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Original Article

# Sustainable Development and Sovereign Debt: A Legal Perspective on Debt Sustainability for Africa

Patricia Kirumira Nattabi<sup>1</sup>\*

<sup>1</sup> Xiamen University, Fujian, China.

\* Author's ORCID ID; <https://orcid.org/0009-0008-1642-3231>; Email: [patriciaknattabi@gmail.com](mailto:patriciaknattabi@gmail.com)

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The World Bank's 2023 Debt Sustainability Analysis (DSA) puts twelve low-income countries (LICs) in Africa at a high risk of debt distress while six are in debt distress. The recurring unsustainable debt in Sub-Saharan Africa has had a long-standing effect on the pace of development, as measures taken to accommodate debt resolution have often had a counter-effect on economic performance, as investment in development priorities and the social welfare of citizens have often taken a back seat to debt servicing. The United Nations 2030 Sustainable Development Agenda and its implementation Action plans address unsustainable debt as a major obstacle to achieving sustainable development and therefore highlight the importance of supporting poverty eradication by filling the financial gap and encouraging coordinated assistance in developing countries to attain long-term debt sustainability through relief, restructuring, and financing. However, there is a need to clarify the norms underlying sustainability principles and ground them in law to create stronger frameworks for certainty, legitimacy, and effectiveness in their application to Africa's sovereign debt problems. This research analyses the arguments for a sustainable development approach to improving debt sustainability in Africa, by relating the state responsibilities and obligations within the sustainable development norms in international law and those responsibilities accruing to creditors and sovereign debtors. It analyses these aspects with three emergent norms of international law, sustainable development, shared responsibility, and debt sustainability, and provides a correlation with the socio-economic, environmental, and governance dimensions of sustainable development. The research finds that neglecting the coherence of these aspects in African debt strategies not only increases vulnerability for debt crisis but also prolongs recovery, thereby slowing the progress towards sustainable development.

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## INTRODUCTION

Borrowing, debt financing, and debt relief constitute an important aspect of financing sustainable development. Sustainable development as a concept provides a sense of longevity and a long-term commitment to addressing intergenerational concerns in an evolving natural and social environment, a responsibility possessed by all states.<sup>1</sup> When applied to the governance of debt in African countries, especially for heavily indebted poor countries, the broadening and relevance of longevity in applying a sustainable development approach to financing is diminished and frustrated by unsustainable debt burdens, limited access to new finance and capital and vulnerability to external shocks both economic and environmental in nature. The chapter analyses the arguments for a sustainable development approach to improving debt sustainability in Africa, by relating the state responsibilities and obligations within the sustainable development norms in international law and those responsibilities accruing to creditors and sovereign debtors. The article analyses these aspects with three emergent norms of international law, sustainable development, shared responsibility, and debt sustainability.

## Research Methodology

This research applies a legal analysis of academic text and legal instruments to achieve its objectives. This includes an analysis of contractual agreements, case law, domestic and

international substantive and procedural legal frameworks that bestow upon governments the power to borrow and the foreign jurisdictions that govern the settlement of debt obligations, as well as a scholarly literature review. This research will therefore apply textual analysis of the international law obligations that lie at the heart of borrowing and lending for states, the impacts as they pertain to sustainable development under international law related to sovereign debt, and the structuring of these issues. This information is primarily acquired through academic and institutional online databases.

## SUSTAINABLE DEVELOPMENT: NECESSITY OF A DEVELOPMENT PARADIGM

The origins of the concept of sustainable development relay the interaction between human development and its impact on the environment.<sup>2</sup> Though technological and scientific advancement has propelled human progress, rapid and increasingly intensified human development has also put pressure on our natural resources.<sup>3</sup> The threat of depletion of our limited unrenowned shared natural resources in the ungoverned self-interest of states, coupled with the unfair distribution of the negative impact of the social and economic circumstances in the human environment, has further gained increased relevance for sustainability as the need for economic growth and development increases.<sup>4</sup> There is, therefore, an imperative to either place limits on human advancement or to incentivize the

<sup>1</sup> Beyerlin, U. (2020). Sustainable Development (October 2013). Max Planck Encyclopedia of Public International Law, erhältlich im Internet unter: < [www.mpepil.com/](http://www.mpepil.com/) (zuletzt besucht am 3.

<sup>2</sup> Du Pisani, J. A. (2006). Sustainable development—historical roots of the concept. *Environmental sciences*, 3(2), 83-96.

<sup>3</sup> Jacobus A. Du Pisani, *ibid*

<sup>4</sup> Hardin, G. (1998). Extensions of "the tragedy of the commons". *Science*, 280(5364), 682-683.

collective benefit, through collective action and global cooperation.<sup>5</sup> The term sustainable development entered into the mainstream global governance language in a report compiled by the World Commission on Environment and Development in 1987, then dubbed the Brundtland Report.<sup>6</sup> The concept is defined as ‘...development that meets the needs of the present without compromising the ability of future generations to meet their own needs’.<sup>7</sup> The report emphasizes that the concept entails prioritizing the needs of the poor and placing limits on the uses and impacts of technology and social organization on the environment’s capacity to meet and accommodate humanity’s “needs”. It proposes a comprehensive guideline to motivate proactive political, social, economic, and legal changes on a global scale to slow down the rate of negative human impact on the environment, the depletion and degradation of natural resources, whose impacts are most felt by the poor and exacerbate the already desperate state of poverty. Nevertheless, a universal definition of the term is still the subject of great debate, given its often conflicting relationship between its pillars and the interests of developed and developing countries.<sup>8</sup>

### **Sustainable Development as a Norm of International Law**

Sustainable development has entrenched itself in international law through international treaties, and soft law in terms of resolutions, declarations, guiding principles, judicial decisions, and legal writing, so much so that several scholars argue it has attained legal normativity.<sup>9</sup> The concept of sustainable development has through widespread

academic study, gradually migrated from a political commitment to finding legal conceptualization in environmental law and into other different areas of public international law, in international economic law and international human rights law, thus building on its environmental, economic and social dimensions.<sup>10</sup> The United Nations General Assembly (UNGA) resolution adopting the World Summit Outcome states that ‘...sustainable development in its economic, social and environmental aspects constitutes a key element of the overarching framework of the United Nations Framework.’<sup>11</sup>

### **Sustainable Development under International Treaty Law**

Substantive principles and concepts forming sustainable development have been slowly condensed into United Nations (UN) resolutions, declarations, and frameworks and eventually migrated into treaty law, all to ensure that the concept has a legal effect, whether in a binding or non-binding capacity.<sup>12</sup> The crystallization of these ideas into instruments has resulted in the development, integration, and application of sustainable development. After the United Nations Conference on Environment and Development in Rio de Janeiro in 1992, an impetus for the formulation of a legal and institutional framework for sustainable development resulted in the Rio Declaration on Environment and Development and Agenda 21, as the objective behind global cooperation on environmental protection, inclusive development and poverty eradication.<sup>13</sup> The Rio Principles

<sup>5</sup> Ostrom, E. (1990). *Governing the commons: The evolution of institutions for collective action*. Cambridge University Press.

<sup>6</sup> Borowy, I. (2013). *Defining sustainable development for our common future: A history of the World Commission on Environment and Development (Brundtland Commission)*. Routledge.

<sup>7</sup> Imperatives, Strategic. "Report of the World Commission on Environment and Development: Our common future." Accessed Feb 10 (1987): 1-300.

<sup>8</sup> Khumalo, T. F. (2020). Sustainable development and international economic law in Africa. *Law, Democracy & Development*, 24(1), 133-157.

<sup>9</sup> Verschuuren, J. (2016). The growing significance of the

principle of sustainable development as a legal norm. In *Research Handbook on Fundamental Concepts of Environmental Law* (pp. 276-305). Edward Elgar Publishing.

<sup>10</sup> Segger, M. C. C., & Weeramantry, C. G. (Eds.). (2004). *Sustainable justice: Reconciling economic, social and environmental law*. BRILL.

<sup>11</sup> 2005 World Summit Outcome, Resolution adopted by the General Assembly on 16 September 2005, A/RES/60/1, para.10

<sup>12</sup> *ibid*

<sup>13</sup> Rio Declaration on Environment and Development, A/CONF.151/26 (Vol. I) Report of the United Nations Conference on Environment and Development, Principle 1, 4,5,7,8,9,12,20,21,22,24,27.

compose the basis of sustainable development on a balance between intergenerational and intra-generation equity.<sup>14</sup> Agenda 21 laid out the three pillars or dimensions of sustainable development; economic, social, and environmental in the use of resources for, as well as the benefits of development.<sup>15</sup> As a direct result of the Rio Conference, the Rio Conventions (the Convention on Biodiversity, the UN Convention to Combat Desertification and the UN Framework Convention on Climate Change (UNFCCC)) became the first international treaties to use the language of sustainability, for sustainable use of biodiversity and promoting a sustainable environment for present and future generations.<sup>16</sup> The principle carried on through to the Paris Climate Agreement as well as the Kyoto Protocol.<sup>17</sup> In the 2002 Johannesburg Declaration on Sustainable Development adopted at the World Summit on Sustainable Development in Johannesburg South Africa, the concept of sustainable development was given a more targeted focus, aligning it with new global commitments to support development under the Millennium Development Goals (MDGs).<sup>18</sup> The Paris Climate Agreement recognizes the intrinsic relationship between climate change action,

responses, impact, and equitable access to sustainable development and poverty eradication.<sup>19</sup> Beyond frameworks that are directly concerned with sustainable development, it is estimated that over 300 legally binding international conventions include sustainable development principles with about 30 of these having universal applicability.<sup>20</sup>

The culmination of global consensus on sustainable development resulted in the 2030 Agenda in 2015 detailing 17 Sustainable Development Goals (SDGs), attempting to provide a balanced approach to integrating the three pillars of sustainable development into the UN agenda as mutually reinforcing and interdependent aspects.<sup>21</sup> To further develop the content of the concept, the International Law Association (ILA) adopted the Declaration on the Principles of International Law Relating to Sustainable Development in 2002 in New Delhi (the New Delhi Principles).<sup>22</sup> Furthermore, both international and domestic courts play an important role in utilizing the interpretative function of sustainable development principles, to resolve disputes and to interpret legal text, thus further building on their substantive normative

<sup>14</sup> Boyle, A. E., & Freestone, D. (Eds.). (2001). *International law and sustainable development: past achievements and future challenges*. Oxford University Press, USA. Intergenerational equity refers to equitable treatment of present and future generations in relation to the capacity of the environment to provide for their development while intragenerational treatment refers to ensuring justice and shared benefits in the treatment of people of the same generation in relation to the environment and achieving development.  
<https://leap.unep.org/en/knowledge/glossary/intergenerational-equity>. The concepts are established under Principle 3 and 6 of the Rio Declaration.

<sup>15</sup> United Nations Conference on Environment and Development (1992: Rio de Janeiro, *Agenda 21, Rio Declaration, Forest Principles*. ([New York]: United Nations, 1992).

<sup>16</sup> The Convention on Biodiversity, 5th June 1992 (in force 29 December 1993), 1760 UNTS 79, 31 ILM 818 (1992); UN Convention to Combat Desertification in those countries experiencing serious drought and/or desertification, particularly in Africa, 14 October 1994 (in force 26 December 1996) (1954 UNTS 3); the UN Framework Convention on Climate Change, New York 9 May 1992, entered into force 21 March 1994, see Article 3(4)

<sup>17</sup> See Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No.

16-1104, preamble, Art.2(1), 4, 5, 6, 7 and 10; the Kyoto Protocol to the UN Framework Convention on Climate Change FCCC/CP/1997/L.7/Add.1 10 December 1997 Art. 2(1), 10 and 12(2)

<sup>18</sup>“Annex 1: Johannesburg Declaration on Sustainable Development.” 2002. International Environmental Agreements 2 (4): 403–6.

<sup>19</sup> Paris Agreement to the United Nations Framework Convention on Climate Change, preamble, Art.2(1)

<sup>20</sup> Barral, V. (2012). Sustainable development in international law: nature and operation of an evolutive legal norm. *European Journal of International Law*, 23(2), 377-400.

<sup>21</sup> Yacine 1973- Ait Kaci and United Nations, *The Sustainable Development Goals* (New York, New York: United Nations Publications, 2017).; Purvis, B., Mao, Y., & Robinson, D. (2019). Three pillars of sustainability: in search of conceptual origins. *Sustainability science*, 14, 681-695. UN General Assembly, *Transforming our world : the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, available at: <https://www.refworld.org/docid/57b6e3e44.html> [accessed 22 August 2022]

<sup>22</sup> “ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development,” *International Environmental Agreements* 2, no. 2 (2002): 209–16.

content.<sup>23</sup> In 2023, Vanuatu, a small island State, spearheaded the request for the adoption of a UNGA resolution to request an ICJ advisory opinion under the UN Charter, for clarification on the obligations under international law for the protection of the climate system from anthropogenic greenhouse gas emissions for States and present and future generations, as well as the legal consequences for acts and omissions.<sup>24</sup> This resulted in the adoption of a UNGA resolution requesting an ICJ advisory opinion, citing the 2030 Agenda for Sustainable Development, the UN Charter, international human rights treaties, international law of the sea, international environmental law, international customary law, and relevant principles of international law.<sup>25</sup> Although an ICJ advisory opinion is not legally binding, scholars believe that this step signifies a major achievement in clarifying rights, obligations, and responsibilities for relevant international law with the potential of creating hard law and carries some legal weight and authority.<sup>26</sup>

### State Rights and Obligations Related to Sustainable Development under International Law

As sustainable development continues to become entrenched into mainstream legal orders, the nature and characteristics of the concept begin to take shape and its legal effect and relevance come into sharper focus. In the broader sense, scholars

on sustainable development recognize the flexibility and malleability of the concept as a product of the times. To maintain its relevance and avoid stagnation, the concept of sustainable development needs to keep evolving to keep up with the pace of development in a way that allows constant applicability. For this reason, scholars argue that sustainable development has an intrinsically evolutive nature that should be expressed for adaptability.<sup>27</sup> The composition of sustainable development varies on *ratione temporis*, *ratione personae*, and *ratione materiae* relevant to the time or period it is applied, and the difference in technological and financial capability of the states it is applied to.<sup>28</sup> Bándi adds variations based on geography (*ratione territorii*) and level of development (*ratione progressionis*) to add context to the positions of developed and developing countries, and in a sense, the need to tailor the application of principles in policies, thus possess country-ownership of policy.<sup>29</sup>

However, given its flexibility and malleability, it has taken on an imprecise quality that has made it difficult to ascertain whether sustainable development principles are fundamentally norm-creating or sufficiently substantive to become the basis of an international cause of action, give rise to international customary law rights and obligations with the legal remedies.<sup>30</sup> Within the emergent body of sustainable development law, this conceptualization through treaty and

<sup>23</sup> The International Court of Justice (ICJ) utilized the concept of sustainable development to highlight the obligations of Argentina and Uruguay for the use of natural resources in River Uruguay under an agreement entered between the conflicting States in its decision in the Pulp Mills on the River Uruguay case stating, "...Article 27 (1975 Statute of the River Uruguay) embodies this interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development." Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p.64, para.177. See also Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 3 (Order of Feb. 5); Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996, p.226.

<sup>24</sup> UN General Assembly, Requesting for an Advisory Opinion of the International Court of Justice on the Obligations of States in respect of Climate Change, 2023, UNGA Resolution A/RES/77/276; <https://sdg.iisd.org/news/>

[unga-asks-icj-for-advisory-opinion-on-climate-obligations-of-states/](https://sdg.iisd.org/news/unga-asks-icj-for-advisory-opinion-on-climate-obligations-of-states/) accessed 5 July 2024

<sup>25</sup> A/RES/77/276, *ibid*

<sup>26</sup> Elena Kosolapova, ICJ to rule on States' climate-related obligations: How did we get here?, 20 March 2024 <https://sdg.iisd.org/commentary/policy-briefs/icj-to-rule-on-states-climate-related-obligations-how-did-we-get-here/>

<sup>27</sup> Barral, V. (2012). *Ibid* 20.

<sup>28</sup> Barral, V. (2012). *Ibid* 20.

<sup>29</sup> Bándi, G. (2022). Sustainable Development, the Interests of Future Generations, and Moral and Legal Implications.

<sup>30</sup> Cordonier Segger, M. C., & Khalfan, A. (2004). Sustainable development law: principles, practices, and prospects., ed. Marie-Claire Cordonier Segger and Ashfaq Khalfan (Oxford University Press, 2004), 0. <https://doi.org/10.1093/acprof:oso/9780199276707.003.0006>.

legislative law takes an integrated environmental, social, and economic approach to development that lends itself to the eventual result of giving rise to rights and obligations. As Segger and Khalfan put it ‘A *substantive body of legal norms has developed, supported by distinctive procedural elements, that can reconcile the perceived conflict and guide further integration at the intersection of environmental, social and economic law.*’<sup>31</sup> Both Segger and Lowe describe sustainable development as an emerging body of legal principles and an interstitial norm.<sup>32</sup> Barral analyses Lowe’s prescription of sustainable development as an interstitial or modifying norm and argues that rather than seeking direct regulation of the behaviour of states, sustainable development principles act as modifiers, linking primary pre-existing norms and solidifying their impact on state behaviour.<sup>33</sup> However, Barral believes states take sustainable development as an objective that implies regulating their behaviour with possible legal effects by including it in treaties, otherwise sustainable development would perform no other function than being a judicial tool. Furthermore, norms governing state behaviour fall into two categories of obligations; obligations of result and obligations of means/conduct, that arise from the International Law Commission (ILC)’s description of state responsibility for the breach of an international obligation.<sup>34</sup> An obligation of result compels a state to achieve a specified result, usually prescribed by the obligation itself while an obligation of means/conduct allows the state to achieve a certain result “by means of its own choice” or make every possible attempt to fulfill

it.<sup>35</sup> Such obligations include due diligence and certain human rights obligations. Continuing with the argument that sustainable development poses an objective that states strive to achieve through available means, Barral offers up the explanation provided by the ILA that sustainability is not an absolute obligation, varying on the availability of resources to achieve it for developed and developing countries.<sup>36</sup>

Sustainable development is influenced by the right to development established under the Declaration on the Right to Development, which informs the SDGs by integrating economic, social, and governance (ESG) principles.<sup>37</sup> The main objective of the SDGs is to strive for sustainable development, whereas the right to development imposes actual rights and duties on States in international law, calling on states to ensure a full and progressive realization through legislative or other means to ensure full participation and sharing of benefits resulting from the process.<sup>38</sup> However, some scholars seek to argue that sustainable development constitutes a right, enforceable under international law.<sup>39</sup> Mollendorf states that from the Brundtland Report to the UNFCCC, a conceptual foundation for a right to sustainable development is established that limits development in pursuit of broader goals of environmental protection, and poverty eradication.<sup>40</sup> The bearer of the right is the state party to the convention and the right is enjoyed collectively by the people, therefore constituting a third-generation right.<sup>41</sup> The author argues that the perceived unreasonableness of recognizing the right to sustainable development should not outweigh the moral credibility of the benefits it

<sup>31</sup> Cordonier Segger, M. C., & Khalfan, A. (2004).

<sup>32</sup> Cordonier Segger, M. C., & Khalfan, A. (2004).

<sup>33</sup> Barral, V. (2012). Ibid 20 on Boyle, Alan E., and David Freestone, eds. *International law and sustainable development: past achievements and future challenges*. Oxford University Press, USA, 2001.

<sup>34</sup> Art.20 and 21. Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001

<sup>35</sup> Barral, V. (2012). Ibid 20 Wolfrum, R. (2011). Obligation of result versus obligation of conduct: some thoughts about the implementation of international obligations. In *Looking to the Future* (pp. 363-383). Brill Nijhoff.

<sup>36</sup> Virgine Barral on Rules, ILA Berlin. "Berlin rules on water resources." In the Fourth report of the Berlin conference on

water resources. Berlin, Germany: Berlin Conference on Water Resources Law. 2004.

<sup>37</sup> "Right to Development | Environment Rights," 2024.

<https://environment-rights.org/rights/right-to-development/#:~:text=The%20Declaration%20on%20the%20right,the%20importance%20of%20the%20environment.>

<sup>38</sup> *ibid.* See Art. 1 and 10 of Declaration on the Right to Development, UNGA Res. 41/128.

<sup>39</sup> Moellendorf, D. (2011). A right to sustainable development. *The Monist*, 94(3), 433-452.; Ivankiv, I. (2020). Right to Sustainable Development as One of the Rights of Humanity. *Studia Iuridica*, (82), 115-130.

<sup>40</sup> Moellendorf, D. *ibid*

<sup>41</sup> Moellendorf, D. *ibid*

provides for people. Under the Maastricht Principles on the Human Rights of Future Generations adopted in 2023, states possess intergenerational and intragenerational human rights obligations to respect and protect against violation, obligations based on sustainable development principles as they pertain to environmental, social, and governance principles.<sup>42</sup> The principles therefore provide ‘...a progressive interpretation and development of existing human rights standards in the context of the human rights of future generations.’<sup>43</sup> This provides both a moral and rights-based state responsibility to imbue within international legal frameworks that impact human livelihood a sense of “long-term sustainability”.<sup>44</sup>

### Role of Sustainable Development within International Law

As states have not agreed on precise measures to give effect to sustainable development principles, the concept often finds itself relegated to a mere political tool and the function of sustainable development as a driver for action outweighs debate on its full normativity as a legal concept, the boundary between the two is blurred.<sup>45</sup> Viñuales states that sustainable development performs an “architectural” function in shaping the substantive text or the form of international law treaties and policies/agenda and an “interpretative” function in explaining or clarifying the meaning or intention behind these treaties and policies.<sup>46</sup> This can be seen increasingly in new generations of international trade and investment treaties, where sustainable development principles are included as

preambular content and connecting provisions on labour, environmental, and human rights protection.<sup>47</sup> Barral also provides four other instances in which sustainable development plays an interpretive role. The first is as an external hermeneutical reference by which Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) provides the basis for the application of sustainable development as well as its limitations.<sup>48</sup> Secondly, parties to an agreement may include sustainable development as an evolutive provision, allowing a court or judicial tribunal interpreting the provision to apply the prevailing norms of international law, and “*not just the law that is in force at the time of the conclusion of the treaty.*”<sup>49</sup> Third, sustainable development principles settle conflict of, balance, or harmonize, norms in international law in its role of integrating other relevant principles across social, economic, and environmental dimensions, particularly in the resolution of a dispute. Finally, sustainable development principles can be used to redefine conventional provisions to reconcile conflicting positions or obligations, for instance, where the obligation to the right to development conflicts with that of environmental protection, requiring reforms or revisions.

### Contextualizing Sustainable Development in Africa: An Under-developed Paradigm

While sustainable development is growing in application and interpretation in various fields of international law, it has received a cautious, mixed, and often controversial reception in Africa. Integration of sustainable development principles in regional and domestic normative

<sup>42</sup> Maastricht Principles on the Human Rights of Future Generations adopted 3 February 2023. See also the UN System Common Principles on Future Generations, by the UN Chief Executive Board for Coordination, 4 May 2023.

<sup>43</sup> Maastricht Principles on the Human Rights of Future Generations, *ibid*.

<sup>44</sup> Julia Tscherrig, “Safeguarding Rights of Future Generations for Long-Term Sustainability.” SDG Knowledge Hub, October 18, 2023.

<https://sdg.iisd.org/commentary/guest-articles/safeguarding-rights-of-future-generations-for-long-term-sustainability/>, accessed 21 October 2024

<sup>45</sup> Bantekas, I., & Akestoridi, K. (2022). Sustainable Development Goals, between Politics and Soft Law: The Emergence of “Political Normativity” in International Law.

Emory Int’l L. Rev., 37, 499.

<sup>46</sup> Viñuales, J. E. (2018). Sustainable Development in International Law. Jorge E. Viñuales, ‘Sustainable Development’, in L. Rajamani, J. Peel (eds.), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2nd.

<sup>47</sup> Hindelang, S., & Krajewski, M. (Eds.). (2016). *Shifting paradigms in international investment law: more balanced, less isolated, increasingly diversified*. Oxford University Press.

<sup>48</sup> Article 31 (3)(c) of the VCLT states that “*There shall be taken into consideration, together with the context...any relevant rules of international law applicable in relations between the parties.*”

<sup>49</sup> Barral, V. (2012). *Ibid* 20

frameworks is met with many challenges. There is still ambiguity associated with defining and translating the meaning, scope, and norms of sustainability into actionable, achievable, and measurable targets that fit the development level of developing countries, a deficiency that is aggravated by a lack of financial resources, infrastructure, sufficient data, technical knowledge, and institutional frameworks. These factors affect the capacity to monitor performance, implement efficient governance structures, address accountability issues, encourage participation by local communities, or even incentivize investment into sustainability practices, thereby slowing the pace of transition into sustainable development.<sup>50</sup> Furthermore, the gap between Organization on Economic Cooperation and Development (OECD) countries and non-OECD countries and inclusivity is often regarded as a Western concept, its ambitions too lofty and financially inaccessible, incompatible with the African reality, and inappropriate for guiding African development.<sup>51</sup> The trend of sustainable development has seemed like a cruel joke against the impossible odds and pressures some of the poorest countries have had to endure, from the structural adjustment policies prescribed by International Financial Institutions (IFIs) to the poor trade terms at the World Trade Organization and the mounting debt.<sup>52</sup>

Opposition towards the application of sustainable development also points to the potential of the concept to limit the policy space of African countries, especially preventing them from utilizing their resources to achieve the level of development attained by industrialized countries.<sup>53</sup> Many African States feel the challenges at the heart of the concept without having had a direct hand in initiating their drivers or the resources to mitigate their advancement. For instance, environmental degradation and

climate change resulting from the Western industrial revolution and the massive demand for African natural resources to feed the global trade in the industrialized and emerging economies are having direct and indirect socio-economic impacts on the basic needs of many communities in Africa who are dependent on land resources.<sup>54</sup> Principle 3 of the New Delhi Principles attempts to address this concern through the common but differentiated responsibilities of developed and developing states to cooperate in achieving sustainable development and environmental protection.<sup>55</sup>

Another concern with the concept of sustainable development, particularly in the realm of environmental conservation and climate change is the interaction with the exploitation of natural resources' potential for economic development and increase in debt levels, an area that carries significant relevance for many oil-dependent African countries.<sup>56</sup> However, attempts to ease the burden of African states have often been met with resistance and frustration from their developed counterparts, the advancement of the mechanism of global trade and liberalization for the investor-state regime, and at times global institutions like the international financial institutions facilitating debt distress have all exacerbated these challenges, thereby increasing the scepticism of African states. It is probably for this reason that the concept has received little attention in law-making and scholarship across the continent, and this detachment has been reflected in the failure of the concept to filter not only into the fundamental African regional and domestic laws but also in engaging the practical mechanisms of implementing international instruments.

Sustainable development was first added under African Union (AU) law in the Constitutive Act

<sup>50</sup> <https://www.plasticcollective.co/sustainable-development-challenges-and-opportunities/>

<sup>51</sup> Khumalo, T. F. (2020), *supra*-8.

<sup>52</sup> Khan, H. A. (1997). *African Debt and Sustainable Development*. New York: phelps-Stokes Foundation.

<sup>53</sup> Khumalo, T. F. (2020), *supra*-8.

<sup>54</sup> See the Bruntland Commission Report, *supra*-6. para. 12-

19.

<sup>55</sup> Bruntland Commission Report, *supra*-6.

<sup>56</sup> Dietz, Charles. "Rethinking African Debt and Exploitation of Natural Resources." *African Business*, March 27, 2023. <https://african.business/2023/03/resources/africas-debt-burden-contributes-to-overexploitation-of-natural-resources>. accessed 21 October 2024.

of the AU.<sup>57</sup> Under Article 3(j), the objectives of the AU include the promotion of sustainable development at the economic, social, and cultural levels as well as in the efforts of African integration, thus providing a normative foundation for the concept.<sup>58</sup> While the promotion of socio-economic development is a running theme throughout the instrument, and human rights protections and abidance to human rights instruments are included, no specific mention is made of environmental protection aside from an administrative duty directed at the Executive Council to formulate policy on environmental protection.<sup>59</sup> The gap, however, is filled by other instruments on environmental protection, like the 2003 African Convention on the Conservation of Nature and Natural Resources (Algiers Convention), whose 2003 revision is directed at sustainable development dimensions of environmental protection,<sup>60</sup> and the Bamako Convention.<sup>61</sup> The African Charter on Human and People's Rights (ACHPR) provides for the right to economic, social, and cultural development '*...equal enjoyment of common heritage of mankind*'.<sup>62</sup> Article 24 states '*All peoples have the right to a general satisfactory environment favorable to their development.*' This provision and the ACHPR's recognition of the indivisibility, interdependency, and justiciability of all rights, reflect the interrelatedness of the economic, social, and environmental dimensions of sustainable development.<sup>63</sup> Through the interpretation of the ACHPR by African regional

judicial and quasi-judicial bodies of the economic, social, and cultural implications of environmental degradation caused by the activities of multinational corporations, considerable strides have been made to not only advance this interrelatedness of human rights but also developing legal norms of sustainable development.<sup>64</sup> At the regional level and domestic level, regional treaties and domestic law play the primary role of advancing economic integration to advance growth and development. Sustainable development is often comprised as a policy tool for driving financing decisions in large-scale infrastructure projects. However, the sustainable development concept lacks the nuance that is articulate and translates into implementable actions with measurable outcomes and accountability.<sup>65</sup>

The AU Agenda 2063, the political regional agenda is directly tied to the principle of sustainable development and the SDGs.<sup>66</sup> Sustainable development is also implemented in the AU's policy through its institutional mechanisms, like the African Union Development Agency- New Partnership for African Development (AUDA-NEPAD), to mobilize cooperation, capacity building, research, and financing.<sup>67</sup> The Cairo Declaration has also urged African countries to utilize their natural resources to combat poverty and advance sustainable development.<sup>68</sup> However, the AU falls behind the EU in committing to the SDGs and establishing a common position, given the European green bond

<sup>57</sup> African Union, Constitutive Act, adopted July 11, 2000, entered into force 2001.

<sup>58</sup> *ibid*

<sup>59</sup> Art.13 and 14 of the Constitutive Act.

<sup>60</sup> The 1968 Algiers Convention was adopted in 1968 and entered into force on 16<sup>th</sup> June 1969. See the Revised African Convention on the Conservation of Nature and Natural Resources, adopted 11<sup>th</sup> July 2003 and entered into force on 23<sup>rd</sup> July 2016, the Preamble, Art.2 (2) Objectives, Art.3(3) Principles, Art.14 Sustainable development and natural resources

<sup>61</sup> Adopted January 30<sup>th</sup> 1991, adopted April 22 1998.

<sup>62</sup> Article 22

<sup>63</sup> Scholtz, W. (2015). Human rights and the environment in the African Union context. In *Regional Environmental Law* (pp. 102-128). Edward Elgar Publishing.

<sup>64</sup> Scholtz, W. *Ibid*. Social and Economic Rights Action Center and another v Nigeria, Communication No. 155/96.

The African Commission stated "*The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment...imposes clear obligations on the government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to promote ecologically **sustainable development** and use of natural resources.*" (emphasis, author's own)

<sup>65</sup> Khumalo, Thabo Fiona. (2020). *Ibid* 20

<sup>66</sup> [https://au.int/Agenda2063/popular\\_version](https://au.int/Agenda2063/popular_version) accessed 22 July 2022

<sup>67</sup> <https://www.nepad.org/publication/selected-pipelines-conduct-means-of-implementation-sustainable-development-goals>

<sup>68</sup> Cairo Declaration on Managing Africa's Natural capital for Sustainable Development and Poverty Eradication, 2015

standard and the Green Deal, which incentivize, encourage, and support investment in sustainability projects by financing assets to support low carbon transmission.<sup>69</sup>

### THE SOVEREIGN DEBT AND SUSTAINABLE DEVELOPMENT: THE SUSTAINABLE DEVELOPMENT-ORIENTED DEBT FINANCE

Financing is closely related to sustainable development and the achievement of the SDGs under the 2030 UN Sustainable Development Agenda and the Addis Ababa Agenda for Action (AAAA).<sup>70</sup> The 2002 Monterrey Consensus notes that ‘*Sustainable debt financing is an important element for mobilizing resources for public and private investment.*’<sup>71</sup> In the pursuit of economic growth, poverty eradication, and sustainable development, developing countries need to mobilize external finances to enhance fiscal space for optimal financing of public goods, as they struggle with multiple challenges such as mobilizing domestic savings, attracting adequate productive investment, building human capacity, stopping capital flight and Illicit flows of capital.<sup>72</sup> The 2005 World Summit Outcome calls for a global partnership for *sustainable debt financing and external debt relief* through both national development policies and international development objectives and goals like the MDGs.<sup>73</sup> Done well, borrowing or “external debt accumulation” is a positive stimulus, provided the debtor State can channel the debt into productive

investments, generating enough foreign exchange earnings, for instance in exports, to repay the debt.<sup>74</sup> It is continuously at the forefront of the global financial cooperation agenda to encourage the cancellation of multilateral debt for eligible heavily indebted poor countries (HIPC) and emphasize debt sustainability to liberate resources necessary to achieve sustainable development objectives.<sup>75</sup>

However, debt-based development finance has often failed to enable African indebted countries to adjust equitably and sustainably to the aftermath of a financial crisis.<sup>76</sup> Research shows that the debt burden in African countries often contributes to the entrenching and prolonging of poverty rather than reducing it.<sup>77</sup> A lot of African nations also lack the necessary fiscal space allowing them to make important budgetary decisions needed to fulfil development objectives as a result of the debt burden thus impacting fiscal sustainability.<sup>78</sup> Poor fiscal policy management by African countries including debt management contributes to poverty, uneven distribution of income and thereby widening the gap of inequality.<sup>79</sup>

### Debt Sustainability: Debt, Sustainability and Sustainable Development

Much like sovereign debt, debt sustainability faces an identity crisis. The commonly applied definition of debt sustainability refers to a state in which a borrower can continue meeting their debt obligations without having any unrealistically

<sup>69</sup> [https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/european-green-bond-standard-supporting-transition\\_en](https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/european-green-bond-standard-supporting-transition_en); [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en) accessed 1st July 2024

<sup>70</sup> UN, Transforming Our World: the 2030 Agenda for Sustainable Development, *ibid* 18; UN, Addis Ababa Action Agenda of the Third International Conference on Financing for Development, July 2015, endorsed by UN General Assembly resolution 69/313.

<sup>71</sup> Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002 (A/CONF.198/11, chapter 1, resolution I (Monterrey Consensus), para. 47.

<sup>72</sup> Brun, J. F., Chambas, G., Combes, J. L., Dulbecco, P., Gastambide, A., Guérineau, S., ... & Graziosi, G. R. (2006). Fiscal space in developing countries. UNDP Concept Paper; see 2005 World Summit Outcome, para.24, *ibid* 10

<sup>73</sup> A/RES/60/1, *ibid* 11.

<sup>74</sup> Beddies, Christian H., Marie-Helene Le Manchec, and Bergljot B Barkbu. (2009) "II What Is Debt Sustainability and Why Does It Matter?". In *The Debt Sustainability Framework for Low-Income Countries*, (USA: International Monetary Fund, 2009) accessed Jul 6, 2024, <https://doi.org/10.5089/9781589067929.084.ch002>

<sup>75</sup> 2005 World Summit Outcome, para. 26.

<sup>76</sup> Khan, H. A. (1997). *Ibid* 52

<sup>77</sup> Thomas, C. (1999). International Debt Forgiveness and Global Poverty Reduction. *Fordham Urb. LJ*, 27, 1711.

<sup>78</sup> Heller, Mr Peter S. (2005) *Understanding fiscal space*. International Monetary Fund. According to Heller, fiscal sustainability relates to the ability of a government to finance its future expenditures and service its debt while maintaining its solvency.

<sup>79</sup> Oduola, A. (2017). Fiscal space, poverty and inequality in Africa. *African Development Review*, 29(S1), 1-14.

large future correction in the balance of income and expenditure.<sup>80</sup> A sovereign State's public debt becomes unsustainable when the government can no longer meet its obligations under its current and future debt commitments without outside intervention or going into default.<sup>81</sup> The influences on the definition of debt sustainability do not end there as the political and socio-economic position of the debtor state must be considered. It is therefore considered that while trying to provide such a general definition for debt sustainability, it overlooks some key factors crucial from the economic theory from which it is derived.<sup>82</sup> Considering the feasibility and desirability of the strategies employed to stick to government budgetary constraints, thus ensuring government solvency which is the consensual necessary condition underlying debt sustainability.<sup>83</sup> It has been proposed to redefine debt sustainability as debt levels that allow a State to achieve the MDGs, thereby making debt sustainability SDG-consistent, it is not possible to finance sustainable development without increasing the risk of indebtedness, increasing the need to diversify means of financing for sustainable development, predicting maintaining debt sustainability having priority over financing for sustainable development.<sup>84</sup> In the United Nations Conference for Trade and Development (UNCTAD) Roadmap to Sustainable Sovereign Debt Workouts, the definition of sustainability is that sovereign debt can be serviced "without

impairing the social and economic development of society."<sup>85</sup>

### *The International Framework for Debt Sustainability*

Making debt sustainable and sustainable in the long term has been a part of global policymaking and the focus of several UN resolutions.<sup>86</sup> The UN Millennium Declaration provides a foundation for global partnerships for long-term debt sustainability for low and middle-income developing countries.<sup>87</sup> The same objective continues under the SDGs encouraging states to '*Assist developing countries in attaining long-term debt sustainability through coordinated policies aimed at fostering debt financing, debt relief, and debt restructuring as appropriate, and address the external debt of highly indebted poor countries to reduce debt distress*'.<sup>88</sup> The 2005 World Summit Outcome refers to debt sustainability as essential to economic growth, achieving both national and global development objectives, and a key motivator for debt relief with the goal of poverty reduction, sustained economic growth, and sustainable development.<sup>89</sup> The means of implementation is embedded within the 2030 Agenda as a "revitalized Global Partnership for Sustainable Development" with the Addis Ababa Action Agenda contextualizing the implementation targets, including debt and debt sustainability.<sup>90</sup> The AAAA states that debt sustainability is important to assist countries

<sup>80</sup> IMF, Assessing sustainability, Policy Development and Review Department May 23, 2002, <https://www.imf.org/external/np/pdr/sus/2002/eng/052802.htm> accessed 10th June 2024; Beddies, C. H., Le Manchec, M. H., & Barkbu, B. B. (2009). The debt sustainability framework for low-income countries. In *The Debt Sustainability Framework for Low-Income Countries*. International Monetary Fund. The IMF's debt sustainability measure under the HIPC initiative is generally expressed by a net present value (NPV) debt-to-export ratio of 200%-250%. Gunter, B. G. (2002). What's Wrong with the HIPC Initiative and What's Next?. *Development Policy Review*, 20(1), 5-24.

<sup>81</sup> Dahlia Hakura, What is Debt Sustainability, September 2020, <https://www.imf.org/en/Publications/fandd/issues/2020/09/what-is-debt-sustainability-basics#:~:text=A%20country's%20public%20debt%20is,assistance%20or%20going%20into%20default.> Accessed 27<sup>th</sup> March 2023

<sup>82</sup> Debrun, X., Ostry, J. D., Willems, T., & Wyplosz, C. (2019). Debt sustainability. Sovereign debt: A guide for

economists and practitioners, 151.

<sup>83</sup> *ibid.*

<sup>84</sup> Gunter, Bernhard G. (2016) "Revisiting Debt Sustainability in Africa."

<sup>85</sup> "Sovereign Debt Workouts: Going Forward Roadmap and Guide," 2015. [https://unctad.org/system/files/official-document/gdsddf2015misc1\\_en.pdf](https://unctad.org/system/files/official-document/gdsddf2015misc1_en.pdf), Principle 5.

<sup>86</sup> See UN General Assembly, External debt crisis and development, 2003, Resolutions 58/203 of 23 December 2003; Resolution 59/223 of 22 December 2004; Resolution 60/187 of 22 December 2005, Resolution 61/188 of 20 December 2006, Resolution 62/186 of 19 December 2007, Resolution 63/206 of 19 December 2008 and Resolution 64/191 of 21 December 2009, under A/RES/65/144.

<sup>87</sup> UN General Assembly, Millennium Declaration, 2000, A/RES/55/2, para.16

<sup>88</sup> A/RES/70/1, Goal 17.4

<sup>89</sup> A/RES/60/1, para.26

<sup>90</sup> A/RES/70/1, para.60

transitioning from least developed country status to resist vulnerability to debt crises.<sup>91</sup> Debt sustainability has been established under the UN Basic Principles on Debt Restructuring Processes,<sup>92</sup> the UNCTAD Roadmap for Sovereign Debt Workouts,<sup>93</sup> UNCTAD Principles for Responsible Sovereign Borrowing and Lending,<sup>94</sup> the Guiding Principles on Foreign Debt and Human Rights (GPFDR),<sup>95</sup> and the Guiding Principles on the Human Rights Impact Assessment (GPHRIA) on economic policy reforms.<sup>96</sup>

The Doha Declaration on Financing for Development points out the responsibility of international debt mechanisms in ensuring debt sustainability in low-income countries as these mechanisms are creditor-driven.<sup>97</sup> Debt sustainability is a key factor for accessing IMF funding, as it determines whether the debt can be repaid, and defaulting states will be required to initiate the restructuring process to return to debt sustainability before accessing extra funds.<sup>98</sup> Debt sustainability is also a key component in fostering foreign direct investment, for instance, the Chinese mega-investment project the Belt and Road Initiative (BRI) published its Debt Sustainability Framework (DSF) for countries participating in the BRI modelled on the IMF/WB's Debt Sustainability Framework for LICs.<sup>99</sup> Debt sustainability is also a key factor in ensuring the success of HIPC initiative beneficiary countries through debt relief and poverty alleviation programs as well as the

achievement of sustainable development goals.<sup>100</sup> Additionally, the impact of private actors on the global debt market and debt sustainability should not be understated. Credit rating agencies influence market expectations, investment and financial flows, borrowing, and lending decisions by providing lenders with information on whether or not borrowers can meet financial obligations, a process that depends on accuracy and credibility, impacting external debt and fiscal sustainability.<sup>101</sup> The deregulated space of multiple private creditors in the global debt market can leave vulnerable indebted states to vulture funds that take advantage of the lowered market value of government debt, buying it up and bringing litigation against the indebted State in jurisdictions with favourable laws at the nominal value, thereby increasing debt servicing costs with additional litigation costs and interest.<sup>102</sup>

Bohoslavsky's commentary notes that debt sustainability analysis often has a narrow perspective of sustainability, concerned only with debt service, which provides a short-term solution to a complex problem.<sup>103</sup> To ensure better results from economic reform, debt sustainability should be defined and measured by social, economic, and environmental sustainability as these factors relate to the country's capability to create the necessary conditions for debt repayments and meet the current and progressive realization of SDGs.

<sup>91</sup> Addis Ababa Action Agenda of the Third Conference on Financing for Development, 2015, para. 93.

<sup>92</sup> Principle 8, "Basic Principles on Sovereign Debt Restructuring Processes," 2015. [https://unctad.org/system/files/official-document/a69L84\\_en.pdf](https://unctad.org/system/files/official-document/a69L84_en.pdf).

<sup>93</sup> Principle 5

<sup>94</sup> Principle 13

<sup>95</sup> Para.65 and 66.

<sup>96</sup> Principle 12.

<sup>97</sup> A/RES/63/239, para. 56-67.

<sup>98</sup> "Sovereign Debt Restructuring-Recent developments and Implications for the Fund's Legal and Policy Framework Executive Summary.," 2012.

<https://www.tralac.org/images/docs/8960/sovereign-debt-restructuring-recent-developments-and-implications-for-the-imf-legal-and-policy-framework-may-2013.pdf>.

<sup>99</sup> Ministry of Finance of the People's Republic of China Debt Sustainability Framework for Participating Countries of the Belt and Road Initiative, 25 April 2019, para. 2.

<sup>100</sup> Heller, Mr Peter S. (2005). Ibid 79, para.49

<sup>101</sup> Anton, Dakota, Malaika Nduko, and Adeyinka Olaleye. (2023) "A Human Rights-Based Approach to Debt and Climate Justice."

<sup>102</sup> Megliani, M. (2018). For the orphan, the widow, the poor: how to curb enforcing by vulture funds against the highly indebted poor countries. *Leiden Journal of International Law*, 31(2), 363-381.

<sup>103</sup> Bohoslavsky, Juan Pablo. 2020. "Guiding Principles on Human Rights Impacts Assessments of Economic Policy Reforms." *The International Journal of Human Rights* 24 (9): 1400-1428. doi:10.1080/13642987.2020.1823651.

### *Conceptualization and Contents of Debt Sustainability in International Law*

The inclusion of debt sustainability in soft law instruments such as the UNCTAD Principles and the GPDHRs which are the guiding sovereign debt governance frameworks alongside established legal principles such as legitimacy, transparency, good faith, and impartiality exemplifies this position.<sup>104</sup> The UNCTAD Roadmap to Sustainable Sovereign Debt Workout categorizes sustainability as a general principle of law, or the least, an emergent principle, as it has constituted domestic policy and law and migrated into the international space.<sup>105</sup> In Goldmann's taxonomy of principles under the UNCTAD Principles, debt sustainability is an emergent principle of international law.<sup>106</sup> As an emergent principle of international law, debt sustainability provides a normative basis and structure to both the emerging trends and tendencies in practice in current global contractual and statutory models for dealing with debt restructuring, as is the nature of forming principles to provide consistency and a constructive, interpretative structure to the amorous nature of international law.<sup>107</sup> According to Bohoslavsky, the principle of debt sustainability emerged from the shifting paradigm of private law debt restructuring in the early 1800s from the use of gun-boat diplomacy as a defence against powerful debtor states protected by sovereignty and sovereign immunity.<sup>108</sup> Progressively, the rise of the Bretton Woods, the creation of new financial institutions, and the need for reconstruction and development funding, a new economic order, led to the institutionalization of global debt disputes setting the stage for IFI

intervention in monitoring and providing policy advice on economic structures to gain access to capital markets.<sup>109</sup> Debt sustainability has placed a larger emphasis on the protection of creditor interests until increasingly frequent financial crises enabled the IMF to gain a prominent role in establishing an emphasis on the benefits of good lending and borrowing practices for economic progress.<sup>110</sup> With the birth of global debt crisis resolution mechanisms like the Brady Plan, the Washington Consensus, the HIPC Initiative, and the terms under the Paris Club economic reforms took a central role in sovereign debt resolution.<sup>111</sup>

The entrenchment of debt sustainability as a concept and as a necessary ingredient for economic development happened as a result of the failure of these programs to resolve debt issues and instead exacerbate them by increasing indebtedness. Nevertheless, these events have brought debt into the scope of public international law and finally as part of the UN SDG agenda, have formed the foundation for debt sustainability as a principle of international law and migrated into many domestic legal systems as part of their debt management strategies.<sup>112</sup> International debt resolution mechanisms like the HIPC Initiative have facilitated the need for initiating domestic legal reforms with a view to debt sustainability. Debt relief under IMF/World Bank programs like the HIPC and MDRI is conditioned on structural reforms at a legislative level to encourage poverty reduction, good governance, public participation and transparency, integrated development strategy, broader economic policy from fiscal to investment and trade, as part of its Debt Sustainability Framework. The UNCTAD

<sup>104</sup> "Sovereign Debt Workouts: Going Forward Roadmap and Guide," 2015. [https://unctad.org/system/files/official-document/gdsddf2015misc1\\_en.pdf](https://unctad.org/system/files/official-document/gdsddf2015misc1_en.pdf). ; Principle 5. Principle 8, "Basic Principles on Sovereign Debt Restructuring Processes," 2015. [https://unctad.org/system/files/official-document/a69L84\\_en.pdf](https://unctad.org/system/files/official-document/a69L84_en.pdf).

<sup>105</sup> *ibid*

<sup>106</sup> Goldmann, Matthias. (2012) "Responsible sovereign lending and borrowing: the view from domestic jurisdictions." In Comparative Survey Written for the United Nations Conference on Trade and Development, available at [http://www.unctad.info/upload/Debt%20Portal/RSLB\\_MGoldmann\\_02-2012.pdf](http://www.unctad.info/upload/Debt%20Portal/RSLB_MGoldmann_02-2012.pdf) (Accessed 1/5/2013).

<sup>107</sup> Emergent principles defer from established principles of international law which requires "...showing that practice follows a consistent normative pattern in a certain field of international law, which is consistent with other rules and principles of international law."; Bohoslavsky, J. P., & Goldmann, M. (2016). An incremental approach to sovereign debt restructuring: Sovereign debt sustainability as a principle of public international law. *Yale Journal of International Law*, 41.

<sup>108</sup> Bohoslavsky, J. P., & Goldmann, M. (2016), *ibid*.

<sup>109</sup> Bohoslavsky, J. P., & Goldmann, M. (2016), *ibid*.

<sup>110</sup> Bohoslavsky, J. P., & Goldmann, M. (2016), *ibid*.

<sup>111</sup> Bohoslavsky, J. P., & Goldmann, M. (2016). *ibid*.

<sup>112</sup> Bohoslavsky, J. P., & Goldmann, M. (2016). *ibid*.

Principles have only motivated more academic scholarship on sustainable debt management and sustainable development in the long run and the development of associated legal principles.<sup>113</sup> Waibel argues that debt sustainability should be a factor in considering whether ICSID has jurisdiction to determine claims arising from sovereign debt defaults, as well as the capacity of debtor countries to pay including emergency legislation in times of debt crisis such as debt moratoriums as well as the likelihood of arbitration interfering with pre-existing procedures by key players and their counter running programs such as those under the IMF.<sup>114</sup> Investment claims have a profound impact on debt sustainability, aggravating the capability of LICs to meet debt obligations.<sup>115</sup> The moral and practical need for a legal principle for debt sustainability is nevertheless central to providing legal predictability for creditors, just and equitable treatment for debtors and creditors alike, and discouraging and regulating disruptive vulture funds and aggressive litigations against LICs.<sup>116</sup>

The UNCTAD principles provide procedural and substantive outcomes of the principle of debt sustainability. Procedural sustainability evokes timely and efficient debt workouts for sovereign debt default, with the use of debt warning indicators and ensuring fair outcomes for stakeholders through good faith and cooperation to restructuring mechanisms, such as collective action.<sup>117</sup> Procedural sustainability can also be expressed through the GPHRIA of economic policy reforms that encourage creditors and debtors to perform due diligence on the

creditworthiness of borrowers, ensure that legal authority has been given to borrow and that no law has been breached.<sup>118</sup> Substantive sustainability on the other hand applies to designing and applying workout mechanisms to achieve long-term sustainability, serving debt and enabling borrower states to achieve SDGs as well as comply with pre-existing international commitments, without hampering economic progress.<sup>119</sup>

## THE CORRELATION BETWEEN DEBT SUSTAINABILITY AND THE DIMENSIONS OF SUSTAINABLE DEVELOPMENT

### Socio-economic Rights and Sustainable Debt

Sustainable development and the fulfilment of human rights are mutually dependent for their realization, reflected in the 2030 Agenda for Sustainable Development, with 92 percent of the SDGs and their targets overlapping with the State's human rights and labour standards and obligations under international legally binding instruments.<sup>120</sup> A sustainable development perspective to development is arguably a human rights-based approach to development.<sup>121</sup> This overlap exists across civil and political core principles like equality and non-discrimination as well as the social, economic, and environmental dimensions. A human rights-based approach to external debt suggests developing "the capabilities of the duty-bearer" (debtor state) to fulfil their obligations and the right holder (the citizens) to claim their rights.", as "the obligation to fulfil incorporates both an obligation to

<sup>113</sup> Gelper, A. (2012). Hard, soft, and embedded: implementing principles on promoting responsible sovereign lending and borrowing.; Sudreau, M., & Bohoslavsky, J. P. (2015). Sovereign Debt Governance, Legitimacy, and the Sustainable Development Goals; Examining the Principles on Responsible Sovereign Lending and Borrowing. Wash. Int'l LJ, 24, 613.; Li, R., & Zhou, Y. (2014). Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing.; Waibel, Michael. (2013) "Out of Thin Air? Tracing the Origins of the UNCTAD Principles in Customary International Law."

<sup>114</sup> Waibel, M. (2007). Opening Pandora's box: sovereign bonds in international arbitration. American Journal of International Law, 101(4), 711-759.

<sup>115</sup> ibid

<sup>116</sup> Doha Declaration on Financing for Development (2008)

<sup>117</sup> Principle 7 and 15 of the Principles on Responsible Sovereign Borrowing and Lending.

<sup>118</sup> Principle 15

<sup>119</sup> Principle 8 of the GPFDRH

<sup>120</sup> <https://www.ohchr.org/en/sdgs>; See Preamble of Transforming our world: the 2030 Agenda for Sustainable Development; <https://www.undp.org/rolhr/publications/human-rights-sustainable-development>

<sup>121</sup> De Man, A. (2019). The Sustainable Development Goals and the rights-based approach to development: Compatible or missing the point?. African Human Rights Law Journal, 19(1), 445-469.

facilitate and an obligation to provide”.<sup>122</sup> This provides a basis for a cross-section between the SDGs and the International Covenant on Economic Social and Cultural Rights (ICESCR).<sup>123</sup> At the heart of the sustainable development agenda is the eradication of poverty and the alleviation of the debt burden on developing countries to allow them the capability to fulfil human rights obligations to their citizens.<sup>124</sup> It has therefore become harder to ignore the relationship development has with human rights in the global policy space as well as in the law-making frameworks. Requiring the poorest countries to divert their limited financial resources to service debt would violate international human rights obligations under the ICESCR to provide the minimum essential human rights standards and progressive realization of human rights with the available resources.<sup>125</sup> Heavy debt burdens have facilitated human rights violations for instance prioritizing debt financing for large military acquisitions rather than the development and provision of human necessities like health and education.<sup>126</sup> With the inclusion of a social-economic dimension to financing sustainable development, it has become apparent that sustainable debt management is an indispensable aspect of the protection of fundamental human rights and meeting various human rights obligations under international legal instruments. The complex impact of debt on socio-economic circumstances, for example on women’s rights and understanding debt sustainability has also been explored through a feminist lens.<sup>127</sup>

Global cooperation for the realization of both SDGs and human rights urges States to individually and collectively aid the protection and realization of human rights through assistance

and cooperation as an extraterritorial state obligation that has a hard law basis, not just soft law under the 2030 Agenda as well as under the UN Charter. Goal 17 sets out a global partnership for sustainable financing under the SDGs secured through debt relief and debt restructuring mechanisms is an immediate way in which debt sustainability relates to human rights, which can be seen through mechanisms like the SDGs and the progressive realization of human rights.<sup>128</sup> Principle 8 of the UN Basic Principles on Sovereign Debt Restructuring Processes (UN Basic Principles) states that ‘*Sustainability implies that sovereign debt restructuring workouts are completed in a timely and efficient manner and lead to a stable debt situation in the debtor state, without compromising creditor rights or sustained, inclusive growth, sustainable development, stability of the international financial system and respecting human rights with minimal socio-economic costs*’.<sup>129</sup> This definition of sustainability reflects this transformation from a creditor-focused one to a more balanced approach that considers the socio-economic repercussions of debt distress. The resolution adopted by the HRC on the effects of foreign debt outlines state, IFI, and private creditor international obligations for the protection and respect for human rights and their shared responsibility for the prevention and resolution of unsustainable debt.<sup>130</sup> It reiterates the insufficiency of debt relief for HIPC’s to achieve debt sustainability, and tackle poverty reduction and long-term growth without the added boost of resource transfers in the form of grants, concessional loans, removing trade barriers, and better export prices.<sup>131</sup> Sustainable financing of human rights, reforming the governance of IFIs’ economic paradigm by having human rights in the making of macroeconomic policies and financial

<sup>122</sup> A/HRC/11/10 para. 44(c) and 66

<sup>123</sup> Article 11 of the ICESCR and General Comment 12 of the UN CESCR; General Comment 15 of the UN CESCR

<sup>124</sup> World Conference on Human Rights 1993 (Monterrey Consensus)

<sup>125</sup> Friedman, E. A. (2000). Debt relief in 1999: Only one step on a long journey. *Yale Hum. Rts. & Dev. LJ*, 3, 190.

<sup>126</sup> *ibid*

<sup>127</sup> Bohoslavsky, J. P., & Rulli, M. (2024). Feminism in

Public Debt: A Human Rights Approach (p. 373). Bristol University Press.

<sup>128</sup> Bohoslavsky, J. P. (2016). Economic inequality, debt crises and human rights. *Yale Journal of International Law*, 41(2), 177-199.

<sup>129</sup> G. A. Resolution on Basic Principles on Sovereign Debt Restructuring Processes A/RES/69/319, 10 September 2015

<sup>130</sup> A/HRC/RES/20/10

<sup>131</sup> A/HRC/RES/20/10, 18<sup>th</sup> July 2012, para.10.

decisions, conditionalities and structural reforms interfering with the performance of human rights obligations, sustainable restructuring of debt, greater emphasis on the principles guiding responsible lending and borrowing, allowing debtor states adequate fiscal space for social public spending.<sup>132</sup> It has been a major criticism against the prevailing creditor-biased global debt architecture, for instance, the IMF, that does not take into account the pressure debtor countries are under to balance overwhelming debt obligations and maintain social spending or allocate finances for fulfilling human rights obligations.<sup>133</sup> The Committee on Economic, Social, and Cultural Rights has called on states and UN agencies to ensure that consideration for basic human rights is built into responses to debt crises and structural adjustment policies.<sup>134</sup>

### **Environmental Sustainability and Sovereign Debt: The Age of Climate Vulnerability**

Debt vulnerability and climate vulnerability are highly correlated as many African LICs struggle to adapt their fiscal policy to increasingly harsh and frequent natural disasters, at rates that are difficult to mobilize finance to recuperate, thereby disrupting economic progress.<sup>135</sup> According to a 2024 UNCTAD report, the pressure sustained by climate-vulnerable indebted countries on their national budget annual cost is estimated to exceed 1 per of the GDP in the next 10 years.<sup>136</sup> The impact of climate change includes increased external borrowing and thereby increased costs in debt servicing, and limited capacity for long-term

investment in sustainability projects, thereby weakening the capability for resilience both in terms of future climate shocks as well as debt sustainability.<sup>137</sup> In addition to being signatories to the UNFCCC, its protocols, and the obligations and commitments entailed there under, African government leaders signed the Kampala Ministerial Declaration on Migration Environment and Climate Change in 2023, renewing the commitment to address climate change individually and collectively.<sup>138</sup> However, maintaining the commitments under the climate agreements would prove futile, especially for those Heavily Indebted Poor Countries (HIPC) in Africa simultaneously vulnerable to climate crises. A report by UNCTAD places 29 out of the 69 poor countries eligible for the IMF's Poverty Reduction Growth Trust (PRGT) concessional finances tackling both debt and climate change crisis vulnerabilities, thereby emphasizing the necessity to scale up access to financing consistent with long-term sustainable development and debt sustainability.<sup>139</sup> Already these countries are facing climate change-induced negative effects on their economic growth which simultaneously raises the cost of debt by an estimated \$62 billion as well as the cost of servicing this debt beyond the capacity to repay.<sup>140</sup> The report calls for an appropriate multilateral legal framework for sovereign debt restructuring and relief to facilitate the resolution of a debt crisis in a timely and orderly manner, that employs debt sustainability assessment for participating indebted countries, incorporating long-term financial needs as well as

<sup>132</sup> Speech by Volker Turk, UN High Commissioner for Human Rights, Sixth Intersessional Meeting of Human Rights Council on Human Rights and the 2030 Agenda, 18<sup>th</sup> January 2024, <https://www.ohchr.org/en/statements-and-speeches/2024/01/integrating-human-rights-international-financial-architecture#:~:text='Debt%20sustainability'%20analyses%20should%20reflect,it%20fairer%20and%20more%20inclusive.>

<sup>133</sup> Anton, Dakota, Malaika Nduko, and Adeyinka Olaleye. " ibid 102

<sup>134</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 2: International technical assistance measures (Art. 22 of the Covenant), E/1990/23, 2 February 1990, <https://www.refworld.org/legal/general/cescr/1990/en/52974> [accessed 10 September 2024]

<sup>135</sup> UNCTAD, Financing for Sustainable Development Report 2024, Financing for Development at a Crossroads, 9

April 2024, p.150 <https://unctad.org/publication/financing-sustainable-development-report-2024> accessed 26 June 2024

<sup>136</sup> ibid

<sup>137</sup> ibid

<sup>138</sup> International Organization for Migration. "African Countries Sign Continental Agreement to Address Climate Mobility," 2021. <https://www.iom.int/news/african-countries-sign-continental-agreement-address-climate-mobility>.

<sup>139</sup> Tackling debt and climate challenges in tandem: A policy agenda - UNCTAD Policy Brief No. 104 (UNCTAD/PRESS/PB/2022/12) 17 Nov 2022.

<sup>140</sup> Natalia Alayza, Valerie Laxton and Carolyn Neunuebel, Developing Countries Won't Beat the Climate Crisis Without Tackling Rising Debt, 22 September 2023, <https://www.wri.org/insights/debt-climate-action-developing-countries> accessed 18th June 2024.

the capacity to meet both SDGs as well as the Paris Agreement.<sup>141</sup> Several DSAs from small island states and LICs provide climate change as a contributing factor to debt distress.<sup>142</sup>

The Addis Ababa Agenda recognizes the impact of natural disasters on a state's debt sustainability and the importance of creditors taking steps to provide debt relief and ease the pressure of debt obligations through cancellations and rescheduling and new debt instruments like debt-to-nature swaps.<sup>143</sup> Shared responsibility of developed creditor nations for debt sustainability is also expressed in "climate debt" which refers to the cumulative negative effects of raising carbon dioxide emissions on LICs without compensation and which pose a projected economic damage of over \$59 trillion between 1959-2018 and is projected to increase by \$80 trillion between 2019 and 2035.<sup>144</sup> Scholars estimate the climate debt to hold about 81% of the GDP IN G20 countries.<sup>145</sup> Scholars note that governments are often faced with the hard choice of considering a trade-off between fiscal sustainability, achieving SDGs, maintaining their development agendas as well as servicing their outstanding debt obligations.<sup>146</sup>

The increase in climate or green financing has thus also motivated the possibility of tackling debt-climate-related issues by designing climate-conscious and compatible debt instruments, with some researchers going as far as to argue that

relative to the growing size of the sovereign bond market, sovereign debt investors have a fiduciary responsibility of integrating sustainability into their engagement with sovereign borrowers.<sup>147</sup> However, caution is needed as according to the UN Development Program, 'More than half of climate adaptation finance comes to Africa through loans, further deepening country indebtedness'.<sup>148</sup> The uniqueness of and growing demand within the debt market for sustainable finance instruments for sovereigns provides an interesting perspective as according to Lupo-Pasini it is states and environmental groups that are driving the demand for these instruments, by creating regulatory conditions to attract investors and creditors, slowly having an impact on market behaviour.<sup>149</sup> However, the author argues that more needs to be done to strengthen the credibility and effectiveness of these instruments by creating stronger provisions within the contracts themselves and binding the ESG terms to legal outcomes.

### Governance Dimensions of Debt Sustainability

Governance, in the global context, relates to the process of collective international decision-making.<sup>150</sup> The UNGA acknowledges that '...good governance and rule of law at national and international levels are essential for sustained, inclusive and equitable economic growth, sustainable development and eradication of

<sup>141</sup> Ibid 197, p.3.

<sup>142</sup> "Chapter 5 | the Impact of Climate Change on Long-Term Growth and Debt Sustainability," 2017. <https://ieg.worldbankgroup.org/evaluations/world-banks-role-and-use-low-income-country-debt-sustainability-framework/chapter-5>.

<sup>143</sup> Para.102

<sup>144</sup> Clements B, Gupta S, and Liu JH, Settling the Climate Debt, <https://www.imf.org/en/Publications/fandd/issues/2023/09/settling-the-climate-debt-clements-gupta-liu> accessed 21 June 2024

<sup>145</sup> Ibid

<sup>146</sup> Garcia-Macia, Daniel, Raphael Lam, and Anh DM Nguyen. "Public Debt Dynamics During the Climate Transition." (2024) IMF Working Paper No. 2024/071 (2024).

<sup>147</sup> van Zanten, J. A., Sharma, B., & Christensen, M. (2023). Sustainability integration for sovereign debt investors: engaging with countries on the SDGs. *Journal of Sustainable Finance & Investment*, 13(3), 1300-1317., referencing the Principles on Responsible Investment (PRI), ESG

Engagement for Sovereign Debt Investors, <https://www.unpri.org/sovereign-debt/esg-engagement-for-sovereign-debt-investors/6687.article> accessed 26 June 2024

<sup>148</sup> UNDP, Africa Governance and Development Outlook 2024, <https://www.undp.org/africa/publications/africa-governance-and-development-outlook-2024> accessed 29 July 2024

<sup>149</sup> Lupo-Pasini, F. (2022). Sustainable finance and sovereign debt: the illusion to govern by contract. *Journal of International Economic Law*, 25(4), 680-698.

<sup>150</sup> The term "governance...implies creative interaction designed at liberating human potential, accountability by the state to civic activism, active state society and society-society relations, and ultimately, the existence of a constitutional order based on these values...sustainable development ...will be difficult to achieve in the absence of an established system of governance." Okoth-Ogendo, H. W. O. (1995). Governance and sustainable development in Africa. In *Sustainable Development and Good Governance* (pp. 105-110). Brill Nijhoff.

poverty and hunger.<sup>151</sup> Mechanisms of good governance should allow transparency and democratic public institutions allowing accountability and participation to the people governed in the decision-making process and providing access to justice for corruption and abuses of power.<sup>152</sup> Governance, as an element of sustainable development, was not added within the MDG framework but made its way into the UN 2030 Agenda.<sup>153</sup> Good governance as a means for sustainable development in the management of finances is well-established under the Monterrey Consensus, the Doha Declaration and the AAAA.<sup>154</sup>

In terms of the application of governance to sovereign debt, there has never been a comprehensive definition of what sovereign debt governance means, but its amorous nature reflects the volatile status of global finance.<sup>155</sup> The need for a comprehensive sovereign debt framework has been filled by a medley of fragmented and competing contractual and statutory mechanisms.<sup>156</sup> The gaps and inadequacies have therefore allowed for the prevalent opaqueness of debt, thereby weakening the effectiveness of fiscal policy and risk management and exposing indebted countries to external vulnerabilities and sustained negative environmental and social impacts.<sup>157</sup> Law plays a central role in establishing good governance practices including strengthening institutions, transparency through reporting and monitoring, and providing accessibility to the public of relevant data relevant to government debt and development policy.

Prudent debt management is therefore essential for long-term debt sustainability.<sup>158</sup>

Nevertheless, there are a growing number of sustainability-focused governance standards built on best practices that guide stakeholders in managing debt transactions and restructuring. These include a mix of sovereign debt-focused instruments, and IFI sustainability standards among others like the UNCTAD Principles on Responsible Lending and Borrowing, the Institute of International Finance's Principles on Stable Capital Flows and Fair Debt Restructuring, Principles for Responsible Investment, the Task-Force for Climate-related Financial Disclosures under the UFCCCC, as well as IMF transparency and reporting guidelines and International Capital Markets Association principles governing sustainability bonds.<sup>159</sup> These build procedural and substantive norms that create legitimacy backing the legality, enforceability, feasibility, agreeability, and well-grounded nature of the actions, principles, rules, and norms of financial decisions taken by both domestic and international authorities as lenders and borrowers.<sup>160</sup> Within DSAs governance legal norms set legitimate expectations of states and other market participants on the factors and the criteria influencing the IMF decision-making process and application of its policies, help to identify and distribute roles and responsibilities, and provide parties with the necessary knowledge to determine the fairness and legitimacy of the DSA-influenced decisions and actions.<sup>161</sup> Therefore, African states need to strengthen mechanisms of good governance of debt to ensure

<sup>151</sup> UNGA, The future we want, resolution adopted by the General Assembly on 27 July 2012, A/RES/66/288.

<sup>152</sup> "Governance for Sustainable Development Integrating Governance in the Post-2015 Development Framework Discussion Paper," 2014. <https://www.undp.org/sites/g/files/zskgke326/files/publications/Discussion-Paper--Governance-for-Sustainable-Development.pdf>.

<sup>153</sup> Para.6 and Goal 16.

<sup>154</sup> See para.11 and 61 of the Monterrey Consensus; para. 9 of the Doha Declaration; para. 18 of the AAAA.

<sup>155</sup> *ibid*

<sup>156</sup> Mohammad Bello, The place of socio-economic rights in sovereign debt governance, a thesis submitted in fulfillment of the requirements for the degree of Doctor of Law (LLD) award at the Faculty of Law, the University of the Free State,

Republic of South Africa. p.71.

<sup>157</sup> Pineda, Mia, and Ron Snipeliski. (2024) "The Legal Foundations of Public Debt Transparency: Aligning the Law with Good Practices Prepared by Karla Vasquez, Kika Alex-Okoh, Alissa Ashcroft, Alessandro Gullo, Olya Kroytor, Yan Liu."

<sup>158</sup> Bradlow, D. D., Lastra, R. M., & Park, S. K. (2024). Rethinking the sustainability of sovereign debt. *Journal of International Economic Law*, jgae020.

<sup>159</sup> <https://www.iif.com/Publications/ID/4887/The-Principles-for-Stable-Capital-Flows-and-Fair-Debt-Restructuring-April-2022-Update> accessed 24 June 2024

<sup>160</sup> Sudreau, M., & Bohoslavsky, J. P. (2015).

<sup>161</sup> Daniel D Bradlow, Rosa M Lastra, Stephen Kim Park, *ibid* 159

that they are empowered to address challenges related to their external debt and finance their development priorities.

## FINDINGS AND DISCUSSION OF RESULTS

The ongoing discourse on the relationship between the concept of sustainable development and sovereign debt has led to several advancements in the development of international law and global approaches to the paradox of resolving unsustainable debt. The advancements including the emphasis on shared responsibility and long-term debt sustainability, increased multilateralism for debt relief, and innovation towards sustainable alternatives to finance dual debt and climate crises provide hope for many heavily indebted African countries. However, the pace to crystallise these advancements into legal norms that are legitimate and offer equitable resolution is slow and needs more research, especially in the design of African debt strategies to increase coherence and efficiency. Many of the existing sustainability standards and guidelines are soft law. As African countries are turning towards sustainable finance instruments, the framing of debt management needs to carefully provide a nuanced understanding of ESG standards, tailoring them to their specific country needs for greater success.

## CONCLUSION

This article has analyzed the normative and conceptual framework for sovereign debt sustainability in international law and questioned how a sustainable development approach contributes to long-term debt sustainability in Africa. The grounds for this approach are based on pre-existing and long-established norms of international law, especially within international human rights law, and make a case for placing a shared moral and legal responsibility for ensuring that heavily indebted African countries can meet these pre-existing international obligations. The sustainable development approach proposes a

departure from creditor protection influenced and focused definition of debt sustainability analysis and applies ESG considerations to the examination of development policies to optimize capacity and country-ownership of strategies to stabilize economies and free debt burdens to allow states to provide essential social and environmental protections. The article argues therefore that sustainable development should be the goal of debt financing and debt should not be an obstacle to achieving development priorities. However, this outcome cannot be realized without international cooperation and increasing African debtor participation in the design and decision-making process of policies that have an impact on domestic governance and management of development policies. Neglecting coherence and interdependency in the application of sustainable development policies and sovereign debt governance at national and international levels not only increases vulnerability to external financial crises but thus affects the effectiveness and efficiency of these policies, thus heightening their economic, social, and environmental costs.<sup>162</sup>

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<sup>162</sup> Report of the UN Secretary-General: External debt crisis and development, sessional document A/57/253, 22 July

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