

³⁹ See *Johannesburg Principles*, *supra* note 30; Lord Justice Carnwath, “Judicial Protection of the Environment: At Home and Abroad” (2004) 16 J. Envtl. L. 315 at 316.

⁴⁰ Gonthier, “National Environmental Governance”, *supra* note 31 at 12-13.

⁴¹ See *Johannesburg Principles*, *supra* note 30.

ciple of equity underlies many of the core principles in the UN human rights instruments.⁴²

Another principle concerns states' common but differentiated obligations. Though states have a common responsibility to protect the environment at the national, regional, and global levels, it shall be balanced with the need to account for different circumstances. In particular, each state's historical contribution to a particular problem must be taken into account, as well as its ability to prevent, reduce, and control the threat.⁴³

Further, judges have recognized the need to take a precautionary approach to human health, natural resources, and ecosystems.⁴⁴ This precautionary approach, they have held, shall be widely applied by states according to their capabilities. The ILA has also defined this principle, recognizing that where there are threats of serious or irreversible damage, lack of full scientific certainty will not justify postponing cost-effective measures to prevent degradation.⁴⁵ In essence, precaution shifts the burden of proof to those proposed activities that might cause serious harm.⁴⁶

⁴² Human rights treaty bodies have alluded to the notion of intergenerational equity. See *The Right to Adequate Food (Art. 11)*, UN ESCOR, 20th Sess., General Comment 12, Agenda Item 7, UN Doc. E/C.12/1999/5 at para. 7; *The Right to Water (Arts. 11 & 12)*, UN ESCOR, 29th Sess., General Comment 15, Agenda Item 3, UN Doc. E/C.12/2002/11 at para. 11. Equally, the concern for how current needs and rights affect the future health and development of the child is central to the *UN Convention on the Rights of the Child*. See e.g. *Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, UN CRCOR, 33d Sess., General Comment 4, UN Doc. CRC/GC/2003/4 at para. 17. See also *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46, 6 I.L.M. 360 (entered into force 3 January 1976) [*ICESCR*]; *United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, 17 June 1994, 1954 U.N.T.S. 3, 33 I.L.M. 1328 (entered into force 26 December 1996) [*UN CCD*]; *The International Treaty on Plant Genetic Resources for Food and Agriculture*, 3 November 2009 (entered into force 29 June 2004), online: <<http://www.planttreaty.org>> [*Seed Treaty*]. For commentary, see Sébastien Jodoin, "Intergenerational Equity and Rights" in Sébastien Jodoin, Marie-Claire Cordonier Segger & Maja Goëpel, eds., *Securing the Rights of Future Generations* (Cambridge: Cambridge University Press) [forthcoming in 2010].

⁴³ See Gonthier, "L'action du juge", *supra* note 33. See also Lavanya Rajamani, *Differential Treatment in International Environmental Law* (Oxford: Oxford University Press, 2006); Duncan French, "Developing States and International Environmental Law: The Importance of Differentiated Responsibilities" (2000) 49 I.C.L.Q. 35.

⁴⁴ Judges "recall the principles adopted in the Rio Declaration on Environment and Development and affirmed adherence to these principles which lay down the basic principles of sustainable development": *Johannesburg Principles on the Role of Law and Sustainable Development* (2003) 15 J. Env'tl. L. 107 at 107.

⁴⁵ The *Rio Declaration* (*supra* note 36) states that "[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities" (Principle 15). See also Gonthier, "National Environmental Governance", *supra*

Another principle recognized in the *New Delhi Declaration* and by the ILA involves the need to encourage public participation in environment and sustainable development processes, supported by access to information and justice. As Justice Gonthier noted,

*[l]a participation du public est essentielle. Les questions environnementales et de développement durable sont essentiellement d'intérêt public. Le plus souvent, elles ne touchent pas que les parties en cause mais au contraire, ont des incidences sur l'ensemble de la société.*⁴⁷

Further, and perhaps most significantly, the principle of integration and interrelationship, particularly for social, economic, and environmental objectives, forms the basis of international law on sustainable development.⁴⁸

In recent years, as negotiators from developing countries have become more skilled in representing their countries' interests, these principles have been adopted in international treaties. Such negotiations can provide a way to ensure that larger, more powerful countries take into account the world's diversity of societies, languages, economies, geographies, and perspectives. They commit to global mechanisms for sustainable development co-operation and may serve as an important tool for facing the global challenges highlighted above, but only if it is possible to learn effective implementation. Through eight years of international legal research and analysis, published in over twenty volumes, the work of Justice Gonthier's research centre has focused on building knowledge and understanding of these treaties. Justice Gonthier stated,

note 31; James Cameron & Juli Abouchar, "The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment" (1991) 14 B.C. Int'l & Comp. L. Rev. 1; Arie Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (The Hague: Kluwer Law International, 2002).

⁴⁶ See Franz Perrez, "Precaution from Rio to Johannesburg: An Introduction" in *Precaution from Rio to Johannesburg: Proceedings of a Geneva Environment Network Roundtable* (Geneva: United Nation Environment Programme for the Geneva Environment Network, 2002) 5 at 6; *Rio Declaration*, *supra* note 36; *Southern Bluefin Tuna Cases, Cases Nos. 3 & 4 (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, online: International Tribunal for the Law of the Sea <<http://www.itlos.org>>; *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, 29 January 2000, 2226 U.N.T.S. 208, 39 I.L.M. 1027 (entered into force 11 September 2003) [*Cartagena Protocol*].

⁴⁷ Gonthier, "L'action du juge", *supra* note 33.

⁴⁸ *Rio Declaration*, *supra* note 36, s. 4; Cordonier Segger, "Sustainable Development in International Law", *supra* note 5, analyzing *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (Complaint by India, Malaysia, Pakistan, and Thailand) (1998), WTO Doc. WT/DS58/AB/R (Appellate Body Report), online: WTO <http://docsonline.wto.org/gen_search/asp>.

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 in both its aspects, economic and social. It involves environmental law and human rights law, just as it implicates property law, contract law, intellectual property and the protection of genetic resources, aboriginal rights and trade disputes.⁴⁹

With Justice Gonthier's encouragement, four categories of important international treaties for sustainable development began to be studied in depth.

Two generations of relevant multilateral environmental agreements make up the first category. From 1968 to 1992, states signed treaties that did not necessarily take developing countries and development concerns into account, but nevertheless made important progress in environmental protection and conservation.⁵⁰ From 1992 to 2010, states have negotiated a second generation of environmental treaties. This second generation of treaties also seeks to promote conservation of the environment, but each also has a second, very important objective: sustainable development.⁵¹ These treaties include the *United Nations Framework Convention on Climate Change* and its associated legal accords, which are, as Justice Gonthier has explained, "*un exemple étonnant de recours fusionnés aux traités*,

⁴⁹ Gonthier, "Sustainable Development", *supra* note 18 at 11-12.

⁵⁰ *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 3 March 1973, 993 U.N.T.S. 243, 12 I.L.M. 1085 (entered into force 1 July 1975); *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, 22 March 1989, 1673 U.N.T.S. 126, 28 I.L.M. 657 (entered into force 5 May 1992); *Convention for the Protection of the Ozone Layer*, 22 March 1985, 1513 U.N.T.S. 323, 26 I.L.M. 1516 (entered into force 22 September 1988); *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 26 I.L.M. 1550 (entered into force 1 January 1989); *African Convention on the Conservation of Nature and Natural Resources*, 15 September 1968, 1001 U.N.T.S. 3 (entered into force 16 June 1969).

⁵¹ *Convention on Biological Diversity*, 5 June 1992, 1760 U.N.T.S. 79, 31 I.L.M. 818 (entered into force 29 December 1993). See also *Cartagena Protocol*, *supra* note 45; *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 U.N.T.S. 107, 31 I.L.M. 849 (entered into force 21 March 1994); *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 U.N.T.S. 148, 37 I.L.M. 22 (entered into force 16 February 2005); *Stockholm Convention on Persistent Organic Pollutants*, 22 May 2001, 40 I.L.M. 532 (entered into force 17 May 2004); *Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, 10 September 1998, 38 I.L.M. 1 (entered into force 24 February 2004); *Convention on Environmental Impact Assessment in a Transboundary Context*, 25 February 1991, 1989 U.N.T.S. 309 (entered into force 10 September 1997), online: United Nations Economic Commission for Europe <<http://www.unece.org>>; *Protocol on Strategic Environmental Assessment*, 21 May 2003 (entered into force 11 July 2010), online: UN Economic Commission for Europe <<http://www.unece.org>>.

lois, règlements, volontariat, éthique et incitatifs économiques, allant jusqu'à créer une nouvelle valeur mobilière et son marché international."⁵²

Second, research has focused on covenants and institutions related to human rights and social justice. It is becoming clear that respect for important social, economic, and cultural rights (including rights of indigenous peoples) is also essential to support sustainable development. From 1947 to 2008, UN human rights accords and institutions have worked to realize these rights.⁵³ As 190 countries recognized in the 2002 WSSD *Johannesburg Plan of Implementation*, these social justice instruments are part of our global architecture to achieve sustainable development. And certainly, without respect for the social pillar and related social justice priorities, sustainable development would be impossible. Work will continue in this area with passion and dedication.

Commitments to sustainable development are also being identified in many international economic treaties, particularly those that have sought to take global public interests into greater account in recent years. Since 1947, these international, regional, and bilateral regimes for trade, investment, and finance (including the World Trade Organization) have begun to integrate and respond to sustainable development as part of their purpose.⁵⁴ Legal research will also continue in this area, charting the course for more responsible international economic rules.⁵⁵

⁵² Charles D. Gonthier, "Les Chartes – nos rôles et défis. Valeurs, droit et éthique" in *Actes de la XVII^e Conférence des juristes de l'État* (Montréal : Yvon Blais, 2006) 99 at 119.

⁵³ See *ICESCR*, *supra* note 41 (recognizing, as many scholars argue, rights to food, water, health and a clean environment); *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 U.N.T.S. 13, Can. T.S. 1982 No. 31 (entered into force 3 September 1981); *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, Can. T.S. 1992 No. 3 (entered into force 2 September 1990). See also the customary rules reflected in the recently agreed *United Nations Declaration on the Rights of Indigenous Peoples* (GA Res. 61/295, UN GAOR, 61st Sess., UN Doc. A/Res./61/295 (13 September 2007)). See generally International Labour Organization, online: ILO <<http://www.ilo.org>> (specifically, its 188 conventions).

⁵⁴ See e.g. *Agreement Establishing the World Trade Organization*, 15 April 1994, 33 I.L.M. 1144 (entered into force 1 January 1995), online: World Trade Organization <<http://www.wto.org>>; *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*]; *Canada-Chile Free Trade Agreement*, 5 December 1996, Can T.S. 1997 No. 50 (entered into force 5 July 1997), online: Foreign Affairs and International Trade Canada <<http://www.international.gc.ca>>; *United States–Chile Free Trade Agreement*, 6 June 2003, 42 I.L.M. 1026 (entered into force 1 January 2004), online: Office of the United States Trade Representative <<http://www.ustr.gov>>; *European Union–Chile Association Agreement*, 18 November 2002, 45 O.J. L352 (30 December 2002) (entered into force 1 March 2005); *Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and*

Finally, a new category of treaties is emerging with the negotiation and implementation of instruments that integrate social, economic, and environmental concerns. In this research, as documented by the jurists of Justice Gonthier's centre, there is an effort to focus on the design of laws that can actually be implemented. As Justice Gonthier was wont to note, "[o]ne can no more legislate cleanliness than virtue if people are not prepared to abide by the laws."⁵⁶ These regimes focus on the sustainable development of common global resources, addressing the concerns highlighted above in a manner that integrates social, environmental, and economic concerns to provide for the needs of present and future generations.⁵⁷

IV. Future Directions

In the future, the international work of Justice Gonthier will continue as a legacy to honour his memory. Justice Gonthier has advised, shaped, and inspired a new generation of lawyers to dedicate their minds to the benefit of the most vulnerable populations of the world. This global network is now actively investigating and practising sustainable development law. While it is impossible to explain all the efforts he has inspired in this short tribute, we can identify three key directions in the continuing work of the many jurists whose lives he has touched around the world.⁵⁸

Its Member States, of the Other Part (Cotonou Agreement), 23 June 2000, 43 O.J. L317 (15 December 2000) (entered into force 1 April 2003); Markus W. Gehring & Marie-Claire Cordonier Segger, eds., *Sustainable Development in World Trade Law* (London, U.K.: Kluwer Law International, 2005); Gary P. Sampson, *The WTO and Sustainable Development* (New York: United Nations University Press, 2005).

⁵⁵ See *ibid.*; *Convention on the Settlement of Investment Disputes*, 18 March 1965, 575 U.N.T.S. 159, 17 U.S.T. 1270 (entered into force 14 October 1966); United Nations Commission on International Trade Law Conventions; *NAFTA*, *supra* note 46, c. 11; *Treaty Concerning the Reciprocal Encouragement and Protection of Investment*, United States and Argentina, 14 November 1991, 31 I.L.M. 124. See Markus Gehring, Marie-Claire Cordonier Segger & Andrew Newcombe, eds., *Sustainable Development in World Investment Law* (The Hague: Kluwer Law International, 2010).

⁵⁶ Charles D. Gonthier, "Remarks on the Charter: Rights, Duties and Responsibilities" (1991) 40 U.N.B.L.J. 193 at 195.

⁵⁷ *UN CCD*, *supra* note 41; *Seed Treaty*, *supra* note 41. See also the venerable *United Nations Convention on the Law of the Sea*, itself (10 December 1982, 1833 U.N.T.S. 3, 33 I.L.M. 1309 (entered into force 16 November 1994)) and its International Tribunal, as well as many of the Regional Fisheries and Seas Conventions.

⁵⁸ Over the next ten years, the Cambridge University Press plans to publish fourteen volumes in a series that will be dedicated to his memory. See Marie-Claire Cordonier Segger & Markus W. Gehring, eds., *Treaty Implementation for Sustainable Development* (Cambridge: Cambridge University Press) [forthcoming], online: Cambridge University Press <<http://www.cambridge.org/series>>.

First, many will focus on the scholarly analysis and legal practice necessary to improve incentives, take down barriers, and make sustainable options more favourable for individuals and countries. This is being done through the treaties and tribunals mentioned above (many of which have over 160 parties) and through related financing and capacity-building instruments like the newly replenished Global Environment Facility. It is also being done through voluntary measures, such as the growth of ethical investing standards, fair trade instruments, and the design of responsible investment codes in nearly every sector of the global economy. These voluntary measures are also worthy of further investigation. Justice Gonthier explained,

On constate que le public est souvent prêt à se soumettre volontairement à certaines restrictions pour le bien commun. On peut penser, par exemple, à la protection de l'environnement : le recyclage, même facultatif, remporte très souvent le soutien enthousiaste du public. De même, plusieurs industries mettent en place des mesures volontaires pour contribuer à la protection de l'environnement. De nombreux citoyens expriment une préoccupation sincère quant au bien-être des générations futures, qui pourtant ne les affecte pas directement.⁵⁹

Second, many will continue to research and act to ensure that the consequences of irresponsible actions are meted out and taken more seriously. Progress has already been made in this area. The International Criminal Tribunal for the Former Yugoslavia alone has secured fifty-six convictions, with forty-four more pending, and another thirty-six having already died in prison. There is increasing respect for the International Criminal Court, which prosecutes genocide, war crimes, and crimes against humanity involving its 160 member countries. Recent innovative proposals include recognition of a new category of crimes against future generations. Jurists are also working to secure better enforcement of anti-corruption conventions and related international instruments.⁶⁰

⁵⁹ Charles D. Gonthier, "Les tribunaux, le parlement et les médias au service du public et de la justice" in Patrick A. Molinari, ed., *Dialogues sur la justice: le public, le législateur, les tribunaux et les médias* (Montreal: Thémis, 2002) 415 at 427.

⁶⁰ For anti-corruption conventions, see e.g. *Convention Against Corruption*, 9 December 2003, 43 I.L.M. 37 (entered into force 14 December 2005); *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 17 December 1997, 37 I.L.M. 1 (entered into force 15 February 1999); *African Union Convention on Preventing and Combating Corruption*, 11 July 2003, 43 I.L.M. 5 (entered into force 5 August 2006); *Council of Europe Criminal Law Convention on Corruption*, 27 January 1999, Eur. T.S. 173, 38 I.L.M. 505 (entered into force 1 July 2002); *Council of Europe Civil Law Convention on Corruption*, 4 November 1999, Eur. T.S. 174 (entered into force 1 November 2003); *Inter-American Convention Against Corruption*, 29 March 1996, O.A.S. Treaties Register B 58, 35 I.L.M. 724 (entered into force 6 March 1997).

The third, perhaps most fascinating directive of the future is to examine the rules and governance of systems themselves.⁶¹ New research has been launched and will continue on the interactional nature of international regimes,⁶² on new ideas of representation and territory in international law, and on new ways to engage nonstate actors. A focus on the duties that accompany rights, which was an abiding interest to Justice Gonthier, is at the core of these investigations. He believed firmly in corporate social responsibility.⁶³ More than encouraging firms to exercise accountability, he sought recognition that, in light of fraternity, the growing importance of firms also entails greater responsibility for firms. Firms have a responsibility not just to their own shareholders but also to all their stakeholders, including members of society and the environment, who can be affected by corporate action. In this area, legal scholars and others focus on encouraging firms to exercise greater corporate accountability in domestic courts through ever-tighter rules on disclosure in the world's stock markets, and in the court of public opinion.⁶⁴ Jurists are passionately working to find ways in which international law can better hear and address the concerns and interests of the world's indigenous peoples. Further, there is deeper transversal research and thinking to be done, as well as new contributions to be made, to our understanding of the coherence, fragmentation, and integration of international law on sustainable development.

Justice Gonthier was a subtle and brilliant jurist with a marvellously open mind. He interacted often with young scholars in Canada and abroad, sparking ideas, challenging assumptions, and guiding the development of legal minds. Through this engagement, he imparted legal rigour, a sense of honour, and a deep commitment to stay the course. At all levels, he would encourage the legal imagination, investigation, and implementation of intricate solutions to complex problems based on a strong respect for foundational values. In the future, a rich and fascinating syn-

⁶¹ See Michael Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000); John Gerard Ruggie, "Reconstituting the Global Public Domain — Issues, Actors, and Practices" (2004) 10 *European Journal of International Relations* 499.

⁶² This research follows in the footsteps of work by Stephen Toope, Jutta Brunnée, Jason MacLean, and Roman Picherack. See e.g. Jutta Brunnée & Stephen J. Toope, "Interactional International Law" (2001) 3 *International Law FORUM du droit international* 186.

⁶³ See Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis*, ed. by Chip Pitts (Markham, Ont.: LexisNexis, 2009) (preface by Hon. Charles Doherty Gonthier).

⁶⁴ See *ibid.*

thesis, research, and action agenda will be carried forward in his legacy, building the legal community that is needed in a truly global civil society.

Conclusion

The legacy of Justice Gonthier is very significant in many areas. One of these areas, to which he turned especially at the end of his career, involved sustainable development and international law. His work will be carried forward, guided by his values. For,

as a complement to the rule of law, there is the 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. Sharing the logic of sustainable development, these values of the spirit of the law must include cooperation, commitment, responsibility, community, trust, fairness, security and empathy.⁶⁵

Across the world, touched and deeply influenced by this remarkable man, legal scholars and responsible authorities are convinced that international law has a role to play in securing sustainable development for present and future generations. And it is well understood that jurists have an important role to play. As Justice Gonthier himself once told a graduating class,

*dans les moments difficiles où le succès manque à l'appel, rappelez-vous cette autre parole du poète: « Toutes choses / Proches ou lointaines / Secrètement / Sont reliées les unes aux autres / Et vous ne pouvez toucher une fleur / Sans déranger une étoile ». Ceci malheureusement pour le mieux et le pire. Mais dites-vous bien que vous pouvez et devez faire une différence. Soyez généreux, la vie vous le rendra.*⁶⁶

The challenge is not to balance international conservation with urgent development objectives. It is to secure sustainable justice globally in a spirit of fraternity for the environment and its peoples. Justice Gonthier's contributions to this worthy goal are recognized by many and will be further appreciated as the full extent of his legacy becomes clear over time.

⁶⁵ Gonthier, "Sustainable Development", *supra* note 18 at 13.

⁶⁶ Speech of L'honorable M. Justice Charles D. Gonthier (2003) upon award of Honorary Doctorate at the University of Ottawa, online: University of Ottawa <<http://www.president.uottawa.ca>>.

To achieve it, all of humanity's collective wisdom, brilliance, respect, integrity, and openness will be needed, together with hope, compassion, and intellectual courage. These were among the qualities that made Justice Gonthier a remarkable man. They are the best of what it means to be part of a society, to be part of a world, and to be human. And with them, we carry on in his honour and in his memory.
