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*Integrating Sustainable  
Development within the  
United Nations Human  
Rights System*

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ERASMUS MUNDUS JOINT MASTER

**International Law  
of Global Security,  
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# INTEGRATING SUSTAINABLE DEVELOPMENT WITHIN THE UNITED NATIONS HUMAN RIGHTS SYSTEM

*Cristopher de la Torre\**

## Introduction

“The choices we make, or fail to make, today could result in breakdown or a breakthrough to a greener, better, safer future. The choice is ours to make.”<sup>1</sup>

Antonio Guterres

The universal human rights system and the concept of sustainability have emerged during different historical periods and were driven by distinct purposes, but they have increasingly converged through the concept of sustainable development as developed by the United Nations. This connection culminated in a milestone when the United Nations General Assembly adopted the resolution *Transforming our World: The 2030 Agenda for Sustainable Development* (Agenda 2030).<sup>2</sup> Agenda 2030 portrays sustainable development and human rights as two faces of the same coin. However, this integration has faced several challenges, primarily related to the sustainable development paradigm and the complexities of balancing human economic and social considerations with environmental ones.

Currently, the human rights system of the United Nations and the Sustainable Development Goals (SDGs) operate independently, even though the cross-cutting issues they address are deeply connected. The human rights system operates under a primarily legal approach based

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<sup>1</sup> Secretary General of the United Nations, 'Our Common Agenda' (2021) <[https://www.un.org/en/content/common-agenda-report/assets/pdf/Common\\_Agenda\\_Report\\_English.pdf](https://www.un.org/en/content/common-agenda-report/assets/pdf/Common_Agenda_Report_English.pdf)>.

<sup>2</sup> General Assembly, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (United Nations 2015) A/RES/70/1 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/291/89/PDF/N1529189.pdf?OpenElement>>.

on treaty-based and charter-based mechanisms, whereas the SDGs are monitored by political organs such as the High-level Political Forum on Sustainable Development (HLPF).

Despite these differences, voices from academia, state representatives, and UN rapporteurs have initiated discussions on the synergies between both frameworks and how to integrate them. This approach seeks to ensure that states can meet their human rights commitments while simultaneously achieving the 17 SDGs in a reinforcing manner. Consequently, several scholars advocate for an integrative approach to human rights and sustainable development. Furthermore, proponents of this perspective argue that human rights mechanisms can help overcome the shortcomings of the SDGs.

Discussions about the legal value of sustainable development began with the *Gabčíkovo-Nagymaros* case before the International Court of Justice (ICJ).<sup>3</sup> However, the legal nature and substantive content of sustainability remain disputed. Regional human rights systems have addressed the integration of a sustainable development approach in their decisions, particularly concerning environmental protection.<sup>4</sup> Despite the close link between sustainable development and Economic, Social, and Cultural Rights (ESCR), there is a notable gap in understanding states' obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR, hereinafter 'the Covenant') in the context of sustainable development. Therefore, the Committee on Economic, Social, and Cultural Rights (CESCR) acknowledged the need for a General Comment that clarifies the relationship between sustainable development and human rights. The CESCR has initiated the drafting procedure for this General Comment; however, the process is still ongoing. Therefore, this research aims to contribute to this task by answering the following question: How to interpret the key concepts of the ICESCR in light of sustainable development?

This paper argues that a General Comment under the ICESCR could help fill this gap by providing a legal framework for states' human rights obligations in the context of sustainable development. Considering the broad range of commitments that states have under the ICESCR, this research paper specifically focuses on interpreting Article 2.1 of the ICESCR

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<sup>3</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (International Court of Justice).

<sup>4</sup> *Climate Emergency and Human Rights (Advisory Opinion AO-32/25)* (Inter-American Court of Human Rights), 29 May 2025 (requested by the Republic of Chile and the Republic of Colombia).



concerning the obligation to take steps toward progressively achieving the full realisation of rights using the maximum available resources within the context of sustainability.

This paper submits that an evolutive interpretation of the Covenant, integrating the concepts of sustainable use, intergenerational and intragenerational equity, integration and sustainable space, can provide a more sustainable understanding of the Covenant. The notions of planetary boundaries and the logic of doughnut economics can be transposed to the ICESCR to view its obligations through the lens of sustainability. Consequently, this research will be structured as follows:

The first section illustrates the interlinkages between sustainability, human rights, and sustainable development, setting the theoretical foundations for understanding their integration. Firstly, it delves into a critical historical analysis of both regimes and their common aspects. Second, it explores the foundational and conceptual divergences between the sustainability perspective and human rights. Lastly, it shifts the focus from sustainability to an analysis of sustainable development and human rights, exploring how these can be integrated, and which integration path should be prioritised, laying the foundations for legal analysis.

The second section provides a legal analysis. Building on work by the drafting committee of the General Comment on Sustainable Development and the International Covenant on Economic, Social and Cultural Rights, the paper presents the current problems of the Covenant in relation to the sustainability paradigm and how notions of economic growth and environmental protection are confronted within the same legal instrument. This aims to explore how the Covenant has supported a view rooted in the traditional economic growth paradigm. The legal analysis examines the terms used in Article 2.1 to understand problematic aspects and nuances of the Covenant's wording from a sustainability perspective. Once its legal problems are identified, the paper clarifies the status quo concerning the legal nature of sustainable development and which elements it can meaningfully offer based on the principles of sustainable use, intergenerational equity, intragenerational equity, integration, and sustainable space. Finally, the research paper proposes a way forward to address the outlined problems, suggesting that an evolutive

interpretation based on the concepts of planetary boundaries and doughnut economics is a viable method to interpret the Covenant in light of sustainable development.

## 1. Two Governance Modes

Sustainability and human rights were not initially conceived as interconnected concepts. These two governance modes emerged from different fields: sustainability as a construct of the scientific community, particularly from the natural sciences; and human rights as a topic discussed by politicians, lawyers, activists, and the social science community. However, nowadays, the connection between both regimes has become a prominent topic, especially under the idea of sustainable development and the ambition “to realize human rights for all” that underlies the 2030 Agenda for Sustainable Development.<sup>5</sup> Moreover, the United Nations High Commissioner for Human Rights, Volker Türk, stated, “Sustainable development is inextricably bound up with human rights. Without human rights, there is no sustainability”.<sup>6</sup>

The Universal Human Rights System found its origins in 1948, a time when the term sustainability had not yet been coined. It was only after 25 years, in the 1970s, as a reaction to an emerging environmental crisis, that the world began to recognise the first connections between both governance modes. To this day, this discussion remains both relevant and increasingly urgent. This urgency has been underscored by the Secretary-General of the United Nations, António Guterres, who has recognised that: “Today, the Earth is facing a triple planetary crisis: climate disruption, nature and biodiversity loss, pollution, and waste. This triple crisis is threatening the well-being and survival of millions of people around the world”.<sup>7</sup>

In this context, understanding and exploring the relationship between both governance modes is important because this can provide a framework for developing solutions for global challenges, such as the triple planetary crisis. Therefore, an interesting way to navigate the complexities of this intricate relationship would be through a historical immersion, subsequently identifying the common and distinct grounds of both regimes and ultimately assessing whether the interaction between them has a practical application.

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<sup>5</sup> General Assembly, “Transforming Our World: The 2030 Agenda for Sustainable Development” (n 3).

<sup>6</sup> Volker Türk, ‘The Key to Development That Works and Lasts Is Rights, Türk Tells EU Ministers’ (*OHCHR*, 11 February 2024) <<https://www.ohchr.org/en/statements-and-speeches/2024/02/key-development-works-and-lasts-rights-turk-tells-eu-ministers>> accessed 30 July 2024.

<sup>7</sup> António Guterres, ‘Ambitious Action Key to Resolving Triple Planetary Crisis of Climate Disruption, Nature Loss, Pollution.’ (21 April 2022) <<https://press.un.org/en/2022/sgsm21243.doc.htm>> accessed 30 July 2024.

## 1.1 A critical historical and conceptual framework

### 1.1.1 An interdisciplinary view on the evolution of sustainability

Defining “sustainability” is a challenging task due to its interdisciplinary, dynamic, and evolving nature, as well as the profound societal implications that come with defining this term. Consequently, there is no universally accepted definition, and policymakers, academics, and scientists constantly discuss how it should be interpreted.<sup>8</sup> However, from a historical perspective, certain milestones have shaped the concept. According to Wu, when the term first emerged, there was no conceptual clarity about the scope and implications of sustainability, nor was there a discipline focused on analysing it.<sup>9</sup> Nowadays, some fundamental tenets inform understandings of sustainability, mainly from a scientific perspective.

Aware of the global, interdisciplinary, and complex nature of environmental and social problems, scientists and economists proposed the first scientific approaches to address these issues, leading to the emergence of the concept of sustainability. The concept of sustainability is a relatively modern term that gained popularity in the 1970s with the publication of *The Limits to Growth* by the Club of Rome.<sup>10</sup> This report raised awareness about the potential consequences of exponential economic growth within a world of finite resources and was a pioneering publication advocating for a sustainable world system.<sup>11</sup> This publication sparked the global interest in the term, giving the basis for the scientific development of the sustainability field. Since then, numerous definitions of sustainability have emerged.

In 1987, a report by the World Commission on Environment and Development, entitled *Our Common Future*, also known as the Brundtland report, triggered various reflections on how sustainability should be framed. On the basis of this report, the sustainability three-pillar

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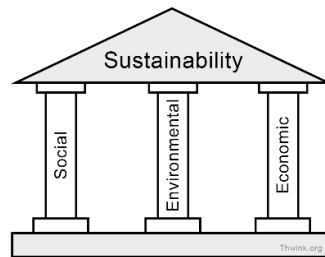
<sup>8</sup> Claudia Lemke, ‘Conceptual Framework of Sustainable Development’ in Claudia Lemke, *Accounting and Statistical Analyses for Sustainable Development* (Springer Fachmedien Wiesbaden 2021) <[http://link.springer.com/10.1007/978-3-658-33246-4\\_2](http://link.springer.com/10.1007/978-3-658-33246-4_2)> accessed 20 July 2024.

<sup>9</sup> Jianguo Wu, ‘Landscape Sustainability Science: Ecosystem Services and Human Well-Being in Changing Landscapes’ (2013) 28 *Landscape Ecology* 999.

<sup>10</sup> A group of scientists, business leaders and economists from 25 countries.

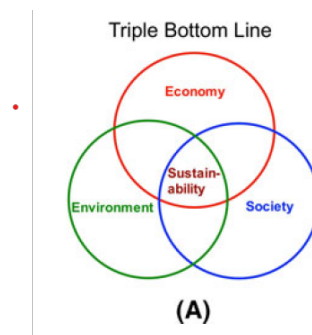
<sup>11</sup> Donella H Meadows, *The Limits to Growth: A Report for The Club of Rome’s Project on the Predicament of Mankind* (2nd edn, Universe Books 1974) <<https://go.exlibris.link/2Gplyx28>>.

paradigm emerged. This entails that economic development, social development, and environmental protection were mutually reinforcing components ( Figure 1).<sup>12</sup>



*Figure 1: Three Pillar Paradigm*<sup>13</sup>

The core ideas of the third pillar's definition have been reflected in several approaches from different fields. For instance, from a business perspective, in 1994, John Elkington developed a triple bottom line definition of sustainability, also known as the 3Ps: people, planet, and profits. This framework aimed to encourage businesses to track and manage economic, social, and environmental performance (Figure 2).<sup>14</sup> In other words, the Triple Bottom Line (TBL) started as "an accounting framework that endeavoured to include environmental and social dimensions into the traditional finance-centric measurement of business performance".<sup>15</sup>



*Figure 2: Triple Bottom Line*<sup>16</sup>

<sup>12</sup> Ben Purvis, Yong Mao and Darren Robinson, 'Three Pillars of Sustainability: In Search of Conceptual Origins' (2019) 14 Sustainability Science 681.

<sup>13</sup> *ibid.*

<sup>14</sup> Lemke (n 8).

<sup>15</sup> Cheng Siew Goh and others, 'Revisiting Triple Bottom Line within the Context of Sustainable Construction: A Systematic Review' (2020) 252 Journal of Cleaner Production 119884, 2.

<sup>16</sup> Wu (n 9).

Beyond just a business perspective, various definitions have emerged that encompass broader societal dynamics, such as the notions of weak and strong sustainability. Aligned with the economic perspective of the TBL and inspired by neoclassical economic thinking, the concept of weak sustainability emerged, largely founded on Robert Solow's ideas that at the core of weak sustainability, natural capital can be substituted with human-made capital (Figure 3).<sup>17</sup> In simple terms, "[i]t does not matter whether the current generation uses up non-renewable resources or dumps CO<sub>2</sub> in the atmosphere as long as enough machinery, roads, and ports are built in compensation".<sup>18</sup> According to this view, natural resources are extremely abundant, and technological progress will bring solutions to the issues arising from the production of goods and services.



Figure 3: Weak Sustainability<sup>19</sup>

In contrast, Herman Daly, in his book *Steady-State Economics* laid the groundwork for strong sustainability, which differs from weak sustainability by not considering natural capital and human capital as substitutable.<sup>20</sup> According to Wu, strong sustainability "means that economic activities are part of the social domain, and both economic and social actions are constrained by the environment".<sup>21</sup> In other words, this view entails a hierarchical understanding of the dimension highlighting the idea of limited natural resources (Figure 4).

<sup>17</sup> Robert Solow, 'An Almost Practical Step toward Sustainability' (1993) 19 Resources Policy 162.

<sup>18</sup> Eric Neumayer, *Weak versus Strong Sustainability: Exploring the Limits of Two Opposing Paradigms* (Edward Elgar Publishing 2003) 1.

<sup>19</sup> Wu (n 9).

<sup>20</sup> Herman E Daly, *Steady-State Economics* (Routledge 2015) 250.

<sup>21</sup> Wu (n 9) 10003.



*Figure 4: Strong sustainability<sup>22</sup>*

The discrepancies between these two understandings of sustainability are centred on the role of the environmental dimension in contrast to the social and economic ones. Although these perspectives seem opposed, they are not fully incompatible. By understanding the relationship between weak and strong sustainability, we can better navigate the complexities at the core of the sustainable development paradigm. Recognising that achieving weak sustainability could be a positive step in the right direction, though insufficient from an overall perspective, provides the foundation to understand that some decisions based on sustainable development are not fully sustainable.

In the 2000s, sustainability science emerged as a new discipline aimed at understanding the intricate interactions between nature and society.<sup>23</sup> Rather than seeking fundamental shifts in sustainability concepts, the field's primary focus has been on integrating new perspectives to enhance the practical implementation and operationalisation of sustainability. As such, scholars such as Clark and Harley have systematised an integrative framework of sustainability, pointing out the research programs that have shaped its modern understanding.<sup>24</sup> From the extensive list that they have developed, some of the programs that have been mainstreamed include resilience, ecosystem services, planetary boundaries, systems thinking, circular and doughnut economy and transdisciplinary approaches. Moreover, from Kate's perspective, these specific research programs

<sup>22</sup> Wu (n 9).

<sup>23</sup> Robert W Kates and others, 'Sustainability Science' (2001) 292 Science 641, 641.

<sup>24</sup> William C Clark and Alicia G Harley, 'An Integrative Framework for Sustainability Science', *Sustainability Science: A Guide for Researchers* (1st edn, 2020) <10.21428/f8d85a02.d9dbc249>.

highlighted concepts in contemporary days that are at the core of the field,<sup>25</sup> which are relevant to this research paper. In sum, the term “sustainability” lacks a universally agreed-upon definition, and its understanding is shaped by various approaches, each with its own nuances yet grounded in shared foundations.

### **1.1.2 The universal human rights system in a nutshell**

Human rights have philosophical and historical roots dating back to ancient times. However, this paper focuses on the period after 1945, when human rights gained structured recognition. It is important to clarify that human rights law exists on different levels: regional, local, and universal. This paper specifically explores international human rights law, particularly the universal rights system that began with the Universal Declaration of Human Rights under the United Nations framework.

The universal system of human rights originated in the post-World War II period. Since 1945, the United Nations has taken a leading role in promoting and respecting human rights from a global perspective. In 1946, the Economic and Social Council established the Commission on Human Rights as the main subsidiary body responsible for providing policy guidelines, conducting research, developing and codifying norms on this topic.<sup>26</sup> Consequently, in 1947, the Commission drafted the Universal Declaration of Human Rights, which was adopted by the General Assembly of the United Nations in 1948.<sup>27</sup>

The Universal Declaration of Human Rights (the Declaration) is the cornerstone of the human rights system, as it outlines the set of rights that define the scope of this system. Articles 3 to 15 and 19 to 21 recognise civil and political rights, while Articles 16 to 18 and 22 to 27 recognise economic, social, and cultural rights. Although the Declaration is a foundational document, it lacks binding legal force. As such, from 1950 to 1960, member states worked on transforming this declaration into concrete legal obligations for states. According to Donnelly, as a result of intense political discussions during the Cold War, two

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<sup>25</sup> Kates and others (n 23).

<sup>26</sup> United Nations High Commissioner for Human Rights (OHCHR), ‘Brief Historic Overview of the Commission on Human Rights’ 1

<<https://www.ohchr.org/sites/default/files/Documents/HRBodies/CHR/BriefHistoric.doc>>.

<sup>27</sup> United Nations, ‘History of the Declaration’ (*United Nations*, 2024) <<https://www.un.org/en/about-us/udhr/history-of-the-declaration>> accessed 30 July 2024.



main human rights treaties were drafted.<sup>28</sup> In 1966, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) were adopted.<sup>29</sup> Together, the Declaration and both the ICCPR and the ICESCR are known as the International Bill of Human Rights, which forms the tenets of the universal human rights framework.

Until the 1970s, the human rights agenda primarily focused on implementing civil and political rights, as well as economic, social, and cultural rights, although the latter was often neglected due to its complexities and costs in their implementation.<sup>30</sup> According to Donnelly, the human rights developments of the time were also influenced by the historical context, which included significant economic and political discrepancies worldwide due to the Cold War and the emergence of the New International Economic Order.<sup>31</sup> This turbulent period impacted the human rights sphere which led to the emergence of new ideas about economic and social rights in the 1970s.<sup>32</sup> Topics related to development, self-determination, the sovereignty of indigenous people, and the environment began to gain relevance, forming the foundation for a new set of human rights based on community rather than individual perspectives.<sup>33</sup> Vasak characterises this as the third generation of rights.<sup>34</sup>

From the 1970s to the 1990s, the Commission established the machinery and the basis for monitoring procedures to ensure compliance on a country or thematic basis. This included mechanisms such as appointing special rapporteurs, creating working groups, and deploying fact-finding missions to countries where severe human rights violations were

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<sup>28</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice* (NED-New edition, 3, Cornell University Press 2013) <<https://www.jstor.org/stable/10.7591/j.ctt1xx5q2>> accessed 20 July 2024.

<sup>29</sup> Ibid.

<sup>30</sup> Peter Uvin, *Human Rights and Development* (Lynne Rienner Publishers 2004) <<https://doi.org/10.1515/9781565492455>> accessed 5 July 2024.

<sup>31</sup> Donnelly (n 28).

<sup>32</sup> David Forsythe (ed), 'Implementing Human Rights Standards', *Human Rights in International Relations* (4th edn, Cambridge University Press 2017) <<https://www.cambridge.org/core/product/324C7BEEF816C68C5C9747903C5F0C7D>>.

<sup>33</sup> William Felice, "'The Normative Framework of the Right to Development'" [2018] OHCHR <<https://www.ohchr.org/en/training-materials-online-course-right-development-and-sustainable-development-goals>> accessed 20 July 2024.

<sup>34</sup> Spasimir Domaradzki, Margaryta Khvostova and David Pupovac, 'Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse' (2019) 20 Human Rights Review 423.

alleged.<sup>35</sup> The movement to codify international human rights law into conventions also achieved significant success. Several key conventions were adopted during this period.<sup>36</sup> Furthermore, for each convention, a specific committee was created to ensure compliance and oversight of state commitments and monitoring of the treaty, mainly through additional protocols.

During the 1990s, the role of the Commission on Human Rights evolved to take on a more advisory function, providing technical assistance to countries to safeguard human rights. Moreover, in 1993, the World Conference on Human Rights was held in Vienna. This conference reinforced the principle that all rights are universal, indivisible, interdependent, and interrelated.<sup>37</sup> It underscored the global commitment to upholding human rights in a comprehensive and cohesive manner, providing a pragmatic solution to the theoretical discussion about the hierarchy of generations of rights. Subsequently, the Office of the High Commissioner for Human Rights was established as the main international political institution devoted to strengthening the protection of human rights. Therefore, by the end of the century, the basis for a cohesive understanding of an interconnected system of rights was in progress.

In 2006, a significant structural change occurred within the human rights system. According to Clapham, due to international pressure and allegations of shielding human rights violations for certain countries, "the Commission was abolished and replaced with the Human Rights Council".<sup>38</sup> This new body revitalised the system by introducing mechanisms such as the Universal Periodic Review (UPR), special procedures, an advisory committee, and a complaint procedure. The UPR marked a significant shift as all 193 UN member states underwent human rights scrutiny.

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<sup>35</sup> United Nations High Commissioner for Human Rights (OHCHR) (n 22).

<sup>36</sup> Elimination of All Forms of Racial Discrimination (1965), Elimination of All Forms of Discrimination Against Women (1979), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the Convention on the Rights of the Child (1989), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).

<sup>37</sup> The World Conference on Human Rights, 'Vienna Declaration and Programme of Action' <<https://www.ohchr.org/en/about-us/history/vienna-declaration>>.

<sup>38</sup> Andrew Clapham, *Human Rights: A Very Short Introduction* (Oxford University Press 2007) <<https://go.exlibris.link/smCmpks4>>.

From 2006 to 2015, the system saw continuous progress in its various dimensions without facing further structural transformations. Although there was emerging attention to digitalisation and environmental issues. Notably, human rights rapporteurs have engaged in substantial discussions on environmental issues, as well as on online freedom of expression and internet access. Overall, this is the status quo of the universal human rights as governance mode.

### **1.1.3 Sustainable development: A common history under the UN framework**

Until now, the histories of these two governance modes have been told separately, illustrating that they initially emerged independently. However, in practice, there is significant overlap among them due to the nature of the topics that they address and their connection to global challenges. As such, this paper explores how the interconnection between both regimes has been present throughout history and evolved over time. It is important to mention that the United Nations framework is the most comprehensive one to explore the relationship between human rights and sustainability.<sup>39</sup> As such, this research paper will focus specifically on developments under the United Nations umbrella, although there have also been interactions in other scenarios, such as specific local or regional initiatives.

The first global and institutional attempts to establish the link between sustainability and human rights can be traced back to the 1972 UN Conference on the Human Environment (UNCHE) in Stockholm. The conference's main outcomes included the introduction of 26 principles that elevated environmental issues to a global concern through a joint declaration, as well as an action plan and recommendations outlining technical and environmental strategies to be followed to address environmental issues comprehensively.<sup>40</sup>

Although the conference primarily focused on environmental issues, often described as “marking the birth of international environmental law”, it also employed striking language

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<sup>39</sup> Frank Biermann, Norichika Kanie and Rakhyun E Kim, ‘Global Governance by Goal-Setting: The Novel Approach of the UN Sustainable Development Goals’ (2017) 26–27 Open issue, part II 26.

<sup>40</sup> United Nations, *Report of the United Nations Conference on the Human Environment: Stockholm, 5-16 June 1972* (1973).

that touched upon human rights.<sup>41</sup> For instance, the preamble of the declaration states, “[b]oth aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights — even the right to life itself”.<sup>42</sup> Moreover, although the text does not explicitly mention sustainability, a systemic and interdisciplinary reading of this convention reveals that it was implicit. For instance, principle 8 refers to the three-pillar sustainability paradigm while stating, “[e]conomic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life”.<sup>43</sup> Hence, since this moment in history, the connection between human rights and sustainability began to appear.

Several years later, the Brundtland Report was released, a milestone in sustainability’s historical development. This report, for the first time, coined the term “sustainable development”, defining it as “[d]evelopment that meets the needs of the present without compromising the ability of future generations to meet their own needs”. Under this definition, it is important to note that it does not refer to sustainability *per se*, but rather defines sustainable development. This terminological divergence *prima facie* entails that theoretically it is possible to differentiate between both terms. In this sense, some scholars argue that both terms are different, whereas others agree that these terms can be used interchangeably or in an integrative manner.<sup>44</sup>

The Brundtland definition opts for an integrative approach, in which sustainability is connected to the environmental and ecological aspects of development, whereas sustainable development is seen as an overarching concept (what authors like Daly would call strong sustainability).<sup>45</sup> Furthermore, considering that the United Nations institutional framework has endorsed the Brundtland Report as an ethical standard for theoretical

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<sup>41</sup> Daniëlla Dam-de Jong and Fabian Amtenbrink (eds), *A Greener International Law: International Legal Responses to the Global Environmental Crisis*, vol 52 (TMC Asser Press 2023) 5  
<<https://link.springer.com/10.1007/978-94-6265-587-4>> accessed 20 July 2024.

<sup>42</sup> United Nations (n 40).

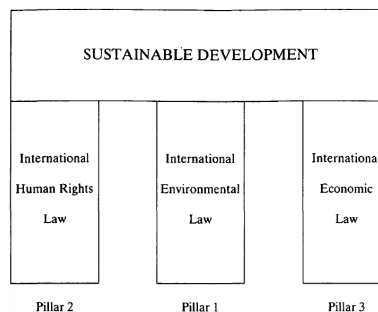
<sup>43</sup> *ibid* 4.

<sup>44</sup> Erling Holden, Kristin Linnerud and David Banister, ‘Sustainable Development: *Our Common Future* Revisited’ (2014) 26 *Global Environmental Change* 130, 130.

<sup>45</sup> *ibid*.

clarity, this research will adopt this view.<sup>46</sup> This perspective perceives sustainability (also referred to as environmental sustainability) as a governance mode with a strong focus (though not the only one) on the environment, and sustainable development as a broader concept that integrates other aspects such as social and economic development as well as intergenerational equity.

The main feature of this definition is that it integrates environmental concerns with a human development approach, framing an integrative concept of sustainable development based on long-term ecological sustainability, meeting basic human needs, and promoting inter- and intra-generational equity. Transposing these ideas to a legal perspective, McGoldrick suggests that the Brundtland definition of sustainable development has three main pillars: International Human Rights Law, International Environmental Law, and International Economic Law (Figure 5).<sup>47</sup>



*Figure 5: Brundtland Temple pillared like structure<sup>48</sup>*

Following this approach, it is clear that this definition of sustainable development has a strong connection to human rights. Moreover, McGoldrick's perspective conveys the idea that sustainable development and human rights overlap and are intrinsically connected because respect for human rights is needed to achieve sustainable development. As such,

<sup>46</sup> Rupert J Baumgartner, 'Managing Corporate Sustainability and CSR: A Conceptual Framework Combining Values, Strategies and Instruments Contributing to Sustainable Development' (2014) 21 Corporate Social Responsibility and Environmental Management 258.

<sup>47</sup> Dominic McGoldrick, 'Sustainable Development and Human Rights: An Integrated Conception' (1996) 45 International and Comparative Law Quarterly 796, 797.

<sup>48</sup> McGoldrick (n 47).

it is worth exploring how sustainable development has evolved and how this concept serves as the bridge that merges these two governance modes.

In 1992, the UN Conference on Environment and Development (UNCED), also known as the Earth Summit, was held. The result of the conference was the adoption of the Rio Declaration and Agenda 21. The declaration includes 27 substantial principles for understanding sustainable development, while the agenda provides a pragmatic approach for states to take action on sustainable development. The Commission on Sustainable Development, established in 1993 by the UN General Assembly, is responsible for monitoring states progress. According to Ebbesson, the Rio Declaration links human rights and sustainability,<sup>49</sup> which has explicitly stated: “Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature”.<sup>50</sup> This reference demonstrates the relationship between human rights and sustainability, emphasising that it takes place through the concept of sustainable development.

From 1995 onwards the understanding of the concept of sustainable development had moved from merely addressing environmental issues to balancing social development, economic development, and environmental protection.<sup>51</sup> The Copenhagen Declaration, adopted during the World Summit for Social Development, elaborated on the social and human aspects and conveyed the idea of social justice which entails that environmental justice cannot be achieved without respecting human rights.<sup>52</sup> Furthermore, in 1997, the discussion on emphasising social development was followed up during the Earth Summit +5, celebrated for the five-year anniversary of the UNCED, which aimed to assess the

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<sup>49</sup> Jonas Ebbesson, ‘Getting It Right: Advances of Human Rights and the Environment from Stockholm 1972 to Stockholm 2022 +’ (2022) 52 *Environmental Policy and Law* 79.

<sup>50</sup> General Assembly United Nations, ‘Rio Declaration on the Environment and Development’ (1992) A/CONF.151/26 (Vol. I) <<https://sustainabledevelopment.un.org/milestones/humanenvironment>>.

<sup>51</sup> CESCR and others, ‘Issues Paper on Sustainable Development and the International Covenant on Economic, Social and Cultural Rights’ (United Nations 2021) <<https://www.ohchr.org/sites/default/files/documents/hrbodies/cescr/discussions/2023/2023-01-30/Issues-Paper-Sustainable-Development-2021-en.docx>>.

<sup>52</sup> Sumudu Atapattu, ‘From Our Common Future to Sustainable Development Goals: Evolution of Sustainable Development under International Law’ (2018) 36 *Wis. Int’l LJ* 215.

progress made in implementing the commitments and actions outlined in Agenda 21 and the Rio Declaration.

By the 2000s, a new framework of action known as the Millennium Development Goals (MDGs) was established. This was the first global attempt to address issues such as eradicating extreme poverty, education, gender equality, health, and environmental sustainability in a comprehensive way based on the overarching idea of human development, which is inherently connected to human rights and sustainability.<sup>53</sup> However, this connection between the governance modes within MDGs was contentious. Ebbesson indicated that “the Millennium Development Goals didn’t have a direct link between human rights and sustainable development”.<sup>54</sup> Moreover, Alston described the relationship between the MDGs and human rights as ships passing in the night.<sup>55</sup> Although, Kuruvilla and others have indicated that there are important complementarities between the MDGs and the human rights framework.<sup>56</sup>

In 2002, according to Atapattu, the Johannesburg World Summit on Sustainable Development reinforced the idea of balancing the three dimensions of sustainable development, with particular emphasis on the social dimension, particularly on eradicating poverty, addressing inequalities, and combating climate change.<sup>57</sup> Following this trend, in 2012, the Rio+20 Conference took place, resulting in the declaration *The Future We Want*. Moreover, the United Nations High-level Political Forum on Sustainable Development was created to replace the Commission on Sustainable Development.

According to Navi Pillay, the UN High Commissioner for Human Rights at the time, argued that *The Future We Want* declaration was a significant milestone because “the centrality of human rights in the international community’s conception of development [had] been

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<sup>53</sup> United Nations General Assembly, ‘United Nations Milenium Decalaration’ (2000) A/RES/55/2 <[https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_55\\_2.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_55_2.pdf)>.

<sup>54</sup> Ebbesson (n 49) 89.

<sup>55</sup> Philip Alston, ‘Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals’ (2005) 27 Human Rights Quarterly 755.

<sup>56</sup> Shyama Kuruvilla and others, ‘The Millennium Development Goals and Human Rights: Realizing Shared Commitments’ (2012) 34 Human Rights Quarterly 141.

<sup>57</sup> Atapattu, ‘From Our Common Future to Sustainable Development Goals’ (n 52).

affirmed".<sup>58</sup> This declaration specifically included provisions on the right to development, the right to an adequate standard of living, the right to food, the right to water and sanitation, the right to health, education, social protection, and the human rights of women, minorities, Indigenous communities, and other vulnerable groups.

Finally, in 2015, the long efforts to establish a framework that linked human rights and sustainability culminated in the adoption of the 2030 Agenda for Sustainable Development. The Agenda established the 17 SDGs, 169 targets, and 231 indicators, with the ultimate goal to "realise the human rights of all".<sup>59</sup> It encompasses elements of economic, social, and cultural rights through goals such as the elimination of poverty and hunger, good health and well-being, quality education, clean water and sanitation, decent work and economic growth. It also encompasses civil and political rights through goals related to peace, justice, and strong institutions. Furthermore, it integrates environmental sustainability through goals related to climate action, climate change, the protection of oceans and marine resources, and the preservation of terrestrial ecosystems.<sup>60</sup> Social, environmental, and economic aspects are intertwined in a framework that combines people, planet, prosperity, peace, and partnerships. As such, the symbiotic and mutually reinforcing relationship between human rights and sustainable development achieved its peak moment.

As an overview to understand the evolution of sustainable development, Viñuales has designed a diagram (Figure 6) summarising the main points discussed.<sup>61</sup>

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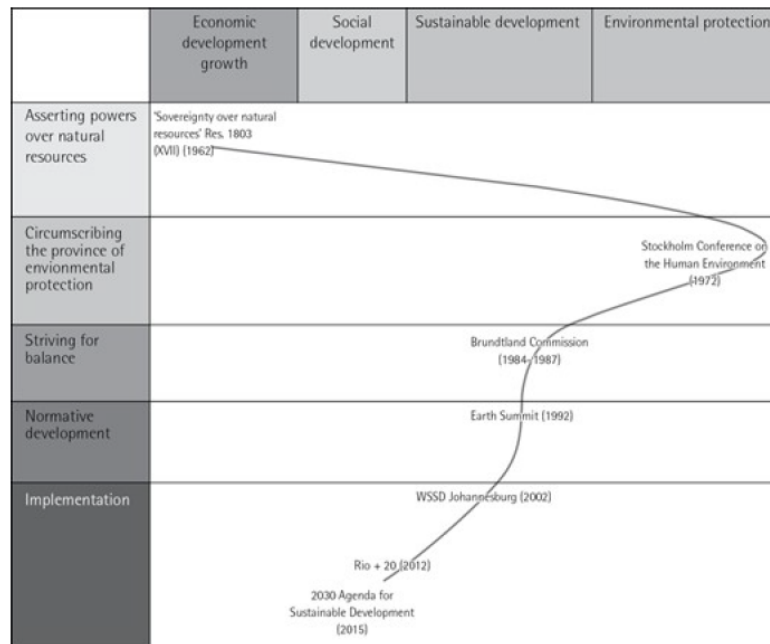
<sup>58</sup> OHCHR, 'Rio+20 Outcome: Human Rights Emerge as New Pillar of Sustainable Development' (22 June 2012) <<https://www.ohchr.org/en/2012/06/rio20-outcome-human-rights-emerge-new-pillar-sustainable-development>> accessed 1 August 2024.

<sup>59</sup> General Assembly (n 2).

<sup>60</sup> OHCHR, 'About the 2030 Agenda on Sustainable Development' (2024) <<https://www.ohchr.org/en/sdgs/about-2030-agenda-sustainable-development>> accessed 1 August 2024.

<sup>61</sup> Jorge E Viñuales, 'Sustainable Development' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2021) <<https://doi.org/10.1093/law/9780198849155.003.0017>> accessed 8 August 2024.





*Figure 6: Evolution of sustainable development<sup>62</sup>*

In sum, the historical evolution of sustainable development reveals an ongoing process of integration between human rights and sustainability, shaped by key institutional milestones under the United Nations framework. While initially emerging as distinct governance modes, their convergence has been reinforced through international declarations, summits, and legal frameworks, culminating in the 2030 Agenda. Although there is still dispute on the right balance among the environmental, social and economic dimensions, efforts to integrate them continue to evolve.

## 1.2 Synergies and Divergences

### 1.2.1 Anthropocentrism vs Ecocentrism

One of the main complexities regarding the integration of sustainability and human rights is related to the ontological foundations of both regimes, which at first glance seem to be contradictory. Human rights are often associated with an anthropocentric understanding of the world, while sustainability departs from an ecocentric perspective. For some, these perspectives are irreconcilable, while others advocate for a nuanced approach under the

<sup>62</sup> *ibid.*

flag of sustainable development, offering a way forward for humans to coexist with nature.<sup>63</sup>

In this context, Duweel and Bis describe three ways of understanding the link between anthropocentrism and human rights: (1) “it can mean that human beings regard themselves as entitled to make unlimited use of non-human nature as means to achieve human ends”; (2) “human rights regime accounts for only human interest; animals, plants, specific ecosystems or nature in a general sense do not count”; and (3) “[a]ll the duties we may have must be justified by reference to the human beings”.<sup>64</sup> Although there are slight differences between understandings, they all reinforce the idea that nature and the environment are not at the centre of human rights thinking.

Following the scientific movement of the 1970s, differently from the dominant anthropocentric paradigms of knowledge, sustainability (at least for the ones who argued for strong sustainability) emerged following a different ethical standard which was ecocentrism.<sup>65</sup> According to Eckersley, ecocentrism views the world as an “intrinsically dynamic, interconnected web of relations in which there are no absolutely discrete entities and no absolute dividing lines between the living and the non-living, the animate and the inanimate, or the human and the nonhuman”.<sup>66</sup> Therefore, it shifts the focus away from humans being the only source of value, urging people to change their human-centred view of ecosystems.<sup>67</sup>

The divergence between sustainability and human rights lies in their ontological origins. Human rights arose as a regime with the human at its centre, contrasting with the original sustainability foundations that placed the environment at the forefront. This binary

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<sup>63</sup> Carl Folke and others, ‘Our Future in the Anthropocene Biosphere’ (2021) 50 *Ambio* 834.

<sup>64</sup> Marcus Düwell and Gerhard Bos, ‘Human Rights and Future People — Possibilities of Argumentation’ (2016) 15 *Journal of Human Rights* 231, 235.

<sup>65</sup> Guido Montani and Edward O Wilson, ‘The Ecocentric Approach to Sustainable Development. Ecology, Economics and Politics’ (2010) <<https://api.semanticscholar.org/CorpusID:53315316>>.

<sup>66</sup> Robyn Eckersley, ‘Ecocentrism Explained and Defended’, *Environmentalism And Political Theory* (1st Edition, Routledge 1993) <<https://www.taylorfrancis.com/chapters/mono/10.4324/9781315072111-5/ecocentrism-explained-defended-robyn-eckersley>>.

<sup>67</sup> Stephen Allen, Ann L Cunliffe and Mark Easterby-Smith, ‘Understanding Sustainability Through the Lens of Ecocentric Radical-Reflexivity: Implications for Management Education’ (2019) 154 *Journal of Business Ethics* 781.

perception created a theoretical divide between the two regimes, in which “[e]cocentrism is often posited against anthropocentrism as the extreme on the other end of the environmental ethics argument”.<sup>68</sup> However, this theoretical dissonance has gradually been addressed in practice, particularly with the new approach to sustainable development, which reconciles the relationship between human rights and sustainability.

The concerning findings regarding pollution, climate change, biodiversity loss, overpopulation and other environmental issues led to criticism of the human rights perspective supporting the human development paradigm. As a result, it was debunked that environmental considerations did not play a substantial role in the initial establishment of the human rights system. This revelation caused internal fractures within the human rights movement, setting the ground for debate regarding a sustained environment as an essential element of human dignity.

Consequently, a doctrine known as the human rights approach to the environment has emerged. On these grounds, synergies between both governance modes started to appear. For instance, a trend of adding an environmental perspective to existing human rights instruments began; the movement for the recognition of new rights based on the third generation of rights movements, specifically focusing on the right to a healthy environment, gained relevance; and the discourse of nature as a rights holder began to take shape.<sup>69</sup> These developments support Atapattu’s idea that opting for a human rights approach does not mean conceding on a non-anthropocentric approach to the environment.<sup>70</sup>

From the sustainability sphere, there has also been an attempt to integrate human rights. A modern understanding of sustainability, which can be associated with the concept of sustainable development, views humans as elements of the community that can actively mitigate negative impacts on the environment to reach an equilibrium. On this note, Eckley has clarified that sustainability, even in its most ecocentric approach, is not opposed to

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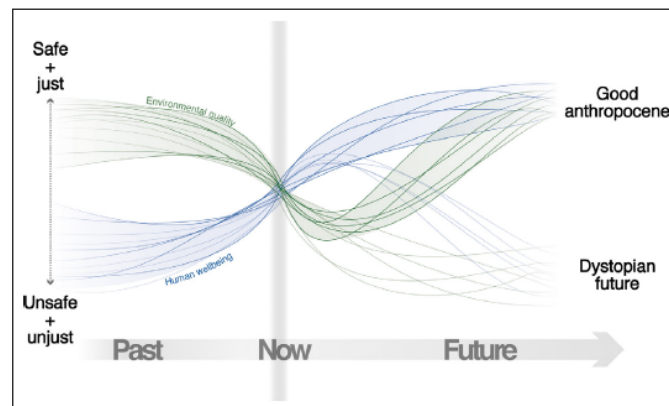
<sup>68</sup> L Goralnik and MP Nelson, ‘Anthropocentrism’ in Ruth Chadwick (ed), *Encyclopedia of Applied Ethics (Second Edition)* (Academic Press 2012) 151  
<<https://www.sciencedirect.com/science/article/pii/B9780123739322003495>>.

<sup>69</sup> John H Knox, ‘Human Rights’ in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2021)  
<<https://doi.org/10.1093/law/9780198849155.003.0045>> accessed 18 July 2024.

<sup>70</sup> Atapattu, ‘From Our Common Future to Sustainable Development Goals’ (n 52).

humans enjoying their rights. According to him, “Ecocentrism is not against humans per se or the celebration of humanity’s special forms of excellence”, which means that both governance modes can have synergies.<sup>71</sup>

Moreover, scholars such as Bennett et al discuss the idea of a Good Anthropocene (Figure 7) which, from an optimistic perspective, involves “identifying and combining seeds to develop a set of possible positive outcomes in the Anthropocene, offering a viable means of understanding how our world could intentionally follow transformative pathways to improve human well-being, even in the face of unprecedented social and environmental challenges”.<sup>72</sup> By seeds, they refer to initiatives related to agroecology, green urbanism, future knowledge, and a fair and sustainable future, which can help secure human rights such as the right to food, adequate housing, education, and fundamental freedoms in general.



*Figure 7: Good Anthropocene*<sup>73</sup>

In sum, there is a false illusion that human rights are necessarily linked to an anthropocentric view of the world, or that sustainability necessarily entails advocating for an extreme ecocentric cause. A purely scientific approach to environmental problems, blind to human rights considerations, is theoretically possible but practically implausible. Similarly, the unlimited satisfaction of rights under the justification of development may

<sup>71</sup> Eckersley (n 66) 56.

<sup>72</sup> Elena M Bennett and others, ‘Bright Spots: Seeds of a Good Anthropocene’ (2016) 14 *Frontiers in Ecology and the Environment* 441, 446.

<sup>73</sup> Bennett and others (n 72).

sound promising, but practically it would lead to the destruction of the environment in which we live. Sustainability and human rights are not governance modes that can be encapsulated on a binary black-or-white scale; rather, there is a grey area where both are synergetic. In reality, beyond the theory, these ideas are interacting simultaneously.

### **1.2.2 Soft political obligations vs Hard legal obligations**

Another problem that emerges in relation to the integration between human rights and sustainability is related to their normative nature.<sup>74</sup> At first glance, it seems society does not perceive that the goals of sustainability are binding in nature, nor are they viewed as fully legitimate and authoritative due to their primarily scientific and political origins. In contrast, respect for human rights is perceived as a mandatory norm of conduct, as states and individuals hold obligations under binding legal instruments. This observation suggests that both regimes coexist but operate in parallel normative spectrums. However, the concept of sustainable development has created a bridge between the two, reaching a point where their normative natures overlap.

Sustainability as a governance mode did not necessarily emerge with the idea of having normative content. However, in practice, the ideas behind sustainability have acquired a normative character through the discourse of sustainable development. The main problem is that sustainable development is a concept with a disputed legal nature, which means that, at least when it was coined, this concept did not bring specific obligations to states and individuals. Moreover, from the perspective of international law, Ogang et al state “[t]here is no international law agreement that sets out the commitments of states specifically on sustainable development”.<sup>75</sup>

One of the main achievements in relation to sustainable development at the international level was the adoption of Agenda 2030. However, this agenda has been categorised as a soft law instrument, meaning that the main objectives behind sustainability are political

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<sup>74</sup> Magdalena Bexell, Thomas Hickmann and Andrea Schapper, ‘Strengthening the Sustainable Development Goals through Integration with Human Rights’ (2023) 23 *International Environmental Agreements: Politics, Law and Economics* 133.

<sup>75</sup> Terence Onang Egute, Eike Albrecht and Kelvin Awanaya Egute, ‘From Stockholm to Paris: Four Decades of Sustainability in International Law’ in Michael Schmidt and others (eds), *Sustainable Global Value Chains* (Springer International Publishing 2019) 80 <[https://doi.org/10.1007/978-3-319-14877-9\\_4](https://doi.org/10.1007/978-3-319-14877-9_4)>.

aspirations that are not necessarily enforceable.<sup>76</sup> This differs from the human rights regime, in which rights are legally binding, states are obligated to respect them, and individuals have mechanisms to ensure those rights are upheld.

In relation to this distinction, Bexel et al indicate that sustainable development goals and human rights are ambivalent from a normative perspective.<sup>77</sup> They point out that sustainable development, specifically the SDGs agenda, is based on goals, in contrast to rights. Goals have a moral and political status, whereas rights carry legal obligations and different political implications. Therefore, there is a need to bridge the gap between goals and rights to address this divergence.

As outlined, the synergies between both regimes can be found due to the flexibility of the term “sustainable development”. For instance, there have been several attempts by the human rights regime to bring the ideas behind sustainability from the realm of soft political obligations into the legal field, using the concept of sustainable development as a tool to do so.<sup>78</sup> The most notable scenarios relate to the inclusion of new rights based on sustainable development, such as the right to development or the right to a healthy environment. Additionally, human rights tribunals and UN human rights bodies have used sustainable development as a legal concept in several ways through their legal reasoning, especially in cases that are linked to the fulfilment of the SDGs but also entail human rights concerns.<sup>79</sup>

The main takeaway is that the synergies between both governance modes occur through the concept of sustainable development. As a consequence, actors in the human rights regime have used this notion to transform soft law political obligations into hard legal obligations. The key to this transformation lies in the appropriate legal framing within human rights logic.

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<sup>76</sup> Markus Kaltenborn, Markus Krajewski and Heike Kuhn (eds), *Sustainable Development Goals and Human Rights*, vol 5 (Springer International Publishing 2020) <<http://link.springer.com/10.1007/978-3-030-30469-0>> accessed 11 February 2024.

<sup>77</sup> Bexell, Hickmann and Schapper (n 74).

<sup>78</sup> Knox (n 69).

<sup>79</sup> Emelie Folkesson, ‘Human Rights Courts Interpreting Sustainable Development: Balancing Individual Rights and the Collective Interest’ (2013) 2 *Erasmus Law Review* 142.

### 1.2.3 Pragmatic and multi-stakeholder vs Judicial and state-centric

At first glance, it seems that sustainability and human rights rely on different actors to advance their respective goals. According to Bexell, both regimes are distinct from an institutional perspective, as they “build upon different organizational bases, including factors that shape their realization, such as legal rules, enforcement powers, mandates, and resources”.<sup>80</sup> However, due to their complementarity, those different actors sometimes find themselves needing to align with both regimes simultaneously. As such, it is worth exploring the divergences and synergies of both regimes from an institutional level.

From the sustainability perspective, the approach to addressing problems is usually based on scientific reasoning that seeks objective and pragmatic solutions. Some examples of these initiatives to solve environmental global challenges include ecology-based strategies for ecosystem management, the protection of forests and endangered species, agroecology, the development of clean technologies to reduce CO<sub>2</sub> emissions and make urban spaces greener, efforts for marine and terrestrial conservation of species, initiatives to prevent deforestation, and education for sustainable futures, among others.<sup>81</sup>

Given that the discourse of sustainability is not just scientific but also economic, other relevant actors, such as businesses and transnational corporations, have also played an active role. Folke has mentioned that “the power of dominant Transnational Corporations helps leverage large-scale systemic change, accelerate positive transformations towards sustainability, and contribute to a safe operating environmental space for humanity.”<sup>82</sup> For instance, one way this has happened is through the introduction of good practices and reporting based on Environmental, Social, and Governance (ESG) reporting standards.<sup>83</sup>

As we can see, many of the ways in which sustainability has been applied in practice involve individuals as the main actors and entail implementing technical solutions to problems based on scientific developments. Furthermore, the results achieved towards sustainable

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<sup>80</sup> Bexell, Hickmann and Schapper (n 74) 135.

<sup>81</sup> Bennett and others (n 72).

<sup>82</sup> Carl Folke and others, ‘Transnational Corporations and the Challenge of Biosphere Stewardship’ (2019) 3 *Nature Ecology & Evolution* 1396, 1398.

<sup>83</sup> Ibid.

transformation have mainly occurred through the private sphere of society as a result of the combined efforts of civil society, scientists, academia, and businesses.<sup>84</sup> Interestingly, so far, the state has not been the main stakeholder. Even more, from this view, it is perceived that regulations coming from the state might even slow down the transformation because those regulations do not advance at the same pace as reality does.

In contrast, the human rights regime is based on a state-centric view. In particular, the United Nations human rights system is designed to address human rights violations committed by states. To achieve this, the system has different bodies and mechanisms responsible for monitoring whether states have fulfilled their treaty obligations.<sup>85</sup> Originally, this regime and the actors within it were not designed to create pragmatic solutions to global problems (especially environmental) and implement them in the field. Neither was it originally driven by business or scientific contributions. Instead, it focuses primarily on the relationship between the state and individuals. However, this has been changing since the introduction of the concept of sustainable development.

The idea of sustainable development creates synergies between both regimes from an institutional perspective, as this concept is connected to global issues that cannot be solved from just one view or solely through the contributions of a single actor. Moreover, Chapin acknowledges that “no single intervention can shift society toward a more sustainable future because of the complexity of multiple problems at multiple scales, linked by many interacting feedbacks that involve numerous actors with different interests” (Figure 8).<sup>86</sup> This demonstrates the need for integrative collaboration across different dimensions and a significant push from the international legal system to promote these normative transformations.

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<sup>84</sup> Joern Fischer and others, ‘Mind the Sustainability Gap’ (2007) 22 *Trends in Ecology & Evolution* 621.

<sup>85</sup> Philip Alston, ‘The Historical Origins of the Concept of “General Comments” in Human Rights Law’ (Brill 2001) <[https://brill.com/view/book/edcoll/9789004479012/B9789004479012\\_s043.xml](https://brill.com/view/book/edcoll/9789004479012/B9789004479012_s043.xml)>.

<sup>86</sup> F Stuart Chapin and others, ‘Earth Stewardship: Shaping a Sustainable Future through Interacting Policy and Norm Shifts’ (2022) 51 *Ambio* 1907, 1915.



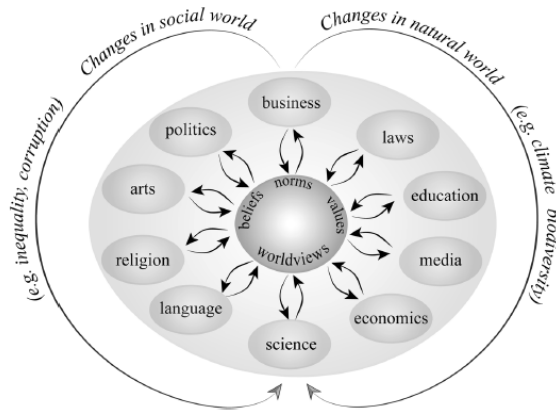


Figure 8: Earth Stewardship<sup>87</sup>

### 1.3 Two Paths Towards Integration

The discussion about synergies has already pointed out various ways in which both governance modes, human rights and sustainability, interact from different angles while subtly hinting at potential ways in which those can be integrated. However, it was more of an illustrative explanation to set up the common grounds rather than an organised presentation of specific integration paths and how to develop them. Therefore, acknowledging this broad interconnectedness between sustainability and human rights, a fundamental question emerges: Is there a way to systematically analyse this integration beyond an illustrative mention of the synergies between both regimes?

As previously indicated, this research acknowledges that the starting point for integrating both governance modes stems from the term “sustainable development” rather than the concept of sustainability itself as a regime. This distinction is crucial, as it implies that while the terms are complementary, they are not interchangeable. The United Nations has utilised sustainable development as an overarching concept that originated from sustainability but has evolved to include more complex dimensions. Consequently, this paper will now adopt and follow the UN approach, shifting its focus to explore the connection between human rights and sustainable development rather than emphasising sustainability from a purely scientific perspective.

<sup>87</sup> Ibid..

The Danish Institute for Human Rights has highlighted the bidirectional anchorage between sustainable development and international human rights, specifically while studying the interdependence and links between SDGs and human rights instruments.<sup>88</sup> Building on this premise, authors such as Kaltenborn et al suggest that integration can be approached from either a human rights-focused perspective or a development policy perspective.<sup>89</sup> Based on this approach, this study proposes two paths for integration: (1) integrating human rights within sustainability, which reflects the development-policy-driven approach; and (2) integrating sustainable development within human rights, which reflects the legal human rights-driven approach.

### **1.3.1 Human Rights within Sustainable Development**

Integrating human rights within sustainable development refers to the process in which human rights mechanisms and principles serve as tools to achieve sustainable development. In other words, from a goals and means perspective, sustainable development can be viewed as a goal (which is clear within the context of SDGs) and human rights mechanisms as useful tools to serve this purpose. Interestingly, states and international organisations have adopted this view when implementing development policies and actions since it is a pragmatic approach.

According to the Danish Institute of Human Rights, “[h]uman rights set standards for good governance, accountability, the rule of law, transparency, participation, inclusion, equality and other key principles that are essential for the successful achievement of the SDGs”.<sup>90</sup> Moreover, “the legally binding nature of human rights standards and the systems set up for their supervision can help to fill accountability gaps in SDGs implementation and monitoring”.<sup>91</sup> This idea shows that there are ways in which human rights can serve to achieve the SDGs. The first one refers to the role of human rights mechanisms in ensuring

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<sup>88</sup> Danish Institute for Human Rights, ‘The Human Rights Guide to the Sustainable Development Goals’ (June 2022) <<https://sdg.humanrights.dk/>> accessed 3 August 2024.

<sup>89</sup> Kaltenborn, Krajewski and Kuhn (n 76) 4.

<sup>90</sup> The Danish Institute for Human Rights, *Integrated Review and Reporting on SDGs and Human Rights: A Key to to Effective, Efficient and Accountable Implementation* (Danish Institute for Human rights 2019) <<https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/integratedreview.pdf>> accessed 24 July 2024.

<sup>91</sup> *ibid* 1.

accountability and implementation of the SDGs. The second one entails that human rights principles can inform sustainable development action. As such, it is worth exploring these two ways in which human rights are integrated within sustainable development.

### **1.3.1.1 Mechanisms to ensure accountability and implementation**

Regarding the accountability and implementation gap of the SDGs, Golay has indicated that “the follow-up and review framework established in the 2030 Agenda is weak and is not explicitly linked to the work of UN human rights mechanisms”.<sup>92</sup> Additionally, the 2030 Agenda for Sustainable Development, due to its nature as a soft law instrument, is not binding and lacks prescriptive language. As a consequence, from the human rights sphere, the UN human rights organs have been working to support this issue.

According to Golay, although the agenda does not directly mandate that human rights bodies monitor the SDGs, it also does not preclude them from doing so.<sup>93</sup> Building upon this legal gap and recognising that the lack of fulfilment of the SDGs has human rights implications and that they ultimately seek the realisation of rights, these bodies have begun complementing the monitoring of the SDGs.<sup>94</sup> In this context, Zeid Raad Al Hussein, the United Nations High Commissioner for Human Rights in 2016, suggested that human rights organs, specifically the Human Rights Council, treaty bodies, and special procedures, can provide guidance and take action on implementing the Agenda in stating that “Sustainable Development Goals seek to realise the human rights of all”.<sup>95</sup>

The Office of the United Nations High Commissioner for Human Rights (OHCHR) developed the Human Rights Index platform, which links human rights recommendations from various mechanisms to the SDGs agenda by providing policy guidance.<sup>96</sup> Additionally, it has aligned the reporting procedures for the UPR to address the SDGs from an intersectional

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<sup>92</sup> Christophe Golay, *No One Will Be Left behind: The Role of United Nations Human Rights Mechanisms in Monitoring the Sustainable Development Goals That Seek to Realize Economic, Social and Cultural Rights* (Geneva Academy of International Humanitarian Law and Human Rights 2018).

<sup>93</sup> *ibid* 39.

<sup>94</sup> *ibid* 41.

<sup>95</sup> Al Hussein Zeid Ra’ad, ‘Annual High-Level Panel Discussion on Human Rights Mainstreaming’ (OHCHR, 29 February 2016) <<https://www.ohchr.org/en/statements/2016/02/annual-high-level-panel-discussion-human-rights-mainstreaming>> accessed 4 August 2024.

<sup>96</sup> OHCHR, ‘Universal Human Rights Index’ (2023) <<https://uhri.ohchr.org/en>> accessed 4 August 2024.

perspective and created methodologies for data sharing to ensure better quality information for different stakeholders who work on implementation of the SDGs.<sup>97</sup>

Special procedures, specifically the rapporteurs with thematic mandates on the right to adequate housing, health, food, drinking water, and sanitation, have released specific recommendations on implementing the SDGs.<sup>98</sup> These recommendations have normative value, pushing states to close the accountability gap. Additionally, these experts, within their competence to monitor and assess the implementation of human rights on the ground during their country visits, have used their leverage to broaden the scope of this role “to scrutinize the implementation of the SDGs at the national level”.<sup>99</sup>

Lastly, since Agenda 2030 was established, treaty bodies have considered the impact of development goals on their respective treaties and have begun providing concluding recommendations to states on how to implement the SDGs. According to Atapattu, these recommendations focus on incorporating human rights into SDGs national plans, linking environmental concerns with human rights, promoting the participation of affected communities, and considering vulnerable populations while pursuing the SDGs.<sup>100</sup> Each recommendation includes specific nuances for the respective human rights treaty, with the overall aim of closing the accountability gap.

However, the overall problem with human rights bodies helping to close the SDGs accountability and implementation gap is that, despite the integration initiatives mentioned in the previous paragraphs, there is a lack of a binding and universal understanding of state obligations under human rights within the context of sustainable development. Additionally, how the concept of sustainable development should be understood within the human rights regime remains inadequately addressed.

### **1.3.1.2 Principles to inform development action**

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<sup>97</sup> The Danish Institute for Human Rights (n 90).

<sup>98</sup> Golay (n 92).

<sup>99</sup> *ibid.*

<sup>100</sup> Sumudu A Atapattu, *UN Human Rights Institutions and the Environment: Synergies, Challenges, Trajectories* (First, Routledge 2023) 117 <<https://go.exlibris.link/zxZCy0dm>>.

Regarding development action for sustainable development, human rights have been incorporated into the field of development through what is known as the human rights-based approach to sustainable development.<sup>101</sup> According to Migowe et al, this view consists of integrating the principles of human rights into the planning, implementation, and evaluation of policies and programs that have objectives to realise the SDGs.<sup>102</sup> Moreover, Steiner has stated that “a human rights-based approach to development based on equality, inclusion, and nondiscrimination is the best way to reduce inequalities and make that high-speed connection to the 2023 Agenda”.<sup>103</sup>

Achieving the SDGs depends on the implementation of policies and programs that are usually driven by states, non-government organisations (NGOs), international organisations, and the private sector. In this sense, the UNDP, the UN Sustainable Development Group, and the OHCHR have been the leading institutions instrumentalising how development action oriented towards Agenda 2030 can use human rights principles to meet this goal.

### **1.3.2 Sustainable Development within Human Rights**

Integrating sustainable development within human rights refers to ways to achieve human rights as the ultimate goal, using the concept of sustainable development as a guiding principle. Building upon this definition and in following Knox’s view on the relationship between human rights and the environment,<sup>104</sup> this research will further explore three ways in which sustainable development can be integrated within the universal human

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<sup>101</sup> Peter Uvin, ‘From the Right to Development to the Rights-Based Approach: How “Human Rights” Entered Development’ (2007) 17 *Development in Practice* 597.

<sup>102</sup> Brian Migowe, Chelsea Shelton and Sarah Rattray, ‘Human Rights and SDG Systems Integration: Beyond Linkages, Data and Efficiency to Leave No One Behind’ (*UNDP*, 9 January 2024) <<https://www.undp.org/publications/dfs-human-rights-and-sdg-systems-integration-beyond-linkages-data-and-efficiency-leave-no-one-behind>> accessed 4 August 2024.

It is important to note that discussing the SDGs as an ultimate aim is problematic, given that the SDGs themselves aim to fulfil human rights. Consequently, the theoretical distinction between SDGs and human rights fades, as achieving sustainable development equates to realizing human rights. However, in practice, this distinction is significant because it helps identify specific actors and concrete actions that can be taken.

<sup>103</sup> *ibid* 2.

<sup>104</sup> Knox (n 69).

rights legal regime: the recognition of new rights, the recognition of new subjects of law, and building upon existing structures.

### **1.3.2.1 Recognition of new rights**

Since sustainable development emerged after the creation of the human rights regime, the notion of sustainable development has not been explicitly recognised in the texts of human rights treaties.<sup>105</sup> Initially, this concept was not even part of the human rights agenda. However, the movement for the third generation of rights, aiming for new rights with a collective view, revolutionised the field and opened the space for the human rights regime to think about developing new binding instruments that recognised new rights based on the foundations of sustainable development.<sup>106</sup> The two more dominant discourses in this regard have been the recognition of the right to development and the recognition of the right to a healthy environment.

In 1986, the UN General Assembly adopted the declaration on the right to development, which proclaimed that:<sup>107</sup>

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

Almost forty years have passed, and the definition, recognition and implementation are still highly disputed due to their political nature. Although the right was conceived for individual rightsholders, according to Kirchmeier, some states, mainly big economic powers, feared that the recognition of this right entails a duty for international cooperation and could be interpreted as a right to development or even a right to everything.<sup>108</sup> Consequently, the discussion has stagnated until now, despite the efforts of the working

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<sup>105</sup> Folkesson (n 79).

<sup>106</sup> Domaradzki, Khvostova and Pupovac (n 34).

<sup>107</sup> United Nations General Assembly, 'Declaration on the Right to Development' (1986) A/RES/41/128 <<https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-right-development>> accessed 4 August 2024.

<sup>108</sup> Felix Kirchmeier, 'The Right to Development: Where Do We Stand' (2006) 23 Dialogue on Globalization Occasional Papers Geneva 1.

groups and independent experts established by the Commission on Human Rights to advance the current developments in this debate.

Interestingly, according to Akram, Agenda 2030 brings some light to the end of this long tunnel” because this globally recognised UN resolution incorporates the Declaration on the Right to Development, which implicitly, for him, means that it recognises the right to development.<sup>109</sup> However, this stance is still under debate within human rights scholarship. In sum, the universal recognition of this right remains a challenge, particularly under a hard law instrument. There is also a gap related to its interplay with the environmental aspects of the 2030 Agenda beyond the economic aspect.

Similarly, after 50 years of advocacy regarding the environmental crisis, the United Nations General Assembly in 2022, recognised the right to a clean, healthy, and sustainable environment.<sup>110</sup> This recognition acknowledges “that sustainable development, in its three dimensions (social, economic and environmental), and the protection of the environment, including ecosystems, contribute to and promote human well-being and the enjoyment of human rights”.<sup>111</sup> Moreover, this resolution was an active response to the triple planetary crisis: climate change, biodiversity and nature loss, and pollution, which entails a significant step forward in linking human rights with sustainable development.<sup>112</sup>

Specifically, the work of the special rapporteurs on the human right to a healthy environment has been instrumental in this regard, providing comprehensive guidance on addressing topics such as clean air, safe and sufficient water, non-toxic environments, a safe climate, healthy ecosystems and biodiversity, and healthy and sustainably produced food through a human rights lens.<sup>113</sup>

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<sup>109</sup> Zamir Akram, ‘Relationship between the Human Right to Development and Core Elements of the Sustainable Development Goals’, *The Right to Development* (Brill Nijhoff 2019) 21.

<sup>110</sup> United Nations General Assembly, ‘The Human Right to a Clean, Healthy and Sustainable Environment’ (UN, 2022) A/RES/76/300 <<http://digitallibrary.un.org/record/3945636>>.

<sup>111</sup> Ibid.

<sup>112</sup> David Boyd, ‘The Right to a Healthy Environment: A User’s Guide - World’ <<https://reliefweb.int/report/world/right-healthy-environment-users-guide>> accessed 29 July 2024.

<sup>113</sup> Human Rights Council, ‘Business, Planetary Boundaries, and the Right to a Clean, Healthy and Sustainable Environment’ (2024) A/HRC/55/43 11 <<chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://documents.un.org/doc/undoc/gen/g23/266/63/pdf/g2326663.pdf?token=yC3gVxEqh6AtH4QDd3&fe=true>>.

However, the concrete applicability of this right remains contested. Its recognition through a soft law legal instrument means that not all states have accepted or embedded it into their local legal regimes.<sup>114</sup> The next challenge is transposing this universal commitment into national human rights laws and hard law instruments to ensure that this right can be enforced effectively. There has been significant progress in developing the content of this right, and efforts must continue to integrate it into legally binding frameworks.

### **1.3.2.2 Recognition of new subjects of law**

Another potential way to integrate sustainability within human rights has emerged under the movement of the rights of nature. The core idea of this discourse is that in contrast to the orthodox human rights perspective, which perceives humans as the only rightsholders, nature should be seen as a subject of law that has its own fundamental rights that are not based on anthropocentrism.<sup>115</sup> Interestingly, this idea emerged from a national perspective rather than from an international overarching approach, which, according to Gilbert et al, entails that this view has not yet gained support from a universal law perspective. One of the most relevant attempts to incorporate this discourse into the universal framework was through the Universal Declaration of the Rights of Mother Earth in 2010. However, this attempt lost momentum, and currently, this debate has been constrained to local discussions.

Recognising the legal personhood of nature promotes the view that all components of the ecosystems are equally relevant, and ideally, their level of protection should be similar. This notion is closely aligned with sustainable development, specifically with the SDGs related to climate action, life below water, and life on land. However, the sustainable development paradigm adds a layer of complexity to this discussion.<sup>116</sup> Sustainable development, at the same time, entails those resources, meaning nature, can be used (at least in a sustainable manner). As such, nature rights could be problematic from the perspective of

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<sup>114</sup> Boyd (n 112).

<sup>115</sup> Jérémie Gilbert and others, 'The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's "Greening" Agenda' in Daniëlla Dam-de Jong and Fabian Amtenbrink (eds), *Netherlands Yearbook of International Law 2021: A Greener International Law—International Legal Responses to the Global Environmental Crisis* (TMC Asser Press 2023) <[https://doi.org/10.1007/978-94-6265-587-4\\_3](https://doi.org/10.1007/978-94-6265-587-4_3)>.

<sup>116</sup> Ibid.



intergenerational equity and for countries that have not yet undergone development processes.

### **1.3.2.3 Building upon existing structures**

Golay argues that there is a lack of a legal framework guiding states and other actors in fulfilling their human rights obligations concerning sustainable development.<sup>117</sup> Recognising this problem, the human rights treaty bodies have taken the lead in developing authoritative guidance on how human rights provisions should be viewed through the lens of sustainable development within their respective treaties, which are the existing human rights structures available. Moreover, according to Atapattu, the Human Rights Committee (CCPR), the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee on the Rights of the Child (CRC) and the CESCR have already shed light on how the concept of sustainable development fits under their specific treaties.<sup>118</sup> As an interesting example, the CESCR is in the process of drafting a specific general comment on sustainable development, which aims to address this relationship from an overarching perspective.

Furthermore, the idea of building on existing structures relates to various initiatives beyond the work of the treaty bodies. It also involves the work of special rapporteurs on existing rights, such as land and health, who have incorporated sustainable development into how certain rights should be understood. Also, this approach is connected to the incorporation of human rights law into multilateral agreements, such as the Paris Agreement, the Escazú Agreement, and the Convention on Biological Diversity, based on the premise that human rights language can enhance these agreements.<sup>119</sup> However, this work is often less impactful than the interpretative work of the treaty bodies.

This approach is significant because, specifically through the work of the treaty bodies, it can guide UN institutions, local and international courts, and tribunals in understanding what sustainable development should look like in the context of human rights. Although

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<sup>117</sup> Golay (n 92).

<sup>118</sup> Atapattu, *UN Human Rights Institutions and the Environment: Synergies, Challenges, Trajectories* (n 96).

<sup>119</sup> Knox (n 69).

this seems straightforward since it builds upon existing processes, it is also complex because it attempts to bridge regimes that were not originally designed to be integrated.

### **1.3.3 Moving forward: Which path goes first?**

While it might seem that there is a dialectical relationship and binary conflict between the two paths of integration (human rights within sustainable development and sustainable development within human rights), this is not necessarily the case in practice. First, both approaches are already occurring simultaneously and in parallel. Second, they can be complementary since there is no hierarchical relationship between them. In sum, sustainable development and human rights are two faces of the same coin.

Interestingly, this complementarity assumes that the human rights regime already understands what sustainable development means, including an agreement on its concrete legal value and essential elements. However, the main problem is that this understanding is currently lacking precision or is scattered across the field, posing a significant challenge that needs to be addressed urgently. Therefore, important considerations must be kept in mind when deciding which path should be prioritised in terms of immediate steps and short-term action.

If there is a lack of a concrete definition of sustainable development within the human rights regime, focusing on human rights mechanisms as a first step to achieving sustainable development goals might lead to fundamental conflicts. This is due to the fact that sustainable development can encompass legitimate but opposing human rights arguments. This issue is one of the current problems facing the integration process and is often referred to as the sustainable development paradigm.<sup>120</sup>

For instance, SDGs 8 and 9 are driven by the classical logic of economic growth, which can be supported by human rights arguments based on the right to an adequate standard of living and the right to work recognised by the ICESCR. Moreover, the ICESCR explicitly states that State parties commit to taking steps to maximize available resources to achieve

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<sup>120</sup> Judith Bueno de Mesquita, 'Reinterpreting Human Rights in the Climate Crisis: Moving beyond Economic Growth and (Un)Sustainable Development to a Future with Degrowth' (2024) 42 *Netherlands Quarterly of Human Rights* 90.

the continuous improvement of living conditions for right-holders.<sup>121</sup> However, this focus on economic growth can conflict with the aims of SDGs 6, 7, 12, 13, 14, and 15, which prioritise environmental protection. These SDGs challenge the traditional understanding of economic growth by emphasising that natural resources are limited and that certain planetary boundaries must be maintained to ensure a safe operating space for humanity and future generations.<sup>122</sup> This is also grounded in a human rights discourse that favours the right to a healthy and sustainable environment. As such, with the current status quo of sustainable development operationalisation in the human rights regime, both approaches are considered legitimate.<sup>123</sup> Consequently, the regime cannot provide a universal solution, leading to local instances where decisions are made based on each entity's own understanding of sustainable development.

Based on this reasoning, human rights within the sustainable development path can only be properly and coherently addressed if the fundamental misunderstandings about sustainable development and the required value ponderations are resolved first by a legitimate human rights body. Otherwise, actions might lead to contradictory results without practical solutions. This is illustrated by the sustainable development paradigm, in which both economic growth and degrowth, or the use and non-use of natural resources, are legitimate actions that can happen simultaneously. Moreover, this is not just a likelihood, but this is already occurring. Therefore, the integration of sustainable development within human rights should be prioritised.

Importantly, this argumentation does not mean that actions to achieve sustainable development should be stopped; rather, it highlights that understanding sustainable development should be a priority. Otherwise, there might be a clash of rights and certain goals. Therefore, this paper will further develop a suggested path to integrate sustainable development within human rights. Specifically, it will explore how to build on existing human rights structures with the concept of sustainable development, clarifying the role of

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<sup>121</sup> Matthias Petel and Norman Vander Putten, 'Economic, Social and Cultural Rights and Their Dependence on the Economic Growth Paradigm: Evidence from the ICESCR System' (2021) 39 *Netherlands Quarterly of Human Rights* 53.

<sup>122</sup> Johan Rockström and others, 'A Safe Operating Space for Humanity' (2009) 461 *Nature* 472.

<sup>123</sup> Bueno de Mesquita (n 120).

sustainable development in the context of social, economic, and cultural rights, in addressing the sustainability paradigm.

## **2. Making the ICESCR more sustainable**

The CESCR has indicated that the Agenda 2030 “powerfully expresses the essence of the International Covenant on Economic, Social, and Cultural Rights”.<sup>124</sup> Moreover, scholars such as Golay have noted that, even to a greater extent than civil and political rights, the Agenda 2030 “powerfully expresses the essence of the International Covenant on Economic, Social, and Cultural Rights”.<sup>125</sup> Following this line of thought, this section will focus specifically on this human rights framework from an economic, social and cultural angle, trying to explore Golay’s inquiry on how to discharge ICESCR obligations while pursuing sustainable development.

Since 2019, the CESCR has been drafting a General Comment on sustainable development. The Drafting Group has already identified ten key themes that this commentary will address.<sup>126</sup> Based on this list of priorities, this research will specifically focus on the interrelationship between sustainable development and key concepts in the ICESCR.<sup>127</sup> Moreover, in line with this theme, the Drafting Committee has already identified eight questions that serve as a guidance to explore the topic.<sup>128</sup>

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<sup>124</sup> UN Committee on Economic and Social and Cultural Rights (65th sess : 2019 : Geneva), ‘The pledge to leave no one behind :: the International Covenant on Economic, Social and Cultural Rights and the 2030 Agenda for Sustainable Development : statement /: by the Committee on Economic, Social and Cultural Rights’ (UN, 2019) E/C.12/2019/1 <<https://digitallibrary.un.org/record/3856956>> accessed 20 July 2024.

<sup>125</sup> Golay (n928).

<sup>126</sup> CESCR Drafting Group, ‘Day of General Discussion on General Comment on Economic, Social and Cultural Rights and Sustainable Development’ (OHCHR, 20 July 2024) <<https://www.ohchr.org/en/events/events/2023/day-general-discussion-general-comment-economic-social-and-cultural-rights-and>> accessed 20 July 2024.

<sup>127</sup> The Drafting group has identified these themes: 1.- Natural resources: Responsible governance and institutions, resource availability, equity in access and limitations in the use 2.- Environmental degradation and biodiversity loss 3.- Climate change, sustainable development, and economic, social and cultural rights 4.- Gender equality 5.- Leave no-one behind: Disadvantaged and marginalised groups and intersectionality 6.- Indigenous Peoples, Peasants and Other People Working in Rural Areas 7.- Private actors and sustainable development 8.- International co-operation, extra-territorial obligations and transboundary impacts 9.- Remedies and accountability. 10.- The interrelationship between sustainable development and key concepts in the Covenant.

<sup>128</sup> See CESCR and others (n 51).

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prepared by the CESCR Drafting Group (September 2021)

**X. The interrelationship between sustainable development and key concepts in the Covenant**

1. How does sustainable development influence and potentially change how key concepts in the Covenant are understood and applied?
2. For example, “progressive realization” is a key concept in article 2(1) of the Covenant. Article 11 of the Covenant also refers to “the continuous improvement of living conditions”. Considering “planetary boundaries” and the need to ensure intra- and inter-generational equity, are there limits to progressive realisation and the “continuous improvement of living conditions”? What would be the best interpretation for progressive realisation, taking into consideration such boundaries and inter-generational equity?
3. If “minimum core obligations” are the floor from which progressive realisation proceeds, is there a ceiling for the level of enjoyment of ESCRs? This raises the question of what constitutes the “full realization” of the rights recognised in the Covenant (art 2(1)) given the limits implied by the concept of sustainability, including for future generations?
- 4. Similarly, Article 2(1) imposes an obligation on each State Party to take steps “to the maximum of its available resources”. How should this obligation be interpreted in the light of the need to preserve the sustainability of natural resources and the equitable distribution of resources both within and between States?<sup>130</sup>**
5. The concept of “international assistance and cooperation” is a central concept in article 2 of the Covenant. 1 What are its implications in the light of the “common but

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<sup>129</sup> CESCR and others (n 51). Obtained from the original source and adapted for the purposes of this article.

<sup>130</sup> Emphasis added

differentiated responsibilities and respective capabilities” (CBDR-RC) of States to address environmental harms such as climate change?

**6. In defining the normative content of the ESCR rights in the Covenant, is the AAAQ (availability, accessibility, acceptability, and quality) framework used by CESCR in general comments suitable for addressing the environmental dimensions of the Covenant obligations? How could the concept of sustainable development be incorporated in the definition of the normative content of the Covenant rights?<sup>131</sup>**

7. What kinds of remedies are appropriate to redress environmental harms that undermine ESCRs?

8. How should the general rights-based methodological tools of the Covenant be applied concerning the implementation of sustainable development in general, and the SDGs in particular?

*Figure 9 Issues Paper on Sustainable Development and the International Covenant on Economic, Social and Cultural Rights*

Out of these questions, this research addresses those related to the interpretation of the obligations contained in Article 2.1, in relation to the key concepts of progressive realisation and the mandate to take steps towards the utilisation of maximum of available resources. This will be examined through the lens of sustainable development based on the notions of planetary boundaries and intergenerational equity. This approach follows scholars such as Caney,<sup>132</sup> Bueno de Mesquita,<sup>133</sup> Donald,<sup>134</sup> and others who have connected the key concepts of the ICESCR as key human rights tools for addressing the tension between environmental protection and economic growth

## **2.1 The sustainable development paradigm embedded in the ICESCR**

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<sup>131</sup> Emphasis added

<sup>132</sup> Simon Caney, ‘Human Rights, Population, and Climate Change’ in Dapo Akande and others (eds), *Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment* (Oxford University Press 2020) <<https://doi.org/10.1093/oso/9780198824770.003.0017>> accessed 7 March 2024.

<sup>133</sup> Bueno de Mesquita (n 120).

<sup>134</sup> Elizabeth Donald, ‘Greening the Covenant: Integrating Environmental Considerations in the Interpretation of States Parties Obligations under Article 2.1 of the ICESCR’ (PhD thesis, Stellenbosch University 2021).

One key aspect of the relationship between ESCR and sustainable development is related to specific obligations that states have under the ICESCR, particularly under Article 2. According to the OHCHR's overview of the obligations, states must take immediate steps to ensure the continuous improvement of ESCR over time, regardless of resource availability.<sup>135</sup> These steps should ensure at least the minimum essential level of each right recognised in the covenant. Moreover, if a measure has been granted, states are prohibited from adopting retrogressive measures that diminish the current enjoyment of rights. Additionally, while taking these steps, states must ensure that their measures do not reduce the enjoyment of these rights. Measures should protect those most at risk and marginalised populations under the principle of non-discrimination, even if resources are limited. Finally, states have the duty to use their maximum available resources for the progressive realisation of ESCR.<sup>136</sup>

Interestingly, scholars such as Petel and Vander Putten have suggested that the way these obligations are understood by the CESCR promote a classical understanding of economic growth. According to them, the notion of states allocating greater resources (i.e., financial means) for the realisation of ESCR whenever they are experiencing strong economic growth (measured by percentages of Gross Domestic Product (GDP), Gross National Product (GNP), and Gross National Income (GNI)) “stems from the obligation to devote the maximum of their available resources to the progressive realization of ESCR under Article 2 of the Covenant”.<sup>137</sup> In the same line of thought, Bueno de Mesquita has recognised that “economic growth has predominantly been viewed as conducive to the realization of human rights”.<sup>138</sup>

The aforementioned critiques of this interpretation are not merely theoretical but supported by an empirical analysis of the CESCR's various statements. In the concluding observations made to states like India, Cameroon, Colombia, Korea, Tunisia, and Ecuador, the CESCR uphold the view that economic growth is useful and sometimes even necessary

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<sup>135</sup> OHCHR, 'Economic, Social and Cultural Rights' (OHCHR, 2024) <<https://www.ohchr.org/en/human-rights/economic-social-cultural-rights>> accessed 20 July 2024.

<sup>136</sup> Ibid.

<sup>137</sup> Petel and Putten (n 121) 61.

<sup>138</sup> Bueno de Mesquita (n 120) 102.

to address poverty, food insecurity, social inequalities, the lack of social security, as well as other core elements that ensure the realisation of ESCR rights.<sup>139</sup> Additionally, general comments, such as General Comment No. 18 related to the right to work, state:<sup>140</sup>

“The right to work requires formulation and implementation by States parties of an employment policy with a view to stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment.”

Therefore, these non-exhaustive examples show that the current interpretation of the Covenant equates economic growth with progress in the realization of ESCR rights. General Comment No. 3 is foundational in interpreting the main obligations of the Covenant but nevertheless states that “in terms of political and economic systems the Covenant is neutral”, although empirical evidence, case law, and scholarship suggest a different conclusion.<sup>141</sup> Therefore, by not criticising the economic growth paradigm, the CESCR implicitly endorses this orthodox economic view. However, for the purposes of this research a key question remains:<sup>142</sup> What are the implications of this bias of the Covenant in relation to sustainable development? Are there any?

From a broad perspective, the main problem with an interpretation of the Covenant is that it endorses an orthodox economic approach which is related to the sustainable development paradigm. According to Bueno de Mesquita, “human rights law has evolved without adequate attention to ecological limits”, which unfortunately has been the case when interpreting the specific obligations of Art. 2.1 of the ICESCR.<sup>143</sup> While sustainable development is understood to encompass economic, social, and environmental dimensions, interpretations of Article 2.1 have tended to neglect the environmental component.

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<sup>139</sup> Bueno de Mesquita (n 120); Petel and Putten (n 121).

<sup>140</sup> CESCR, ‘General Comment No. 18: The Right to Work (Art. 6 of the Covenant)’ (2006) E/C.12/GC/18 26 <<https://www.refworld.org/legal/general/cescr/2006/en/32433>> accessed 21 July 2024.

<sup>141</sup> CESCR, ‘General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)’ (1990) 8 <<https://www.refworld.org/legal/general/cescr/1990/en/5613>> accessed 21 July 2024.

<sup>142</sup> Petel and Putten (n 121).

<sup>143</sup> Bueno de Mesquita (n 120) 109.



Moreover, in the context of climate change, an interpretation of the maximum available resources and progressive realisation of rights that prioritises the economic pillar can be dangerous. According to Viñuales and Chuffart, it might lead to catastrophic outcomes from a scientific perspective, such as exceeding planetary boundaries, and might sacrifice the whole idea of intergenerational equity based on short-term necessity.<sup>144</sup> Therefore, to understand this complex relationship better, it is worth exploring the concepts of maximum available resources and progressive realisation to see their specific nuances under the sustainable development angle.

## 2.2 Art 2.1: Unsustainable Obligations

Article 2.1 of the ICESCR prescribes:<sup>145</sup>

“Each State Party to the present Covenant undertakes to **take steps**, individually and through international assistance and co-operation, especially economic and technical, **to the maximum of its available resources**, with a view **to achieving progressively the full realization of the rights** recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

Given this prescription, the notions of maximum available resources, progressive realisation, and achieving the full realisation of rights will be specifically analysed.

### 2.2.1 Maximum Available Resources

Commenting on this provision, Boyle describes that taking steps towards the utilisation of maximum available resources entails that governments must mobilise all possible resources within their control to fund the realisation of ESCR. This can be done through

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<sup>144</sup> Stéphanie Chuffart and Jorge E Viñuales, ‘From the Other Shore: Economic, Social, and Cultural Rights from an International Environmental Law Perspective’ in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014) <<https://doi.org/10.1093/acprof:oso/9780199685974.003.0010>> accessed 21 July 2024.

<sup>145</sup> United Nations General Assembly, ‘International Covenant on Economic, Social and Cultural Rights | OHCHR’ (1976) resolution 2200A (XXI) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>> accessed 4 August 2024. (emphasis added)

several means, mainly through tax collection or exerting all possible efforts to generate domestic revenue to have budgetary means for achieving the ESCR rights.<sup>146</sup> Furthermore, the Center for Economic and Social Rights has clarified that, over the last two decades, there has been a significant effort to elucidate the content of this norm.<sup>147</sup>

There is now general consensus that references to maximum available resources includes “obligations related to resource allocation, resource generation, and actual resource spending”.<sup>148</sup> This first approximation provides an initial understanding of the key aspects. However, Dowell-Jones has argued that this phrase has been one of the most complex to interpret and that there are still controversies regarding its implications.<sup>149</sup> Therefore, to better grasp the link between maximum available resources and sustainable development, an individual analysis of the terms “resources”, “available”, and “maximum” will be conducted to achieve a precise understanding of the issue.

### 2.2.1.1 Resources

The Covenant does not provide a specific definition of “resources”. However, some CESR statements and scholarly interpretations have clarified that resources encompass financial and non-financial resources in a broad but not exclusive sense.<sup>150</sup> According to Uprimiy et al, financial resources include budgetary allocations, debt, taxes and international development assistance.<sup>151</sup> Moreover, these forms of financial resources have received the most attention from the CESCR. According to Sokogly, non-financial resources can include technological, information, human, and, interestingly, natural resources.<sup>152</sup> Based on this

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<sup>146</sup> Alan Boyle, ‘Human Rights and the Environment: Where Next?’ (2012) 23 *European Journal of International Law* 613.

<sup>147</sup> Center for Economic and Social Rights, ‘Developing Practical Guidance on “Maximum Available Resources” Discussion Paper’ <<https://cesr.org/>> accessed 21 July 2024.

<sup>148</sup> *ibid.*

<sup>149</sup> Mary Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* / Mary Dowell-Jones. (Martinus Nijhoff Publishers 2004).

<sup>150</sup> Donald (n 134).

<sup>151</sup> Rodrigo Uprimny, Sergio Chaparro Hernández and Andrés Castro Araújo, ‘Bridging the Gap: The Evolving Doctrine on ESCR and “Maximum Available Resources”’ in Katharine G Young (ed), *The Future of Economic and Social Rights* (Cambridge University Press 2019) <<https://www.cambridge.org/core/product/BFEA0C31932DE128E024BCFDD7685604>>.

<sup>152</sup> Sigrun Skogly, ‘The Requirement of Using the “Maximum of Available Resources” for Human Rights Realisation: A Question of Quality as Well as Quantity?’ (2012) 12 *Human Rights Law Review* 393.

distinction, the inclusion of natural resources at the disposal of states becomes relevant in the context of the link with sustainable development.

The inclusion of natural resources in the definition of resources under Article 2.1 implies that states must use these resources to ensure the enjoyment of the ESC rights. However, the extent to which natural resources can be used and how those should be used remains a controversial topic regarding sustainable development, particularly from the perspective of environmental sustainability. This issue will be further analysed under the concepts of “available” and “maximum” respectively. For now, it is important to note that states have the discretion to use natural resources as part of their available resources.

Moreover, Donald explains that under certain interpretations of Article 2.1 these resources are not necessarily meant for environmental protection but rather to contribute to the realisation of ESCR through revenue generated by their exploitation.<sup>153</sup> But, at the same time, natural resources inherently support ESCR through their ecosystemic value by providing clean air, fertile soil for food production, and clean drinking water.<sup>154</sup> Again, the sustainable development paradigm remains unresolved.

### **2.2.1.2 Available**

Similarly to the “resources” term, the meaning of “availability” has not been explicitly defined. However, from a literal understanding of Article 2.1, the term already implies that state parties are not bound to use all their resources to ensure ESCRs, but only the resources that are actually available.. In this line of thought, Bilkova expresses that “resource availability seems to be an inherent condition for, and limitation upon, the exercise of social rights”.<sup>155</sup> However, it is important to recall that the Optional Protocol to the ICESCR indicates that resource constraints alone cannot justify inaction “even in times of severe resource constraints” and that state parties must ensure the widest enjoyment of ESCR rights.<sup>156</sup> As

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<sup>153</sup> Donald (n 134).

<sup>154</sup> *ibid* 158.

<sup>155</sup> Veronika Bílková, ‘The Nature of Social Rights as Obligations of International Law: Resource Availability, Progressive Realization and the Obligations to Respect, Protect, Fulfil’ (Edward Elgar Publishing 2020) 22 <<https://www.elgaronline.com/view/edcoll/9781788972123/9781788972123.00009.xml>>.

<sup>156</sup> United Nations General Assembly, ‘Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (2008) A/RES/63/117 <<https://www.ohchr.org/en/instruments->

a general rule, this is the first limitation that the Covenant places on the use of resources. But the question remains: what should be considered “available”?

A narrow interpretation of the term “availability” entails that “available resources” refer to the state’s own resources. However, this interpretation was never adopted as the standard. Rather, a broader understanding of the term “availability” has been predominant, in which “available resources” include those from outside the country as well.<sup>157</sup> As such, the Limburg Principles on the implementation of the ICESCR state that “available resources refers to both the resources within a State and those available from the international community through international co-operation and assistance”.<sup>158</sup> Moreover, General Comment No. 24 by the CESCR, as echoed by Chapman and Russell, considers that private resources may also fall under the meaning of “available resources”.<sup>159</sup> Overall, this shows that although there are various approaches, the accepted interpretation tends to be towards a broader understanding of the term.

From the perspective of sustainable development, the term “availability” leads to two main discussions. The first is that it challenges the state-centric perspective that the Covenant has. It highlights the necessity to involve more actors beyond individual states to ensure the realisation of ESCRs. This brings attention to the obligation states might have to provide international assistance; a topic also addressed from the right to development perspective but one that has not yet been resolved. Additionally, it reveals that private actors are important stakeholders who need to be part of the discussion regarding resources. However, this first aspect will not be developed in this research due to space constraints.

The second discussion is the one that becomes relevant for the current research due to its relation to the availability of natural resources. According to Donald:<sup>160</sup>

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mechanisms/instruments/optional-protocol-international-covenant-economic-social-and> accessed 4 August 2024.

<sup>157</sup> Bílková (n 155).

<sup>158</sup> ‘Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights’ (*ESCR-Net*) <<https://www.escr-net.org/resources/limburg-principles-implementation-international-covenant-economic-social-and-cultural>> accessed 21 July 2024.

<sup>159</sup> Audrey Chapman and Sage Russel, *Core Obligations : Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002).

<sup>160</sup> Donald (n 134).

“the emphasis in relation to natural resource availability and mobilisation to date has been on the availability of natural resource exploitation to provide revenue for the realisation of the ESCRs, and not on the ability of those resources to directly contribute to the enjoyment of the rights in the covenant”

So far, it has been clear that the interpretation through the lens of financial resources has been mainstreamed, with less attention given to the availability of natural resources from an environmental perspective. However, this needs to be addressed. Specifically, considering that an analysis of the use of non-renewable natural resources might bring complexities to the discussion. These resources may be available today, but if they are exploited without any limits, they might not be available for future generations, compromising the notion of intergenerational equity, which is a pillar of sustainable development.

Moreover, authors such as Uprimny have already pointed out that “some economic and material resources that could be used in the past are no longer available as they are not sustainable because of their negative impact on climate change”.<sup>161</sup> The UN Special Rapporteur on extreme poverty in addressing the sustainable use of natural resources stated that “Natural resources can be a vital source of revenue that the State can use to comply with its human rights obligations. The financial and social benefits of natural resource exploitation are, however, increasingly bypassing people in producing countries”.<sup>162</sup> Furthermore, Viñuales and Chuffart, from an overarching consideration, argue that international environmental considerations can broaden the way we think about ESCR.<sup>163</sup> This logic should be applied in this case due to the lack of development of the notion of the availability of natural resources.

### **2.2.1.3 Maximum**

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<sup>161</sup> Uprimny, Chaparro Hernández and Araújo (n 151).

<sup>162</sup> Magdalena Sepúlveda Carmona, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona :addendum’  
<[https://digitallibrary.un.org/record/773516/files/A\\_HRC\\_26\\_28\\_Add.1-AR.pdf](https://digitallibrary.un.org/record/773516/files/A_HRC_26_28_Add.1-AR.pdf)>.

<sup>163</sup> Chuffart and Viñuales (n 144).

Robertson suggests “that maximum stands for idealism, while available stands for reality. Maximum is the sword of human rights rhetoric, whereas available is the wiggle room for the state”.<sup>164</sup> On these grounds, the term maximum in the context of Article 2.1 has usually been interpreted from a quantitative perspective in referring to *all* available resources.<sup>165</sup> This falls from the literal definition of the term which is the “greatest amount, extent, or intensity possible, permitted, or recorded”.<sup>166</sup> When applied to the Covenant, Sadid has equated this to “the broadest possible definition of resources in mobilisation and the most inclusive methods of allocation”.<sup>167</sup> However, he also notes that, in practice, determining what is the maximum carries important implications<sup>168</sup>.

First, this view mainly sheds light on financial resources because those are easier to quantify. However, it does not fully consider non-financial resources. Despite being difficult to quantify, non-financial resources are also crucial to define the maximum. Second, the issue of resources extends beyond a quantitative approach. This narrow quantitative perspective maximum overlooks the qualitative dimensions of resource use. Third, as Ben et al have noted, considerations of resource allocation, which help define what constitutes the maximum, are subject to political and economic factors.<sup>169</sup> Thus, beyond the legal dimension, this definition becomes a matter of realpolitik.<sup>170</sup>

In relation to sustainable development, the notion of maximum, especially from the quantitative perspective, is problematic. According to Donald, “it implies an open-ended growth and a correlative perpetual use of natural resources”.<sup>171</sup> Therefore, an issue at the

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<sup>164</sup> Robert E Robertson, ‘Measuring State Compliance with the Obligation to Devote the “Maximum Available Resources” to Realizing Economic, Social, and Cultural Rights’ (1994) 16 Human Rights Quarterly 693, 694.

<sup>165</sup> Donald (n 134).

<sup>166</sup> Oxford English Dictionary, ‘Maximum’ (2024)

<<https://www.oed.com/search/dictionary/?scope=Entries&q=maximum&tl=true>> accessed 4 August 2024.

<sup>167</sup> Ahmed Shahid, ‘For Want of Resources: Reimagining the State’s Obligation to Use “Maximum Available Resources” for the Progressive Realisation of Economic, Social and Cultural Rights’ (University of Sydney 2016).

<sup>168</sup> Ibid

<sup>169</sup> Saul Ben, David Kinley and Jackeline Mowbray, ‘The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials’, *The International Covenant on Economic, Social and Cultural Rights* (Oxford University Press 2014)

<<https://opil.ouplaw.com/display/10.1093/law/9780199640300.001.0001/law-9780199640300>> accessed 22 July 2024.

<sup>170</sup> Ibid.

<sup>171</sup> Donald (n 134) 193.

core of the controversy surrounding the terms maximum and sustainable development is the lack of limits imposed by the Covenant, specifically regarding the collection of revenue to fulfil ESCR. Hence, considering that resources are limited and the need to ensure that these rights are available for future generations, Bueno de Mesquita argues that the use of natural resources should have a ceiling based on the environmental principles that inform sustainable development.<sup>172</sup>

Therefore, the lack of limits within the Covenant, specifically in relation to the collection of revenue to fulfil ESCR, is a fundamentally contentious issue related to interpretations of “maximum” and their connection to sustainable development. Considering that resources are limited and the need to ensure those rights are available for future generations, Bueno de Mesquita and Skogly argue that the use of natural resources should have a ceiling based on the environmental principles that inform sustainable development.<sup>173</sup>

### **2.2.2 Progressively achieving the full realisation of the rights**

The section analyses the obligations of states to take steps to progressively achieve the full realisation of rights. It is worth noting that the phrase maximum available resources as explained previously is a qualifier of how these progressive steps must be taken. Therefore, this section directly addresses the positive obligation itself.

To understand the full dimension of this obligation, additionally, it is relevant to explain the notion of minimum core obligations, as these are the basis for comprehending the scope and meaning of progressive and full realisation of rights. This analysis will methodologically follow the approach suggested by Donald, who has proposed that “[c]ore obligations can be seen as the baseline or foundation of ESCRs, while progressive realisation proceeds from this foundation and seeks to achieve the full realization of Covenant rights”.<sup>174</sup>

#### **2.2.2.1 Minimum Core Obligations**

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<sup>172</sup> Bueno de Mesquita (n 120).

<sup>173</sup> *ibid.*

<sup>174</sup> Donald (n 134) 210.

According to General Comment No. 3 by the CESCR:<sup>175</sup>

“...a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.”

This definition has been widely accepted and will be followed in this research. Regarding the terminology, General Comment No. 3 addresses this topic using the phrases “minimum essential levels” and “minimum core obligations”.<sup>176</sup> These terms are interrelated but not necessarily the same. The former refers to the substantive aspect and content that constitutes the essence of the right, while the latter refers to the specific obligations identified and outlined in the relevant General Comments that states owe under each right.

Regarding these core obligations, the CESCR has made some clarifications. First, these should be fulfilled immediately and prioritised over other obligations to ensure the ESCR rights.<sup>177</sup> Second, these are not subject to limitations based on resource constraints unless the state demonstrates that every effort has been made to use all available resources to prioritise these minimum core obligations.<sup>178</sup> Third, these core obligations set a limit for retrogressive measures, as such measures cannot be justified if they are incompatible with the minimum core obligations.<sup>179</sup>

The direct link between the concept of minimum core obligations and sustainable development relates to the dependency of the minimum core content of all ESCR on the environment and natural resources.<sup>180</sup> For instance, the right to food cannot be realised if

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<sup>175</sup> CESCR, ‘General Comment No. 3’ (n 141).

<sup>176</sup> Later, this was shifted to core obligations in subsequent pronouncements by the Committee to avoid minimum compliance justifications by the states.

<sup>177</sup> International NGO Coalition for the and Optional Protocol to the ICESCR, ‘A Toolkit for Action Refreshing Your Knowledge About the International Covenant on Economic, Social and Cultural Rights. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.’

<sup>178</sup> *ibid.*

<sup>179</sup> *ibid.*

<sup>180</sup> Donald (n 134).



natural resources from which food is obtained no longer exist, or if the soil used to grow it is no longer fertile due to pollution or environmental degradation. The right to health is severely affected if there are pollutants in the water and contaminants in the air that are inhaled and consumed by humans. The right to water is compromised if it is polluted with chemicals and dangerous waste from natural resource exploitation.<sup>181</sup> The main problem is that neither the Covenant nor the CESCR has directly addressed the minimum environmental conditions required for the minimum core obligations of each right.

#### **2.2.2.2 Progressive realisation**

Tasioulas has suggested two ways in which minimum core obligations and progressive realisation are connected. First, he suggests that minimum core obligations should not be subject to progressive realisation, as these need to be immediately adopted. Conversely, these measures are the initial steps needed to realise ESCR progressively and in full.<sup>182</sup> Consequently, the following question arises: what does “progressively” exactly entail?

The CESCR has defined the notion of progressive realisation as a “necessary flexibility device” that allows states to fulfil their obligations under the Covenant based on their capacities.<sup>183</sup> This definition acknowledges that the full realisation of ESCR cannot be achieved immediately; however, it does not mean that states can indefinitely postpone their actions.<sup>184</sup> This is reasonable due to the economic considerations of the Covenant. Moreover, the CESCR has clarified that states must take deliberate, concrete, and targeted steps in an effective and reasonably timely manner, and additionally, according to General Comment 1, states are required to have “a detailed plan of action for progressive

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<sup>181</sup> Kaltenborn, Krajewski and Kuhn (n 76).

<sup>182</sup> Tasioulas, John, ‘Minimum Core Obligations : Human Rights in the Here and Now’ (World Bank 2017) Working Paper 122563 <<https://documents.worldbank.org/en/publication/documents-reports/documentdetail/908171515588413853/Minimum-core-obligations-human-rights-in-the-here-and-now>> accessed 22 July 2024.

<sup>183</sup> CESCR, ‘General Comment No. 3’ (n 141) 9.

<sup>184</sup> Lillian Chenwi, ‘Unpacking “Progressive Realisation”, Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance’ (2013) 46 De Jure Law Journal 742.

realization”.<sup>185</sup> So far, this has been the way that the CESCR has characterised progressive realisation.

From a comprehensive perspective, according to Chenwi, there are three key points to keep in mind: (1) “there must be immediate and tangible progress towards the realization of rights; (2) states cannot pursue deliberate retrogressive measures; and (3) it requires special measures for vulnerable and disadvantaged groups”<sup>186</sup>. In sum, progressive realisation entails an ongoing process that should be conducted without delay, driven by a long-term aim to achieve the full realisation of rights.

Although there might not seem to be a direct link between progressive realisation and sustainable development, the connection can be found through the work conducted by the CESCR. On several occasions in its Concluding Observations, the Committee has referred to sustainability or a sustainable approach to the progressive realisation of obligations.<sup>187</sup> According to Donald, the issue is that this notion does not necessarily relate to sustainable development nor include environmental considerations.<sup>188</sup> She indicates that when the Committee has referred to sustainability, it means maintaining a measure over a long period of time, aiming for a consistent and long-term realisation of rights.<sup>189</sup> This can be dangerous since unsustainable measures can be taken in this pursuit.

This problem arises from the lack of clarity on how to operationalise sustainable development in this specific human rights context. While the notion of sustainability used so far considers intergenerational equity to some extent, it does not encompass environmental considerations. Therefore, this notion does not align with a view of sustainable development that is composed of the environmental, social, and economic dimensions in an integrated manner. Consequently, this is a task that the CESCR must address.

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<sup>185</sup> CESCR, ‘General Comment 1’ (1989) 1 <<https://www.escri-net.org/resources/general-comment-1>> accessed 22 July 2024; CESCR, ‘General Comment No. 3’ (n 141) 3.

<sup>186</sup> Lillian Chenwi, ‘Unpacking “Progressive Realisation”, Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance’ (2013) 46 *De Jure Law Journal* 742.

<sup>187</sup> Donald (n 134).

<sup>188</sup> *ibid.*

<sup>189</sup> *ibid.*

### 2.2.2.3 Full realisation

Finally, it is important to refer to the notion of full realisation briefly. Full realisation can be understood from two perspectives, one that is procedural, and another that is substantive. From the procedural perspective, full realisation is the result of a continuous process of taking ongoing steps to realise ESCR. Whereas, from the substantive perspective, providing a definition might be more problematic. This is because the term “full” at some point seems to refer to the utmost level of satisfaction achievable for each right. Drawing an analogy with the minimum essential level, the term “full realization” seems to evoke the possibility of determining the maximum essential level that ESCR contain. Unfortunately, this is a topic that has remained unexplored.

It seems that the Covenant has tried to define the maximum essential level of satisfaction on an individual basis for certain rights by clarifying the steps needed to achieve full realisation. For instance, in the case of the right to work in Article 6, the ICESCR states:<sup>190</sup>

“The steps to be taken [...] to achieve the *full realization of this right* shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”

In a similar way for the right to education the ICESCR prescribes:<sup>191</sup>

“The steps to be taken [...] to achieve the *full realization of this right* shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”

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<sup>190</sup> United Nations General Assembly, ‘International Covenant on Economic, Social and Cultural Rights | OHCHR’ (n 138).

<sup>191</sup> *ibid.*

However, this approach has not been developed systematically for every right in the Covenant, nor is there any statement that confirms this is a consistent and accepted approximation of the topic. Moreover, due to the specific nature of each right, it might be complex to deliver an overarching understanding of full realisation for ESCRs in general.

It is worth noting that in General Comments 12, which relates to the right to food,<sup>192</sup> General Comment 14 on the right to adequate housing,<sup>193</sup> and General Comment 13 on the right to education,<sup>194</sup> the CESCR uses the adequacy criteria to illustrate what full realisation of these rights means, or at least to set a threshold for the measures that need to be adopted to achieve it. This adequacy criteria have been developed through the concepts of Availability, Accessibility, Acceptability, and Quality, which are collectively known as the AAAQ framework.<sup>195</sup> Theoretically, these indicators depict the status of the realisation of rights which aim to achieve full realisation. If these criteria are fulfilled, the steps towards their full realisation of rights may seem closer.

However, this framework has been used in certain cases, depending on the specific contexts of the rights in question. The CESCR has not directly stated that this criterion should be equated to full realisation, although it provides some guidance. Notably, the AAAQ framework has not yet integrated any criteria related to sustainability or environmental considerations. Furthermore, it brings up fundamental questions regarding the desired extent to which it is possible to enjoy a right. Is it legitimate to establish such a limit?

Exactly at this point is where the link with sustainable development appears again. Based on the concept of intergenerational equity, which is crucial for sustainable development, the maximum level of realisation of rights should not sacrifice the rights of future

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<sup>192</sup> Committee on Economic, Social and Cultural Rights, 'General Comment No. 12 on the Right to Adequate Food' (1999) E/C.12/1999/5 12 <<https://www.ohchr.org/en/documents/general-comments-and-recommendations/ec1219995-general-comment-no-12-right-adequate-food>>.

<sup>193</sup> Committee on Economic, Social and Cultural Rights, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)' (United Nations 2000) E/C.12/2000/4 14 <<https://www.refworld.org/legal/general/cescr/2000/en/36991>>.

<sup>194</sup> CESCR, 'General Comment No. 13 Right to Education' (1999) E/C.12/1999/10 13 <<https://www.refworld.org/legal/general/cescr/1999/en/37937>>.

<sup>195</sup> Mads Holst, Marie Villumsen and Thomas Docker, 'The AAAQ Framework and the Right to Water' <[chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.humanrights.dk/files/media/dokumenter/udgivelser/aaaq\\_issue\\_paper\\_2014.pdf](chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.humanrights.dk/files/media/dokumenter/udgivelser/aaaq_issue_paper_2014.pdf)>.

generations, nor should the fulfilment of one right come at the expense of others. From an environmental perspective, the concept of a safe operating space for humanity, explored by Rockström et al, through the formulation of planetary boundaries, can conflict with the full realisation of rights if such realisation requires significant amounts of resources.<sup>196</sup> These controversies have not been addressed by the CESCR nor fully explored in mainstream human rights scholarship, resulting in only a minority of scholars delving into these topics.

## **2.3 Operationalisation of sustainable development**

The General Comment on Sustainable Development is the key instrument that the CESCR can use to clarify how to operationalize the content of sustainable development and how it should be applied within Art 2.1, addressing the specific problems outlined. The normative character and scope of sustainable development in the context of international human rights law have not been explored in depth yet. As such, this section aims to present the *status quo* of the legal nature of sustainable development and clarify which can be some of its essential substantive elements, looking forward to how it can be incorporated and used by human rights bodies.

### **2.3.1 Legal Nature of Sustainable Development**

Considering that international human rights law is ultimately constrained by the general rules of public international law, the legal nature of a concept can be determined based on whether it is itself or is contained within one of the recognised sources of law according to the ICJ Statute. Article 38 of the ICJ Statute states that the main sources of international law are international conventions (treaties), international custom, and general principles of law. Additionally, judicial decisions and the teachings of the most highly qualified publicists are recognised as subsidiary means for the determination of rules of law.<sup>197</sup> On these

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<sup>196</sup> Rockström and others (n 122).

<sup>197</sup> International Court of Justice, 'Art. 38. Statute of the International Court of Justice' (1945) <<https://www.un.org/en/about-us/un-charter/statute-of-the-international-court-of-justice>> accessed 6 August 2024.

grounds, Barral argues the concept of sustainable development has been conceived from different perspectives.<sup>198</sup>

The discussion of the legal nature of sustainable development has been triggered by certain cases brought before the ICJ, such as the *Gabčíkovo-Nagymaros Project* case<sup>199</sup> and the *Pulp Mills on the River Uruguay* case.<sup>200</sup> These cases have acknowledged that sustainable development possesses substantial recognition in international law, although there is no universal agreement on its normative value. Therefore, scholars have referred to the legal nature of sustainable development in different ways, such as an overarching obligation contained in treaties, a customary norm, a general principle of international law or just as a hermetical tool.<sup>201</sup> For some, it represents the formation of a new branch of law, while for others, sustainable development remains an ethical value which is contained in soft law instruments. Although none of these labels and categorisations are mutually exclusive, a contested debate over its legal nature persists.

From the treaty perspective, Barral notes sustainable development “is included in over 300 conventions” which are mostly environmental conventions.<sup>202</sup> However, the main problem is that sustainable development has been predominantly formulated as a political objective rather than as a legal obligation.<sup>203</sup> On the other hand, Sands and Peel indicate that the concept of sustainable development has entered the corpus of international customary law under the logic of equating it to the norm of integrating environmental measures in economic development, which is already a requirement of international law.<sup>204</sup> Another way of reasoning to provide sustainable development with customary law status

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<sup>198</sup> Virginie Barral, ‘Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm’ (2012) 23 *European Journal of International Law* 377.

<sup>199</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (n 3).

<sup>200</sup> *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (International Court of Justice).

<sup>201</sup> Barral (n 198).

<sup>202</sup> *ibid.*

<sup>203</sup> Onita Das, ‘Sustainable Development and Environmental Peacebuilding’ (Edward Elgar Publishing 2023) <<https://www.elgaronline.com/view/book/9781789906929/book-part-9781789906929-9.xml>>.

<sup>204</sup> Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Cambridge University Press 2012).

is through upholding that it meets the conditions of *opinio juris* and state practice. However, these formulations have generally not received majority jurisprudential acceptance.<sup>205</sup>

Another approach views sustainable development as a principle rather than as a concept.<sup>206</sup> This perspective is grounded in the separate opinion of Judge Weeramantry in the *Gabčíkovo-Nagymaros* case, where he argued that sustainable development is "a principle with normative value".<sup>207</sup> Judge Weeramantry further emphasised that the way to integrate the "need for development and the necessity to protect the environment" (essentially referring to the sustainable development paradigm) is through "the existence of a principle which harmonizes both needs," which, in this case, is sustainable development.<sup>208</sup> Interestingly, this notion has gained wide support from scholars and various tribunals across different branches of international law.<sup>209</sup>

The problem with understanding sustainable development as a general principle of international law is that the concept of what constitutes a principle of international law has itself been contested and is still under development. The International Law Commission (ILC), the legitimate UN body to shed light on the development of international law, has acknowledged that there is a need to:<sup>210</sup>

"...elaborate a definition of general principles of law, in particular, to distinguish between general principles of law that gave rise to the rights and obligations of States, fundamental political and legal ideas that were principles of a higher order than rules of international law, and interpretative techniques used to fill lacunae and to ensure the optimal application of substantive legal rules."

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<sup>205</sup> Barral (n 198).

<sup>206</sup> Giulia Capitani and Giovanni Comazzetto, 'The Concept of Sustainable Development in Global Law: Problems and Perspectives' (2019) 5 Athens JL 35.

<sup>207</sup> Separate Opinion of Vice-President Weeramantry, 'Gabčíkovo-Nagymaros Project (Hungary/Slovakia) Judgment' (1997).

<sup>208</sup> *ibid.*

<sup>209</sup> Christina Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law*, vol 2 (Brill 2009).

<sup>210</sup> International Law Commission, 'Report of the International Law Commission on the Work of Its Seventy-Fourth Session (2023)' (United Nations 2024) A/CN.4/763.

Therefore, this lack of clarity has added a layer of complexity for courts and tribunals in explicitly recognising sustainable development as a general principle of international law or in using it as such.

Interestingly, in an attempt to address this issue, the ILC released the text of the draft conclusions on general principles of law in 2023. According to Draft Conclusion 3, there are two types of general principles of law: "the ones (i) derived from national legal systems, and the ones (ii) formed within the international legal system".<sup>211</sup> Therefore, due to its nature, sustainable development appears to represent the latter type. Moreover, on the identification of this specific type of general principle, Draft Conclusion 7 indicates that:

"To determine the existence and content of a general principle of law that may be formed within the international legal system, it is necessary to ascertain that the community of nations has recognised the principle as intrinsic to the international legal system."<sup>212</sup>

Furthermore, referring to the functions of general principles, the Draft Conclusion 10 establishes that:<sup>213</sup>

"1. General principles of law are mainly resorted to when other rules of international law do not resolve a particular issue in whole or in part. 2. General principles of law contribute to the coherence of the international legal system. They may serve, inter alia: (a) (b) to interpret and complement other rules of international law; as a basis for primary rights and obligations, as well as a basis for secondary and procedural rules."

Under this framework, it might be straightforward to argue that sustainable development clearly meets the criteria identified by the ILC for recognising a general principle of international law. However, an analysis under these parameters has not been conducted officially by any international court or tribunal. Furthermore, this reference is based on draft conclusions, which might be subject to change. Nonetheless, these criteria may

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<sup>211</sup> International Law Commission, 'General Principles of Law' (United Nations 2023) A/CN.4/L.982.

<sup>212</sup> Ibid.

<sup>213</sup> Ibid.



contemplate the future legal nature of sustainable development in a universally accepted way.

In sum, there is no general consensus about the specific normative value of sustainable development under a specific source of law based on Article 38 of the ICJ Statute. According to Lowe, the concept of sustainable development does not fit into the classical conception of a norm, which entails prescriptive language and a norm-creating character.<sup>214</sup> He suggests that it is an umbrella term used to label a group of consistent norms, mainly other principles that might not have the appearance of archetypical norms. However, if this is the case, the question of the current legal status of sustainable development still remains.

Interestingly, Lowe has suggested that while the concept of sustainable development lacks normative character, this does not mean it lacks normative value.<sup>215</sup> He asserts that the normativity of sustainable development “can be sought in the realm of judicial decision-making, serving as an element in the process of judicial reasoning”.<sup>216</sup> In a similar vein, Barral has referred to sustainable development as “a very powerful hermeneutical tool in the hands of judges, as it can be used to weigh on the interpretation of existing norms”.<sup>217</sup>

Barral describes sustainable development as having four main interpretative functions. Firstly, it serves as an external hermeneutical tool that provides interpretative guidance. Second, it acts as a legitimising factor for evolutive interpretation, allowing for the adaptation of legal norms to modern reality. Third, it is a concept that can assist in the redefinition of treaty interpretation. Lastly, it functions as an integrative principle to resolve conflicts between norms.<sup>218</sup> Regarding this last specific function, McGoldrick categorises sustainable development as an integrative principle (though not in the same sense as Article 38 of the ICJ Statute). She highlights that the value of understanding sustainable development as a principle lies in its reflection of the interactive and

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<sup>214</sup> Vaughan Lowe, ‘Sustainable Development and Unsustainable Arguments’ in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 1999) 31 <<https://doi.org/10.1093/acprof:oso/9780198298076.003.0002>> accessed 24 July 2024.

<sup>215</sup> *ibid.*

<sup>216</sup> *ibid.* 33.

<sup>217</sup> Barral (n 198) 398.

<sup>218</sup> *ibid.*

integrative nature of environmental, international human rights, and international economic law.<sup>219</sup> As such, the interpretative approach is currently used within this spectrum of international law. Specifically, in the human rights regime, the concept of sustainable development has been used through its interpretative function.<sup>220</sup>

### 2.3.2 Substantive content of sustainable development

Regardless of sustainable development not being explicitly classified under a specific source of international law, it is clear that the concept has undeniable relevance for international law, especially for international human rights law. As such, this concept has already been used, primarily as an external hermeneutical reference, to solve disputes and will continue to be used until there is a more straightforward juridical reasoning to apply it. However, Viñuales and Dupuy argue this has led to the concept of sustainable development being misused and abused since there is not a widely accepted, holistic, and integrative approach that defines the legal content of sustainable development.<sup>221</sup>

In an attempt to limit the misuse of the concept of sustainable development, the Commission on Sustainable Development appointed a group of experts with the objective of identifying the principles that underscore the existing normative essence of sustainable development. According to Atapattu, the principles contained in the report released in 1996 “can be summarized as follows: Principle of interrelationship and integration, Principles relating to international cooperation, Principles of participation, decision-making and transparency, Principles on dispute avoidance, resolution procedure, monitoring and compliance”.<sup>222</sup> All of these are aimed at developing a clearer framework on sustainable development.

Similarly, the International Law Association (ILA), despite their lack of legal authoritative value, made a significant effort to articulate and codify the scattered norms existent in the international law *corpus iuris* related to sustainable development. As such, they developed

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<sup>219</sup> McGoldrick (n 47).

<sup>220</sup> Folkesson (n 79).

<sup>221</sup> Pierre-Marie Dupuy and Jorge Viñuales, ‘The Principles of International Environmental Law’, *International Environmental Law* (Cambridge University Press 2018).

<sup>222</sup> SA Atapattu, ‘Sustainable Development: Emergence And Application’ (Brill | Nijhoff 2006) 98 <[https://brill.com/view/book/9789047440147/Bej.9781571051820.i-536\\_003.xml](https://brill.com/view/book/9789047440147/Bej.9781571051820.i-536_003.xml)>.

the New Delhi Declaration which outlined key legal principles (not necessarily in the sense of Article 38 of the ICJ Statute) and duties on the topic, providing a comprehensive framework to address this longstanding issue.<sup>223</sup> The issue with these attempts is that, while identifying principles, they do not provide any guidance on how these principles interrelate, resulting in an extensive list that is complex to apply.

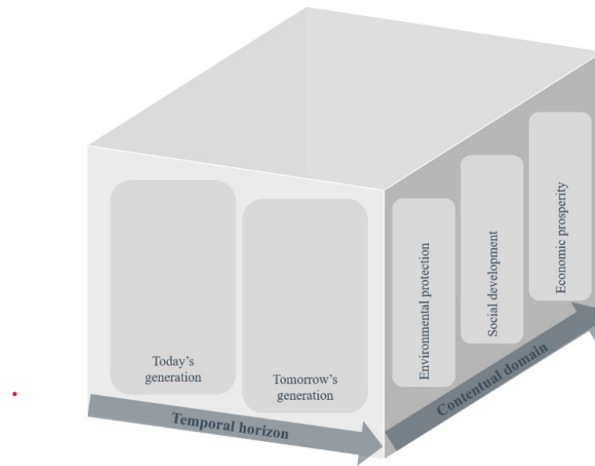
Consequently, other initiatives from academia, mainly based on the Rio Declaration and its impact on defining and understanding sustainable development, have developed a less extensive but more comprehensive framework. Recognising the widely accepted international agreement that the backbone of sustainable development is the integration of environmental considerations with social and economic development within a temporal scope that considers both current and future generations (Figure 10).<sup>224</sup> Scholars such as Boyle, Sands, Peel, Aguilar, McKenzie, and Viñuales have identified a new set of principles.<sup>225</sup> The common principles among them are integration, intergenerational equity, intragenerational equity, and sustainable use.

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<sup>223</sup> The main elements according to this declaration were: “The duty of States to ensure the sustainable use of natural resources, The principle of equity and the eradication of poverty, The principle of common but differentiated responsibilities, The principle of the precautionary approach to human health, natural resources, and ecosystems, The principle of public participation and access to information and justice, The principle of good governance, The principle of integration and interrelationship, particularly in relation to human rights and social, economic, and environmental objectives” (International Law Association, 2002)

<sup>224</sup> Lemke (n 8).

<sup>225</sup> Alan Boyle and others (eds), ‘The Elements of Sustainable Development’, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 1999) <<https://doi.org/10.1093/acprof:oso/9780198298076.003.0001>> accessed 7 December 2024; Dupuy and Viñuales (n 221); Sands and Peel (n 204).



*Figure 10: Conceptual framework of sustainable development<sup>226</sup>*

Therefore, in following Donald's view, this research applies the aforementioned four principles to define the substantive content of sustainable development, acknowledging that there might be other alternatives. Following the ideas of Buser, this research argues that sustainable development needs to be informed by interdisciplinary ideas<sup>227</sup> As such, this study suggests that another substantial element to define sustainable development beyond the purely legal aspects (though with legal consequences) is the notion of sustainable space, which will also be developed.

### **2.3.2.1 Sustainable Use**

Sands and Peel indicate that this principle focuses “on the adoption of standards governing the rate of use or exploitation of specific natural resources rather than on their preservation for future generations”.<sup>228</sup> This principle has appeared in several international law instruments, ranging from treaties to soft law instruments. Although not explicitly stated, Principle 8 of the Rio Declaration prescribes that “States should reduce and eliminate unsustainable patterns of production and consumption and promote

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<sup>226</sup> Lemke (n 8).

<sup>227</sup> Andreas Buser, ‘From Doughnut Economics to Doughnut Jurisprudence: A Human Rights Perspective’ (2024) 24 Human Rights Law Review ngae002.

<sup>228</sup> Sands and Peel (n 204) 210.

appropriate policies”.<sup>229</sup> Additionally, the Agenda 2030 for Sustainable Development, particularly SDGs 14 and 15, are also linked to the notion of sustainable use of resources.

The term “sustainable use” has gained significant importance, specifically in relation to biodiversity management and conservation, although it is not exclusively applicable to this field. For instance, the Convention on Biological Diversity defines “sustainable use” as “the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.”<sup>230</sup> Although, this is only one example of how this concept has been used in international law. According to Donald, the sustainable use principle tends to be adapted on a contextual basis, as seen in the case of biodiversity.<sup>231</sup> However, overall, this principle is essentially related to the conservation of natural resources which aims to ensure the sustainability of these resources in the long term.<sup>232</sup>

### **2.3.2.2 Inter and Intra Generational Equity**

From the temporal dimension of sustainable development, it is essential to refer to the intergenerational principle as well as the intragenerational principle. Both are fundamental pillars for addressing the needs of the current generation and future generations. Relevantly, Principle 3 of the Rio Declaration states that the right to development “must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations”, which refers to this dual concern.<sup>233</sup> Similarly, the UN Framework Convention on Climate Change emphasises in its principles that “[t]he Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but

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<sup>229</sup> General Assembly United Nations (n 50).

<sup>230</sup> United Nations, ‘Convention on Biological Diversity’ (1992).

<sup>231</sup> Donald (n 134).

<sup>232</sup> *ibid.*

<sup>233</sup> General Assembly United Nations (n 50).

differentiated responsibilities and respective capabilities”.<sup>234</sup> Thus, the concern for both present and future generations is evident.

At its core, the intergenerational equity principle requires that future generations are considered in decision-making processes related to development and the environment. Boyle contends that “a central aspect of this idea is the need to conserve options for the future use of resources, including their quality and that of the natural environment”.<sup>235</sup> Moreover, Weiss has explored the environmental burdens that the current generation can impose on future ones, referring to intergenerational equity as a partnership between generations, where each generation takes care of the Earth for the future while also benefiting from the care taken by previous generations.<sup>236</sup>

This principle has already experienced some development within international law. The Stockholm Declaration notably refers to the responsibility to “protect and improve the environment for future generations”. The ICJ has also addressed the intergenerational equity principle in notable cases such as the *Gabcikovo-Nagymaros Project* case,<sup>237</sup> and most notably in its Advisory opinion on the Threat of Nuclear Weapons, which underscored the responsibility to consider the long-term impacts of environmental harm.<sup>238</sup> Thus, it is clear that this principle is embedded in the fabric of international law.

At the other end, in referring to the intragenerational equity principle, Donald has acknowledged that there has been significantly less development on this principle, and it has not gained wide recognition in international law beyond being a policy goal.<sup>239</sup> This principle has been associated with the current inequalities that the world faces in relation to wealth disparity and extreme poverty. In the view of Boyle, this principle emerged as a critical perspective on the high rates of development experienced by wealthier states in

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<sup>234</sup> United Nations Framework Convention on Climate Change Secretariat, *United Nations Framework Convention on Climate Change* (UNFCCC 1992).

<sup>235</sup> Boyle and others (n 225).

<sup>236</sup> Edith Brown Weiss, ‘In Fairness to Future Generations’ (1990) 32 *Environment: Science and Policy for Sustainable Development* 6.

<sup>237</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (n 3).

<sup>238</sup> ICJ, ‘Legality of Threat of Use of Nuclear Weapons’ (1986) <<https://www.icj-cij.org/case/95>>.

<sup>239</sup> Donald (n 134).

comparison to the lack of development in developing countries<sup>240</sup>. According to Brown Weiss, all individuals who are part of the same generation have the same rights to benefit from the planet they live on. Moreover, she expresses concern that if people cannot even care about their present conditions of living, addressing inequalities within the existing economic system is essential.<sup>241</sup> Although it is worth mentioning that this perspective can be contested in light of global development patterns reported by institutions such as the World Bank, for instance, while the extreme poverty rate fell from 38 percent in 1990 to 8.5 percent in 2024<sup>242</sup>, the issue remains controversial. Therefore, this is still a pending task for international law bodies, although it does not mean it should not be considered a principle. **2.3.2.3 Integration**

Regarding the integration principle, it is important to clarify that there has been a significant overlap between the meaning of this principle and the concept of sustainable development itself. However, for the purposes of this research, the integration principle is considered part of the broader notion of sustainable development. The essence of this principle, in the view of Boyle, lies in the interdependence of environmental, social, and economic development.<sup>243</sup> According to Donald, this principle aims to harmonise all these aspects from an interdisciplinary and complementary perspective through a structured planning process.<sup>244</sup> The main complexity of this principle, however, lies in the granularities of this integration and the hierarchical relationship among them.

In relation to its status from the international law perspective, the integration principle is reflected in Principle 4 of the Rio Declaration, which states that “environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it”.<sup>245</sup> Moreover, in the *Gabcikovo-Nagymaros* case, the ICJ recognised “the need to reconcile economic development with environmental protection is aptly expressed

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<sup>240</sup> Boyle and others (n 225).

<sup>241</sup> Weiss (n 236).

<sup>242</sup> World Bank, *Poverty, Prosperity, and Planet Report 2024: Pathways Out of the Polycrisis* (Washington, DC: World Bank, October 15, 2024), published online by the World Bank, <https://www.worldbank.org/en/publication/poverty-prosperity-and-planet>.

<sup>243</sup> Boyle and others (n 225).

<sup>244</sup> Donald (n 134).

<sup>245</sup> General Assembly United Nations (n 50).

in the concept of sustainable development”, essentially referring to the principle of integration.<sup>246</sup> This recognition indicates that the principle of integration is already embedded in the *corpus juris* of international law.

Distinctly from the other principles, this one requires the interaction between three main areas of international law (international economic law, environmental law, and human rights law) since these reflect each tenet of sustainable development. But interestingly, each of these areas has its own set of principles. For instance, environmental law includes framework principles for environmental protection; international economic law, particularly in trade, encompasses principles of the General Agreements on Trade in products and services; and human rights law is centred around the rights themselves. Currently, the specific interaction between these different jurisdictions poses one of the main challenges to the practice of this principle.<sup>247</sup>

#### **2.3.2.4 Sustainable Space**

From the perspective of science and economics, some interesting ideas have been proposed to clarify the boundaries of what sustainable development entails. Specifically, the notions of planetary boundaries and doughnut economics have been fundamental in delineating what this research labels as sustainable space. These concepts highlight the limits within which society should operate to achieve sustainable development, and which priorities should be made to integrate social, economic, and environmental elements while ensuring both intra- and intergenerational equity.

According to Vanderhole, “Sustainable development typically pursues three objectives at once: economic development, social development and ecological development. Strong definitions of sustainable development introduce a hierarchy between these objectives and give prominence to the ecological and social one”.<sup>248</sup> In this context, the principle of sustainable space is based on the premise that, without taking value to the economic and

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<sup>246</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (n 3 ).

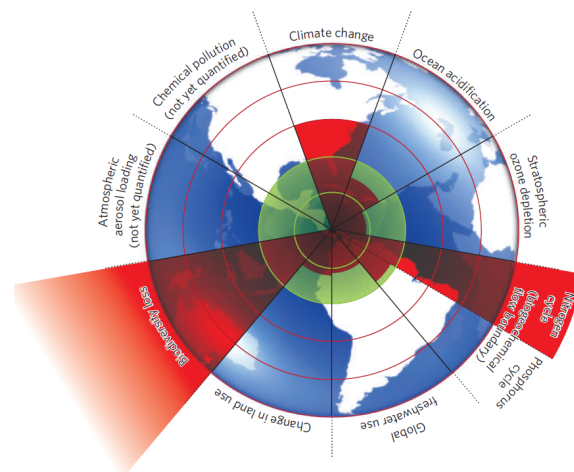
<sup>247</sup> Dupuy and Viñuales (n 221).

<sup>248</sup> Wouter Vandenhoe, ‘De-Growth and Sustainable Development: Rethinking Human Rights Law and Poverty Alleviation Special Issue: Law and Development in Africa: Poverty and Sustainable Development’ (2018) 11 *Law and Development Review* 647, 671.



social dimensions, the ecological aspect sets the boundaries for what is feasible without compromising human existence. Therefore, sustainable space is a substantive element of sustainable development as it helps to have an approximation of what sustainable development means in practice and how it can be applied.

From the perspective of science, the concept of planetary boundaries has been extremely relevant for understanding the limits of resource enjoyment without endangering the existence of the planet for current and future generations. This notion was originally coined by Rockström, who indicates that there are nine planetary boundaries that “define the safe operating space for humanity with respect to the Earth system and are associated with the planet’s biophysical subsystems or processes”.<sup>249</sup> These include biodiversity loss, atmospheric aerosol loading, chemical pollution, climate change, ocean acidification, stratospheric ozone depletion, nitrogen cycle, phosphorus cycle, and change in land use (Figure 11)<sup>250</sup>. Furthermore, he indicates that “if these thresholds are crossed, then important subsystems could shift into a new state, often with deleterious or potentially even disastrous consequences for humans”.<sup>251</sup>



*Figure 11: Planetary Boundaries*<sup>252</sup>

<sup>249</sup> Rockström and others (n 122) 472.

<sup>250</sup> Ibid.

<sup>251</sup> Ibid.

<sup>252</sup> Ibid.

Interestingly, this notion is starting to be reflected in the legal dimension, particularly the boundaries related to climate change and biodiversity. Additionally, Buser argues “the planetary boundary for climate change has already implicitly shaped human rights jurisprudence and could do so more substantially in the future”.<sup>253</sup> For instance, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* and *Carême v. France* are strong indicators that this notion can be integrated as a legal principle.<sup>254</sup>

From an economic perspective, Raworth has developed a model in the shape of a doughnut, which “in essence is a pair of concentric rings. Below the inner ring – the social foundation – lie critical human deprivations such as hunger and illiteracy. Beyond the outer ring – the ecological ceiling – lies critical planetary degradation such as climate change and biodiversity loss”.<sup>255</sup> The circular shape of the diagram (Figure 12) shows the need to balance the social foundation with the ecological ceiling, creating in the middle a safe and just space for humanity where the well-being of both people and the planet coincide.

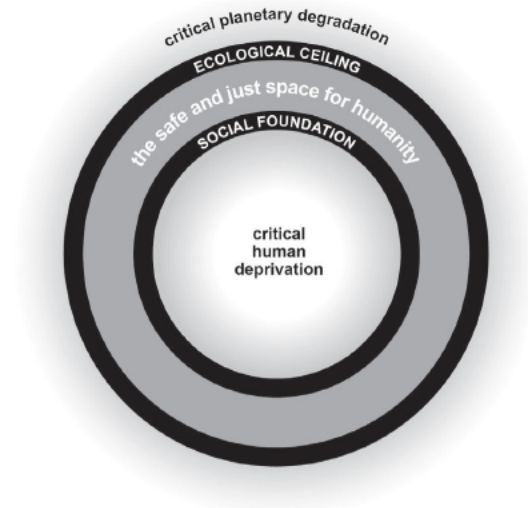


Figure 12: Doughnut Economics<sup>256</sup>

<sup>253</sup> Buser (n 227) 11.

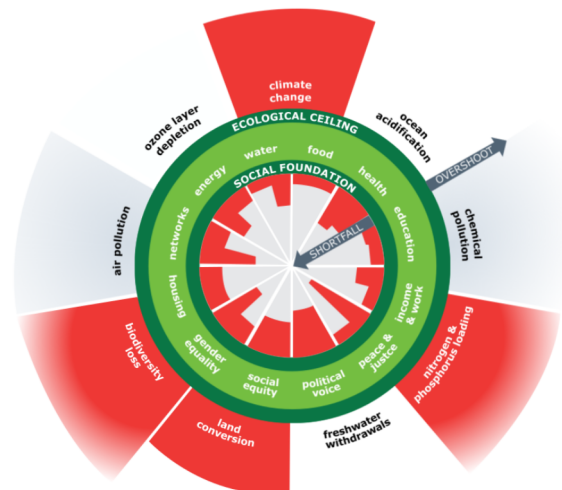
<sup>254</sup> Ole W Pedersen, ‘Climate Change Hearings and the ECtHR’ (*EJIL: Talk!*, 4 April 2023) <<https://www.ejiltalk.org/climate-change-hearings-and-the-ecthr/>> accessed 8 August 2024.

<sup>255</sup> Kate Raworth, *Doughnut Economics* (Chelsea Green Publishing, 2017).

<sup>256</sup> *ibid.*

The model of doughnut economics has not yet been applied from an international law perspective, nor has it been widely treated as a principle. However, the United Nations Special Rapporteur on Human Rights and the Environment has recognised the potential of doughnut economics within the human rights regime, particularly concerning economic, social, and cultural rights.<sup>257</sup> According to Boyd, the strength of this concept is that it aims to “guarantee the material, social, and environmental conditions necessary for all people to live with dignity on a flourishing planet”.<sup>258</sup> This indicates that the concept is slowly gaining legal value and might have a place in international law.

In sum, if a sustainable space does not exist, then sustainable development cannot exist either, as it becomes purposeless in reality. Similarly, with the intergenerational equity principle, if future generations do not inform the basic notion of sustainable development, the concept loses its essence. In this case, if measures are taken against sustainable space, it becomes impossible to achieve sustainable development because the capacity limits of an ecosystem are exceeded. Moreover, the very existence of humanity could be threatened. As such, the following Figure 13 is how the sustainable space would look like.



*Figure 13: The Doughnut of Social and Planetary Boundaries*<sup>259</sup>

<sup>257</sup> Human Rights Council (n 109).

<sup>258</sup> *ibid* 17.

<sup>259</sup> 'Doughnut | Kate Raworth' (28 April 2013) <<https://www.kateraworth.com/doughnut/>> accessed 8 August 2024.

Finally, to conclude the analysis of the substantive elements, as a corollary, it is relevant to mention that the approach taken by this paper contemplates the main aspects of sustainable development in a way that makes its essence clearer. However, additional components could be included. But, overlooking the elements pointed out might not be ideal, as they represent the current understanding of sustainable development. Moreover, other principles, such as those specifically related to the environment or trade, can be categorised as subcategories of these main ones. The principle of integration might be the key to developing interconnection mechanisms.

## **2.4 A new understanding of the key concepts of the ICESCR**

### **2.4.1 Interpreting the ICESCR.**

The CESCR's primary function is to monitor the implementation of the ICESCR. As such, there are several mechanisms available for the Committee to ensure they can fulfil this task effectively. One such mechanism, specifically aimed at providing interpretative clarity of the norms embodied in the Covenant, is its publication of General Comments.<sup>260</sup> According to Odello and Seatzu, General Comments are “an essential tool for understanding, interpretation, and application of economic cultural rights”.<sup>261</sup> According to Alston, these comments “serve as a means by which a UN human rights expert committee distils its considered views on issues arising from the provisions of the treaty it supervises”, reflecting the emerging consensus of states on various contemporary issues.<sup>262</sup>

Although the legitimacy and authority of General Comments have been questioned, Reiners suggests that they are authoritative, clarifying that “their authority does not derive directly from their decisions, and instead requires further enacting”.<sup>263</sup> As such, General Comments

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<sup>260</sup> ‘Fact Sheet No. 16 (Rev. 1): The Committee on Economic, Social and Cultural Rights (Archive) | OHCHR’ <<https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-16-rev-1-committee-economic-social-and-cultural-rights>> accessed 28 July 2024.

<sup>261</sup> *ibid.*

<sup>262</sup> Alston (n 81) 746.

<sup>263</sup> Nina Reiners (ed), ‘Human Rights Treaty Interpretation’, *Transnational Lawmaking Coalitions for Human Rights* (Cambridge University Press 2021) 36 <<https://www.cambridge.org/core/product/5742DE7E3B8FB7D8C2F0725D57327D55>>.

are a powerful tool that the Committee has to develop a progressive interpretation of human rights.

In line with its mandate, in the context of examining States party reporting, the CESCR has already advised States on how to discharge their Covenant obligations while pursuing sustainable development. Since its 65th session, the CESCR has decided to work on a General Comment to consolidate these observations and views.<sup>264</sup> This General Comment opens the door for the Committee to interpret obligations in light of sustainable development. However, the Committee cannot change the meaning of what was written in the Covenant to adopt a new interpretation of the obligations of the ICSCR. The Committee is bound to follow the Vienna Convention on the Law of the Treaties (VCLT).

Articles 31 to 33 of the VCLT emphasise that treaty interpretation should logically and progressively consider the text (textual interpretation), the context (contextual interpretation), subsequent agreements (systematic interpretation), and the purpose and objective of the treaty (teleological interpretation).<sup>265</sup> Furthermore, supplementary means of interpretation may be used if the result of the previous approach is ambiguous, obscure, absurd, or unreasonable.<sup>266</sup> In sum, according to Donald, the VCLT accommodates various modes of interpretation which indicates these should be used as part of a unified rule of interpretation.<sup>267</sup> However, there have been slight nuances to these rules for the human rights regime compared to other branches of international public law.

Regarding specialised treatment or the human rights regime, Crawford has indicated that “the distinctive features of human rights treaties mean there has been intense scrutiny as to whether the Vienna Convention on the Law of Treaties is sufficient or even applicable in this context”.<sup>268</sup> In the same line of thought, Arato argues that the nature of human rights

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<sup>264</sup> CESCR Drafting Group (n 129).

<sup>265</sup> United Nations, ‘Vienna Convention on the Law of Treaties’.

<sup>266</sup> *ibid.*

<sup>267</sup> Donald (n 134) 63.

<sup>268</sup> James Crawford and Amelia Keene, ‘Interpretation of the Human Rights Treaties by the International Court of Justice’ (2020) 24 *The International Journal of Human Rights* 935, 938.

treaties and their obligations present challenges when it comes to treaty interpretation.<sup>269</sup> This entails that the literal method of interpretation can be highly conflictive in this regime, as interpretations have a practical impact on the rights of individuals.<sup>270</sup>

Moreover, Fitzmaurice has noted the *pro homine* nature of human rights treaties and the non-reciprocal character of human rights obligations as elements that allow for a different interpretative approach than the traditional VCLT understanding.<sup>271</sup> Considering these specific considerations, according to Dothan, there has been a tendency within the human rights regime to either give more weight to the object and purpose or the teleological method of interpretation reflected in the VCLT.<sup>272</sup>

Another interpretative approach that has been used in the human rights regime is the evolutionary method. According to Bjorge, although there is no standard definition of evolutionary interpretation, the core idea is that “the meaning of treaty terms may change over time, without the specific intervention of the parties to amend or modify the treaty terms”.<sup>273</sup> However, Vidigal notes that this method entails the dilemma of “whether the interpreter should aim to ascertain the meaning of a treaty or document to its drafters or to construct a meaning that is attuned to contemporary realities”.<sup>274</sup> This has raised criticism that this method does not fall under the provisions of the VCLT. However, in cases related to sustainable development, such as the *Gabčíkovo-Nagymaros Project* and *Pulp Mills on the River Uruguay*, the ICJ has used the evolutionary method of interpretation, providing its basis under the logic of finding the intention of the parties.<sup>275</sup> This aligns with

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<sup>269</sup> ‘Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences by Julian Arato :: SSRN’ <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1684818](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1684818)> accessed 28 July 2024.

<sup>270</sup> Crawford and Keene (n 259) 942.

<sup>271</sup> Malgosia Fitzmaurice, ‘Interpretation of Human Rights Treaties’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) <<https://doi.org/10.1093/law/9780199640133.003.0032>> accessed 27 July 2024.

<sup>272</sup> Shai Dothan, ‘The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights’ (30 August 2018) <<https://papers.ssrn.com/abstract=3241331>> accessed 27 July 2024.

<sup>273</sup> Eirik Bjorge, ‘Introducing *The Evolutionary Interpretation of Treaties*’ (*EJIL: Talk!*, 15 December 2014) <<https://www.ejiltalk.org/introducing-the-evolutionary-interpretation-of-treaties/>> accessed 28 July 2024.

<sup>274</sup> Geraldo Vidigal, ‘Evolutionary Interpretation and International Law’ (2021) 24 *Journal of International Economic Law* 203.

<sup>275</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (n 3).; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (n 192).

Fitzmaurice's perspective that this method is consistent with the VCLT and is linked to Articles 31.1 and 31.3.c of the Convention.<sup>276</sup>

, Regarding the dilemma of interpreting treaties by text or intent the human rights regime has adopted the most progressive approach, mainly leaning towards the perspective that requires a view of contemporary realities.<sup>277</sup> For instance, within the context of the dialogues between Regional Courts held in 2018, the representatives and judges of the Inter-American Court of Human Rights, the European Court of Human Rights and the African Court of Human and Peoples' Rights have adopted the concept of human rights treaties as living instruments, meaning their interpretation needs to be linked to current living conditions and evolving times.<sup>278</sup>

Similarly, the UN human rights bodies, especially those supervising the implementation of universal human rights treaties, have supported this view. For example, the Human Rights Committee for the ICCPR, in *Judge v. Canada*, stated that "the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions".<sup>279</sup> The CERD has invoked in its General Recommendation 32 that "the Convention, as the Committee has observed on many occasions, is a living instrument that must be interpreted and applied taking into account the circumstances of contemporary society".<sup>280</sup> Similarly, the CRC in General Comment No. 8 has referred to "the convention, like all human rights instruments, whose interpretation

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<sup>276</sup> Fitzmaurice (n 262).

<sup>277</sup> Daniel Moeckli and Nigel D White, "Treaties as "Living Instruments"" in Michael J Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018) <<https://www.cambridge.org/core/product/7447600916FCE6E0AA1524CD9C661A3F>>.

<sup>278</sup> Interamerican Court o Human Rights, 'From the Interpretation of Norms to Social Change: Human Rights Treaties as Living Instruments in Light of Reality', *Dialogue Between Regional Human Rights Courts* (GIZ 2020) 59 <<chrome-extension://efaidnbmninnibpcapjpcgglefindmkaj/https://www.corteidh.or.cr/sitios/libros/todos/docs/dialogo-en.pdf>>.

<sup>279</sup> *Judge v Canada* [1998] Human Rights Committee CCPR/C/78/D/829/1998.

<sup>280</sup> Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 32. The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination' (2009) CERD/C/GC/32 <[https://adsdatabase.ohchr.org/IssueLibrary/CERD\\_Recommendation%20No32.pdf](https://adsdatabase.ohchr.org/IssueLibrary/CERD_Recommendation%20No32.pdf)>.

develops over time”.<sup>281</sup> In sum, it is clear that the evolutionary approach is part of the practice of the human rights regime.

With a clear overview of the interpretative rules governing human rights treaties and their general application, it is worth exploring the specific practices of the CESCR, given the focus of this research. According to Donald and Sepúlveda, the CESCR has rarely identified the interpretative methodology used, but an examination of its work shows that its general approach, mainly in its General Comments, has focused on the object and purpose method, even if it was not explicitly stated.<sup>282</sup> Examples of this method of interpretation can be found in General Comments 2 and 19.<sup>283</sup> Therefore, the status quo regarding interpretation methods has been rather static within the traditional understanding of the VCLT.

However, in recent years, the reference to the evolutionary approach has become more evident in the Committee’s work. This is logical due to the inherently evolutionary nature of the ICESCR, noted by Desierto and Gillespie who argue that “among the major international human rights treaties, the normative design of ICESCR obligations stands out for being purposely evolutive and dynamic”.<sup>284</sup> Various General Observations by the Committee have indicated that notions such as health and work require a contemporary view.<sup>285</sup> Moreover, in specific cases such as General Comment 25, the Committee has acknowledged the importance of contemporary challenges like climate change in understanding the scope of these obligations.<sup>286</sup> This shows that the Committee has already used this interpretative approach.

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<sup>281</sup> Committee on the Rights of the Child (CRC), ‘General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, Inter Alia)’ (2006) CRC/C/GC/8 <<https://www.refworld.org/legal/general/crc/2007/en/41020>>.

<sup>282</sup> Donald (n 134) 77.

<sup>283</sup> Committee on Economic, Social and Cultural Rights (CESCR), ‘General Comment No. 2: International Technical Assistance Measures’ (1990) E/1990/23; Committee on Economic, Social and Cultural Rights (CESCR), ‘General Comment No. 19: The Right to Social Security (Art. 9 of the Covenant)’ (2008) Committee on Economic, Social and Cultural Rights (CESCR) <<https://www.refworld.org/legal/general/cescr/2008/en/41968>>.

<sup>284</sup> Collin Gillespie and Diane Desierto, ‘Evolutive Interpretation and Subsequent Practice. Interpretive Communities and Processes in the Optional Protocol to the ICESCR’ (2013) 73 549, 562.

<sup>285</sup> Donald (n 134).

<sup>286</sup> ‘General Comment No. 25 on Science and Economic, Social and Cultural Rights (Article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights)’ (2020) E/C/12/GC/25 <<https://digitallibrary.un.org/record/3899847?v=pdf>>.



Transitioning from a general and abstract analysis of interpretative methods to how the CESCR can apply them in its work, there are key ideas to keep in mind. The evolutionary interpretation is a hermeneutical perspective that can be used to view the Covenant through the lens of sustainable development. This is because sustainable development derives from a modern understanding of global society, with special attention to the current triple planetary crisis. This contrasts with the perspective of the world when the ICESCR was first drafted, which represented a classical economic paradigm of growth that can now be considered problematic.<sup>287</sup>

According to Barral, some criticism of this approach might arise on the basis that “the impact of an interpretative reference to sustainable development via Article 31(3)(c) remains unclear”.<sup>288</sup> Furthermore, the idea that the role of sustainable development should be constrained and limited by the principle of contemporaneity, according to that treaties must be interpreted in the context of the law applicable at the time of its conclusion.<sup>289</sup> However, a static interpretation of the Covenant will not contribute to addressing global challenges and will ultimately entail a loss of human rights, which contradicts the purpose of the Covenant.

Interestingly, if the CESCR adopts the idea of an evolutionary interpretation to frame obligations under sustainable development and the triple planetary crisis, it will not be the first or the only one. The CRC in General Comment No. 26 on children’s rights with a special focus on climate change has already taken the first step. Specifically, this general comment intended to “clarify... the obligations of States to the Convention and provid[e] authoritative guidance on legislative, administrative, and other appropriate measures to address environmental harm, with a special focus on climate change”.<sup>290</sup> Thus, the juridic path is already traced, but the main challenge now is how this evolutionary interpretation should look. The next section sheds some light on this topic.

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<sup>287</sup> Petel and Putten (n 117).

<sup>288</sup> Barral (n 198) 394.

<sup>289</sup> Barral (n 198).

<sup>290</sup> Committee on the Rights of the Child, ‘General Comment No. 26 on Children’s Rights and the Environment with a Special Focus on Climate Change’ (2023) CRC/C/GC/26  
<<https://www.ohchr.org/en/documents/general-comments-and-recommendations/crccgc26-general-comment-no-26-2023-childrens-rights>>.

### 2.4.2 Overall Sustainable Interpretation

An evolutionary and systematic interpretation of Article 2.1 should clarify how to interrelate the substantive elements of sustainable development to address the main issues within the Covenant's provisions. Following the ideas proposed by Donald <sup>291</sup> and Liebenberg,<sup>292</sup> this paper suggests that the interpretation can be guided by two main steps: (1) clarifying the minimum and maximum levels of enjoyment of rights within the logic of sustainable development; and (2) clarifying how the measures adopted between these limits remain under the logic of sustainable development.

Regarding the first step, the concepts of planetary boundaries and doughnut economics are substantial. The notion of planetary boundaries can help determine an environmental ceiling for the enjoyment of ESCR.<sup>293</sup> Conversely, the ideas of the social foundations developed through the doughnut economic model can help establish an inverse economic ceiling based on the minimum environmental conditions needed to fulfil the core obligations of ESCR,<sup>294</sup> grounded in the elements of the right to a healthy environment.<sup>295</sup> This is aligned with Buser's perspective, who suggests that:

“The concept of doughnut jurisprudence promotes a holistic perspective on sustainability, equity, and human rights. Human rights can serve as a basis for both social and ecological limits and may even provide states with guidance in addressing (potential) conflicts through redistributive instruments. A progressive interpretation of human rights obliges states to uphold planetary boundaries and restrict their ecological impact within a range that allows humanity to return within the safe operating space.” <sup>296</sup>

Additionally, it would be interesting to adjust the framework of availability, accessibility, acceptability, and quality, which has been used to define the full realisation of rights, by

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<sup>291</sup> Donald (n 134).

<sup>292</sup> '19th Meeting, 73rd Session, Committee on Economic, Social and Cultural Rights (CESCR)' (24 February 2023) <<https://webtv.un.org/en/asset/k17/k17v2c8hr2>>.

<sup>293</sup> Donald (n 134).

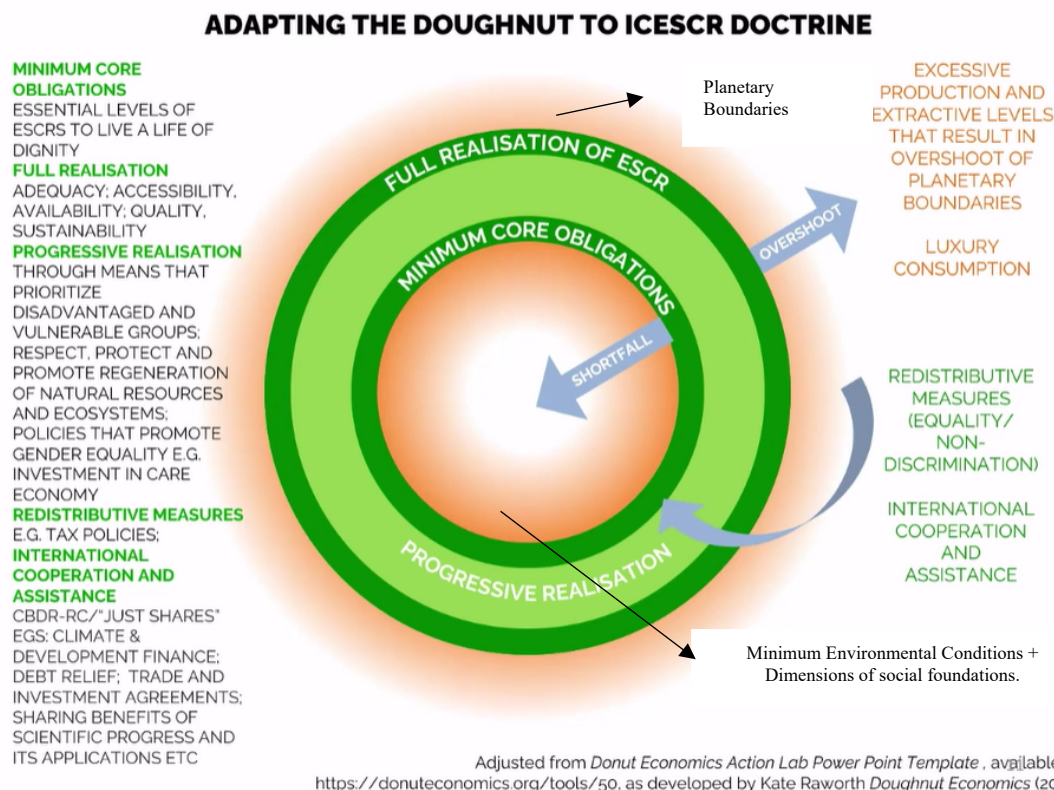
<sup>294</sup> Buser (n 227).

<sup>295</sup> Boyd (n 112).

<sup>296</sup> Buser (n 227) 23.

adding another label named “sustainability”. This criterion would also set a limit for the full realisation of rights on the basis of the principles of sustainable use and inter-generational equity.

Regarding the second step, between these ceilings lies the space for sustainable development which needs to be secured through progressive measures that have a long-term perspective. These measures should be based on an assessment that accounts for the substantive elements of sustainable development: sustainable use, intergenerational equity, and integration. The initial steps, which are more related to core needs, should have an intragenerational focus while later measures must consider an intergenerational approach. As such, to better illustrate this interaction, for both steps, Liebenberg has proposed the following diagram (which has been modified for the specific purposes of this paper).<sup>297</sup>



<sup>297</sup> Donald (n 134).

*Figure 14: Adapting the Doughnut to ICESCR Doctrine*<sup>298</sup>

This proposal of an overall sustainable understanding, in a broad manner, already addresses some of the questions posed by the Drafting Group and points a way forward. But, considering the time based relationship between the application of core obligations, progressive realisation, and full realisation of rights, as well as the specific implications of resource use in each of these areas, it is worth making some specific considerations regarding these points.

Since the core obligations are the ones that require immediate action, those will be analysed first. The main problem is the dependency on natural resources to achieve these obligations. Specifically, there is no excuse related to the lack of resources for states to avoid meeting these obligations, which differs from the flexibility allowed for the adoption of progressive measures. Also, poor attention has been given to the environmental conditions necessary for these obligations and how the exploitation of resources to meet them can harm future generations.

As such, the more feasible interpretation should involve acting according to the intra-generational principle but with limits on environmental conditions that ensure that present and future generations prioritise environmental protection. These conditions are the substantive elements of the right to a healthy environment, which include safe climate, clean air, healthy ecosystems and biodiversity, safe and sufficient water, healthy and sustainable food, a non-toxic environment.<sup>299</sup> Keeping these elements will allow the present generation to address their immediate pressing needs without overshooting the resources needed by future generations who also require the same minimum environmental conditions to live.

Leaning towards the intermediate steps that need to be taken to achieve the full realisation of rights, it is necessary to analyse progressive measures. Again, there is a lack of guidance on the inclusion of environmental considerations when deliberate and concrete measures are going to be taken. Beyond the mere environmental aspect, another problem arises from

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<sup>298</sup> *ibid.*

<sup>299</sup> Boyd (n 112).

the lack of clarity on how to operationalise sustainable development to avoid unsustainable measures that initially seem adequate but later compromise intergenerational equity.

Although there is no concrete formula to operationalise sustainable development, the integration principle should be the compass for decision-making. Also, there is a need to incorporate structured and long-term planning in the decision-making process, especially with attention to the environment and future generations. In this regard, some insights could be taken from the work of Brown Weiss on the environmental burden that present generations can cause to future generations, which, for her, is mainly related to the depletion of resources, the degradation of environmental quality, and discriminatory access to environmental resources enjoyed by previous generations.<sup>300</sup> Hence, these aspects should be considered when thinking about progressive measures in light of intergenerational equity. Additionally, progressive measures should be assessed with attention to ecological limits, specifically planetary boundaries, since their transgression would undermine the principle of intergenerational equity.. The ultimate aim of Article 2.1 is that states take steps to achieve the full realisation of rights. The main problem at this stage is that there are no clear limits on what constitutes full realisation, which poses a challenge to balance sustainability with the utmost level of rights satisfaction. Although the AAAQ framework has been proposed as a threshold for defining full realisation, this framework still has not considered sustainability as a criterion that should be embedded in the full realisation of rights. Again, this aspect of intergenerational equity is relevant and perhaps problematic in this context since the full realisation of rights for the present generations might entail that future generations can never achieve the same point.

To address this issue from an evolutive and sustainable perspective, the first aspect to consider is that full realisation cannot entail an infinite use of resources. It is necessary to clarify that full realisation has limits which should be based on planetary boundaries. The limit for the full realisation of rights should be based on protecting the ability of future generations to achieve that full realisation. Therefore, in following Liebenberg, incorporating a sustainability criterion to determine the extent of the full realization presents an

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<sup>300</sup> Edith Brown Weiss, 'Climate Change, Intergenerational Equity and International Law: An Introductory Note' (1989) 15 Climatic Change 327.

interesting alternative which is challenging and would require a general consensus on the substantive elements of sustainable development, which is still the subject of ongoing debate.<sup>301</sup>

Finally, as a qualifier of the obligation to take progressive steps towards the realisation of the rights, the ICESCR suggests that states must do this to their maximum available resources. However, the main problem is that current interpretations have a more restrictive understanding of resources, focusing primarily on financial resources. However, current levels of natural resources are being considered part of that pool of available resources to use. Moreover, states can generate high income through the exploitation of natural resources to ensure the rights of their population. Thereby, this concept in the Covenant is problematic from a sustainable perspective since “maximum” can imply that states can exploit all their natural resources.

An individual analysis of its components can be helpful in interpreting “maximum available resources” from an evolutionary and sustainable approach. First, referring to the concept of “resources”, a change in mindset regarding the function of natural resources is needed. These should not just be considered as a means to collect revenue through exploitation but should also be acknowledged for the environmental services they offer. Second, from the perspective of “availability”, based on their impact on intergenerational equity, certain natural resources could be excluded from those that are available. The principle of integration can play a fundamental role in this task since it facilitates the application of environmental law as a mechanism for limiting the availability of certain resources. Third, referring to “maximum”, it is clear that a sustainable perspective acknowledges that resources are limited. Therefore, the idea of “maximum” should be nuanced with notions of equitable and effective use of resources, ensuring that future generations have available resources and that the resources that are available can still be used but under strict environmental considerations.<sup>302</sup>

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<sup>301</sup> Donald (n 134). .

<sup>302</sup> Donald (n 134).

In sum, this specific consideration reinforces the notion of the overall sustainable interpretation by providing more specific details on how the nature of each specific term can be addressed. As a final note, in the case of conflicts derived from interpretation, the way to solve them is by keeping in mind the overarching premise of sustainable development. This premise maintains a balance between social, economic, and environmental development. It is important that none of these components are neglected to ensure at least minimal weak sustainability and, ideally, to achieve strong sustainability. Within this interpretation, there is room for trial and error, but the essentials cannot be sacrificed in the process.

### **3. Conclusion**

The relationship between sustainability and sustainable development has evolved over time. Originally, both governance modes were conceived from different angles. In theory, these differences between both governance modes entailed three fundamental divergences. The first concerns their ontological foundations, where sustainability tends to be more aligned with ecocentrism, while human rights seem to be rooted in anthropocentrism. Second, the ideas behind sustainability were driven by a political and scientific agenda, whereas the human rights regime was supported by extensive international legal machinery to ensure its implementation. Third, in terms of the actors, sustainability focuses on multiple societal actors, with particular emphasis on private initiatives, whereas human rights primarily centre on the state as the main actor. However, in practice, these divergences have evolved into synergies due to the emergence of the concept of sustainable development, which has brought both governance modes closer together.

The concept of sustainable development became the main focus for exploring the interaction with the human rights regime. As a result, two paths of integration are feasible: (1) human rights within sustainable development; and (2) sustainable development within human rights. The first approach, rooted in the rhetoric of the goals, is closely related to the fulfilment of Agenda 2030 and the SDGs. The second approach focuses on clarifying the meaning of sustainable development within the human rights regime. According to this

paper, the latter should be prioritised because a better understanding of the concept of sustainable development can be more effective in its practical application.

Interestingly, ESCR play a significant role in the integration process because most of the SDGs are related to these specific groups of rights. Therefore, this research focused on these rights, as they are crucial to addressing overarching integration challenges. Furthermore, human rights bodies, such as the CESCR, have been essential in this process. Moreover, the CESCR has already begun drafting a General Comment to clarify the role of sustainable development in the context of states obligations under the ICESCR. However, several challenges have emerged in fully embracing a sustainable development perspective through the ICESCR. The main issue is that the ICESCR is embedded within the sustainability paradigm. Despite its alleged neutrality, it has traditionally supported a view that favours economic growth over environmental considerations, leading to an imbalance in what sustainable development truly entails.

Specifically referring to the main obligations of states under Article 2.1, there are three main issues. First, the obligation to take steps to utilise maximum available resources to progressively achieve the full realisation of rights is embedded within the sustainability paradigm. The current interpretation of these obligations has favoured an unsustainable model aligned with a traditional economic growth paradigm.<sup>303</sup> Second, environmental considerations have generally been absent in the interpretation of the Covenant.<sup>304</sup> Despite the evident environmental challenges that the world is facing, the Committee has not integrated these considerations from a holistic, sustainable development perspective. Third, the normative value and content of sustainable development have not been defined within the human rights context, nor for the purposes of interpreting this Covenant.<sup>305</sup> Consequently, various human rights institutions, mainly courts, have used the concept of sustainable development as a hermeneutic tool with interpretative value.<sup>306</sup> However, this

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<sup>303</sup> Petel and Putten (n 117).

<sup>304</sup> Donald (n 134).

<sup>305</sup> Barral (n 198).

<sup>306</sup> Folkesson (n 79).



sometimes results in legitimate decisions made in the name of sustainable development, leading to unsustainable outcomes.<sup>307</sup>

Acknowledging the triple planetary crisis of climate change, pollution, and environmental degradation, which has been recognised by several human rights organs of the UN, as well as the evolving global context, there is an urgent need to reevaluate the Covenant from a progressive and evolutionary perspective regarding how states fulfil their obligations. As such, the current General Comment on Sustainable Development has momentum, legitimacy, and authority, contributing to closing the gap between human rights and sustainable development.

This paper suggests that before the Committee formalises its stance, the legal nature and substantive content of sustainable development requires clarification. Regarding its legal nature, it is evident that a lack of agreement persists. However, the interpretative function of sustainable development as a hermeneutic tool has been increasingly utilised. This paper recommends that the CESCR adopt this approach when addressing the topic. Regarding the substantive content, this paper suggests that the elements defining sustainable development include the principles of sustainable use, intra and intergenerational equity, and integration, along with the notion of a sustainable space that sets the boundaries for a safe space for humanity through the concepts of planetary boundaries and doughnut economics.

Finally, in response to the research question and as a recommendation for the CESCR on how to interpret the key obligations under Article 2.1, this paper suggests the following. An evolutionary interpretation of the ICESCR is crucial for integrating sustainable development with human rights. The acceptance of sustainable development as a general principle of international law could potentially facilitate this task. However, even under the current legal status of sustainable development, it is entirely possible to achieve outcomes that contribute to a more sustainable society.

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<sup>307</sup> Andrew Blowers, Jan Boersema and Adrian Martin, 'Is Sustainable Development Sustainable?' (2012) 9 *Journal of Integrative Environmental Sciences* 1.

Specifically, the way forward for the CESCR in interpreting the key obligations of states in light of sustainability should be guided by the substantive content of sustainable development. Therefore, these key obligations should always be intertwined with the principles of sustainable use, intergenerational and intragenerational equity, and integration, which acts as a hinge between the economic, social, and environmental aspects. Finally, the idea of sustainable space, encapsulated within planetary boundaries and the minimum social foundation, with the nuances of the right to a healthy environment, should define the limits of progressive and full realisation of rights to the maximum available resources.

Lastly, it is important to remember that the relationship between sustainable development and human rights cannot be confined to the key obligations of Article 2.1 analysed in this research. Additionally, Article 2.1 also references other key obligations, such as the obligation for international cooperation, which deserves further detailed examination. Furthermore, as mentioned, this research was intended to address a specific aspect of the questions raised by the Drafting Committee on the link between sustainable development and human rights, but all the topics that they listed still require further exploration. For instance, the relationship between business and human rights, how sustainable development can be key to this connection, and the role of environmental impact assessments, are issues that the Committee still needs to address. However, the ideas and theoretical approaches presented in this paper may be helpful in achieving an overall sustainable interpretation of ESCR in light of sustainability. The study of aspects beyond the key obligations of Article 2.1 is a task that remains pending.

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