

# SUSTAINABLE DEVELOPMENT AND SOCIAL JUSTICE: A NEED FOR COHERENCE WITH INTERNATIONAL LAW

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Since 1992 sustainable development has become a unifying theme mobilising the political forces and public opinion all over the world. Nevertheless, its implementation into law appears particularly difficult for States, although some effort has been done to integrate the concept as a principle in new laws<sup>1</sup> or to use it in the law-making process. As it is used now, sustainable development serves to conciliate social, environmental and economic considerations when adopting or implementing law, but few States have been using the concept in order to shed new light on the pre-existing legal instruments pursuing common objectives. In other words, very few have made use of the sustainable development concept to conciliate social, environmental and economic legal obligations.

In our view, sustainable development should be considered as a hinge between the various fields of law. However, we have to admit that in reality they remain highly partitioned,<sup>2</sup> especially at an international level. Some efforts have been made by inter-State organisations, such as the International Labour Organization (ILO), in order to make connections between social and environmental legal principles, but not much has been done in order to conciliate economic law with the two other spheres of law. Indeed, economic law, more often than not, prevails over environmental and social law.

Sustainable development should be considered not only as a tool, as it is mainly used now, to create new law conciliating economy, environment and social development, but also as a new way to interpret existing legislation. Putting forward sustainable development in a legal context does not mean to deny legislation existing before its creation. Contrariwise, it underlines the necessity for States to stop considering each law field as if existing in a vacuum. They have to be considered as a whole, in a holistic perspective. It seems totally logical to do so because States

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- 1 For example, Sustainable Development Act, LRQ 2006, c D-8.1.1; Federal Sustainable Development Act, LRC 2008, c 33.
- 2 Sandrine Rousseau "Dimensions humaine et sociale du développement durable : une problématique séparée du volet environnemental?" (6 November 2004) Développement durable & territoires <<http://developpementdurable.revues.org/1214>>.

taking economic decisions at the World Trade Organization (WTO)<sup>3</sup> are generally the same States that engage themselves to pursue social objectives at the ILO<sup>4</sup> and to protect the environment under the aegis of United Nations Environment Program (UNEP).<sup>5</sup> In that sense, sustainable development could be used as a way to bring more *coherence* into the international arena.<sup>6</sup> Following this logic, pre-existing recognised legal principles, such as social justice, should be considered as part of the sustainable development three spheres' content. We can even go further and assert that any interpretation of sustainable development that does not include these legal principles goes against the obligations imposed by international law to States and intergovernmental organisations.

The example of social justice, as a legal principle, is particularly striking in this regard. Even if sustainable development has been designed to give a role as important to the social dimension as the ones given to the economy and the environment, and although it has its roots in international legal instruments, we have to admit that it is often neglected by States when implementing the concept. Moreover, social justice seems to be the "poor cousin" of sustainable development, at least judging by the amount of literature devoted to it. In the light of this, questions should be addressed: Is it possible to conceive sustainable development without taking account of social justice principle? Most importantly, is it possible to do so without violating international law? These questions form the basis of this paper, which continues a discussion already begun in a recent study. In the latter we showed that sustainable development and decent work, which involves respect for fundamental human and labour rights, are interdependent concepts, both legally and functionally.<sup>7</sup>

This paper is divided into two parts. In part I we will address the following questions: What is social justice? What does it mean in international law? In part II we will identify links between social justice and sustainable development. In other words, we will ask the following questions: In terms of international law, what is the current function of social justice in sustainable development? What should States do to take into account social justice when they enact bills or measures in order to achieve sustainable development? Our approach is based on human rights, and that is why we will give the example of the eight "core" ILO conventions, widely ratified by the ILO member States, and the International Covenant on Economic, Social and Cultural Rights (the Covenant), a treaty ratified by 160 countries .

## I. SOCIAL JUSTICE AS PRE-EMINENT LEGAL PRINCIPLE

Tracing the historical origins of the concept of social justice is a perilous adventure far beyond the objectives of this study. We therefore limit ourselves to present a few examples.

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3 World Trade Organization "Members and Observers" <[www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)>.

4 International Labour Organization "Alphabetical list of ILO member countries" <[www.ilo.org/public/english/standards/relm/country.htm](http://www.ilo.org/public/english/standards/relm/country.htm)>.

5 United Nations Environment Programme "About UNEP: The Organization" <[www.unep.org/Documents.Multilingual/Default.asp?DocumentID=43](http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=43)>.

6 Johanne Brodeur and others *Legal analysis: Improving the coherence of international standards. Recognizing agricultural and food specificity to respect human rights* (Yvon Blais Bruxelles Bruylant, Cowansville, 2010).

7 Marie-Claude Desjardins and Dominic Roux "Développement durable et travail décent: à la recherche d'une interface en droit international" (2009) 5 McGill International Journal of Sustainable Development Law and Policy 199 at 209.

Origins of the social justice principle can be traced back to antiquity. It has been developed throughout history, particularly in the philosophical literature, but also in political action. In Book 5 of *Nicomachean Ethics*, Aristotle devised the concept of “proportional reciprocity”, which is a sort of forerunner for social justice, and he justified his rationale: “For it is by proportionate requital that the city holds together.”<sup>8</sup> In the 16th century, we find the early writings on the need to provide work for the poor, especially a law adopted by Parliament of Paris in February 1515.<sup>9</sup> In France, the French Revolution put an end to the corporate system in 1791. A law was adopted to enable all citizens to exercise the profession of their choice so they could meet their needs and those of their families.<sup>10</sup> The same year, another law called “Loi Le Chapelier” stated in its preamble that “it is to the Nation and Public officers to provide work to those who need it for their existence and provide assistance to disabled person”. The French have explicitly reiterated this “right to work” in the Constitution of 1793, adding that “public assistance is a sacred debt”, because “the society must give subsistence to poor citizens” (art 21).<sup>11</sup> The idea of social justice also appeared in *Rerum Novarum*, the encyclical issued by Pope Leo XIII in 1891 and entitled “Rights and Duties of Capital and Labour”. This influential text is the official Catholic social teaching. Besides the rights and obligations of employers and employees described therein (which among others aim to provide respectable working conditions for workers), we find this:<sup>12</sup>

Whoever has received from the divine bounty a large share of temporal blessings, has received them for the purpose of using them for the perfecting of his own nature, and, at the same time, that he may employ them, as the steward of God’s providence, for the benefit of others.

Eighty years later, in his book *A Theory of Justice* published in 1971, John Rawls speaks of social justice as a principle whose goal is to provide a way to determine the rights and duties in society and define the appropriate distribution of benefits and burdens of social cooperation.<sup>13</sup> This principle can be achieved, according to Rawls, if the most disadvantaged people get their fair share and actually see their situation improve. In short, there must be a *reduction of*

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8 Alain Supiot *L’esprit de Philadelphie – La justice sociale face au marché total* (Seuil, Paris, 2010) at 43.

9 Also, in 1525, the Spanish Juan Luis Vives published what could be considered the first book devoted to public assistance (*De Subventionem pauperum – Assistance to the poor*). Organisation of work by government was then, in his view, the main measure against poverty: Juan Luis Vivès *De subventionem pauperum (1525)* (Nouvelle édition, Bruxelles, De Valero & Fils, 1943) at 203, quoted by Pierre Rosanvallon *La nouvelle question sociale* (Seuil, Paris, 1995) at 138.

10 Thierry Revet “La liberté du travail” in R Cabrillac and others (eds) *Droits et libertés fondamentaux* (Daloz, Paris, 1996) at 435.

11 Dominic Roux *Le principe du droit au travail: juridicité, signification et normativité* (Wilson & Lafleur, Montréal, 2005) at 79.

See also Dominic Roux “Le droit au travail” in Lucie Lamarche and Louis Bosset (eds) *Donner droit de cité aux droits économiques, sociaux et culturels – La Charte des droits et libertés du Québec en chantier* (Éditions Yvon Blais, Cowansville, 2011) 161.

12 The full text of *Rerum Novarum* is available on the Vatican’s official website: <[www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html)>.

13 In fact, for Rawls, there are two fundamental principles of justice: the first is a sort of “right of each person ... to have an equal right to liberties”; the second principle, which he calls the “difference principle”, aims at reducing the social and economic inequalities. Those will be acceptable only insofar as they provide the greatest benefit to the most disadvantaged members of society. See John Rawls *A Theory of Justice* (The Belknap Press of Harvard University Press, Cambridge (MA), 1971).

*inequality*, and this can only be achieved if the basic needs of the poor are met and if the wealth is distributed more evenly. Rawls' theory was criticised in particular by Amartya Sen, recipient of the Nobel Prize in Economics Sciences (1998). Through his many writings, Sen proposed to define social justice in terms of "capabilities", which are the concrete and real opportunities available to each individual to achieve freely (the "freedom") the things that are important to him.<sup>14</sup> The factors that hinder the "capabilities" come from personal considerations, such as physical disabilities, but they may also result from poverty – broadly understood, not only deprivation of resources – such as decent work.<sup>15</sup> For Sen, the government has the obligation and responsibility to help those in need: it must take ethical decisions guided by the ideal of justice, that is to say improve the "capabilities" of each individual.<sup>16</sup> Sen's writings have had a great influence on the policies of international development assistance. His work is also one of the founders of the Human Development Index adopted in 1990 by the United Nations Development Program (UNDP), an index that takes into account three criteria: life expectancy at birth (depending on access to adequate food, drinking water, adequate housing and adequate health care); education level; and living standards (measured on the basis of economic indicators).<sup>17</sup>

These few non-exhaustive examples give a good idea of the origin and the content of social justice in a general context. This concept has not only interested philosophers but it has also been integrated into international law. Indeed, social justice is an established "legal principle" that expresses itself through concrete international obligations binding on States, either because of their membership in international organisations such as the ILO or United Nations (UN), or because these States have ratified or acceded to international treaties that aim to respect, protect and promote human rights.

The formal consecration of social justice as a legal principle in international law occurred in 1919 when the ILO was founded<sup>18</sup> at the end of World War I. Although almost a century has passed since then and although the international context has changed, the objectives pursued by its founders remain highly relevant in the current era of economic globalisation and domination of neo-liberal and free-market ideologies. Some of them are explicitly mentioned in the ILO Constitution's preamble. The first sentence of this founding treaty of the ILO, which binds all member States, is revealing in this regard: "Whereas universal and lasting peace can be established only if it is based upon social justice."<sup>19</sup> For the ILO and its 185 current members,

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14 Amartya Sen *L'idée de justice* (Flammarion, Paris, 2009) at 283; Amartya Sen *Development as Freedom* (Oxford University Press, Oxford and New York, 1999). See also Renée-Claude Drouin "Capacitas and Capabilities in International Labour Law" in Simon Deakin and Alain Supiot (eds) *Revisiting the Legal Notion of Capacity* (Hart Publishing, Oxford, 2009) 141.

15 Sen *L'idée de justice*, above n 14, at 309.

16 At 292.

17 United Nations Development Programme "Human Development Index – 2011" Human Development Reports <<http://hdr.undp.org/en/>>. These criteria correspond essentially to the social dimension of sustainable development which will be described in the second section of this text.

18 It should be noted that, since 1946, the ILO is a specialised agency of the United Nations. It meets annually at the International Labour Conference (ILC). Each of the 185 member States is represented by four delegates: two for government and one delegate for each of the most representative organisations of employers and employees present in the country.

19 ILO Constitution, preamble <[www.ilo.org/dyn/normlex/en/f?p=1000:62:2503588611032723::NO:62:P62\\_LIST\\_ENTRIE\\_ID:2453907:NO#A1](http://www.ilo.org/dyn/normlex/en/f?p=1000:62:2503588611032723::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#A1)>.

there is no possible doubt: the world peace is impossible without social justice. That is what the second statement of the ILO Constitution's preamble asserts:

Whereas conditions of labour exist involving such injustice hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required.

Finally, social justice cannot be achieved without strong cooperation between States and, mainly, without international standards in order to ensure fair international trade. In other words, social justice requires that ILO norms protect States, and therefore workers, against "a race to the bottom".<sup>20</sup> That is what the third statement of the ILO Constitution's preamble stipulates:

Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.

In 1944 the ILO and its member States took a step further in the legal recognition of social justice principle by adopting a text we can consider as the precursor of the universal recognition of human rights by the UN a few years later. This is the Declaration of Philadelphia, which was annexed to the ILO Constitution and therefore binds the organisation and all the member States. In this powerful text the ILO "reaffirms" the structural principles which founded the creation of the ILO, including the fact that "Labor is not a commodity", that "poverty anywhere constitutes a danger to prosperity everywhere", and that "the war against want requires to be carried on with unrelenting vigour within each nation".<sup>21</sup> Although adopted nearly 50 years before, these principles are very close to the one proposed by the international community in 1992 through the sustainable development concept "war against want and poverty".<sup>22</sup>

That being said, one of the most striking provisions of the Declaration of Philadelphia is the one stating the prerequisite for the realisation of the social justice principle:<sup>23</sup>

All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.

This fundamental right, which in itself expresses social justice and furthermore implies equality for all people, should be, according to the text of the Declaration, the *main objective of all national and international policies*. Indeed, economic and social aspects cannot be separated, and it is clear that the ILO and its member States have a formal obligation to put social justice at the heart of their international and national decisions. These two excerpts of the Declaration confirm that idea:<sup>24</sup>

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20 Bob Hepple *Labour Laws and Global Trade* (Hart Publishing, Oxford and Portland (Oregon), 2005) at ch1; RJ Flanagan "Labor Standards and International Competitive Advantage" in RJ Flanagan and others (eds) *International Labor Standards: Globalization, trade and public policy* (Stanford Law and Politics, Stanford, 2003) 17; Sarah H Cleveland "Why International Labor Standards?" in RJ Flanagan and WB Gould IV (eds) *International Labor Standards: Globalization, trade and public policy* (Stanford Law and Politics, Stanford, 2003) 129.

21 Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia), art I.

22 We will come back in part II on that issue.

23 Declaration of Philadelphia, art II(a).

24 Declaration of Philadelphia, art II(b)(c).

the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy; ...

all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective

In other words, the economy is not an end in itself but should rather be at the service of human beings! For the ILO, acting for social justice has always meant adopting international legal standards in order to establish working conditions that respect the dignity of workers, protect their health – their physical safety and their mental health, especially for women and children – and restore fairness in international trade relations. These are the common structural bases that have always guided the normative and institutional activity of the ILO. In short, the 189 conventions and 202 recommendations adopted so far by the ILO *implement social justice principle*.<sup>25</sup>

To a lesser extent, the same conclusions can be made from the two major declarations recently adopted by the ILO. In 2008 the ILO adopted a text which is not a treaty and has not been incorporated into the Constitution, unlike the Declaration of Philadelphia. It is a mere instrument of “soft law”.<sup>26</sup> However, the title of this instrument, and the fact that it was adopted unanimously by 183 countries, deserves some attention here.<sup>27</sup> This is the ILO Declaration on Social Justice for a Fair Globalization.<sup>28</sup> The long preamble recognizes that “achieving an improved and fair outcome for all has become even more necessary in these circumstances to meet the universal aspiration for social justice”. In this text the ILO and its member States undertake “to place full and productive employment and decent work at the centre of economic and social policies”. In order to do this, these policies “should be based on the four equally important strategic objectives of the ILO” which have to be considered as “inseparable, interrelated and mutually supportive”. Those objectives appear in art I-A: promoting employment by creating a sustainable institutional and economic environment; developing and enhancing measures of social protection (social security and labour protection); promoting social dialogue and tripartism; and respecting, promoting and realising the fundamental principles and rights at work.

Several jurists have expressed scepticism about this “soft” statement, written in a highly technical style, and devoid of any binding monitoring mechanism.<sup>29</sup> Admittedly, it is stipulated in art II-B that member States:

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25 These ILO conventions and recommendations are all available at <[www.ilo.org/dyn/normlex/en/f?p=1000:12000:4402457742319280::NO::>](http://www.ilo.org/dyn/normlex/en/f?p=1000:12000:4402457742319280::NO::>).

26 Isabelle Duplessis “Le vertige et la *soft law*. Réactions doctrinales en droit international” (2007) (Hors-série) Revue québécoise de droit international 245; Isabelle Duplessis “Soft international labour law: The preferred method of regulation in a decentralized society”, in International Institute for Labour Studies *Governance, International Law & Corporate Social Responsibility*, (Research Series 116, Geneva, 2008) 7 <[www.ilo.org/public/english/bureau/inst/download/116.pdf](http://www.ilo.org/public/english/bureau/inst/download/116.pdf)>.

27 F Maupain “New Foundation or New Façade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalisation” (2009) 20 EJIL 823.

28 ILO Declaration on Social Justice for a Fair Globalization <[www.ilo.org/wcmsp5/groups/public/@dgreports/@cabinet/documents/publication/wcms\\_099766.pdf](http://www.ilo.org/wcmsp5/groups/public/@dgreports/@cabinet/documents/publication/wcms_099766.pdf)>.

29 Renée-Claude Drouin and Isabelle Duplessis “La régulation internationale du travail de 1998 à 2008: un Eldorado normatif ou un désert interprétatif?” (2009) 14 Lex Electronica I.

have a key responsibility to contribute, through their social and economic policy, to the realization of a global and integrated strategy for the implementation of the strategic [and decent work] objectives

Critics were quite right. The debates preceding its adoption confirm the extreme difficulty of reaching consensus, except for this: the new instrument should not impose any new international obligation that goes beyond those already existing under the relevant ILO conventions. In short, it was clear that the member States, and therefore the vast majority of the delegates attending the International Labour Conference (ILC), did not want any binding instrument whose violation could be legally punished.<sup>30</sup>

However, we have previously hypothesised that the 2008 Declaration could eventually broaden the “core” fundamental labour rights recognised as such by the international community.<sup>31</sup> We must recall that the ILO only acknowledged four of these in the 1998 ILO Declaration on Fundamental Principles and Rights at Work,<sup>32</sup> a text which was a response to the failure of the attempt to include a social clause in the binding WTO agreements. The 1998 Declaration recalled that “economic growth is essential but not sufficient to ensure equity, social progress and the eradication of poverty, confirming the need for the ILO to promote strong social policies, justice and democratic institutions”; also, it stated that:<sup>33</sup>

in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate, and to achieve fully their human potential.

This 1998 Declaration is of course strictly promotional – it is not a treaty – but it devotes the mandatory status of fundamental rights for all member States simply because of their membership in the ILO. These four rights are: freedom of association and effective recognition of right to collective bargaining; elimination of all forms of forced or compulsory labour; effective abolition of child labour; and elimination of discrimination at work.<sup>34</sup> This Declaration reflects the international consensus that already exists with regard to these principles, but the exclusion of health and safety and minimum wage is difficult to justify,<sup>35</sup> considering that the first laws

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30 International Labour Conference “Provisional Record 13 A/B” (International Labour Conference, 97th Session, Geneva, 2008); International Labour Office “Strengthening the ILO’s capacity to assist its Members’ efforts to reach its objectives in the context of globalization: Continuation of the discussion on strengthening the ILO’s capacity and possible consideration of an authoritative document, possibly in the form of a Declaration or any other suitable instrument, together with any appropriate follow-up, and the form they may take” (International Labour Conference, Report VI, 97th session, Geneva, 2008).

31 Marie-Claude Desjardins and Dominic Roux “Développement durable et travail décent: à la recherche d’une interface en droit international” (2009) 5 McGill International Journal of Sustainable Development Law and Policy 199 at 209.

32 International Labour Organization “Declaration on Fundamental Principles and Rights at Work and its Follow-up” (International Labour Conference, Eighty-sixth Session, Geneva, 18 June 1998).

33 ILO Declaration on Fundamental Principles and Rights at Work, preamble.

34 Claire La Hovary *Les droits fondamentaux au travail: Origines, statut et impact en droit international* (PUF, Paris, 2009).

35 Alan Hyde “The International Labor Organization in the Stag Hunt for Global Labor Rights” (2009) 3 Law & Ethics of Human Rights 154.

adopted by the industrialised states in the late 19th and early 20th centuries were in this area.<sup>36</sup> Although the Declaration was the subject of much criticism,<sup>37</sup> it has a positive impact.<sup>38</sup> First, several regional or bilateral trade agreements explicitly refer to it,<sup>39</sup> as do many transnational corporations in their codes of conduct.<sup>40</sup> Second, ratifications of the eight core conventions increased significantly.<sup>41</sup> To make it clear, the average rate of ratification for these eight conventions is more than 91 per cent (167 out of 185 member States, on average), which is clearly excellent. This is a very important fact, because ratification or accession to a treaty indicates if an international standard is “healthy” or not. Indeed, in monist countries a ratified treaty is automatically integrated into national law, which means it can be invoked directly in court. In dualistic countries a specific legislation is required to achieve the same result. In several dualistic countries, such as Canada, legislation to ensure compliance of domestic law under the obligations provided by the treaty will be adopted prior to ratification; in any case, the ratification will occur only if the government considers that its domestic law *already* complies with the treaty.<sup>42</sup> Obviously, in any system, the State should take various legislative, financial, governmental and administrative measures to ensure the full implementation of the obligations imposed by the treaty.<sup>43</sup> Ultimately, ratification guarantees neither compliance with international standard nor its effectiveness. The main problem, especially in developing countries, is that existing legislation is not, in fact, implemented by the authorities, and that there are still serious labour rights violations, committed both by States and private actors. The following reasons are

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- 36 Fernand Morin and others *Le droit de l'emploi au Québec* (4th ed, Wilson & Lafleur, Montréal, 2010) at 109; Bob Hepple *The Making of Labor Law in Europe – A Comparative Study of Nine Countries up to 1945* (Mansell Publishing Limited, London, 1986).
- 37 Philip Alston and James Heenan “Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?” (2004) 36 *Journal of International Law and Politics* 221; Philip Alston “‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime” (2004) 15 *EJIL* 457; Philip Alston “Facing Up to the Complexities of the ILO’s Core Labour Standards Agenda” (2005) 16 *EJIL* 467.
- 38 Francis Maupain “Revitalisation Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights” (2005) 16 *EJIL* 439.
- 39 Cleopatra Doumbia-Henry and Éric Gravel “Free trade agreements and labour rights: Recent developments” (2006) 145 *Intl Lab Rev* 185; Pierre Verge “Les accords de coopération dans le domaine du travail liant le Canada” in Pierre Verge (ed) *Droit international du travail – Perspectives canadiennes* (Éditions Yvon Blais, Cowansville, 2010) 261.
- 40 Renée-Claude Drouin “Responsabiliser l’entreprise transnationale: portrait d’une normativité du travail en évolution” in Pierre Verge (ed) *Droit international du travail – Perspectives canadiennes* (Éditions Yvon Blais, Cowansville, 2010) 283.
- 41 The eight core labour conventions are: C87 - Freedom of Association and Protection of the Right to Organise Convention, 1948; C98 - Right to Organise and Collective Bargaining Convention, 1949; C29 - Forced Labour Convention, 1930; C105 - Abolition of Forced Labour Convention, 1957; C138 - Minimum Age Convention, 1973; C182 - Worst Forms of Child Labour Convention, 1999; C100 - Equal Remuneration Convention, 1951; and C111 - Discrimination (Employment and Occupation) Convention, 1958.
- 42 Government of Canada “Policy on Tabling of Treaties in Parliament” (26 June 2011) Canada Treaty Information <[www.treaty-accord.gc.ca/procedures.aspx](http://www.treaty-accord.gc.ca/procedures.aspx)>; Charles-Emmanuel Côté “La réception du droit international en droit canadien” (2010) 52 *SCLR* (2d) 483; Pierre Verge and Dominic Roux “L’affirmation des principes de la liberté syndicale, de la négociation collective et du droit de grève selon le droit international et le droit du travail canadien : deux solitudes?” in Pierre Verge (ed) *Droit international du travail – Perspectives canadiennes* (Éditions Yvon Blais, Cowansville, 2010) 446.
- 43 ILO Constitution, art 19(5)(d); Committee on Economic, Social and Cultural Rights *General Comment 3, The nature of States parties’ obligations* E/1991/23 (1991).



mentioned by the ILO and some experts to explain this situation: lack or insufficiency of the labour inspectorate and effective sanctions; legal system lacking financial resources and expertise; non-compliance with the principle of the rule of law; incompetence of the judiciary; and predominance of the informal economy.<sup>44</sup>

That being said, social justice cannot be separated from another structuring principle recognised by the international legal order since 1945: *respect for human dignity*. In the preamble of the Charter of the United Nations, member States resolved to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person” and to “*promote social progress and better standards of life in larger freedom*” (emphasis added). This commitment was reiterated in 1948 in the preamble of the Universal Declaration of Human Rights. Fundamental human rights, which find their legal basis in the social justice principle and its mirror, human dignity, are enshrined not only in the Universal Declaration but in a considerable number of UN treaties opened for ratification. In fact, once again, these treaties are widely ratified (90 per cent)<sup>45</sup> except for one of them (the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), ratified by only 46 countries):

- International Convention on the Elimination of All Forms of Racial Discrimination (1965) (175 countries).
- International Covenant on Civil and Political Rights (1966) (167 countries).
- International Covenant on Economic, Social and Cultural Rights (1966) (160 countries).
- Convention on the Elimination of All Forms of Discrimination against Women (1979) (187 countries).
- Convention on the Rights of the Child (1989) (193 countries).
- Convention on the Rights of Persons with Disabilities (2006) (126 countries).

Do all these instruments of international law adopted under the aegis of the ILO and the UN agree on the rule that the economy must serve social justice and not vice versa? For us, a detailed analysis of their content certainly supports this conclusion. Then it should mean that the whole organisation of economic life is subject to compliance with the social justice principle. Yet, even if the States engaged themselves to commit to this rule when ratifying these social and human rights conventions, it seems often forgotten and even reversed when these same States meet at the WTO’s lounge. As noted recently by Professor Alain Supiot, the economy (quantifiable gains for people and corporations) has become the primary purpose of international law developed by the WTO, while free trade is the means to achieve it. If social justice is formally absent from WTO agreements, the welfare of human beings, Supiot said,<sup>46</sup> appears only indirectly in the Preamble of the agreement establishing the WTO in 1994:<sup>47</sup>

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44 See for example Bob Hepple *Labour Laws and Global Trade* (Hart Publishing, Oxford and Portland (Oregon), 2005) at 39.

45 One hundred and ninety-three countries are members of the UN. For detailed analysis of these treaties, see: Dominic Roux “Le ‘droit à un travail décent’ affirmé dans les normes internationales de l’ONU et l’OÉA. Ou la longue marche d’un vieux couple: le droit du travail et les droits de la personne” in Pierre Verge (ed) *Droit international du travail – Perspectives canadiennes* (Éditions Yvon Blais, Cowansville, 2010) 147.

46 Alain Supiot “A legal perspective on the economic crisis of 2008” (2010) 149 *Intl Lab Rev* 151 at 154.

47 Agreement Establishing the World Trade Organization (1994) 1867 UNTS 3 <[www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf)>.

[The WTO members recognise] that their relations in the field of trade and economic endeavour should be conducted with a view to *raising standards of living, ensuring full employment* and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and service ... (emphasis added)

Moreover, it seems that negotiations which currently take place under the aegis of the WTO almost exclusively focus on the second objective, namely “increased production and trade”. Sometimes, there even seems to be only one objective for some countries: expanding trade.<sup>48</sup>

This problem becomes even more significant if we remind ourselves that the WTO system has a mechanism for resolving disputes which aims to ensure full implementation of the legal obligations created and even allows the proportional suspension of trade benefits in case of non-compliance of WTO decisions.<sup>49</sup> However, there is no similar mechanism for protecting human rights in international law. This situation seems to place the ILO and UN systems in an inferior position compared to the WTO system, especially as the WTO system gives a marginal place to legitimate non-trade factors. These factors are *exceptions* to free trade regulations, even if States can ultimately temporarily set aside their application without penalty for breach of agreements. Exceptions adopted by WTO member States based on these non-trade factors (such as protecting workers’ rights, local agriculture and the environment) are eligible only if they are (1) “necessary to protect public morals” or “necessary to protect human, animal or plant life or health”, and (2) “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”.<sup>50</sup> These exemptions allowed by the WTO agreements raise several questions still left unanswered. For example, would a restrictive measure adopted by a State (for example banning the import of carpets made by children in Bangladesh) be considered as really necessary to protect the “morality” on its territory? Might there be other less restrictive measures to achieve the same result, such as temporary restriction or labelling? When they are adopted for protecting health and safety, what should we target? People living on the territory of the exporting country that violates the rights of workers, or people located in the importing country that adopts the restrictive measure? And are these measures necessary? Do they effectively contribute to reduce risks to people’s health and lives? Are other effective options available?<sup>51</sup> Ultimately, as Professor Hepple said:<sup>52</sup>

the general exceptions and safeguards provisions of GATT do not appear to be apt to allow trade measure for breach of labour standards. An explicit amendment to the GATT would be required, but there is no political consensus to bring this about.

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48 Johanne Brodeur and others *Legal analysis: Improving the coherence of international standards. Recognizing agricultural and food specificity to respect human rights* (Yvon Blais Bruylant Cowansville, 2010) at 12–20 and 34–35.

49 Dispute Settlement Understanding 1869 UNTS 401, arts 22–23.

50 General Agreement on Tariffs and Trade (GATT), art XX.

51 WTO *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R (1998); WTO *European Communities – Measures Affecting Asbestos and Products Containing Asbestos* WT/DS135/R (2001). Those issues have been addressed largely by lawyers and academics. We shall only quote two texts: Adelle Blackett “Commerce international et travail: définir le rôle réglementaire de l’État dans la nouvelle économie” in Pierre Verge (ed) *Droit international du travail – Perspectives canadiennes* (Éditions Yvon Blais, Cowansville 2010) 227; Bob Hepple *Labour Laws and Global Trade* (Hart Publishing, Oxford and Portland (Oregon), 2005) at ch 6.

52 Bob Hepple *Labour Laws and Global Trade* (Hart Publishing, Oxford and Portland (Oregon), 2005) at 130.

In the light of this, it seems that there is an obvious inconsistency in law. States should (or even *must*) show a minimum of (or more) coherence with respect to the various obligations they have undertaken internationally:<sup>53</sup>

- First, as we already saw, the 1944 Declaration of Philadelphia, which binds every ILO member State, imposes to “accept” all national and international economic and financial policies and measures “only if they respect and not restrain or hinder the achievement” of the “fundamental objective” of the ILO, which is social justice (which means the right of each human being to pursue his materiel well-being and his spiritual development with freedom, dignity and economic security).
- Second, art 1 of the UN Charter provides that one of the most important goals of this organisation is “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”. But what is really interesting is reading art 103 of the same Charter which provides: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, *their obligations under the present Charter shall prevail.*” (emphasis added)
- Third, it can be argued that the fundamental rights related to social justice, as discussed above, should benefit a pre-eminent status in international law. Some of them, such as prohibition of forced or compulsory labour and prohibition of racial discrimination,<sup>54</sup> or discrimination in employment and occupation,<sup>55</sup> may even be peremptory norms of general international law (*jus cogens*). Therefore, no express or implied derogation of those rights, provided in a free trade treaty (multilateral, plurilateral or bilateral), would be allowed. In fact, “a treaty is void if, at the time of its conclusion, it conflicts with this norm”.<sup>56</sup> Also, because their legal recognition is based on common values to all States and on a general concern for their compliance, these fundamental rights could impose *erga omnes* obligations. So, when a State violates these obligations, all States, without exception, have a legal interest to claim the termination of this wrongful act.<sup>57</sup> In other words, obligations *erga omnes* are universal rules that specify the obligations of any State to the international community.

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53 Johanne Brodeur and others *Legal analysis: Improving the coherence of international standards. Recognizing agricultural and food specificity to respect human rights* (Yvon Blais Bruxelles Bruylant, Cowansville, 2010).

54 *Barcelona Traction, Light and Power Company, Limited* (Belgium v Spain) (second phase) (1970) CIJ Rec 1970 at [34].

55 Inter-American Court Of Human Rights “Advisory Opinion OC-18, Legal Status and Rights of Undocumented Workers” (17 September 2003) <[www.cidh.oas.org/Migrantes/migrants.caselaw.htm](http://www.cidh.oas.org/Migrantes/migrants.caselaw.htm)> at [101].

56 *Vienna Convention on the Law of Treaties of 1969* (1980) 1155 RTNU 331, art 53.

57 *Barcelona Traction, Light and Power Company, Limited* (Belgium v Spain) (second phase) (1970) CIJ Rec 1970 at [33]–[34]. See also *East Timor* (Portugal v Australia)(1995) CIJ Rec 1995 at 102[29]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro)(1996) CIJ Rec 1996 at [31]–[32]; Institute of International Law “Obligations and rights erga omnes in international law” (2005) Institute of International Law Yearbook 1.

Obviously, this question of human rights and hierarchy of norms in international law is definitely not settled yet and many authors have already studied it.<sup>58</sup> Only time will tell what will happen. In view of the foregoing, it is difficult to argue that social justice is a utopia, or is merely a philosophical or moral principle. It is clearly a principle which explicitly belongs to international legal order. It is necessarily recognised in international law not only because it is explicitly “affirmed”, but also because it is implemented by rules contained in treaties or customary law.<sup>59</sup>

Indeed, as we have shown in this first part of the paper, each of those widely ratified treaties adopted by member States of the ILO or the UN – which are roughly the same countries – implement the social justice principle.

Moreover, their legal content corresponds to the essence of the concept of sustainable development, as we will demonstrate in the second part of this paper.

## II. IMPLEMENTATION OF SOCIAL JUSTICE THROUGH SUSTAINABLE DEVELOPMENT: A MATTER OF HUMAN RIGHTS

What connections can be made between social justice and sustainable development, as it is currently formulated, defined and implemented by the international community?

We begin with a brief reminder of what sustainable development is. Although it is difficult to ascertain the exact origin of this ancient concept,<sup>60</sup> we might first note the consensus that already existed in 1972 between UN members when they adopted, at Stockholm, the Declaration of the United Nations Conference on the Human Environment:

Principle 1 - Man has the fundamental right to freedom, equality and *adequate conditions of life*, in an environment of a quality that *permits a life of dignity and well-being*, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

Principle 8 - Economic and social development is essential for ensuring a favorable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life. (emphasis added)

Fifteen years later, the Brundtland Report adopted in 1987 by the World Commission on Environment and Development exposed and clarified the idea of sustainable development with

58 Christian Tomuschat and Jean-Marc Thouvenin (eds) *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff Publishers, Leiden/Boston, 2006); Koji Teraya “Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights” (2001) 12 EJIL 917; Hon Rosalie Silberman Abella “International Law and Human Rights: The power and the Pity” (2010) 55 McGill LJ 871; Alix Toubanc “L’article 103 et la valeur juridique de la Charte des Nations Unies” (2004) 108 RGDIP 439; Robert Kolb “Observation sur l’évolution du concept de jus cogens” (2009) 113 RGDIP 837; Véronique Marleau “Réflexion sur l’idée d’un droit international coutumier du travail” in Jean-Claude Javillier and Bernard Gernigon (eds) *Les normes internationales du travail: un patrimoine pour l’avenir. Mélanges en l’honneur de Nicolas Valticos* (BIT, Genève, 2004) 363.

59 See Dominic Roux *Le principe du droit au travail: juridicité, signification et normativité* (Wilson & Lafleur, Montréal, 2005) at 69; Georges Ripert *Les forces créatrices du droit* (LGDJ, Paris 1955) at 325; Charles Perelman *Logique juridique – Nouvelle rhétorique* (2nd ed, Dalloz, Paris, 1979) at 105; Ronald Dworkin *Prendre les droits au sérieux* (PUF, Paris, 1995); Ronald Dworkin *L’empire du droit* (PUF, Paris, 1994) at 56; Neil MacCormick *Raisonnement juridique et théorie du droit* (PUF, Paris, 1996) at chs VII and IX.

60 Kristin Bartenstein “Les origines du concept de développement durable” (2005) 3 Revue juridique de l’environnement 289.

this well-known definition, at least one that seems to reach a broad consensus among authors and within the international community:<sup>61</sup>

Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of “needs”, in particular the essential needs of the world’s poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs.

A modelling made from this definition resulted in a widely recognised three interconnecting spheres (economic growth, social development and environmental protection) diagram. These three spheres were designed to be of equal importance, but the environmental dimension has received much more attention.<sup>62</sup> However, in spite of this lack of interest in the social dimension of sustainable development, it makes no doubt that it has been considered as important as the other spheres. The Rio Declaration, adopted in 1992 by 182 States attending the UN Conference on Environment and Development, is clear on this point:<sup>63</sup>

All States and all people shall cooperate in the essential task of *eradicating poverty as an indispensable requirement* for sustainable development, in order to decrease the disparities in *standards of living and better meet the needs* of the majority of the people of the world. (emphasis added)

If we do not find any specific reference to the expression “social justice”, we have to recognise that the principle is clearly present in the instruments and texts adopted by States at the Rio Summit. Action 21, a guide to implementation of sustainable development for the 21st century, adopted at the 1992 Earth Summit as a complement to the Rio Declaration, gives us plenty of good examples in this respect. The idea of social justice is clearly expressed in this excerpt from art 3.4 of Action 21:

The long-term objective of enabling all people to achieve sustainable livelihoods should provide an integrating factor that allows policies to address issues of development, sustainable resource management and poverty eradication simultaneously.

The principle of social justice could also be found in ch 29 of Action 21, which is entirely dedicated to the role of workers and unions in the implementation of sustainable development. Several provisions of this chapter clearly show that decent work, which is an important element of social justice, has to be part of sustainable development. For example, art 29.2 states that “the overall objective is poverty alleviation and full and sustainable employment, which contribute to safe, clean and healthy environments – the working environment, the community and the physical environment”. Other provisions specifying the social objectives that States should seek to achieve by year 2000 also speak for themselves: “ratification of ILO conventions of subject and the enactment of legislation in support of those agreements”; “increasing the number of environmental collective agreements aimed at achieving sustainable development”; “reducing

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61 *Report of the World Commission on Environment and Development: Our Common Future* GA Res 42/187, A/RES/42/187 (1987) at pt 1, ch 2.

62 Marie-Claude Desjardins and Dominic Roux “Développement durable et travail décent: à la recherche d’une interface en droit international” (2009) 5 McGill International Journal of Sustainable Development Law and Policy 199; Jérôme Ballet, Jean-Luc Dubois and François-Régis Mahieu “A la recherche du développement socialement durable: concepts fondamentaux et principes de base” (2004) Développement durable & territoires 3.

63 *Rio Declaration on Environment and Development* (1992) at principle 5.

occupational accidents, injuries and diseases according to recognized statistical reporting procedures”; and “increasing the provision of workers’ education, training and retraining, particularly in the area of occupational health and safety and environment” (article 29.3). Also, workers, unions and the promotion of rights at work have a role to play in facilitating the implementation of sustainable development (art 29.4 and ff).

Ten years later in 2002, 100 Heads of States attending the World Summit on Sustainable Development in Johannesburg reiterated, even more clearly, their willingness to integrate the issue of social justice into sustainable development. Indeed, one of the main commitments of the Summit is the following:<sup>64</sup>

[W]e assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development – economic development, social development and environmental protection – at the local, national, regional and global levels.

In the same Declaration, the States declared that the elimination of poverty is a primary objective and a precondition of sustainable development (at [11]):

We recognize that poverty eradication, changing consumption and production patterns, and protecting and managing the natural resource base for economic and social development are overarching objectives of, and essential requirements for sustainable development.

Achieving social justice through sustainable development implies, in particular, according to the Declaration, “provid[ing] assistance to increase income generating employment opportunities, taking into account the International Labour Organization (ILO) Declaration of Fundamental Principles and Rights at Work” (at [28]).

Speaking of the ILO, we have to mention that efforts have not only been deployed to link sustainable development to social justice in international instruments specifically dedicated to sustainable development, but also in other international forums such as the ILC. Indeed, at the 2007 ILC, the ILO made clear connections between its flagship objective, “Decent Work”, and sustainable development. Let us recall that Decent Work is this unifying concept that embodies, since 1999, the fundamental purpose of the ILO to “promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity”.<sup>65</sup> The aspiration to put Decent Work as an essential component of sustainable development has been vigorously defended not only by the Director-General of the ILO but also by several States and representatives of workers and employers attending the 2007 ILC.<sup>66</sup> The title of the Director-General’s report is eloquent on that matter: *Decent work for sustainable development*. The report states that the ILO “needs to anchor the vision of sustainable development as the overriding policy paradigm within which the Decent Work Agenda can make its key contribution to development”.<sup>67</sup>

If this session of the ILC is the first attempt of the ILO to integrate Decent Work as a corollary to the achievement of sustainable development, it must be admitted that a

64 World Summit on Sustainable Development *Johannesburg Declaration on Sustainable Development* A/CONF 199/L.6/Rev2 (2002) at [5].

65 ILO “Decent Work” (Report of the Director-General to the International Labour Conference, International Labour Conference, 87th Session, International Labour Office, Geneva, 1999).

66 ILO “Provisional Record 24” (International Labour Conference, 96th session, Geneva, 2007).

67 ILO “Director-General’s introduction to the International Labour Conference Decent work for sustainable development” (ILC 96-2007/Report I (A), Geneva, June 2007).

rapprochement between the two concepts had been already made by the organisation in 1998. The preamble of the ILO Declaration on Fundamental Principles and Rights at Work confirms this:

Whereas the ILO should, now more than ever, draw upon all its standard-setting, technical cooperation and research resources in all its areas of competence, in particular employment, vocational training and working conditions, to ensure that, in the context of a global strategy for economic and social development, economic and social policies are mutually reinforcing components in order to create broad-based sustainable development;

Ten years later, the preamble of the ILO Declaration on Social Justice for a Fair Globalization also proves that social justice should be seen as an integral part of the concept of sustainable development:<sup>68</sup>

in a world of growing interdependence and complexity and the internationalization of production, the fundamental values of freedom, human dignity, social justice, security and non-discrimination are essential for sustainable economic and social development and efficiency.

Connections may also be made between the principle of social justice as developed in international human rights law treaties and sustainable development.

The International Covenant on Economic, Social and Cultural Rights (with, as a backdrop, the eight core ILO conventions) is a good example. This is one of the two major treaties adopted by the UN in the field of human rights. It was adopted in 1966 and has been in force since 1976. The preamble recalls that:<sup>69</sup>

the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.

It is true that, for historical, political and ideological reasons,<sup>70</sup> the two covenants were split. Without reopening the old recurring and semantics debate on “justiciability” of first and second generation human rights,<sup>71</sup> it may be useful to recall one of the essential premises of international law, declared in 1968 and repeated in 1993 at two World Conferences on Human Rights held respectively in Tehran<sup>72</sup> and Vienna:<sup>73</sup>

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68 ILO Declaration on Social Justice for a Fair Globalization <[www.ilo.org/wcmsp5/groups/public/@dgreports/@cabinet/documents/publication/wcms\\_099766.pdf](http://www.ilo.org/wcmsp5/groups/public/@dgreports/@cabinet/documents/publication/wcms_099766.pdf)>.

69 International Covenant on Economic, Social and Cultural Rights <[www2.ohchr.org/english/law/cescr.htm](http://www2.ohchr.org/english/law/cescr.htm)>.

70 Lucie Lamarche *Perspectives occidentales du droit international des droits économiques de la personne* (Bruylant, Bruxelles, 1995) at 59; Daniel J Whelan *Indivisible Human Rights: A History* (University of Pennsylvania Press, Philadelphia, 2010).

71 In this regard, read the debates of 2004 and 2005 published in Human Rights Quarterly, launched by Kenneth Roth “Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organisation” (2004) 26 HRQ 63. See also Dominic Roux *Le principe du droit au travail: juridicité, signification et normativité* (Wilson & Lafleur, Montréal, 2005) at 131; Philip Harvey “Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously” (2002) 33 Colum Hum Rts L Rev 363.

72 International Conference of Human Rights *Proclamation of Teheran, Final Act of the International Conference on Human Rights A/CONF/32/41* (1968) at 3.

73 World Conference on Human Rights *Vienna Declaration and Programme of Action A/CONF/157/23* (1993) at [5].

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.

There is an inexorable logic in this premise.<sup>74</sup> The death of a person who has been tortured by State agents is dramatic, but is it worse than the death of a person who did not receive adequate care because of a lack of resources or who died because he or she had not enough to eat? In all these cases we should consider that there are internationally recognised human rights violations. Besides, what does the right to life or to liberty effectively mean without the right to health, the right to education or the right to an adequate standard of living? What does freedom of expression and the right to vote really mean without a good education?<sup>75</sup>

Even if there is no explicit reference to the Covenant in the Rio Declaration or in Action 21, many of the economic, social and cultural rights they enshrine are clearly essential components of a sustainable development. The main element that interconnects them is their common objective of poverty eradication. Indeed, it is considered to be an indispensable requirement for sustainable development and also a major component of the social justice principle, as “it is now widely accepted that ... poverty should not be seen only as a lack of income, but also as a deprivation of human rights”.<sup>76</sup>

The first right mentioned in the Covenant, the *right to work* (art 6), is a good example of a right pursuing this poverty elimination objective. Gainful employment is in fact often the first step for an individual to get out of poverty. Moreover, as the Brundtland Report says: “The most basic of all needs is for a livelihood: that is, employment.” What does this right include concretely? Labour must be free, which means that everyone can earn a living and have a job freely chosen and accepted, without being discriminated.<sup>77</sup> It also implies the right not to be unfairly deprived of employment.<sup>78</sup> The right to work minimally presupposes the abolition of forced labour and slavery,<sup>79</sup> but also the obligation for all States to take measures aiming at achieving full employment.<sup>80</sup> This right is related to a host of “core” ILO conventions and other UN treaties,<sup>81</sup> and its normative components are guaranteed in those instruments. The right to

74 Dominic Roux “Le ‘droit à un travail décent’ affirmé dans les normes internationales de l’ONU et l’OÉA. Ou la longue marche d’un vieux couple: le droit du travail et les droits de la personne” in Pierre Verge (ed) *Droit international du travail – Perspectives canadiennes* (Éditions Yvon Blais, Cowansville, 2010) 155.

75 Manisuli Ssenyonjo *Economic, Social and Cultural Rights in International Law* (Hart Publishing, Oxford and Portland (Oregon), 2009) at 13.

76 The Office Of High Commissioner For Human Rights “Human Rights, Poverty Reduction and Sustainable Development : Health, Food and Water, A Background Paper” (World Summit on Sustainable Development, Johannesburg, 26 August 2002 – 4 September 2002) at 2.

77 Discrimination (Employment and Occupation) Convention 1958, C111.

78 Committee on Economic, Social and Cultural Rights *General Comment 18 – The right to work* E/C/12/GC/18 (2006) at pts I and 4.

79 Forced Labour Convention 1930, C29; Abolition of Forced Labour Convention 1957, C105; Minimum Age Convention 1973, C138; Worst Forms of Child Labour Convention 1999, C182.

80 Employment Policy Convention 1964, C122.

81 International Convention on the Elimination of All Forms of Racial Discrimination (1965), art 5; International Covenant on Civil and Political Rights (1966), arts 8 and 26; Convention on the Elimination of All Forms of Discrimination against Women (1979), art 11; Convention on the Rights of the Child (1989), arts 32–34; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); Convention on the Rights of Persons with Disabilities (2006), arts 2, 5 and 27.



work implies a “Decent Work”, and that is why it is also related to art 7 of the Covenant: it is the *right of everyone to the enjoyment of just and favourable conditions of work* which ensure, in particular, remuneration that provides all workers, as a minimum, with a decent living for themselves and their families, and which also ensure safe and healthy working conditions, rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.<sup>82</sup>

In connection with those rights, the Covenant enshrines other labour rights: trade union rights (art 8), which are also recognised in two ILO “core” conventions;<sup>83</sup> the right to strike (art 8); the right to social security (art 9); and the right to family protection, especially for mothers and children, particularly with regard to working conditions (art 10). Once again, this last right is part of other UN treaties<sup>84</sup> and many ILO conventions.<sup>85</sup>

Besides labour-related rights, the Covenant also includes other important rights that States must seek to fill through the lens of sustainable development: the right of everyone to an adequate standard of living for himself and his family, which includes the right to adequate food (since the States recognise the “fundamental right of everyone to be free from hunger”);<sup>86</sup> the right to have enough clothes and the right to live in adequate housing (art 11) (this right might also include right to water);<sup>87</sup> the right to health, that is to say the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health” (art 12);<sup>88</sup> and the right to education, which particularly means that “primary education shall be compulsory and available free to all” (arts 13 and 14).<sup>89</sup> The Brundtland Report mentions several of them, such as rights to food, housing, drinking water, sanitation, health care and energy. Action 21, adopted at the Rio Summit in 1992, also explicitly mentions the eradication of poverty, civil society participation in decision-making on social and environmental issues, and the improvement of living conditions and health protection as issues of high importance with regard to the implementation of sustainable development. The Plan of Implementation<sup>90</sup> adopted in 2002 at the World Summit on Sustainable Development in Johannesburg is even clearer on this point.

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82 Stephanie Bernstein “Le droit à des conditions de travail justes et favorables: un retour aux fondements de la ‘décence’ au travail” in Lucie Lamarche and Pierre Bosset (eds) *Donner droit de cité aux droits économiques, sociaux et culturels – La Charte des droits et libertés du Québec en chantier* (Éditions Yvon Blais, Cowansville, 2011) 93.

83 Freedom of Association and Protection of the Right to Organise Convention 1948, C87; Right to Organise and Collective Bargaining Convention 1949, C98.

84 Convention on the Elimination of All Forms of Discrimination against Women (1979), art 11; Convention on the Rights of the Child (1989), arts 32–34.

85 Minimum Age Convention 1973, C138; Worst Forms of Child Labour Convention 1999, C182. See also Maternity Protection Convention 2000, C183.

86 Committee on Economic, Social and Cultural Rights *General Comment 12 – Right to adequate food* E/C.12/1999/5 (1999).

87 Committee on Economic, Social and Cultural Rights *General Comment 15, The right to water* E/C.12/2002/11 (2002).

88 Committee on Economic, Social and Cultural Rights *General Comment 14, The right to the highest attainable standard of health* E/C.12/2000/4 (2000).

89 Committee On Economic, Social And Cultural Rights *General Comment 13, The right to education* E/C.12/1999/10 (1999).

90 World Summit On Sustainable Development “Plan of Implementation of the World Summit on Sustainable Development” (Johannesburg, 2002).

Chapter II of this Plan, entitled “Poverty Eradication”, qualified as “the greatest global challenge facing the world today and an indispensable requirement for sustainable development, particularly for developing countries”, provides a range of needs for every human being and correlative measures that have to be taken by States and international organisations. It includes: health services for all and reducing environmental health threats; real access to primary schooling and all levels of education for every children; access to agricultural resources for people living in poverty, including the transfer of basic sustainable agricultural techniques and knowledge; food availability and affordability; access to sanitation to improve human health and reduce infant and child mortality; and prioritising water and sanitation. In the light of this comparison, we can assert that economic and social rights and sustainable development clearly pursue the same objective: the satisfaction of all “basic needs” of human beings.

What should we conclude from all of the above? First, it provides us with two main ideas that characterise sustainable development and are related to the social justice principle as developed in international law:

- (1) States and the intergovernmental organisations they belong to *must absolutely put priority* on meeting the basic needs of the poorest people.
- (2) The *respect of equity* is a primary condition for achieving sustainable development:<sup>91</sup> intragenerational equity, on the one hand, since it is necessary to *share* the wealth between the richest and poorest people of the world; intergenerational equity, on the other hand, since the planet’s resources are not unlimited and their use must be controlled so that future generations can enjoy them, too, when the time comes.<sup>92</sup>

Sustainable development therefore accords perfectly with the social justice principle in international law. Both concepts share a common and central basis, which is *welfare of human beings*. That means respect for human dignity through satisfaction of basic needs and collective wealth sharing. In the words of the Brundtland Report: “Sustainable development requires a change in the content of growth, to make it less material- and energy-intensive and more equitable in its impact.”<sup>93</sup>

Even if the ILO conventions, the international human rights treaties and the concept of sustainable development share the common objective of social justice, it has to be underlined that they do not have the same legal effects. Indeed, the concept of sustainable development (which was taken by many actors and sometimes used in a way remote from its original design) has its own areas of ambiguity. In other words, even though several national and international instruments expressly refer to sustainable development, it is very difficult at present to say that this notion corresponds to a formally and universally accepted definition in international law, or that it is a well established general principle or customary law binding all States.<sup>94</sup> In the light of this, international human rights treaties and ILO conventions, which have been widely ratified by

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91 Jean-Guy Vaillancourt “Penser et concrétiser le développement durable” (1995) 15 *Écodécision* 24 at 28–29.

92 Edith Brown Weiss *In Fairness to Future Generations* (Transnational Publishers, Dobbs Ferry (NY), 1989); Axel Gosseries “Theories of intergenerational justice: a synopsis” (2008) 1 *SAPIENS*.

93 *Report of the World Commission on Environment and Development: Our Common Future A/42/a/27* 4 August (1987) at pt 1, ch 2.

94 Jean-Maurice Arbour, Sophie Lavallée and Hélène Trudeau *Droit international de l’environnement* (Éditions Yvon Blais, Cowansville, 2012) 98; Patricia W Birnie and Alan E Boyle *International Law and the Environment* (2nd ed, Oxford University Press, Oxford, 2002) at 85 and 95.

States and thus constitute legally binding instruments for the majority of the countries, should not only be used as a guidance for States on how to implement the social dimension of sustainable development – because they are much more explicit about social justice content – but also as a way to give sustainable development more legal force.

The Covenant, for example, already provides explicit and specific legal obligations to State parties. Indeed, art 2 of the Covenant sets out the legal obligations of State parties. Obviously, there is a general obligation of progressive realisation of all rights guaranteed in that treaty. For the Committee on Economic, Social and Cultural Rights, a body composed of 18 independent experts which is responsible for ensuring compliance with the obligations of State parties, the Covenant's provisions include three basic duties for States: (1) the obligation to respect the enjoyment of rights guaranteed in the Covenant, which requires them not to obstruct, by their acts or omissions, the enjoyment of those rights; (2) the obligation to protect, which requires preventing violations that may be committed by third parties, including companies, in the territory under their jurisdiction; and (3) the obligation to fulfil or provide the full realisation of rights, which involves taking the necessary legislative, administrative, budgetary and judicial measures. Although this Committee is not a supranational court like the Inter-American Court of Human Rights, the European Court of Human Rights or the International Criminal Court, its general conclusions and decisions are recognised as authorities when there are violations of rights committed by the State parties.

Moreover, art 2 of the Covenant recognises the constraints due to limited available resources. The fact remains that States must guarantee that all these rights will be exercised without discrimination of any kind. States have a fundamental duty to act immediately in order to ensure the full enjoyment of all those rights, regardless of their national resources or level of economic and social development. The expression “maximum of its available resources” in this case cannot excuse a State that is unable to achieve the implementation of guaranteed rights.<sup>95</sup> This means first and foremost, the adoption of legislative measures necessary to prohibit and eliminate discrimination, forced labour and child labour, for example. Moreover, many of the rights enshrined in the Covenant have to be implemented “immediately” by State parties: prohibition of discrimination; equality between men and women; the right to fair wages and equal pay for equal work without discrimination based on sex; trade union rights; the right of children to be protected against exploitation and work harmful to their development; and the right to free and accessible primary education.<sup>96</sup> Therefore, according to the interpretation of the Committee, art 2 entails the fundamental obligation of the State parties to ensure, whatever their level of economic or social situation, the rights of all to a minimum level of subsistence and, especially, protect adequately the poor and vulnerable people.<sup>97</sup>

It is not mundane to recall that no fewer than 160 countries are bound by its provisions. This is the vast majority of 185 ILO member countries and WTO members (which counts 157). Of these, over 110 countries bound by that instrument are neither European nor North American

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95 Committee on Economic, Social and Cultural Rights *General Comment 3, The nature of States parties' obligations* E/1991/23 (1991).

96 Committee on Economic, Social and Cultural Rights *General Comment 3, The nature of States parties' obligations* E/1991/23 (1991) at [5]; Committee On Economic, Social And Cultural Rights *General Comment 9, The domestic application of the Covenant* E/C12/1998/24 (1998) at [8] and [10].

97 Committee On Economic, Social And Cultural Rights *General Comment 3, The nature of States parties' obligations* E/1991/23 (1991) at [12].

States but developing countries or countries largely underdeveloped. Therefore the Covenant is a crucial vector for social justice and sustainable development, as well as the ILO conventions. In other words, ratifying the Covenant is equivalent to legally endorsing social targets of sustainable development.

Ultimately it is our point of view that, legally speaking, the concept of sustainable development put forward in 1987 and universally recognised at the 1992 Rio Summit and reiterated at the 2002 Johannesburg Summit brings nothing new in terms of content regarding the notion of social justice. Things were quite different regarding the protection of the environment.<sup>98</sup> Nevertheless, we have to admit that sustainable development has been useful to clearly remind States, international organisations and private actors (such as transnational corporations) that conditions and limits *must legally be* imposed to economic development: these are respect of human rights, in the name of social justice.

As a legal principle, social justice means (*purpose*) that all human beings should be treated with dignity and equality, and that all human beings have the right to meet their basic needs without discrimination. This social justice principle implies three conditions (*means*) so that it can be achieved: a sharing of wealth; respect of basic human rights; and an economy that serves human beings. At least, this is what asserts the Declaration of Philadelphia of 1944, a text that binds the 185 ILO member States. Therefore, in a concrete way and as a legal principle, social justice is the foundation of many legal rules derived from international treaties or international custom. It should then control the interpretation and application of international law linked with them or the creation of a new rule in case of silence or obscurity of the existing ones.<sup>99</sup> This sense of social justice binds all to whom it is addressed, that is to say, the States and intergovernmental organisations.

Given the above, we think it is through international law that social justice could likely go from utopia to reality. And it is through international law that sustainable development will not be reduced to the mere status of “popular slogan”. However, in order to do so, we need common political will. It is clear that social justice, even as a pre-eminent legal principle, and the concept of sustainable development in itself, will not acquire more legal binding significance until the time they get, both politically and economically, sufficient interest from the international community. If, for now, social justice is only “promoted” in international law – that is to say, that violations of ILO conventions and UN human rights treaties cannot be sanctioned as are violations of multilateral or bilateral free trade agreements – it is for a specific reason: the States have decided so. Actually, States still do not want to adopt truly binding mechanisms for the ILO or UN. After watching the excellent (but still shocking) documentary by Charles Ferguson, *Inside Job*, we would say that it is also the will of powerful bankers on Wall Street.

However, ultimately all this discussion has been a good opportunity to recall what *should* or even *must* be the place of social justice and fundamental human rights in the international legal order: at the top of the hierarchy of norms. It remains now for lawyers and legal scholars to scientifically prove this hierarchical superiority and pre-eminence. This will make it easier to convince governments and the courts to act in this same direction.

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98 Sophie Lavallée “Sustainable Development ... without ‘Ecological’ Justice?” in Marie-Ange Moreau and Antoine Duval (eds) *Towards Social Environmental Justice?* (workshop held in Firenze (Italia) organised by the European University Institute, 26 November 2010) 37 <<http://cadmus.eui.eu/handle/1814/20018>>.

99 Dominic Roux *Le principe du droit au travail: juridicité, signification et normativité* (Wilson & Lafleur, Montréal, 2005) at 71.